difference between life imprisonment and a death sentence.

*45 Consideration of the purposes underlying the Sixth Amendment's jury trial guarantee further demonstrates why our acceptance of judge-made findings in the context of discretionary sentencing suggests the approval of the same judge-made findings in the context of determinate sentencing as well. One important purpose of the Sixth Amendment's jury trial guarantee is to protect the criminal defendant against potentially arbitrary judges. It effectuates this promise by preserving, as a constitutional matter, certain fundamental decisions for a jury of one's peers, as opposed to a judge. For example, the Court has recognized that the Sixth Amendment's guarantee was motivated by the English experience of "competition ... between judge and jury over the real significance of their respective roles," Jones, 526 U.S., at 245, 119 S.Ct. 1215, and "measures [that were taken] to diminish the juries' power," ibid. We have also explained that the jury trial guarantee was understood to provide "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." Duncan v. Louisiana, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Blackstone explained that the right to trial by jury was critically important in criminal cases because of "the violence and partiality of judges appointed by the crown, ... who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure." 4 Blackstone, Commentaries, at 343. Clearly, the concerns animating the Sixth Amendment's jury trial guarantee, if they were to extend to the sentencing context at all, would apply with greater strength to a discretionary-sentencing scheme than to determinate sentencing. In the former scheme, the potential for mischief by an arbitrary judge is much greater, given that the judge's decision of where to set the defendant's sentence within the prescribed statutory range is left almost entirely to discretion. In contrast, under a determinate-sentencing system, the discretion the judge wields within the statutory range is tightly constrained. Accordingly, our approval of discretionary-sentencing schemes, in which a defendant is not entitled to have a jury make factual findings relevant to sentencing despite the effect those findings have on the severity of the defendant's sentence, demonstrates that the defendant should have no right to demand that a jury make the equivalent factual determinations under a determinate-sentencing scheme.

The Court appears to hold today, however, that a defendant is entitled to have a jury decide, by proof beyond a reasonable doubt, every fact relevant to the determination of sentence under a determinate-sentencing scheme. If this is an accurate description of the constitutional principle underlying the Court's opinion, its decision will have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades. Justice THOMAS' rule, as he essentially concedes, see ante, at ----, 27, n. 11, would have the same effect.

*46 Prior to the most recent wave of sentencing reform, the Federal Government and the States employed indeterminate-sentencing schemes in which judges and executive branch officials (e.g., parole board officials) had substantial discretion to determine the actual length of a defendant's sentence. See, e.g., U.S. Dept. of Justice, S. Shane-DuBow, A. Brown, & E. Olsen, Sentencing Reform in the United States: History, Content, and Effect 6- 7 (Aug.1985) (hereinafter Shane-DuBow); Report of Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 11-13 (1976) (hereinafter Task Force Report); A. Dershowitz, Criminal Sentencing in the United States: An Historical and Conceptual Overview, 423 Annals Am. Acad. Pol. & Soc. Sci. 117, 128-129 (1976). Studies of indeterminate-sentencing schemes found that similarly situated defendants often received widely disparate sentences. See, e.g., Shane-Dubow 7; Task Force Report 14. Although indeterminate sentencing was intended to soften the harsh and uniform sentences formerly imposed under mandatory-sentencing systems, some studies revealed that indeterminate sentencing actually had the opposite effect. See, e.g., A. Campbell, Law of Sentencing 13 (1978) ("Paradoxically the humanitarian impulse sparking the adoption of indeterminate sentencing systems in this country has resulted in an actual increase of the average criminal's incarceration term"); Task Force Report 13 ("[T]he data seem to indicate that in those jurisdictions where the sentencing structure is more indeterminate, judicially imposed sentences tend to be longer").

In response, Congress and the state legislatures shifted to determinate- sentencing schemes that aimed to limit judges' sentencing discretion and, thereby,

afford similarly situated offenders equivalent treatment. See, e.g., Cal.Penal Code Ann. § 1170 (West Supp.2000). The most well known of these reforms was the federal Sentencing Reform Act of 1984, 18 U.S.C. § 3551 et seq. In the Act, Congress created the United States Sentencing Commission, which in turn promulgated the Sentencing Guidelines that now govern sentencing by federal judges. See, e.g., United States Sentencing Commission, Guidelines Manual (Nov.1998). Whether one believes the determinate-sentencing reforms have proved successful or not--and the subject is one of extensive debate among commentators--the apparent effect of the Court's opinion today is to halt the current debate on sentencing reform in its tracks and to invalidate with the stroke of a pen three decades' worth of nationwide reform, all in the name of a principle with a questionable constitutional pedigree. Indeed, it is ironic that the Court, in the name of constitutional rights meant to protect criminal defendants from the potentially arbitrary exercise of power by prosecutors and judges, appears to rest its decision on a principle that would render unconstitutional efforts by Congress and the state legislatures to place constraints on that very power in the sentencing context.

Finally, perhaps the most significant impact of the Court's decision will be a practical one--its unsettling effect on sentencing conducted under current federal and state determinate-sentencing schemes. As I have explained, the Court does not say whether these schemes are constitutional, but its reasoning strongly suggests that they are not. Thus, with respect to past sentences handed down by judges under determinate-sentencing schemes, the Court's decision threatens to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court's decision today. Statistics compiled by the United States Sentencing Commission reveal that almost a half-million cases have been sentenced under the Sentencing Guidelines since 1989. See Memorandum from U.S. Sentencing Commission to Supreme Court Library, dated June 8, 2000 (total number of cases sentenced under federal Sentencing Guidelines since 1989) (available in Clerk of Court's case file). Federal cases constitute only the tip of the iceberg. In 1998, for example, federal criminal prosecutions represented only about 0.4% of the total number of criminal prosecutions in federal and state courts. See National Center for State Courts, A National Perspective: Court Statistics Project (federal and state court filings, 1998), http://www.ncsc.dni.us/divisions/ research/csp/csp98-fscf.html (showing that, in 1998, 57,691 criminal cases were filed in federal court compared to 14,623,330 in state courts). Because many States, like New Jersey, have determinate- sentencing schemes, the number of individual sentences drawn into question by the Court's decision could be colossal.

*47 The decision will likely have an even more damaging effect on sentencing conducted in the immediate future under current determinate-sentencing schemes. Because the Court fails to clarify the precise contours of the constitutional principle underlying its decision, federal and state judges are left in a state of limbo. Should they continue to assume the constitutionality of the determinate-sentencing schemes under which they have operated for so long, and proceed to sentence convicted defendants in accord with those governing statutes and guidelines? The Court provides no answer, yet its reasoning suggests that each new sentence will rest on shaky ground. The most unfortunate aspect of today's decision is that our precedents did not foreordain this disruption in the world of sentencing. Rather, our cases traditionally took a cautious approach to questions like the one presented in this case. The Court throws that caution to the wind and, in the process, threatens to cast sentencing in the United States into what will likely prove to be a lengthy period of considerable confusion.

III

Because I do not believe that the Court's "increase in the maximum penalty" rule is required by the Constitution, I would evaluate New Jersey's sentence-enhancement statute, N.J. Stat. Ann. § 2C:44-3 (West Supp.2000), by analyzing the factors we have examined in past cases. See, e.g., Almendarez-Torres, 523 U.S., at 242-243, 118 S.Ct. 1219; McMillan, 477 U.S., at 86-90, 106 S.Ct. 2411. First, the New Jersey statute does not shift the burden of proof on an essential ingredient of the offense by presuming that ingredient upon proof of other elements of the offense. See, e.g., id., at 86-87, 106 S.Ct. 2411; Patterson, 432 U.S., at 215, 97 S.Ct. 2319. Second, the magnitude of the New Jersey sentence enhancement, as applied in petitioner's case, is constitutionally permissible. Under New Jersey law, the weapons possession offense to which petitioner pleaded guilty carries a sentence range of 5 to 10 years' imprisonment. N.J. Stat. Ann. §§ 2C:39-4(a), 2C:43- 6(a)(2) (West 1995). The fact that petitioner, in committing that offense, acted with a purpose to intimidate because of race exposed him to a higher sentence range of 10 to 20 years'

imprisonment. § 2C:43-7(a)(3). The 10-year increase in the maximum penalty to which petitioner was exposed falls well within the range we have found permissible. See Almendarez-Torres, supra, at 226, 242-243, 118 S.Ct. 1219 (approving 18-year enhancement). Third, the New Jersey statute gives no impression of having been enacted to evade the constitutional requirements that attach when a State makes a fact an element of the charged offense. For example, New Jersey did not take what had previously been an element of the weapons possession offense and transform it into a sentencing factor. See McMillan, 477 U.S., at 89, 106 S.Ct. 2411.

In sum, New Jersey "simply took one factor that has always been considered by sentencing courts to bear on punishment"--a defendant's motive for committing the criminal offense--"and dictated the precise weight to be given that factor" when the motive is to intimidate a person because of race. Id., at 89-90, 106 S.Ct. 2411. The Court claims that a purpose to intimidate on account of race is a traditional mens rea element, and not a motive. See ante, at ---- - ---- 26-27. To make this claim, the Court finds it necessary once again to ignore our settled precedent. In Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993), we considered a statute similar to the one at issue here. The Wisconsin statute provided for an increase in a convicted defendant's punishment if the defendant intentionally selected the victim of the crime because of that victim's race. Id., at 480, 113 S.Ct. 2194. In a unanimous decision upholding the statute, we specifically characterized it as providing a sentence enhancement based on the "motive" of the defendant. See id., at 485, 113 S.Ct. 2194 (distinguishing between punishment of defendant's "criminal conduct" and penalty enhancement "for conduct motivated by a discriminatory point of view" (emphasis added)); id., at 484-485, 113 S.Ct. 2194 ("[U]nder the Wisconsin statute the same criminal conduct may be more heavily punished if the victim is selected because of his race ... than if no such motive obtained" (emphasis added)). That same characterization applies in the case of the New Jersey statute. As we also explained in Mitchell, the motive for committing an offense has traditionally been an important factor in determining a defendant's sentence. Id., at 485, 113 S.Ct. 2194. New Jersey, therefore, has done no more than what we held permissible in McMillan; it has taken a traditional sentencing factor and dictated the precise weight judges should attach to that factor when the specific motive is to intimidate on the basis of race.

*48 The New Jersey statute resembles the Pennsylvania statute we upheld in McMillan in every respect but one. That difference--that the New Jersey statute increases the maximum punishment to which petitioner was exposed--does not persuade me that New Jersey "sought to evade the constitutional requirements associated with the characterization of a fact as an offense element." Supra, at ---- 2. There is no question that New Jersey could prescribe a range of 5 to 20 years' imprisonment as punishment for its weapons possession offense. Thus, as explained above, the specific means by which the State chooses to control judges' discretion within that permissible range is of no moment. Cf. Patterson, supra, at 207-208, 97 S.Ct. 2319 ("The Due Process Clause, as we see it, does not put New York to the choice of abandoning [the affirmative defense] or undertaking to disprove [its] existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment"). The New Jersey statute also resembles in virtually every respect the federal statute we considered in Almendarez- Torres. That the New Jersey statute provides an enhancement based on the defendant's motive while the statute in Almendarez-Torres provided an enhancement based on the defendant's commission of a prior felony is a difference without constitutional importance. Both factors are traditional bases for increasing an offender's sentence and, therefore, may serve as the grounds for a sentence enhancement.

On the basis of our prior precedent, then, I would hold that the New Jersey sentence-enhancement statute is constitutional, and affirm the judgment of the Supreme Court of New Jersey.

JUSTICE BREYER, with whom CHIEF JUSTICE REHNQUIST joins, dissenting.

*49 The majority holds that the Constitution contains the following requirement: "any fact [other than recidivism] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Ante, at ---- 24. This rule would seem to promote a procedural ideal--that of juries, not judges, determining the existence of those facts upon which increased punishment turns. But the real world of criminal justice cannot hope to meet any such ideal. It can function only with the help of procedural compromises, particularly in respect to sentencing. And those compromises, which are themselves necessary for the fair functioning of the criminal

justice system, preclude implementation of the procedural model that today's decision reflects. At the very least, the impractical nature of the requirement that the majority now recognizes supports the proposition that the Constitution was not intended to embody it.

I

In modern times the law has left it to the sentencing judge to find those facts which (within broad sentencing limits set by the legislature) determine the sentence of a convicted offender. The judge's factfinding role is not inevitable. One could imagine, for example, a pure "charge offense" sentencing system in which the degree of punishment depended only upon the crime charged (e.g., eight mandatory years for robbery, six for arson, three for assault). But such a system would ignore many harms and risks of harm that the offender caused or created, and it would ignore many relevant offender characteristics. See United States Sentencing Commission, Sentencing Guidelines and Policy Statements, Part A, at 1.5 (1987) (hereinafter Sentencing Guidelines or Guidelines) (pointing out that a "charge offense" system by definition would ignore any fact "that did not constitute [a] statutory elemen[t] of the offens [e] of which the defendant was convicted"). Hence, that imaginary "charge offense" system would not be a fair system, for it would lack proportionality, i.e., it would treat different offenders similarly despite major differences in the manner in which each committed the same crime.

There are many such manner-related differences in respect to criminal behavior. Empirical data collected by the Sentencing Commission makes clear that, before the Guidelines, judges who exercised discretion within broad legislatively determined sentencing limits (say, a range of 0 to 20 years) would impose very different sentences upon offenders engaged in the same basic criminal conduct, depending, for example, upon the amount of drugs distributed (in respect to drug crimes), the amount of money taken (in respect to robbery, theft, or fraud), the presence or use of a weapon, injury to a victim, the vulnerability of a victim, the offender's role in the offense, recidivism, and many other offense-related or offender-related factors. See United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 35-39 (1987) (table listing data representing more than 20 such factors) (hereinafter Supplementary Report); see generally Department of Justice, W. Rhodes & C. Conly, Analysis of Federal Sentencing (May 1981). The majority does not deny that judges have exercised, and, constitutionally speaking, may exercise sentencing discretion in this way.

Nonetheless, it is important for present purposes to understand why judges, rather than juries, traditionally have determined the presence or absence of such sentence-affecting facts in any given case. And it is important to realize that the reason is not a theoretical one, but a practical one. It does not reflect (Justice SCALIA's opinion to the contrary notwithstanding) an ideal of procedural "fairness," ante, at ---- 1 (concurring opinion), but rather an administrative need for procedural compromise. There are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury. As the Sentencing Guidelines state the matter,

*50 "[a] bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth." Sentencing Guidelines, Part A, at 1.2.

The Guidelines note that "a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect." Ibid. To ask a jury to consider all, or many, such matters would do the same.

At the same time, to require jury consideration of all such factors--say, during trial where the issue is guilt or innocence--could easily place the defendant in the awkward (and conceivably unfair) position of having to deny he committed the crime yet offer proof about how he committed it, e.g., "I did not sell drugs, but I sold no more than 500 grams." And while special postverdict sentencing juries could cure this problem, they have seemed (but for capital cases) not worth their administrative costs. Hence, before the Guidelines, federal sentencing judges typically would obtain relevant factual sentencing information from probation officers' presentence reports, while permitting a convicted offender to challenge the information's accuracy at a hearing before the judge without benefit of trial-type evidentiary rules. See Williams v. New York, 337 U.S. 241, 249-251, 69

S.Ct. 1079, 93 L.Ed. 1337 (1949) (describing the modern "practice of individualizing punishments" under which judges often consider otherwise inadmissible information gleaned from probation reports); see also Kadish, Legal Norm And Discretion In The Police And Sentencing Processes, 75 Harv. L.Rev. 904, 915-917 (1962).

It is also important to understand how a judge traditionally determined which factors should be taken into account for sentencing purposes. In principle, the number of potentially relevant behavioral characteristics is endless. A judge might ask, for example, whether an unlawfully possessed knife was "a switchblade, drawn or concealed, opened or closed, large or small, used in connection with a car theft (where victim confrontation is rare), a burglary (where confrontation is unintended) or a robbery (where confrontation is intentional)." United States Sentencing Commission, Preliminary Observations of the Commission on Commissioner Robinson's Dissent 3, n. 3 (May 1, 1987). Again, the method reflects practical, rather than theoretical, considerations. Prior to the Sentencing Guidelines, federal law left the individual sentencing judge free to determine which factors were relevant. That freedom meant that each judge, in an effort to tailor punishment to the individual offense and offender, was guided primarily by experience, relevance, and a sense of proportional fairness. Cf. Supplementary Report, at 16-17 (noting that the goal of the Sentencing Guidelines was to create greater sentencing uniformity among judges, but in doing so the Guidelines themselves had to rely primarily upon empirical studies that showed which factors had proved important to federal judges in the past).

Finally, it is important to understand how a legislature decides which factual circumstances among all those potentially related to generally harmful behavior it should transform into elements of a statutorily defined crime (where they would become relevant to the guilt or innocence of an accused), and which factual circumstances it should leave to the sentencing process (where, as sentencing factors, they would help to determine the sentence imposed upon one who has been found guilty). Again, theory does not provide an answer. Legislatures, in defining crimes in terms of elements, have looked for guidance to common-law tradition, to history, and to current social need. And, traditionally, the Court has left legislatures considerable freedom to make the element determination. See Almendarez-Torres v. United States, 523 U.S. 224, 228, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); McMillan v. Pennsylvania, 477 U.S. 79, 85, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

*51 By placing today's constitutional question in a broader context, this brief survey may help to clarify the nature of today's decision. It also may explain why, in respect to sentencing systems, proportionality, uniformity, and administrability are all aspects of that basic "fairness" that the Constitution demands. And it suggests my basic problem with the Court's rule: A sentencing system in which judges have discretion to find sentencing-related factors is a workable system and one that has long been thought consistent with the Constitution; why, then, would the Constitution treat sentencing statutes any differently?

II

As Justice Thomas suggests, until fairly recent times many legislatures rarely focused upon sentencing factors. Rather, it appears they simply identified typical forms of antisocial conduct, defined basic "crimes," and attached a broad sentencing range to each definition--leaving judges free to decide how to sentence within those ranges in light of such factors as they found relevant. Ante, at ---- - ----, ----, 12-15, 21 (concurring opinion). But the Constitution does not freeze 19th-century sentencing practices into permanent law. And dissatisfaction with the traditional sentencing system (reflecting its tendency to treat similar cases differently) has led modern legislatures to write new laws that refer specifically to sentencing factors. See Supplementary Report, at 1 (explaining that "a growing recognition of the need to bring greater rationality and consistency to penal statutes and to sentences imposed under those statutes" led to reform efforts such as the Federal Sentencing Guidelines).

Legislatures have tended to address the problem of too much judicial sentencing discretion in two ways. First, legislatures sometimes have created sentencing commissions armed with delegated authority to make more uniform judicial exercise of that discretion. Congress, for example, has created a federal Sentencing Commission, giving it the power to create Guidelines that (within the sentencing range set by individual statutes) reflect the host of factors that might be used to determine the actual sentence imposed for each individual crime. See 28 U.S.C. § 994(a); see also United States Sentencing Commission, Guidelines Manual (Nov.1999). Federal judges must apply those Guidelines in typical cases (those that lie in the "heartland" of the crime as the

statute defines it) while retaining freedom to depart in atypical cases. Id., ch. 1, pt. A, 4(b).

Second, legislatures sometimes have directly limited the use (by judges or by a commission) of particular factors in sentencing, either by specifying statutorily how a particular factor will affect the sentence imposed or by specifying how a commission should use a particular factor when writing a guideline. Such a statute might state explicitly, for example, that a particular factor, say, use of a weapon, recidivism, injury to a victim, or bad motive, "shall" increase, or "may" increase, a particular sentence in a particular way. See, e.g., McMillan, supra, at 83, 106 S.Ct. 2411 (Pennsylvania statute expressly treated "visible possession of a firearm" as a sentencing consideration that subjected a defendant to a mandatory 5-year term of imprisonment).

*52 The issue the Court decides today involves this second kind of legislation. The Court holds that a legislature cannot enact such legislation (where an increase in the maximum is involved) unless the factor at issue has been charged, tried to a jury, and found to exist beyond a reasonable doubt. My question in respect to this holding is, simply, "why would the Constitution contain such a requirement"?

III

In light of the sentencing background described in Parts I and II, I do not see how the majority can find in the Constitution a requirement that "any fact" (other than recidivism) that increases the maximum penalty for a crime "must be submitted to a jury." Ante, at ----, 24. As Justice O'CONNOR demonstrates, this Court has previously failed to view the Constitution as embodying any such principle, while sometimes finding to the contrary. See Almendarez-Torres, supra, at 239-247, 118 S.Ct. 1219; McMillan, supra, at 84-91, 106 S.Ct. 2411. The majority raises no objection to traditional pre-Guidelines sentencing procedures under which judges, not juries, made the factual findings that would lead to an increase in an individual offender's sentence. How does a legislative determination differ in any significant way? For example, if a judge may on his or her own decide that victim injury or bad motive should increase a bank robber's sentence from 5 years to 10, why does it matter that a legislature instead enacts a statute that increases a bank robber's sentence from 5 years to 10 based on this same judicial finding?

With the possible exception of the last line of Justice SCALIA's concurring opinion, the majority also makes no constitutional objection to a legislative delegation to a commission of the authority to create guidelines that determine how a judge is to exercise sentencing discretion. See also ante, at ---- 27, n. 11 (THOMAS, J., concurring) (reserving the question). But if the Constitution permits Guidelines, why does it not permit Congress similarly to guide the exercise of a judge's sentencing discretion? That is, if the Constitution permits a delegatee (the commission) to exercise sentencing- related rulemaking power, how can it deny the delegator (the legislature) what is, in effect, the same rulemaking power?

The majority appears to offer two responses. First, it argues for a limiting principle that would prevent a legislature with broad authority from transforming (jury-determined) facts that constitute elements of a crime into (judge-determined) sentencing factors, thereby removing procedural protections that the Constitution would otherwise require. See ante, at ---- 19 ("constitutional limits" prevent states from "defin[ing] away facts necessary to constitute a criminal offense"). The majority's cure, however, is not aimed at the disease.

*53 The same "transformational" problem exists under traditional sentencing law, where legislation, silent as to sentencing factors, grants the judge virtually unchecked discretion to sentence within a broad range. Under such a system, judges or prosecutors can similarly "transform" crimes, punishing an offender convicted of one crime as if he had committed another. A prosecutor, for example, might charge an offender with five counts of embezzlement (each subject to a 10-year maximum penalty), while asking the judge to impose maximum and consecutive sentences because the embezzler murdered his employer. And, as part of the traditional sentencing discretion that the majority concedes judges retain, the judge, not a jury, would determine the last-mentioned relevant fact, i.e., that the murder actually occurred.

This egregious example shows the problem's complexity. The source of the problem lies not in a legislature's power to enact sentencing factors, but in the traditional legislative power to select elements defining a crime, the traditional legislative power to set broad sentencing ranges, and the traditional judicial power to choose a sentence within that range on the basis of relevant offender conduct. Conversely, the solution to the problem lies, not in prohibiting

legislatures from enacting sentencing factors, but in sentencing rules that determine punishments on the basis of properly defined relevant conduct, with sensitivity to the need for procedural protections where sentencing factors are determined by a judge (for example, use of a "reasonable doubt" standard), and invocation of the Due Process Clause where the history of the crime at issue, together with the nature of the facts to be proved, reveals unusual and serious procedural unfairness. Cf. McMillan, 477 U.S., at 88, 106 S.Ct. 2411 (upholding statute in part because it "gives no impression of having been tailored to permit the [sentencing factor] to be a tail which wags the dog of the substantive offense").

Second, the majority, in support of its constitutional rule, emphasizes the concept of a statutory "maximum." The Court points out that a sentencing judge (or a commission) traditionally has determined, and now still determines, sentences within a legislated range capped by a maximum (a range that the legislature itself sets). See ante, at ---- - ---- 14-15. I concede the truth of the majority's statement, but I do not understand its relevance.

From a defendant's perspective, the legislature's decision to cap the possible range of punishment at a statutorily prescribed "maximum" would affect the actual sentence imposed no differently than a sentencing commission's (or a sentencing judge's) similar determination. Indeed, as a practical matter, a legislated mandatory "minimum" is far more important to an actual defendant. A judge and a commission, after all, are legally free to select any sentence below a statute's maximum, but they are not free to subvert a statutory minimum. And, as Justice THOMAS indicates, all the considerations of fairness that might support submission to a jury of a factual matter that increases a statutory maximum, apply a fortiori to any matter that would increase a statutory minimum. See ante, at ---- - ---- 25-26 (concurring opinion). To repeat, I do not understand why, when a legislature authorizes a judge to impose a higher penalty for bank robbery (based, say, on the court's finding that a victim was injured or the defendant's motive was bad), a new crime is born; but where a legislature requires a judge to impose a higher penalty than he otherwise would (within a pre-existing statutory range) based on similar criteria, it is not. Cf. Almendarez-Torres, 523 U.S., at 246, 118 S.Ct. 1219.

IV

*54 I certainly do not believe that the present sentencing system is one of "perfect equity," ante, at ---- 2 (SCALIA, J., concurring), and I am willing, consequently, to assume that the majority's rule would provide a degree of increased procedural protection in respect to those particular sentencing factors currently embodied in statutes. I nonetheless believe that any such increased protection provides little practical help and comes at too high a price. For one thing, by leaving mandatory minimum sentences untouched, the majority's rule simply encourages any legislature interested in asserting control over the sentencing process to do so by creating those minimums. That result would mean significantly less procedural fairness, not more.

For another thing, this Court's case law, prior to Jones v. United States, 526 U.S. 227, 243, n. 6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), led legislatures to believe that they were permitted to increase a statutory maximum sentence on the basis of a sentencing factor. See ante, at ---- - ---- 7-17 (O'CONNOR, J., dissenting); see also, e.g., McMillan, supra, at 84-91, 106 S.Ct. 2411 (indicating that a legislature could impose mandatory sentences on the basis of sentencing factors, thereby suggesting it could impose more flexible statutory maximums on same basis). And legislatures may well have relied upon that belief. See, e.g., 21 U.S.C. § 841(b) (1994 ed. and Supp. III) (providing penalties for, among other things, possessing a "controlled substance" with intent to distribute it, which sentences vary dramatically depending upon the amount of the drug possessed, without requiring jury determination of the amount); N.J. Stat. Ann. §§ 2C:43-6, 2C:43-7, 2C:44-1a-f, 2C:44-3 (West 1995 and Supp.1999-2000) (setting sentencing ranges for crimes, while providing for lesser or greater punishments depending upon judicial findings regarding certain "aggravating" or "mitigating" factors); Cal.Penal Code Ann. § 1170 (West Supp.2000) (similar); see also Cal. Court Rule 420(b) (1996) (providing that "[c]ircumstances in aggravation and mitigation" are to be established by the sentencing judge based on "the case record, the probation officer's report, [and] other reports and statements properly received").

As Justice O'CONNOR points out, the majority's rule creates serious uncertainty about the constitutionality of such statutes and about the constitutionality of the confinement of those punished under them. See ante, at ---- - ---- 27-30 (dissenting opinion). The few amicus briefs that the Court

received in this case do not discuss the impact of the Court's new rule on, for example, drug crime statutes or state criminal justice systems. This fact, I concede, may suggest that my concerns about disruption are overstated; yet it may also suggest that (despite Jones and given Almendarez-Torres) so absolute a constitutional prohibition is unexpected. Moreover, the rationale that underlies the Court's rule suggests a principle--jury determination of all sentencing-related facts--that, unless restricted, threatens the workability of every criminal justice system (if applied to judges) or threatens efforts to make those systems more uniform, hence more fair (if applied to commissions).

*55 Finally, the Court's new rule will likely impede legislative attempts to provide authoritative guidance as to how courts should respond to the presence of traditional sentencing factors. The factor at issue here--motive-- is such a factor. Whether a robber takes money to finance other crimes or to feed a starving family can matter, and long has mattered, when the length of a sentence is at issue. The State of New Jersey has determined that one motive-- racial hatred--is particularly bad and ought to make a difference in respect to punishment for a crime. That determination is reasonable. The procedures mandated are consistent with traditional sentencing practice. Though additional procedural protections might well be desirable, for the reasons Justice O'CONNOR discusses and those I have discussed, I do not believe the Constitution requires them where ordinary sentencing factors are at issue. Consequently, in my view, New Jersey's statute is constitutional.

I respectfully dissent.

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RESP
PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER
Nevada Bar #0566
JOSEPH S. SCISCENTO
DEPUTY SPECIAL PUBLIC DEFENDER
Nevada Bar #4380
DAYVID J. FIGLER
Nevada Bar # 4264
309 South Third Street, 4th Floor
Las Vegas, Nevada 89155-2316
(702) 455-6265
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DONTE JOHNSON, Defendant.	Case No. C153154 Dept. No. V Hearing Date: 7/13/00 Hearing Time: 9:00 AM

REPLY TO RESPONSE TO MOTION FOR NEW TRIAL
(Request for Evidentiary Hearing)

COMES NOW, Defendant, DONTE JOHNSON, by and through his attorneys, PHILIP J. KOHN, Special Public Defender, JOSEPH S. SCISCENTO, Deputy Special Public Defender, and DAYVID J. FIGLER, Deputy Special Public Defender, in reply to State's response to Motion for New Trial.

DATED this 10 day of July, 2000.

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By _____
JOSEPH S. SCISCENTO
DEPUTY SPECIAL PUBLIC DEFENDER
NEVADA BAR #4380
309 SOUTH THIRD STREET, 4TH FLOOR
LAS VEGAS, NEVADA 89155-2316

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ARGUMENT

N.R.S. 176.515(4) contemplates a motion for a new trial on "any other grounds" and fixes the time frame for the submission of such a motion. "Any other grounds" has been broadly defined to even include that "the verdict was contrary to law." See **State v. Purcell**, 110 Nev. 1389 (1994). Further, a defendant may only appeal final orders under N.R.S. 177.015, and the determination of facts warranting a new trial is properly within the jurisdiction of the District Court. See **Layton v. State**, 89 Nev. 252 (1973). Finally, actual misconduct by jurors or witnesses when only discovered after the rendition of the verdict must have a remedy at law and in fact does. See **Rowbottom v. State**, 105 Nev. 472 (1989). The District Court is initially charged with making determinations of misconduct and as such as the authority to render a remedy. See, **Hul v. State**, 103 Nev. 321 (1987) citing **Big Pond v. State**, 101 Nev. 1, 3 (1985).

When the integrity of the verdict is called into question by specific facts and conduct, it is axiomatic that the District Court has the purview to determine that the verdict cannot stand and a new trial is mandated.

In the present case, the Defendant raises four grounds for a new trial.

First, that the prosecutor changed position with regard to the room in which the vital piece of State's evidence, the blood splattered pants, were found. The State responds that it did not change position, that it maintained that the Defendant never had exclusive control of the bedroom. The language of the closing argument however reveals that in calling this "Donte's room" and "Donte's house", the prosecutors took the new position that this was the exclusive domain of the Defendant. As a result, the prosecutors were arguing that this was Donte Johnson's room and therefore the pants and guns found there belonged to Donte Johnson. The State, therefore, made a strong

point that only the person who occupied this room could have had possession or ownership of these items. Unfortunately for the State, this is not the position they took during the motion to suppress. At that time, the State argued that many people had access to this room and that there Donte Johnson had no reasonable expectation of privacy in these items. The State cannot have it both ways pursuant to law. As such, the Motion to Suppress was improperly denied, and the degree of unreliability of the State's uncorroborated case warrants a new trial pursuant to N.R.S. 176.515.

Second, the Defendant alleges that one Juror expressed information on the record which revealed an actual racial prejudice in contravention of the law. See generally, **Spillers v. State**, 84 Nev. 23 (1968). The Defendant submits that racial fear comments made by a juror after being sworn in may impact the right of a Defendant to have a fair trial meeting the standards of due process. Cf. **State v. Green**, 81 Nev. 173 (1965) (where juror's comment in 1965 Nevada that "the dirty nigger got what he deserved" was not juror misconduct nor grounds for new trial under former N.R.S. 175.535).

Third, the Defendant alleges that at least two jurors admitted to violating the court's admonishment to refrain from discussing the matter with others or viewing media accounts of the trial. This was a highly publicized trial with cameras and reporters in the courtroom every day from opening arguments to declaration of penalty phase mistrial.[1] It was improper for the jurors to view media or discuss the case even once. Based on their admissions, a new trial is warranted, or in the alternative, it cannot be disputed that a prima facie case has been established that at least two jurors did not take the

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[1] Defendant had renewed motion for change of venue as a result of all the media attention.

admonition serious enough to follow in contravention of the due process rights of the Defendant. As such, an evidentiary hearing allowing counsel to make further inquiry is required.

Finally, it was brought to the court's attention that a family member of one of the victims was in the clearly marked, restricted jury lounge area. There can be no excuse for this conduct. At a minimum, the Court should make further inquiry as to how this occurred and if in fact there were other interactions. See Pray v. State (Nevada Case No. 28998, 7/10/00)(remanding case to District Court to make findings regarding contact between jurors and victim's family members).

In the case at bar, the new position of prosecutor coupled with the juror and victim's family misconduct supports that a different result would have occurred if the trial was free from these errors.

WHEREFORE, Defendant prays that this Honorable Court grant a new trial, or in the alternative conduct an evidentiary hearing to create a full and complete record.

DATED this 10 day of July, 2000.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By _____
JOSEPH S. SCISCENTO
DEPUTY SPECIAL PUBLIC DEFENDER
NEVADA BAR #4380
309 SOUTH THIRD STREET, 4TH FLOOR
LAS VEGAS, NEVADA 89155-2316

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing **REPLY TO RESPONSE TO MOTION FOR A NEW TRIAL** is hereby acknowledged this 16th day of July, 2000.

STEWART L. BELL
District Attorney
200 S. Third Street
Las Vegas, NV 89155
Attorney for Plaintiff

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0001
PHILIP J. KOHN, ESQ.
SPECIAL PUBLIC DEFENDER
State Bar No. 000556
JOSEPH S. SCISCENTO
State Bar No. 004380
DAYVID J. FIGLER
State Bar No. 004264
309 South Third Street
P. O. Box 552316
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

****

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON, aka
John White, ID # 1586283,

Defendant.

CASE NO: C153154
DEPT. NO: V

Date of Hearing:
Time of Hearing:

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing **MOTION FOR IMPOSITION OF LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCE; OR, IN THE ALTERNATIVE, MOTION TO EMPANEL JURY FOR SENTENCING HEARING AND/OR FOR DISCLOSURE OF EVIDENCE MATERIAL TO CONSTITUTIONALITY OF THREE JUDGE PANEL PROCEDURE** is hereby acknowledged this 10th day of July, 2000.

STEWART L. BELL
District Attorney
200 S. Third Street
Las Vegas, NV 89155
Attorney for Plaintiff

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SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

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MEMO
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. VI
Docket H

MEMORANDUM REGARDING THE THREE JUDGE PANEL

DATE OF HEARING: N/A
TIME OF HEARING: N/A

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through GARY L. GUYMON, Chief Deputy District Attorney, and files this Memorandum Regarding the Three Judge Panel.

This Memorandum is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing,

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if deemed necessary by this Honorable Court.

DATED this 12 day of July, 2000.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
GARY L. GUYMON
Chief Deputy District Attorney
Nevada Bar #003726

FACTS

The defendant, Donte Johnson, was convicted of first-degree murder. The prosecution is seeking the death penalty; however, the jury which determined his guilt was unable to reach a unanimous verdict upon the sentence to be imposed. Pursuant to N.R.S. § 175.556, a panel of three district judges is now required to determine the defendant's sentence. The judge who conducted the trial requested a memorandum indicating the duties of judges sitting on a three-judge panel. Transcript, June 20, 2000, 9:00 A.M., p. 4, ll. 14-16.

ISSUES

1. Whether a judge sitting on a three-judge panel pursuant to N.R.S. § 175.556 has the same duties as a juror determining the sentence to be imposed, and what those duties are.
2. Whether a judge sitting on a three-judge panel may use his own experience and philosophies of punishment in determining a penalty.

ANALYSIS

N.R.S. § 175.556 provides for a panel of three judges to sentence a defendant when a jury is unable to reach a unanimous verdict upon the sentence in a case in which the death penalty is sought. The panel consists of "the district judge who conducted the trial" and two district judges from other judicial districts. N.R.S. § 175.556(1) (1999). A unanimous vote of the panel is required for a sentence of death; a majority vote is permissible for any other sentence. Id. If the panel is unable to obtain a majority vote for any sentence less than death, a new panel of

three district judges, "none of whom was a member of the original panel," is required. N.R.S. § 175.562 (1999).

The United States Supreme Court has held that a sentence of death is not constitutionally required to be imposed by a jury. Spaziano v. Florida, 468 U.S. 447, 460 (1984). The Nevada Supreme Court has consistently upheld the constitutionality of N.R.S. 175.556. Hill v. State, 102 Nev, 377, 379, 724 P.2d 734, 735 (1986), (see also Williams v. State, 113 Nev. 1008, 945 P.2d 438 (1997), Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996), Paine v. State, 110 Nev. 609, 877 P.2d 1025 (1994), Redman v. State, 108 Nev. 227, 828 P.2d 395 (1992), Beets v. State, 107 Nev. 957, 821 P.2d 1044 (1991), Baal v. State, 106 Nev. 69, 787 P.2d 391 (1990)).

In Paine v. State, 110 Nev. 609, 877 P.2d 1025 (1994), the Nevada Supreme Court rejected the defendant's claim that the use of a three-judge panel was unconstitutional in his case because he was given no opportunity to voir dire the panel. Id. at 1030. The court found that the defendant provided no evidence or support that the judges "failed in any sense to adhere strictly and honorably to the duties of their office and the solemn assignment undertaken with respect to the sentencing." Id. The court upheld this holding in Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996). The Nevada capital sentencing scheme contains no provision for voir dire examination of a trial judge.

All judicial officers are required to take an oath to "faithfully perform all the duties of" their office. N.R.S. § 282.020 (1999). Furthermore, Canon 2(A) of the Nevada Code of Judicial Conduct requires a judge to "respect and comply with the law and [to] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Pursuant to Paine, a judge sitting on a three-judge panel must strictly and honorably adhere to the duties of his office with respect to sentencing.

A judge cannot adhere strictly and honorably to the duties of his office if his views on the death penalty would prevent or substantially impair the performance of such duties. Additionally, in such a situation, a judge may be in violation of Canon 2(A) of the Nevada Code of Judicial Conduct as his impartiality and ability to comply with the law may be questioned.

In Paine v. State, 107 Nev. 998, 823 P.2d 281 (1991), the Nevada Supreme Court

addressed the issue of a violation of the Nevada Code of Judicial Conduct by a district judge during a penalty hearing before a three-judge panel. The defendant was sentenced to death by the panel. Id. at 282. On appeal, the defendant claimed that one of the judges was inattentive during the hearing, resulting in an unfair penalty hearing. Id. The court found that an evidentiary hearing on the issue would be ineffective as only the judge knew whether he was attentive, and dismissing the defendant's claim would be unsatisfactory. Id. at 283. The court, concerned that a possible violation of the Code of Judicial Conduct had occurred, vacated the death sentence and remanded the case for a new sentencing hearing before a panel of three new judges. Id. However, the court stressed that their holding "will not be expanded beyond these extraordinary circumstances." Id.

A judge's duty while sitting on a three-judge panel is statutorily similar to a juror's duty during sentencing. N.R.S. § 175.554 provides, "[t]he jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." N.R.S. § 175.554(3) (1999). Furthermore, the word "may" in N.R.S. § 175.554 "is not to be construed to create a requirement, but rather, is construed to signify the ability to choose or the power to act." Bennett v. State, 111 Nev. 1099, 1109, 901 P.2d 676, 683 (1995). The jury has the discretion to return a penalty other than death, irrespective of its findings. Id.

The Nevada Supreme Court has held that "the state is entitled to a jury capable of imposing the death penalty." Bean v. Nevada, 86 Nev. 80, 87, 465 P.2d 133, 137 (1970). While that holding applies only to juries, it should be extended to judges sitting on a three-judge panel since the underlying idea is a fair and impartial sentencer.

In Nevius v. Warden, Nevada State Prison, 113 Nev. 1085, 944 P.2d 858 (1997), the defendant claimed that comments made by a Nevada Supreme Court Justice that he favored the death penalty constituted a disqualifying bias. Id. at 859. The court held that "a general philosophical orientation, or a belief in a particular controversial legal position, is not normally a ground for disqualification." Id. In rejecting the defendant's claim, the court reasoned that

the judges comments merely amounted to a showing that he will enforce Nevada law. Id.

N.R.S. § 175.556 states that the three-judge panel shall "determine the presence of aggravating and mitigating circumstances." The statute is silent on what other types of evidence the panel may consider at the penalty hearing. The United States Supreme Court has stated that a capital punishment statute must not "prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character. . . ." Penry v. Lynaugh, 492 U.S. 302, 318 (1989). Although consideration of the present case in relation to similar cases is not required, it remains a relevant consideration.

CONCLUSION

The underlying idea behind penalty hearings is a fair and impartial sentencer. Judges sitting on a panel are required to faithfully perform all the duties of their office and must strictly and honorably adhere to these duties with respect to sentencing. N.R.S. § 282.020 (1999), Paine, 877 P.2d at 1030. Furthermore, Canon 2(A) of the Nevada Code of Judicial Conduct requires a judge to "respect and comply with the law and [to] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Since judges are sworn to uphold the law, their personal position on the death penalty should not be at issue. "A general philosophical orientation, or a belief in a particular controversial legal position, is not normally a ground for disqualification" when such a belief amounts to a showing that a judge will enforce the law. Nevius, 944 P.2d at 859. A judge may bring his own experience and beliefs into a penalty consideration as long as he upholds the law. The judges sitting on a three-judge panel should be able to faithfully and impartially apply the

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law and consider the full range of punishment.

DATED this 12 day of July, 2000.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
GARY L. GUYMON
Chief Deputy District Attorney
Nevada Bar #003726

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of MEMORANDUM REGARDING THE THREE JUDGE PANEL, was made this 12th day of July, 2000, by facsimile transmission to:

DAYVID FIGLER
JOSEPH SCISCENTO
DEPUTY SPECIAL PUBLIC DEFENDERS
SPECIAL PUBLIC DEFENDER'S OFFICE
FAX #455-6273

Patti Manis
Secretary for the District Attorney's Office

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MEMO

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. VI
Docket H

MEMORANDUM REGARDING THE THREE JUDGE PANEL

DATE OF HEARING: N/A
TIME OF HEARING: N/A

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through GARY L. GUYMON, Chief Deputy District Attorney, and files this Memorandum Regarding the Three Judge Panel.

This Memorandum is made and based upon all the papers and pleadings on file herein,

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0001
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

NOTICE OF MOTION AND STATE'S MOTION IN LIMINE SUMMARIZING THE FACTS ESTABLISHED DURING THE GUILT PHASE OF THE DONTE JOHNSON TRIAL

DATE OF HEARING: 07/20/00

TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through GARY L. GUYMON, Chief Deputy District Attorney, and files this Notice of Motion and State's Motion in Limine Summarizing the Facts Established During the Guilt Phase of the Donte Johnson Trial.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will

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bring the foregoing motion on for setting before the above entitled Court, in Department V thereof, on Thursday, the 20th day of July, 2000, at the hour of 9:00 o'clock a.m., or as soon thereafter as counsel may be heard.

DATED this 14 day of July, 2000.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
for GARY L. GUYMON
Chief Deputy District Attorney
Nevada Bar #003726

POINTS AND AUTHORITIES

STATEMENT OF FACTS

On June 5, 2000, a jury was selected in the capital case captioned State of Nevada v. Donte Johnson. The opening statements began on June 6, 2000. During the guilt phase of the trial, the State called 17 witnesses before resting. The defense did not call any witnesses in the guilt phase of the trial.

The guilt phase lasted for three trial days and was recorded and transcribed. The transcription of the guilt phase facts is 956 pages in length.

After deliberations the jury returned the following verdicts:

Burglary While in Possession of a Firearm - Guilty;

Conspiracy to Commit Robbery and/or Kidnapping and/or Murder - Guilty;

Robbery With Use of a Deadly Weapon - Guilty.

Robbery With Use of a Deadly Weapon - Guilty.

Robbery With Use of a Deadly Weapon - Guilty.

Robbery With Use of a Deadly Weapon - Guilty.

First Degree Kidnapping With Use of a Deadly Weapon -Guilty.

First Degree Kidnapping With Use of a Deadly Weapon -Guilty.

First Degree Kidnapping With Use of a Deadly Weapon -Guilty.

First Degree Kidnapping With Use of a Deadly Weapon -Guilty.

Murder With Use of a Deadly Weapon - Guilty.

Murder With Use of a Deadly Weapon - Guilty.

Murder With Use of a Deadly Weapon - Guilty.

Murder With Use of a Deadly Weapon - Guilty.

The penalty phase of the trial began on Tuesday, June 13, 2000, and was concluded after deliberations and the declaration of mistrial on June 16, 2000.

In an effort to familiarize the three judges selected with the facts which were established during the guilt phase of the trial, the State has summarized each of the witnesses' testimony who testified during the guilt phase below. As can be seen, the State has cited to the trial transcript so that all three of the selected judges can be assured that the facts alleged are true and accurate.

The State has summarized the testimony in an effort to expedite the penalty phase so that the State does not need to call to the witness stand the 17 witnesses to refamiliarize the three judge panel with the facts associated with the above case.

FACTS ESTABLISHED DURING THE GUILT PHASE

Justin Perkins, a friend of the deceased and the first to discover the bodies, testified first as to the condition of the residence at 4825 Terra Linda the evening prior to the crimes and then to discovering the crime scene the next day. (Trial Transcript (TT), 6/6/00, Vol. II-76-110). Perkins testified that he had visited the Terra Linda home at around 8:00 p.m. on August 13, 1998. (TT, 6/6/00, II-80). He testified that Tracey Gorringe, Matt Mowen and Jeffrey Biddle were home at the time. (TT, 6/6/00, II-80). Perkins testified that his friends owned a television, a VCR and a stereo, which they kept in an entertainment center in the living room. (TT, 6/6/00, II-81). They also owned a Play Station, which they were playing when he arrived. (TT, 6/6/00, II-81). He testified that the house seemed to be in normal condition except for a couple of beer cans lying around. (TT, 6/6/00, II-82-83).

Perkins returned to the Terra Linda home the following day at 6:00 p.m. (TT, 6/6/00, II-85). When he arrived at the home he noticed the front gate and the front door were open. (TT, 6/6/00, II-86). This was unusual since his friends owned puppies that would escape if

the doors were left open. (TT, 6/6/00, II-86). Photos of the front of the Terra Linda home as it existed on August 14, 1998, are admitted into evidence as Exhibits 9 and 10. (TT, 6/6/00, II-88).

When Perkins entered the home he saw his three friends lying on the living room floor face down and duct taped. (TT, 6/6/00, II-90). They appeared to have been beaten and had blood on them. (TT, 6/6/00, II-90-91). They also appeared to have been robbed because the house had been trashed. (TT, 6/6/00, II-91). Perkins went to the house next door to call police. (TT, 6/6/00, II-92). He then returned to the home to see if his friends were still alive. (TT, 6/6/00, II-92). A photograph of how the living room looked on August 14, 1998, is admitted into evidence as Exhibit 63. (TT, 6/6/00, II-92).

Nicholas DeLucia, a next-door neighbor to the Terra Linda residence, next testified as to what he observed at the home as he drove past at 1:30 a.m. on August 14, 1998, as he left for work. (TT, 6/6/00, II-110-125). DeLucia worked from 2:00 a.m. to 10:30 a.m., so he left for work around 1:30 a.m. (TT, 6/6/00, II-111). As he drove past the Terra Linda home, he noticed two people in the front yard, one up by the driveway and one watering the lawn with a garden hose. (TT, 6/6/00, II-113). He then continued on to work. (TT, 6/6/00, II-114).

DeLucia testified that the following day at 6:00 p.m., a man he later found out to be Justin Perkins came to his door and asked him to call the police, that his friends had been robbed and tied up. (TT, 6/6/00, II-115). Delucia then got dressed and went outside to see if he could help. (TT, 6/6/00, II-117). As he approached the Terra Linda home he could see through the front door a person lying face down on the floor with his arms duct taped behind his back. (TT, 6/6/00, II-117). Within minutes the police arrived. (TT, 6/6/00, II-119).

Next Sgt. Randy Sutton of the Las Vegas Metropolitan Police Department testified as to what occurred after he responded to the call for backup at the Terra Linda home at 6:00 p.m. on August 14, 1998. (TT, 6/6/00, II-125-140). Sgt. Sutton arrived at the Terra Linda home moments after paramedics and Metro Officer Dave West. (TT, 6/6/00, II-128). When Sgt. Sutton arrived, Officer West informed him that he could see several bodies on the floor inside through the open front door, but that he had not yet cleared the area, meaning that he

was not certain whether there were still suspects in or around the house. (TT, 6/6/00, II-129). Sgt. Sutton and Officer West then proceeded to enter the home with their weapons drawn in order to clear the house. (TT, 6/6/00, II-130). Sgt. Sutton testified that he first looked into the home through the open front door and saw three bodies lying on the floor face down with their hands and legs duct taped. (TT, 6/6/00, II-130). He observed a great deal of blood around the heads of the victims, indicating head wounds. (TT, 6/6/00, II-131). As Sgt. Sutton moved through the house he found a fourth body in the dining area in a similar condition as the other three. (TT, 6/6/00, II-131). The interior of the home was in great disarray. (TT, 6/6/00, II-131). Some of the furniture had been upended, there was paper strewn about and the entire home generally appeared to be ransacked. (TT, 6/6/00, II-131-132). The officers also noticed that the victims' wallets were lying on the floor. (TT, 6/6/00, II-134). After having gone through the entire home, the officers found no suspects. (TT, 6/6/00, II-132). Photos of the interior of the home as it appeared on August 14, 1998, are admitted into evidence as Exhibits 21 thru 60. (TT, 6/6/00, II-138). Photos of the victims and the interior of the home are admitted into evidence as Exhibits 64 thru 67, 69 thru 70, and 81. (TT, 6/6/00, II-140).

Tod Armstrong, an occupant of the home where the defendant was staying at the time of the crimes, next testified as to what he observed the evening of August 13th and the following morning. (TT, 6/6/00, II-142-258). Armstrong lived at 4815 Everman Drive, a home owned by his mother. (TT, 6/6/00, II-143). Armstrong had one roommate in August 1998 by the name of Ace Hart. (TT, 6/6/00, II-143). He had another roommate that lived with him up until June 1998 by the name of Bryan Johnson. (TT, 6/6/00, II-146). Armstrong was introduced to the defendant, codefendant Terrell Young (Red), codefendant Sikia Smith (Tiny Bug) and defendant's girlfriend, Charla Severs, through Ace Hart. (TT, 6/6/00, II-147-149). In August, the defendant, Red and Severs began living at the Everman house at the request of Ace Hart. (TT, 6/6/00, II-148). The defendant and Severs slept in the master bedroom. (TT, 6/6/00, II-151). A few days after the three began staying at the home, Armstrong noticed that they had guns, which they kept with them or in a duffel bag on the

floor. (TT, 6/6/00, II-152-158). Armstrong described the guns as a .22 rifle with a fold-out handle and a banana clip, a .380 semi-automatic handgun, a revolver and a sawed-off shotgun. (TT, 6/6/00, II-153-158).

Armstrong testified that prior to August 14th, he did not have a VCR, a Play Station or a pager. (TT, 6/6/00, II-159). He also testified that the defendant smoked primarily Black and Mild brand cigars, which came in a box that contains about eight cigars. (TT, 6/6/00, II-160).

Armstrong also knew three of the victims at the Terra Linda residence through Hart. (TT, 6/6/00, II-161). Matt Mowen, Tracy Gorringe and Jeffrey Biddle would come over to the house occasionally to party with Hart. (TT, 6/6/00, II-162).

Mowen came over to the Everman house to buy drugs from the defendant sometime between August 7-10. (TT, 6/6/00, II-169). At that time, Mowen, in front of Armstrong, the defendant, Red, Severs and Hart, spoke of returning from a tour with a rock group where he had made a lot of money selling drugs. (TT, 6/6/00, II-171). Shortly after that, the defendant began asking Armstrong repeatedly where Mowen lived. (TT, 6/6/00, II-174). Armstrong testified that he did not know where he lived at that time. (TT, 6/6/00, II-175). Around August 10-12, the defendant was driving around with Red, Hart and Armstrong when the defendant asked again where Mowen lived. (TT, 6/6/00, II-176). As they drove through the neighborhood, Hart pointed the Terra Linda house out to the defendant. (TT, 6/6/00, II-176).

On the evening of August 13th, Armstrong testified that he was home all night. (TT, 6/6/00, II-177). That evening, the defendant and Red were also at the Everman house. (TT, 6/6/00, II-177). Armstrong did not know what time they left that night, but he was awakened when they returned. (TT, 6/6/00, II-178). The defendant and Red returned early the next morning while it was still dark carrying two duffel bags, one of which was used to store the guns. (TT, 6/6/00, II-179). That bag was set on the floor in the living room next to the television. (TT, 6/6/00, II-181). From the second bag, Red pulled out a VCR and a Play Station. (TT, 6/6/00, II-182).

The defendant went into the bedroom and returned to the living room with Severs, and

at that point, he told Armstrong that he had been to Mowen's house and that he ended up killing four people. (TT, 6/6/00, II-183). He said that he killed one of them because he was "mouthing off." (TT, 6/6/00, II-183). He said he shot him in the head. (TT, 6/6/00, II-184). Armstrong testified that the defendant stated that when he arrived at the Terra Linda house, Mowen was outside watering the lawn, and he told him to go inside. (TT, 6/6/00, II-184). Tracey Gorringe was also inside the house at the time. (TT, 6/6/00, II-185). Since Gorringe and Mowen didn't have any money on them, the defendant had them call some other people. (TT, 6/6/00, II-185). Two other people then arrived at the Terra Linda house. (TT, 6/6/00, II-185). It was one of these two that began mouthing off to the defendant. (TT, 6/6/00, II-186). After shooting the one that was mouthing off, the defendant said that since he had killed one, he would have to kill them all. (TT, 6/6/00, II-187).

Armstrong testified that as the defendant told the story he was laughing and that he thought it was funny. (TT, 6/6/00, II-187). The defendant went on to state that they had taken a couple hundred dollars, the VCR and the Play Station from the Terra Linda home. (TT, 6/6/00, II-188). Armstrong was too scared to report what the defendant had told him at that time. (TT, 6/6/00, II-189).

The following day, Saturday, August 15, 1998, Bryan Johnson and Ace Hart went over to the Everman house to see Armstrong, because the three had planned to go for a job interview. (TT, 6/6/00, II-191). While at the Everman house, Armstrong overheard Hart talking to the defendant about the killings. (TT, 6/6/00, II-192). Armstrong testified that he heard the defendant tell Hart that he killed one guy because he was mouthing off. (TT, 6/6/00, II-193). The defendant went on to say that he didn't want to kill Tracey Gorringe because he was cooperating, but he just ended up killing them all. (TT, 6/6/00, II-193).

Armstrong testified that he did not own a pager, but he saw one on the counter in the master bedroom on August 15th. (TT, 6/6/00, II-195). The pager later disappeared. (TT, 6/6/00, II-195).

After August 15th, Armstrong went to stay at Bryan Johnson's mother's house with Bryan and Ace Hart. (TT, 6/6/00, II-198). The three still had not told their story to the

police. (TT, 6/6/00, II-198). On August 17th, Bryan and his mother got into an argument, and the police were called to the house. (TT, 6/6/00, II-199). It was then that the three decided to tell the police that they knew who committed the murders. (TT, 6/6/00, II-199). The three were separated, and each gave separate statements. (TT, 6/6/00, II-199). At that time, Armstrong gave police permission to search the Everman house. (TT, 6/6/00, II-200). Photos of the Everman house as it appeared on August 17, 1998, are admitted into evidence as Exhibits 98 thru 112. (TT, 6/6/00, II-201). Exhibit 99 shows the living room with the VCR and the Play Station in it. (TT, 6/6/00, II-202). Exhibit 104 shows the duffel bag that the guns were normally kept in with a roll of duct tape on top. (TT, 6/6/00, II-205). Exhibit 107 shows the .22 rifle that was described earlier lying on a pair of black pants in the master bedroom. (TT, 6/6/00, II-207). Exhibits 108-112 show a pager and a set of keys that were dug up in the back yard of the Everman house. (TT, 6/6/00, II-209). The keys belong to a room at the Thunderbird Hotel. (TT, 6/6/00, II-209).

Armstrong testified that he believed the pants depicted in Exhibit 107 belonged to the defendant. (TT, 6/6/00, II-210). In the early morning hours of August 14th, Armstrong testified that when the defendant and codefendant Young returned from the Terra Linda home, they were both wearing all black. (TT, 6/6/00, II-211).

LaShawnya Wright, codefendant Sikia Smith's live-in girlfriend at the time of the murders, testified as to the events she witnessed on or around August 13-14. (TT, 6/6/00, II-258-300). In the afternoon on August 13th, Wright testified that the defendant and codefendant Terrell Johnson (Red) came over to her apartment at Fremont Plaza. (TT, 6/6/00, II-263). The defendant and Red stayed for about two to three hours and then left carrying a duffel bag. (TT, 6/6/00, II-264). Wright testified that she knew what was in the duffel bag -- a sawed-off rifle, a smaller gun, duct tape and brown gloves. (TT, 6/6/00, II-265). The defendant and Red were gone about two hours before they returned to the apartment. (TT, 6/6/00, II-269). They then stayed till about 11:00 p.m., and during that time they talked about going out and committing a robbery. (TT, 6/6/00, II-271). The two then left again with codefendant Smith. (TT, 6/6/00, II-273).

The defendant and two codefendants returned to the Fremont Plaza apartment at about 1:00 p.m. the following day, August 14th. (TT, 6/6/00, II-273). Wright testified that as the three entered the apartment, codefendant Smith appeared scared. (TT, 6/6/00, II-275). Smith was carrying a VCR and a Nintendo. (TT, 6/6/00, II-276). Once inside the apartment, the defendant bought the VCR from Smith for twenty dollars. (TT, 6/6/00, II-277). After the three had returned, Wright testified as to seeing Smith with a .380 automatic that she had not seen in the apartment previously. (TT, 6/6/00, II-279). A day or two later, Smith sold the gun. (TT, 6/6/00, II-280).

On Saturday, August 15th, Wright was with the defendant and codefendant Smith when the defendant bought a newspaper. (TT, 6/6/00, II-281). At that point, the defendant said to Smith, "we made front page." (TT, 6/6/00, II-282). The headline on the newspaper read, "Four Young Men Slain in Southeast." (TT, 6/6/00, II-283). Wright testified that at that moment the defendant appeared "excited", "thrilled." (TT, 6/6/00, II-284-285).

Charla Severs (La La), the defendant's girlfriend at the time of the murders, next testified as to the events she witnessed on or about August 13-14. (TT, 6/7/00, III-2-132). In July 1998, Severs was living with the defendant at the Thunderbird Hotel along with codefendant Young (Red). (TT, 6/7/00, III-5). Both the defendant and Red had keys to the room. (TT, 6/7/00, III-7). At the beginning of August, the three moved into Tod Armstrong's house. (TT, 6/7/00, III-8). Severs testified that the defendant smoked Black and Mild cigars. (TT, 6/7/00, III-13). She also testified that they all smoked crack cocaine at the Everman house on a regular basis. (TT, 6/7/00, III-16). Severs testified as to seeing a duffel bag that belonged to the defendant with guns in it at the Everman house. (TT, 6/7/00, III-23). She described the guns as a revolver, a sawed-off gun and a black gun with a curved clip. (TT, 6/7/00, III-23-27). She testified as to seeing three or four pairs of brown gloves at the Everman house that belonged to the defendant and two codefendants. (TT, 6/7/00, III-28). She also testified as to seeing duct tape at the house. (TT, 6/7/00, III-28). Severs testified as to seeing other guns in the house belonging to Tod Armstrong, Ace Hart and Bryan Johnson. (TT, 6/7/00, III-28-29). She described one as a shotgun. (TT, 6/7/00, III-

29).

Severs testified that Matt Mowen came to the house around August 10th or 11th to buy crack cocaine. (TT, 6/7/00, III-32-33). She overheard Armstrong talking to the defendant after Mowen had left, stating that Mowen had about ten thousand dollars and a lot of mushrooms at his house, and that they could get some money if they robbed him. (TT, 6/7/00, III-35).

On the night of August 13th, Severs testified as to seeing the defendant, Red and codefendant Smith leave the house together. (TT, 6/7/00, III-38). Armstrong was in the living room. (TT, 6/7/00, III-38). When he left that night, the defendant was wearing black jeans a black shirt and red FuBu shoes. (TT, 6/7/00, III-39). Red was also wearing black jeans and a black shirt. (TT, 6/7/00, III-40). The defendant wore his pants sagging off his butt. (TT, 6/7/00, III-40). Smith was wearing brown Dickie pants and a black hooded shirt. (TT, 6/7/00, III-41). Red was carrying the duffel bag with the guns in it. (TT, 6/7/00, III-41). Red was wearing brown gloves, and the defendant had brown gloves hanging out of his back pocket. (TT, 6/7/00, III-42). After the three left, Severs went to sleep in the master bedroom. (TT, 6/7/00, III-42). Armstrong was asleep on the living room couch. (TT, 6/7/00, III-43).

The defendant and Red returned to the Everman house early in the morning of August 14th while it was still dark out. (TT, 6/7/00, III-44). When Severs woke up, the defendant, Red and Armstrong were in the living room talking and everyone was hyped up. (TT, 6/7/00, III-44). Severs testified as to seeing the duffel bag on the living room floor next to the couch. (TT, 6/7/00, III-45). It appeared full. (TT, 6/7/00, III-45). The four were in the living room talking for about an hour, and during that time the defendant said that he had gone to get some money. (TT, 6/7/00, III-46). He said that he had only gotten a couple hundred dollars. (TT, 6/7/00, III-46). He said that while getting the money, he had to kill somebody. (TT, 6/7/00, III-47). He said he killed a Mexican, because he doesn't like Mexicans and he was "talking mess." (TT, 6/7/00, III-48). He said he shot him in the head. (TT, 6/7/00, III-48). The defendant then told Severs that they had to go to sleep, because

"you have to go to sleep after you kill somebody." (TT, 6/7/00, III-44).

The following day, the defendant, Red and Severs were in the living room of the Everman house when the defendant told Severs to watch the news. (TT, 6/7/00, III-52). When the story came on about the killings, Severs recognized the pictures of the victims. (TT, 6/7/00, III-53). She then said to the defendant, "I was just over there the other day. I know you didn't." (TT, 6/7/00, III-53). The defendant replied that yes, he did. (TT, 6/7/00, III-53). The defendant went on to say that he killed a total of four people. (TT, 6/7/00, III-54). He said he shot them in the back of the head. (TT, 6/7/00, III-55).

Next Bryan Johnson, a former resident at the Everman house testified as to the events he witnessed on or around August 13-14, 1998. (TT, 6/7/00, III-133-175). Johnson was living at the Everman house from about October 1997 to June of 1998. (TT, 6/7/00, III-137). He moved out prior to the defendant moving in, but he continued to visit the residence. (TT, 6/7/00, III-135). On the morning of August 15th, Johnson went to the Everman house to meet with Tod Armstrong to go to a job interview. (TT, 6/7/00, III-139). While he was there he overheard the defendant talking to Severs and Red about the murders. (TT, 6/7/00, III-142). The defendant said that he drove over to a house where he and the two codefendants intended to get money or drugs. (TT, 6/7/00, III-142). He said that once they got to the house, there was somebody standing outside drinking a beer and they continued to go toward the person with guns. (TT, 6/7/00, III-144). They told him to go inside the house. (TT, 6/7/00, III-142). Once inside, the defendant and Red duct taped the person and two other people who were inside the house. (TT, 6/7/00, III-144). A fourth person came to the house and began mouthing off to the defendant. (TT, 6/7/00, III-145). The defendant said that this person was Mexican. (TT, 6/7/00, III-145). He said he took him into the back room and shot him in the head. (TT, 6/7/00, III-145). Subsequently, all four people in the house were killed. (TT, 6/7/00, III-146). The defendant said that as the victims were shot, the blood "squirted up like Niagara Falls." (TT, 6/7/00, III-146-147).

The defendant mentioned that he got blood on his pants during the murders. (TT, 6/7/00, III-147). He also mentioned that he got about two hundred and fifty dollars from the

robbery. (TT, 6/7/00, III-147).

Johnson testified that prior to August 15th, there was no VCR or Play Station at the Everman home, but on the morning of the 15th, there was. (TT, 6/7/00, III-148). He also testified that the defendant kept guns at the house. (TT, 6/7/00, III-149). He described them as a shotgun, a handgun and an automatic weapon. (TT, 6/7/00, III-149).

Crime scene analyst Shawn Fletcher with the Metropolitan Police Department next testified as to what she found at the crime scene at 4825 Terra Linda. (TT, 6/7/00, III-176-237). Her duties at the scene were the collection and preservation of evidence. (TT, 6/7/00, III-179).

As she approached the house, the sliding gate across the driveway was open and the front door was open. (TT, 6/7/00, III-185). There was a hose in the driveway. (TT, 6/7/00, III-189). There were no signs of forced entry to the home. (TT, 6/7/00, III-185).

As she entered the residence, there were three victims face down on the living room floor with their hands bound behind their backs with duct tape. (TT, 6/7/00, III-184). The living room was extensively ransacked. (TT, 6/7/00, III-184). There were numerous items on the floor. (TT, 6/7/00, III-184). There was a lot of blood and dog paw prints throughout the residence. (TT, 6/7/00, III-184). There were several cigarette butts in ashtrays and strewn about on the floor that were collected for DNA evidence. (TT, 6/7/00, III-190-200). A total of twelve cigarette butts were collected for analysis. (TT, 6/7/00, III-199). The entertainment center was ransacked with the TV pulled out and several unattached cables hanging down. (TT, 6/7/00, III-202). There was a Play Station attachment on top of the entertainment center, but no Play Station. (TT, 6/7/00, III-202). There were several types of controlled substances found -- a white powder substance (later identified as methamphetamine (TT, 6/7/00, III-238)), white pills and blue pills, all in baggies. (TT, 6/7/00, III-204). There were mushrooms in one of the bedrooms on the floor and one in the dining room. (TT, 6/7/00, III-204). Two empty wallets were found on the living room floor, and two more were attached to the victims by chains and went to the autopsies with the bodies. (TT, 6/7/00, III-205). A Black and Mild cigar box was on the floor near the feet of

one of the victims. (TT, 6/7/00, III-207). Four cartridge casings from a .380 semiautomatic weapon and some bullet fragments were found near the bodies. (TT, 6/7/00, III-214).

Bradley Grover, a senior crime scene analyst for the Las Vegas Metropolitan Police Department, testified as to his findings at 4825 Terra Linda on August 15, 1998. (TT, 6/7/00, III-239-256). Grover collected fingerprints in the living room of the Terra Linda home. (TT, 6/7/00, III-243). A latent fingerprint was lifted from a Black and Mild cigar box found on the floor in the living room. (TT, 6/7/00, III-245-246). That fingerprint was transferred to a fingerprint card and admitted into evidence as Exhibit 188. (TT, 6/7/00, III-248).

Dr. Robert Bucklin, a forensic pathologist, next testified as to his findings in the autopsies of the four victims. (TT, 6/7/00, III-257-315). From Dr. Bucklin's autopsy of Jeffrey Biddle, he testified that the body had been restrained by duct tape, which was around the clothing of the ankles and around the wrists. (TT, 6/7/00, III-266). There was an entrance gunshot wound in the right side of the back of the scalp. (TT, 6/7/00, III-268). The wound showed some charring of its borders. However, there was very little evidence of sooting in the tissues around the wound, which would indicate the gun being about an inch or so from the skin surface. (TT, 6/7/00, III-268-269). The bullet entered the head traveling in a back to front pattern, and fragments were recovered from cerebellum, the cortex and the base of the skull. (TT, 6/7/00, III-270). The caliber was about a .38 or 9 millimeter. (TT, 6/7/00, III-272). The cause of death was a gunshot wound to the head. (TT, 6/7/00, III-273).

From Dr. Bucklin's autopsy of Tracey Gorringe, he testified that there was a gunshot wound to the back portion of the skull. (TT, 6/7/00, III-274). There was the presence of a marked hemorrhage into the upper lid of the right eye, and a lesser degree of hemorrhage in the left eye. (TT, 6/7/00, III-275). This would indicate that there was some injury to the facial bones and Tracey Gorringe may have lived up to ten minutes after being shot. (TT, 6/7/00, III-277). There was blood in the nostrils, which indicates the track of the bullet. (TT, 6/7/00, III-275). The entrance wound was about 3/8 of an inch in diameter and showed some charring of the borders, but no soot was found. (TT, 6/7/00, III-275-276). This would

indicate a close gunshot wound from about one or two inches away. (TT, 6/7/00, III-276). The bullet traveled from back to front, and three fragments were recovered in the cerebella. (TT, 6/7/00, III-278). It was a large caliber bullet about .38 or 9 millimeter. (TT, 6/7/00, III-278). Cause of death was a gunshot wound to the head. (TT, 6/7/00, III-278).

From Dr. Bucklin's autopsy of Matthew Mowen, he testified that the body was bound by duct tape at the ankles and wrists, and there was a gunshot wound at the base of the hair on the back of the scalp. (TT, 6/7/00, III-280). The wound was about 3/8 of an inch in diameter, and had distinct black charring at the borders and some discoloration of the surrounding skin, which would indicate that the gun would have been about an inch from of the body. (TT, 6/7/00, III-281-282). The bullet traveled from back to front, and two fragments were recovered from the cervical spinal canal. (TT, 6/7/00, III-282). Because the spinal cord was completely severed near the brain, the person would have died in a matter of seconds. (TT, 6/7/00, III-283). Cause of death was a gunshot wound to the neck. (TT, 6/7/00, III-283).

From Dr. Bucklin's autopsy of Peter Talamantez, he testified that the deceased had a gunshot wound in the back of the head behind the left ear and a laceration of the scalp near the gunshot wound. (TT, 6/7/00, III-285). The laceration was fresh and would be the result of blunt force trauma to the head. (TT, 6/7/00, III-287-288). From the size of the bullet hole, the projectile would have to be about .38 or 9 millimeter. (TT, 6/7/00, III-289). There was charring of the borders of the wound, but no soot powder on the skin, which would indicate that the gun would have been about an inch or two from the skin. (TT, 6/7/00, III-290). The direction of the bullet was from left to upper right, and three bullet fragments were recovered, two close to the entrance point and one at the top part of the head. (TT, 6/7/00, III-290-291). Cause of death was a gunshot wound to the head. (TT, 6/7/00, III-291).

Toxicology tests were also done on the four boys and all four had controlled substances in their blood and urine. (TT, 6/7/00, III-292). Jeffrey Biddle had a high level of methamphetamine, amphetamine (a byproduct of metabolized methamphetamine) and

cocaine metabolite in his system, but no alcohol. (TT, 6/7/00, III-292-293). Tracey Gorringe had methamphetamine, amphetamine and cocaine metabolite in his system, but no alcohol. (TT, 6/7/00, III-294). Matthew Mowen had methamphetamine, amphetamine, nordiazepam (a tranquilizer) and traces of alcohol in his system and urine. (TT, 6/7/00, III-294). Peter Talamantez had methamphetamine and amphetamine in his system and urine, but no alcohol. (TT, 6/7/00, III-295).

Dr. Bucklin testified that from the injuries the four boys sustained, there would not be any spurting of blood from the wounds, but more of a natural flow due to gravity. (TT, 6/7/00, III-303-310).

Sgt. Robert Honea of Nevada Highway Patrol testified as to an encounter he had with the defendant on U.S 95 on August 17, 1998. (TT, 6/7/00, III-316-329). Sgt. Honea was traveling northbound on U.S. 95 when he noticed a 1994 Ford four-door automobile traveling at a high rate of speed. (TT, 6/7/00, III-317). He accelerated to catch up with the vehicle and clocked it doing eighty-five miles per hour, so he directed the car to pull over. (TT, 6/7/00, III-318). Once stopped, Sgt. Honea could see two black male occupants in the car. (TT, 6/7/00, III-318). Sgt. Honea identified the driver as the defendant seated in the courtroom. (TT, 6/7/00, III-320). When asked to produce identification, the driver had none and gave the name Donte Fletch with a date of birth as May 27, 1978. (TT, 6/7/00, III-320). When Sgt. Honea attempted to run the information through his computer system, he could not find a match. (TT, 6/7/00, III-321). He asked the driver to step back out of the vehicle to the patrol car. (TT, 6/7/00, III-321). He asked the driver the name of the passenger in the vehicle, and the driver said his name was Red. (TT, 6/7/00, III-321). At that point, Sgt. Honea noticed the passenger door start to open. (TT, 6/7/00, III-322). Alarmed, he stepped back behind the door of the patrol car. (TT, 6/7/00, III-322). The passenger stepped out of the car with a small handgun in his hand. (TT, 6/7/00, III-322). At that point Sgt. Honea drew his weapon, and the driver and passenger ran off, jumped the concrete wall next to the freeway and ran down the Charleston off ramp. (TT, 6/7/00, III-322). The two were not apprehended at that time. (TT, 6/7/00, III-322). When Sgt. Honea searched the car he found

a sawed-off rifle with a magazine in it which contained about twenty rounds of ammunition. (TT, 6/7/00, III-323). In addition, there was another thirty-round magazine in the vehicle. (TT, 6/7/00, III-325).

Next, Sgt. Ken Hefner, a homicide detective of the Las Vegas Metropolitan Police Department who was assigned to the quadruple homicide of August 14, 1998, testified as to his investigation. (TT, 6/7/00, III-329-360). On August 18, 1998, Sgt. Hefner went to 4815 Everman to assist officers in the arrest of the defendant. (TT, 6/7/00, III-334). When he arrived, the officers on the scene had already removed all of the people from inside the house. (TT, 6/7/00, III-334). Sgt. Hefner and Marc Washington, a crime scene analyst already on the scene, then searched the house for items of evidentiary value. (TT, 6/7/00, III-342). Impounded from the living room were a teal colored tote bag with a partially used roll of duct tape inside, a black pair of jeans, a VCR and a box which contained various items including an empty Black and Mild cigar box. (TT, 6/7/00, III-342-345). Impounded from the master bedroom were a pair of black jeans that had blood spatter on the bottom of one of the legs, another pair of pants, shoes, a Ruger .22 long rifle and an ammunition clip. (TT, 6/7/00, III-346-348). On a tip that something may be buried in the back yard, Sgt. Hefner searched and found a blue Motorola pager and two keys from the Thunderbird Hotel. (TT, 6/7/00, III-349-351).

Admitted into evidence by stipulation of the parties was the following evidence: On July 24, 1998, Ace Hart rented room 6829 at the Thunderbird Hotel at 1213 South Las Vegas Boulevard; on August 4, 1998, that room was vacated; on August 4, room 6704 was rented by Ace Hart through August 17, 1998; on August 18, 1998, Marc Washington impounded a blue Motorola pager bearing serial number AXAAA 0717595 from the backyard of 4815 Everman; that pager belonged to Peter Talamantez. (TT, 6/7/00, III-362-363).

Next, crime scene analyst Marc Washington testified as to the evidence impounded from the Everman home on August 18, 1998. (TT, 6/7/00, III-363-378). Washington verified in court that the VCR, tote bag, duct tape, black jeans with blood stains, .22 rifle, ammunition clip, hotel keys, and pager entered into evidence were in fact the items

impounded from the Everman home on August 18th. (TT, 6/7/00, III-364-376).

Thomas Thowsen, a detective with the Las Vegas Metropolitan Police Department assigned to the murders, testified as to his investigation. (TT, 6/7/00, III-379-393). On August 18, 1998, Det. Thowsen and his partner Det. James Buczek arrested defendant Donte Johnson and charged him with murder. (TT, 6/7/00, III-383). At that time, two swabs were taken from inside the mouth of the defendant for the purpose of obtaining the defendant's DNA. (TT, 6/7/00, III-385).

Edward Guenther, a latent fingerprint examiner with the Las Vegas Metropolitan Police Department, next testified to his findings from the fingerprints collected at the crime scene at 4825 Terra Linda. (TT, 6/8/00, IV-2-43). Guenther was asked to examine the finger and palm prints taken from the crime scene and compare them with the known finger and palm prints of the four victims, the defendant, the two codefendants, Tod Armstrong, Nicholas Gorringe and Joseph Haphes. (TT, 6/8/00, IV-11-12). A positive identification of a palm print on the bottom of the VCR stolen from Terra Linda was matched to that of codefendant Smith. (TT, 6/8/00, IV-19). A positive identification of a thumbprint on the Black and Mild cigar box found at the Terra Linda home was matched to that of the defendant. (TT, 6/8/00, IV-23).

Richard Good, a lab manager in the forensic laboratory at the Las Vegas Metropolitan Police Department, testified as to ballistics evidence from the weapon used in the murders at 4825 Terra Linda on August 13, 1998. (TT, 6/8/00, IV-44-58). (TT, 6/8/00, IV-11). Good compared the four cartridge casings impounded from the Terra Linda home on August 14th, and determined them to be fired from the same .380 automatic firearm. (TT, 6/8/00, IV-53-54). Good testified that there is almost no difference in the diameter of the bullet fired from a .380, a .38 or a 9 millimeter firearm. (TT, 6/8/00, IV-56).

Det. James Buczek of the Las Vegas Metropolitan Police Department next testified as to his investigation into the murders at 4825 Terra Linda on August 13, 1998. (TT, 6/8/00, IV-59-90). On October 23, 1998, Det. Buczek spoke with Dave Mowen, the father of one of the victims, and learned that he had given a VCR to his son like the one recovered from the

Everman residence. (TT, 6/8/00, IV-62). Mr. Mowen then remembered that he still had a remote control to the VCR, which he was able to produce. (TT, 6/8/00, IV-62). On April 20, 1999, that remote was taken to the evidence vault and Det. Buczek attempted to operate the VCR impounded from the Everman house. (TT, 6/8/00, IV-63). Both the remote and the VCR were made by RCA, and Det. Buczek was able to activate and operate the VCR with the remote. (TT, 6/8/00, IV-63).

Thomas Wahl, a criminalist and DNA analyst with the Las Vegas Metropolitan Police Department, testified as to his determinations from the evidence collected in connection with the murders at 4825 Terra Linda on August 13, 1998. (TT, 6/8/00, IV-91-164). Wahl tested several pieces of evidence obtained from the crime scene, the four victims, the defendant and two codefendants in order to make DNA comparisons. (TT, 6/8/00, IV-105). He tested a pair of jeans impounded from the master bedroom of the Everman residence which had eight human bloodstains on the back of the right pant leg. (TT, 6/8/00, IV-108). Through DNA testing, Wahl was able to positively identify one of the victims, Tracey Gorringe, as the source of the bloodstains on the bottom of the pants. (TT, 6/8/00, IV-112). Wahl also tested a white crusty substance on the inside zipper flap of the pants which was determined to contain sperm. (TT, 6/8/00, IV-119). A microscopic examination of the substance revealed that it may contain semen mixed with another biological fluid. (TT, 6/8/00, IV-119). Through DNA testing, Wahl was able to determine that the substance was a mixture of substances from two individuals, possibly the result of a sex act. (TT, 6/8/00, IV-119). Wahl, by separating the substances and through DNA testing was able to positively identify the defendant as the source of the sperm. (TT, 6/8/00, IV-121).

Wahl also tested several of the cigarette butts collected from the Terra Linda residence. (TT, 6/8/00, IV-121). Of the cigarette butts collected, ten were Marlboro brand and two were no brand. (TT, 6/8/00, IV-122). Jeffrey Biddle was positively identified as the source of the DNA on four of the Marlboro butts. (TT, 6/8/00, IV-122). One cigarette butt, which was recovered from the living room floor, had a mixture of DNA on it, but the majority DNA component was positively identified as that of the defendant. (TT, 6/8/00, IV-

123). There was inconclusive evidence as to the DNA on the remainder of the cigarette butts. (TT, 6/8/00, IV-123). Exhibits 204 and 205 are admitted into evidence showing the results of the DNA profiles of the victims, the defendant, the codefendants and the physical evidence. (TT, 6/8/00, IV-129-136).

DATED this 14 day of July, 2000.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY Christopher Lee
for GARY L. GUYMON
Chief Deputy District Attorney
Nevada Bar #003726

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of NOTICE OF MOTION AND STATE'S MOTION IN LIMINE SUMMARIZING THE FACTS ESTABLISHED DURING THE GUILT PHASE OF THE DONTE JOHNSON TRIAL, was made this 14th day of July, 2000, by facsimile transmission to:

DAYVID FIGLER
JOSEPH SCISCENTO
DEPUTY SPECIAL PUBLIC DEFENDERS
SPECIAL PUBLIC DEFENDER'S OFFICE
FAX #455-6273

Patti Mancia
Secretary for the District Attorney's Office

\SCHUBERTD:pm

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*** TX REPORT ***
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TRANSMISSION OK

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STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

NOTICE OF MOTION AND STATE'S MOTION IN LIMINE SUMMARIZING THE FACTS ESTABLISHED DURING THE GUILT PHASE OF THE DONTE JOHNSON TRIAL

DATE OF HEARING: 07/20/00

TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through GARY L. GUYMON, Chief Deputy District Attorney, and files this Notice of Motion and

ORIGINAL

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OPPS
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

FILED
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

STATE'S OPPOSITION FOR IMPOSITION OF LIFE WITHOUT AND OPPOSITION TO EMPANEL JURY AND/OR DISCLOSURE OF EVIDENCE MATERIAL TO CONSTITUTIONALITY OF THE THREE JUDGE PANEL PROCEDURE

DATE OF HEARING: 07/20/00
TIME OF HEARING: 9:00 A.M.

RECEIVED
JUL 17 2000
COUNTY CLERK

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through GARY L. GUYMON, Chief Deputy District Attorney, and files this State's Opposition for Imposition of Life Without and Opposition to Empanel Jury and/or Disclosure of Evidence Material to Constitutionality of the Three Judge Panel Procedure.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if

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deemed necessary by this Honorable Court.

DATED this 12 day of July, 2000.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
GARY L. GUYMON
Chief Deputy District Attorney
Nevada Bar #003726

POINTS AND AUTHORITIES

SUMMARY OF ARGUMENTS

1. The United States Supreme Court did not declare the three-judge panel process for imposing a sentence of death unconstitutional under the Due Process Clause in Apprendi v. New Jersey.

2. The three-judge panel process defined in NRS 175.556 is not ambiguous.

3. Nevada's process for the selection of judges of a three-judge panel for capital murder sentencing does not violate a defendant's right to an impartial tribunal.

4. The three-judge panel in capital sentencing does not violate the Eighth and Fourteenth Amendments.

5. The defendant has no right to voir dire any member of the panel or the Nevada Supreme Court.

STATEMENT OF THE CASE

The defendant, Donte Johnson, was convicted of first-degree murder. The prosecution is seeking the death penalty; however, the jury which determined his guilt was unable to reach a unanimous verdict upon the sentence to be imposed. Pursuant to NRS 175.556, a panel of three district judges is now required to determine the defendant's sentence.

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ARGUMENT

1. The United States Supreme Court Did Not Declare The Three-Judge Panel Procedure For Imposing A Sentence Of Death Unconstitutional Under The Due Process Clause Of The Constitution In Apprendi v. New Jersey.

Defense counsel misstates the holding in Apprendi v. New Jersey, ___U.S.___, 2000 WL 807189 (June 26, 2000) and errs in applying that case to a capital sentencing proceeding. The Supreme Court in Apprendi specifically states that it does not render invalid state capital sentencing schemes permitting a panel of judges rather than a jury to determine whether aggravating factors exist to warrant a sentence of death, once the jury has found a defendant guilty of a capital crime. Apprendi, 2000 WL 807189, *16 (U.S.) citing Walton v. Arizona, 497 U.S. 639 (1990).

In Apprendi, the Court addressed the constitutionality of a New Jersey statute that allowed for a sentencing enhancement where an offense is determined to be a hate crime. The statute, Section 2C: 44-3(e), permitted a court to impose an enhanced sentence if the judge found that the State had proven that the crime was committed "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." State v. Apprendi, 731 A.2d 485, 486, 487- 88 (N.J. 1999) (quoting N.J. Stat. Ann. § 2C: 44-3(e).

During sentencing, in determining whether an offense constitutes a hate crime, the judge is required to make a factual determination as to the defendant's racial biases. Because the very nature of a hate crime turns on the mental processes of the individual committing the crime, the defendant's racial bias is a material element of the offense. The Court held that such factual determinations must be determined beyond a reasonable doubt by a jury. Apprendi v. New Jersey, 2000 WL 807189 (U.S.).

In Apprendi, the issue before the Court was whether a judge, rather than a jury, could make a determination as to the existence of a material element of a crime to increase the maximum prison sentence for the offense. Without determining the existence of racial bias, the judge may not impose the sentence enhancement. Apprendi, 2000 WL 807189, *6 (U.S.).

By contrast, in a capital murder case, the defendant's guilt is determined beyond a

reasonable doubt as to every material element of the offense by the jury prior to sentencing. A sentencing body, be it judge or jury, then selects from the statutory range of punishments that are available for the offense. By concluding that the defendant had committed first-degree murder, the jury effectively sets the maximum penalty at death, leaving to the sentencing body the ultimate authority to choose between the sentences authorized by statute.

Defense counsel cites Jones v. United States in support of their position that an aggravating factor should be decided by a jury. The Supreme Court in Jones articulated -- as an expression of "Constitutional doubt" -- the proposition that a sentencing factor that increased the maximum could thereby be considered an element of the crime. 526 U.S. at 326 n.6 (1999).

That opinion's discussion of Walton also demonstrates that the sentencing scheme at issue here does not "increase the maximum" for purposes of the Court's analysis. In the capital-sentencing scheme at issue in Walton, Arizona law provided two alternative degrees of punishment for a defendant convicted of first-degree murder: life imprisonment or death. A defendant became eligible for the more severe of the two statutorily-available degrees of punishment if the judge found one or more aggravating factors. Walton, 497 U.S. at 644. Even though a judicial finding of at least one aggravating factor was necessary to actually impose the death penalty, that punishment was within the scope of punishments available once the jury convicted a defendant of first-degree murder. On that basis, Jones indicated that the judge's findings of aggravating factors could properly be characterized "as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." Jones, 526 U.S. at 331.

Jones based its analysis on language in Walton, which stated: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice between the alternative verdicts of death and life imprisonment." 526 U.S. at 251.

In Nevada, the sentencing decision in a capital case is made by weighing relevant aggravating and mitigation factors. NRS 175.554. Those factors include, but are not limited to aggravating factors outlined in NRS 200.033 and mitigating factors outlined in NRS 200.035. Allen v. State, 99 Nev. 485, 488, 665 P.2d 238, 240 (1983) (including "any other matter which

the court deems relevant to sentence"). The jury or panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found. NRS 175.554 (3); NRS 200.030 (4)(a).

This sentencing procedure is functionally identical to judicial capital sentencing procedures that have been approved by the Supreme Court. Under such procedures, the jury determines whether the prosecution has proven beyond a reasonable doubt all of the elements of first-degree murder and, thus, guilt or innocence. Upon conviction, the jury's role ends and degrees of punishment including death are available to the sentencing judge. The more severe penalty is available only if the judge finds one or more statutory "aggravating factors." See e.g., Walton v. Arizona, 497 U.S. 639 (1990) (approving such a sentencing procedure).

The capital-sentencing procedures approved in Walton are the same as in Nevada. "Under Arizona law, as construed by Arizona's highest court, a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved." Walton, 497 U.S. at 709. The Supreme Court rejected the argument that a jury, rather than the judge, was required to find the existence of such aggravating factors. Id. at 647. "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." Id. at 647, (citing Clemons v. Mississippi, 494 U.S. 738, 745, 110 S.Ct. 1441, 1446, 108 L.Ed.2d 725 (1990)).

The statute in issue in Apprendi, permitted a sentencing judge to impose a sentence far in excess of the statutory limit for the underlying offense. A truly analogous death penalty statute would provide for life imprisonment for first degree murder (thus setting the statutory maximum for the offense at life imprisonment) and a separate "penalty enhancing provision" calling for the imposition of a death sentence if the trial judge made certain determinations of the defendant's mental state based on a mere preponderance of the evidence. There is no doubt that such a statute would violate the Fifth and Sixth Amendment rights of criminal defendants. By contrast, NRS 200.030 requires the imposition of specific sentences within a relatively

narrow range and does not presume guilt or the existence of any element of a crime, create a separate offense, change the definition of any crime, or outlaw any new conduct. See Almendarez-Torres, 523 U.S. at 243 (1998). There is no dispute that "the Due Process Clause protects the accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970) (emphasis added). Nor can there be any genuine dispute that although Winship thus requires a jury trial and proof beyond a reasonable doubt for all elements of a crime, sentencing factors can properly be decided by a judge based on a preponderance of the evidence. Almendarez-Torres v. United States, 523 U.S. 224, 226 (1998).

The Supreme Court has expressly rejected the argument that any fact that affects the "degree of criminal culpability" or the "severity of punishment" must be treated as an element of the crime. Patterson v. New York, 432 U.S. 197, 215 n.15 (1977); McMillan v. Pennsylvania, 477 U.S. 79, 84 (1986); see also, Hopkins v. Reeves, 524 U.S. 88, 100 (1998) (the Court reaffirmed the principle with respect to the intent findings required for a capital sentence. The Court explained that the Eighth Amendment rule requiring a "culpable mental state" for a capital sentence "does not concern the guilt or innocence of the defendant--it establishes no new elements of the crime of murder that must be found by the jury ... and does not affect the state's definition of any substantive offense").

To require a jury to determine whether aggravating circumstances sufficient for imposition of the death penalty exist beyond a reasonable doubt would go against the Court's consistent holdings in capital cases that the aggravating factors necessary to impose a death sentence need not be made "elements" of the capital offenses in question, and may be found by sentencing judges (or even by an appellate court). See, e.g., Walton v. Arizona, 497 U.S. 639, 645, 647-649 *23 (1990); Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam); Cabana v. Bullock, 474 U.S. 376, 385-386 & n.3 (1986) ("while the Eighth Amendment prohibits the execution of *** defendants [in the absence of predicate findings], it does not supply a new element of the crime of capital murder that must be found by the jury"; rather, it places "a substantive limitation on sentencing" that "need not be enforced by the jury."); Spaziano v.

Florida, 468 U.S. 447, 452 (1984).

In Hildwin, for example, the Court stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638, 109 S.Ct., at 2056, and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Id., at 640-641, 109 S.Ct., at 2057.

The Supreme Court also analyzed McMillan in upholding a Florida capital-sentencing statute that permitted the judge to override a jury recommendation and required the judge to find at least one aggravating factor in order to impose the death penalty. Spaziano, 468 U.S. at 459 (1984) (Upholding a statute permitting a judge to impose the death penalty even though the jury had recommended only life imprisonment and stating that "[t]he Sixth Amendment has never been thought to guarantee a right to jury determination of [the appropriate punishment to be imposed on an individual].").

United States v. Hopper, 177 F.3d 824 (9th Cir. 1999) is a federal sentencing guidelines case in which the court held that the sentencing judge's departure, not just from the sentencing range, but from the usually-applicable guidelines -- and seven- and four-level enhancements of the defendants' sentences -- was not such an "extremely disproportionate effect" as to alter the general rule stated in McMillan, 477 U.S. at 92 n.8, and United States v. Restrepo, 946 F.2d 654, 661 (9th Cir. 1991), "that due process does not require a higher standard of proof than preponderance of the evidence to protect a convicted defendant's liberty interest in the accurate application of the Guidelines." See Hopper, 177 F.3d at 832-33.

As noted above, the Court has upheld the use and operation of the federal Sentencing Guidelines. Mistretta v. United States, 488 U.S. 361 (1989). Cases under the Guidelines make clear that so long as the minimum and maximum sentences prescribed by statute are observed, it is constitutionally permissible for the Guidelines to guide and channel the discretion exercised by sentencing courts--and to do so on the basis of factual findings made by the sentencing judge by a preponderance of the evidence. See, e.g., Edwards v. United States, 523 U.S. 511, 513-514

(1998); United States v. Watts, 519 U.S. 148, 155-156 (1997); Witte v. United States, 515 U.S. 389, 400-404 (1995); see also note 2, supra. The sentencing ranges set by the Guidelines operate as legal constraints on the sentencing court. See Stinson v. United States, 508 U.S. 36, 42 (1993). The judge is ordinarily limited to the maximum term set by the applicable Guidelines range, unless the range exceeds the statutory maximum term or there are grounds to depart upward. See Koon v. United States, 518 U.S. 81, 92-93 (1996); United States v. R.L.C., 503 U.S. 291, 306-307 (1992).

The Constitution thus permits legislatures to set determinate sentences, or to set only broad sentencing ranges, leaving all subsidiary determinations to the unguided discretion of the sentencing judge; or to set overall maximum and minimum sentences, and then require judges to abide by intermediate sentencing ranges established by a sentencing commission (subject to departures in extraordinary cases). To hold otherwise would essentially forbid the legislature from mandating sentencing ranges within an overall maximum term, with no departures from those ranges allowed, unless the court treated each fact that made a defendant eligible for a higher range as if it were an element of an aggravated offense. The constitutional principle that would require those distinctions is elusive at best.

Apprendi, a non-capital case, does not make new law in the area of capital sentencing. In Apprendi, the Court did not intend to undo twenty years of precedent in capital sentencing, nor does it require a review of Nevada's sentencing procedure. Therefore, there is no reason to disturb the decisions handed down by the Nevada Supreme Court upholding the constitutionality of the three-judge panel. Williams v. State, 113 Nev. 1008 (1997); Kirksey v. State, 112 Nev. 980 (1996); Paine v. State, 110 Nev. 609 (1994); Redmen v. State, 108 Nev. 227 (1992).

2. The Three-Judge Panel Sentencing Procedure As Provided By NRS 175.556 Is Not Ambiguous.

The Defendant's second argument reiterates various objections to the use of a three-judge panel to determine the penalty phase of a death penalty case that have been previously raised, considered, and dismissed in recent Nevada Supreme Court cases. See, e.g., Williams v. State, 113 Nev. 1008, 945 P.2d 438 (1997), cert. denied 525 U.S. 830, 119 S.Ct. 82 (1998); Riker v.

State, 111 Nev. 1316, 905 P.2d 706 (1995), cert. denied 517 U.S. 1194, 116 S.Ct.1687 (1996); Paine v. State, 110 Nev. 609, 877 P.2d 1025 (1994), cert. denied 514 U.S. 1038, 115 S.Ct. 1405 (1995); Redmen v. State, 108 Nev. 227, 828 P.2d 395 (1992), cert. denied, 506 U.S. 880, 113 S.Ct. 229 (1992); Beets v. State, 107 Nev. 957, 821 P.2d 1044 (1991)(Steffen, J., concurring), cert. denied, 506 U.S. 838, 113 S.Ct. 116 (1992); Baal v. State, 106 Nev. 69, 787 P.2d 391 (1990); and Hill v. State, 102 Nev. 377, 724 P.2d 734 (1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1330 (1987).

The Defendant asserts that the three-judge panel is ambiguous as it acts as an unconstitutionally created court, as a hybrid court (composed of one judge and two judges functioning in a non-judicial role), or in the capacity of a jury. In any case, the Defendant contends that the use of a three-judge panel as provided by NRS 175.556 is unconstitutional.

In Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996), cert. denied 525 844, 119 S.Ct. 111 (1998), the defendant argued "that the three-judge panel procedure creates a special court unconstitutionally encroaching on the judicial power and inconsistent with the constitutional jurisdiction of the district courts or an improper hybrid court composed of one judge exercising judicial power and two judges functioning in a non-judicial role." Id. at 407. Furthermore, Colwell's counsel cited the Illinois case, People ex rel. Rice v. Cunningham, 61 Ill.2d 353, 336 N.E.2d 1 (1975), just as the Defendant's counsel does in the present case. Colwell, 919 P.2d at 407. The Nevada Supreme Court determined Rice to be unpersuasive and held that those issues lacked merit. Id.

Additionally in Colwell, the defendant challenged the constitutionality of the three-judge panel procedure on the grounds that it violated "a defendant's right to an impartial tribunal, due process and a reliable sentence by disallowing challenges to the qualifications and selection of panel members and by returning death sentences more often than juries." Id. at 407. The Nevada Supreme Court yet again held that these issues were without merit. Id.

The Defendant has raised challenges identical to challenges previously raised and rejected in Nevada Supreme Court cases. Therefore, given that the Defendant has failed to assert any novel arguments testing the constitutionality of the three-judge sentencing scheme, his assertions

must fail.

The Defendant asserts that the three-judge panel unconstitutionally interferes with the jurisdiction of the district court. The Defendant relies on People ex rel. Rice v. Cunningham, 61 Ill.2d 353, 336 N.E.2d 1 (1975), for the proposition that a three-judge panel violates jurisdictional limitations of the individual district court judges.

The Nevada Supreme Court addressed this exact issue in Colwell, and found it to be without merit. The court stated:

> We hold that this argument lacks merit because (1) the Nevada Constitution contains no language prohibiting the legislature from providing that district judges must act as a collegial body in the exercise of certain proper judicial functions, such as sentencing, and (2) the legislature clearly has the power to regulate procedure in criminal cases. The three-judge panel procedure does not interfere with judicial power or district court jurisdiction as those concepts are understood. The three-judge panel procedure creates no new power which did not already lie within the power of the district courts, namely, the sentencing of criminal defendants.

Id. (citations omitted). Furthermore, the court stated that "Rice was decided based on an interpretation of Illinois law and we do not determine it to be persuasive here." Id.

A three-judge panel is not a "court." It is not permanent. It lasts simply for the duration of the penalty phase of one particular case. It creates no new power which did not already lie with the District Court, namely the sentencing of criminal defendants. A three-judge panel is simply a back-up option created by the legislature for the administration of criminal procedure, used only in the rare instance that either a penalty-phase jury is unable to reach a unanimous verdict or where a defendant pleads guilty to first-degree murder. NRS 175.556, NRS 175.558.

Nonetheless, the issues raised by the Defendant have been considered and rejected by the Nevada Supreme Court, and, therefore, must be rejected by this Court.

3. Nevada's Procedure For The Selection Of A Three-Judge Panel For Capital Sentencing Does Not Violate A Defendant's Right To An Impartial Tribunal.

The procedure in Nevada for selecting judges for a three-judge panel in capital sentencing proceedings does not affect the impartiality of the judges presiding. NRS 175.556 provides, in

relevant part:

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

The Nevada Supreme Court selects two of the three judges for the panel. If the integrity of the court's decision is in question in this case, it would have to be in question for all decisions that it makes. The Defendant makes the argument that no evidence of propriety is evidence of impropriety. Such an assertion is not only absurd, but is unsupportable. To argue that a proposition or fact can be proven by the lack of evidence to the contrary is to commit the fallacy of argumentum ad ignorantium, since no conclusion can be drawn concerning the truth or falsity of a proposition due to the absence of proof. The Defendant cites instances of past misconduct by individual judges, but provides no evidence as to impropriety by the current panel. The judges must be presumed to uphold the oath of their office until proven other wise. NRS 177.055(2) provides a mechanism for the review of judicial conduct to determine whether a sentence of death was imposed "under the influence of passion, prejudice or any arbitrary factor." Until such can be shown to have occurred, it cannot be presumed that it exists without justification.

The Defendant contends that the three-judge panel process outlined in NRS 175.556 violates a defendant's right to an impartial tribunal and to due process of law by not providing a mechanism for challenging the selection and qualification of panel members, and by returning death sentences more often than juries do. This precise argument has been decided by this court on numerous occasions, and found to be without merit. Williams v. State, , 443 (1997); see also, e.g., Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996); Riker v. State, 111 Nev. 1316, 1326, 905 P.2d 706, 712 (1995), cert. denied 517 U.S. 1194, 116 S.Ct. 1687, 134 L.Ed.2d 788 (1996); Paine v. State, 110 Nev. 609, 617-18, 877 P.2d 1025, 1030-31 (1994), cert. denied, 514 U.S. 1038, 115 S.Ct. 1405, 131 L.Ed.2d 291 (1995).

Here, the Defendant has made no attempt to provide the slightest evidence or support for

the proposition that the three judges sitting on the panel will fail in any sense to adhere strictly and honorably to the duties of their office and the solemn assignment undertaken with respect to the sentencing. There is no basis for counsel engaging in voir dire of judges who are knowledgeable with respect to the law and their sworn duties to uphold it. If counsel has any cause to assume bias on the part of any judge, the remedy is to assert a timely challenge to any such judge.

4. The Three-Judge Panel Does Not Violate the Eighth and Fourteenth Amendments.

The Defendant asserts that a three-judge panel cannot provide a reliable sentence because it does not act as the conscience of the community in violation of his Eighth and Fourteenth Amendment Rights.

The Defendant cites Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154 (1984), in noting that a sentence of death is not constitutionally required to be imposed by a jury. Id. at 463. However, in Spaziano, the United States Supreme Court rejected the defendant's argument that "[s]ince the jury serves as the voice of the community, the jury is in the best position to decide whether a particular crime is so heinous that the community's response must be death." Id. at 461. In so rejecting, the Court stated that:

> Imposing the sentence in individual cases is not the sole or even the primary vehicle through which the community's voice can be expressed. This Court's decisions indicate that the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable. The sentencer is responsible for weighing the specific aggravating and mitigating circumstances the legislature has determined are necessary touchstones in determining whether death is the appropriate penalty. Thus, even if it is a jury that imposes the sentence, the "community's voice" is not given free rein. The community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined. We do not denigrate the significance of the jury's role as a link between the community and the penal system and as a bulwark between the accused and the State. The point is simply that the purpose of the death penalty is not frustrated by, or inconsistent with, a

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> scheme in which the imposition of the penalty in individual cases is determined by a judge.

Id. at 462-463 (citations omitted). Similarly, in the present case, a sentence determination by a three-judge panel is entirely appropriate.

The Defendant argues that the use of a three-judge panel to impose sentence in a capital case violates the Eighth and Fourteenth Amendments. Eighth Amendment jurisprudence establishes that for a valid death sentence the sentencing body may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). NRS 177.055(2) requires any sentence of death to be reviewed to determine if that sentence was imposed arbitrarily or under the influence of passion or prejudice or is excessive considering both the crime and the defendant. The Defendant has presented no evidence to suggest that the Nevada Supreme court selected judges who are partial to the death sentence to sit on the three-judge panel. Additionally, this same issue was addressed and rejected in Paine v. State, 110 Nev. 609, 618, 877 P.2d 1025, 1030 (1994), cert. denied, 514 U.S. 1038, 115 S.Ct. 1405, 131 L.Ed.2d 291 (1995), wherein the court stated: "Paine's fear that this court selects judges who are partial to sentences of death is not only unsupported, it is unsupportable since it does not occur."

In Nevada, the jury is given responsibility for imposing the sentence in a capital case, but if the jury cannot agree, a panel of three judges may impose the sentence. NRS 175.554, 175.556 (1981). In Arizona, Idaho, Montana, and Nebraska, the court alone imposes the sentence. Ariz.Rev.Stat.Ann. 13-703 (Supp.1983-1984); Idaho Code 19-2515 (1979); Mont.Code Ann. 46-18-301 (1983); Neb.Rev.Stat. 29-2520 (1979). None of those capital sentencing statutes have been held unconstitutional. Nor has it been held that a single judge or a panel of judges would not be competent to make a capital sentencing decision absent specific facts to the contrary.

The Defendant's argument challenging the constitutionality of the three-judge panel

procedure is that the three-judge panel procedure violates a defendant's right to an impartial tribunal, due process and a reliable sentence by disallowing challenges to the qualifications and selection of panel members and by returning death sentences more often than juries. As to this argument, the Nevada Supreme Court has addressed this exact issue on numerous other occasions and found it to be without merit. Baal v. State, 106 Nev. 69, 787 P.2d 391 (1990), cited, Beets v. State, 107 Nev. 957, at 969, 821 P.2d 1044 (1991), concurring opinion, Redmen v. State, 108 Nev. 227, at 236, 828 P.2d 395 (1992), Paine v. State, 110 Nev. 609, at 617, 877 P.2d 1025 (1994), see also Riker v. State, 111 Nev. 1316, 905 P.2d 706 (1995), Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996), Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996), Williams v. State, 113 Nev. 1008, 945 P.2d 438 (1997).

The Defendant has simply interspersed a few novel challenges within the usual well-settled ones. However, as with the many previous challenges to the constitutionality of the three-judge sentencing scheme in Nevada, these challenges must fail.

5. The Defendant Has No Right To Voir Dire Any Member Of The Panel Or The Nevada Supreme Court.

The Defendant requests that the Nevada Supreme Court provide information concerning the three-judge panel procedure, and that the members of the panel respond to various questions as an alternative to an automatic default to life without the possibility of parole or the empanelling of a new jury.

This request is clearly without merit. Nevada's capital sentencing scheme contains no provision for voir dire examination of judges. Furthermore, the Nevada Supreme Court, in Paine v. State, 110 Nev. 609, 877 P.2d 1025 (1994), cert. denied 514 U.S. 1038, 115 S.Ct. 1405 (1995), dealt directly with this issue. In that case, the court found that the defendant provided no authority that he was entitled to voir dire the judges on the panel and that there "is no basis for counsel engaging in voir dire of judges who are knowledgeable with respect to the law and their sworn duties to uphold it." Id. at 1030.

The Nevada Supreme Court upheld this holding in Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996). The court rejected the defendant's argument that the three-judge panel

procedure violated his right to an impartial tribunal, due process, and a reliable sentence by disallowing challenges to the qualifications and selection of panel members. Id. at 407. In so rejecting, the court found that "[c]ounsel 'has not provided additional and more persuasive arguments than those already considered by this court to persuade us to overrule our decision in Paine.'" Id. (quoting Riker v. State, 111 Nev. 1316, 1326, 905 P.2d 706, 712 (1995)) (see also Williams v. State, 113 Nev. 1008, 1017, 945 P.2d 438, 443-444 (1997)).

Again, this issue is not new. It has been considered and rejected by the Nevada Supreme Court. Accordingly, the Defendant's request for an order for the disclosure of information must be dismissed.

CONCLUSION

For the above stated reasons, all of the Defendant's arguments as to the constitutionality of three-judge sentencing panels must fail. They must fail as they have repeatedly done so in the recent past. The Defendant has offered no new basis on which to challenge this system, and, therefore, the Defendant is not entitled to an automatic sentence of life without the possibility of parole. Nor is he entitled to have a new jury impanelled to hear the penalty proceedings in this case. Furthermore, the Defendant is not entitled to an order for the disclosure of information by the Nevada Supreme Court or the members of the panel regarding the three-judge panel procedure. Accordingly, this motion should be denied.

DATED this 17 day of July, 2000.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
GARY L. GUYMON
Chief Deputy District Attorney
Nevada Bar #003726

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of STATE'S OPPOSITION FOR IMPOSITION OF LIFE WITHOUT AND OPPOSITION TO EMPANEL JURY AND/OR DISCLOSURE OF EVIDENCE MATERIAL TO CONSTITUTIONALITY OF THE THREE JUDGE PANEL PROCEDURE, was made this 17th day of July, 2000, by facsimile transmission to:

DAYVID FIGLER
JOSEPH SCISCENTO
DEPUTY SPECIAL PUBLIC DEFENDERS
SPECIAL PUBLIC DEFENDER'S OFFICE
FAX #455-6273

Patti Morris
Secretary for the District Attorney's Office

\SCHUD\BONAJ:pm

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*** TX REPORT ***
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OPPS
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

STATE'S OPPOSITION FOR IMPOSITION OF LIFE WITHOUT AND OPPOSITION TO EMPANEL JURY AND/OR DISCLOSURE OF EVIDENCE MATERIAL TO CONSTITUTIONALITY OF THE THREE JUDGE PANEL PROCEDURE

DATE OF HEARING: 07/20/00
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through

309

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FILED

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MEMO
PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER
State Bar No. 000556
JOSEPH S. SCISCENTO
State Bar No. 004380
DAYVID J. FIGLER
State Bar No. 004264
309 South Third Street
P. O. Box 552316
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

****

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON, aka
John White, ID # 1586283,

Defendant.

CASE NO: C153154
DEPT. NO: V

MEMORANDUM IN SUPPORT OF GRANTING STAY.

Rule 8 of the Nevada Rule of Appellate Procedure, a stay must first be sought in the District Court . NRAP reads in part as follows:

> (a) **Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Supreme Court** Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supercedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court.
>
> * * *
>
> (e) **Stays in Criminal Cases; Admission of Bail.** Stays in criminal cases shall be had in accordance with the provisions of NRS 177.095 et. Seq. Admission of bail shall be as

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SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

provided in NRS 178.488

* * *

In the case at bar the Defense is requesting that this Court, grant a stay in the event this Court denies the Motion filed by the Defense.

An appeal of a criminal matter can be taken by extraordinary relief directly to the Supreme Court.

> " First NRS 177.025 provides that in criminal matters, appeals to the supreme court from the district court can be taken on questions of law alone. Nothing in this statute prohibits this court from reviewing discretionary decisions of the district court. If a district court abuses its discretion in making an evidentiary determination, it errs as a matter of law. Second, the State's right to appeal does not rest on its objecting to a motion to dismiss. NRS 177.015(1)(b), specifically provides that in a criminal action either the State or the defendant may appeal to this court "from an order of the district court granting a motion to dismiss" .
>
> In considering an appeal from an entry of final judgment, this court has jurisdiction to review all intermediate orders of the district court. NRS 177.045" State of Nevada v. Shade 111 Nev. 887 (1995).

In the case at bar the District Court decision is an appealable order that can be taken up on an interlocutory appeal. Further the issue of appeal is a question of law and of constitutional rights. The issue is dispositive of the case and upon the determination of the Nevada Supreme Court, this issue can then be appealed through ordinary channels.

Due Process and the Constitution, by and through the fourteenth amendment, require that the Defendant be granted a stay, to prevent a violation of his constitutional rights to a fair trial

> This court may issue a writ of mandamus in order "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." NRS 34.160. Generally, a writ of mandamus may issue only when there is no plain, speedy, and adequate remedy at law. See NRS 34.170. However, where circumstances reveal urgency or strong necessity, this court may grant extraordinary relief. See Jeep Corp. v. District Court, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982). Moreover, "where an important issue of law needs clarification and public policy is served by this court''s invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified." Business Computer Rentals v. State Treas., 114 Nev. 63, 67, 953 P.2d 13, 15 (1998).

It is the Defendants position that after the decision of Apprendi v. New Jersey, the

Nevada Three Judge Panel is unconstitutional. Therefor allowing the procedure to continue would be a violation of the defendants constitutional right and as a result the defendant is entitled to extraordinary relief by way of a Writ. Upon filing of a Writ the Supreme court should allow the stay.

JUDICIAL ECONOMY MANDATES STAYING THE PENALTY HEARING

If a stay is not granted the Defense will appeal this issue under the Apprendi case. This is an issue of first impression. The Nevada Supreme Court has not previously ruled on this specific issue.

Should the panel convene it is apparent that both the Prosecution and Defense will accrue the expenses of a penalty phase. If the Supreme Court grants Defendant relief, it would mandate a third penalty hearing at astronomical avoidable expense.

In anticipation of having a penalty phase the Defendant, and presumably the State, has begun to arrange to bring in out-of-state witnesses to the anticipated penalty hearing. If the Supreme Court grants a stay then the expenses have been wasted. Further if the Supreme Court rules in favor of the Defendants motion then the penalty phase will begin anew.

A court should grant a stay where it will promote final determination of a legal question, promote judicial economy and save taxpayer expenses.

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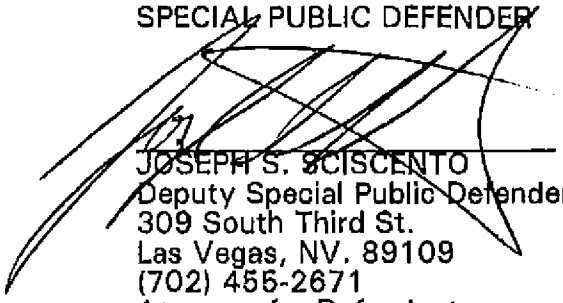
CONCLUSION

Based on the above argument the Defendant hereby requests that this Court grant a Stay pending Appeal, on the issue of the constitutionality of the Three-Judge panel.

DATED this 18 day of July, 2000

PHILLIP J. KOHN
SPECIAL PUBLIC DEFENDER



JOSEPH S. SCISCENTO
Deputy Special Public Defender
309 South Third St.
Las Vegas, NV. 89109
(702) 455-2671
Attorney for Defendant
DONTE JOHNSON

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing **MEMORANDUM IN SUPPORT OF GRANTING STAY** is hereby acknowledged this 18th day of July, 2000.

STEWART L. BELL
District Attorney
200 S. Third Street
Las Vegas, NV 89155
Attorney for Plaintiff

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REPL
PHILIP J. KOHN, ESQ.
SPECIAL PUBLIC DEFENDER
State Bar No. 000556
JOSEPH S. SCISCENTO
State Bar No. 004380
DAYVID J. FIGLER
State Bar No. 004264
309 South Third Street
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

****

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON, aka
John White, ID # 1586283,

Defendant.

CASE NO: C153154
DEPT. NO: V

Date of Hearing: 7-20-00
Time of Hearing: 8:30 a.m.

REPLY TO STATE'S OPPOSITION REGARDING THREE-JUDGE PANEL

COMES NOW, the Defendant Donte Johnson, by and through his attorneys of record, PHILIP J. KOHN, Special Public Defender, JOSEPH S. SCISCENTO, Deputy Special Public Defender and DAYVID J. FIGLER, Deputy Special Public Defender and hereby replies to the State's Opposition to his Motion for Imposition of Life Without the Possibility of Parole Sentence; Or, in the Alternative, Motion to Empanel Jury for

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SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

Sentencing Hearing And/or for Disclosure of Evidence Material to Constitutionality of Three Judge Panel Procedure.

Dated this 18 day of July, 2000.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By _____
DAYVID J. FIGLER
Deputy Special Public Defender
State Bar No. 004264
309 South Third Street, 4th Floor
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Defendant

ARGUMENT

The State is apparently alone in the assessment that "Apprendi, a non-capital case, does not make new law in the area of capital sentencing." (Opposition, page 8, line 17-18). To the contrary, even the United States Supreme Court in Apprendi acknowledges that there exist important implications especially as they relate to capital sentencing. (See majority opinion (discuss of Walton in a non-capital case), Thomas concurrence, Scalia concurrence, O'Connor dissent). In fact, Justice Thomas, noted that

> "I need not in this case address the implications of the rule that I have stated for the Court's decision in **Walton v. Arizona**, 497 U.S. 639, 647-649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). **Walton** did approve a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. In this sense, that fact is an element. But that scheme exists in a unique context, for in the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment – we have restricted the legislature's ability to define crimes. Under our recent capital-punishment jurisprudence, neither Arizona nor any other jurisdiction could provide– as previously, it freely could and did – that a person shall be death eligible automatically upon conviction for certain crimes. We have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment. Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day."

Apprendi at *27(Thomas, J., concurring).

The present case of Donte Johnson raises the implications foretold by the United States Supreme Court. The day for application of Apprendi in a capital case is today.

The Nevada Capital structure is unique and quite distinct from the one outlined in Walton. Further, 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. N.R.S. 175.552(1)(a). The charge of the jury is to find the existence of the alleged aggravators and mitigators and then weigh the impact of these findings of fact. N.R.S. 175.554. It must also be noted that specifically in Nevada the aggravators are fact-specific and oftentimes are indistinguishable from the type of findings made during the trial or guilt phase.

Unlike Walton, a defendant in Nevada is never even eligible for death penalty consideration if the jury does not first unanimously find the aggravator(s) beyond a reasonable doubt. In Arizona, all first degree murder convictions are capital eligible offenses, it is then left to the judge to determine whether the death penalty will be imposed based on an analysis *never* given to the jury. See generally, Walton. In Florida, the jury's sentencing recommendation in a capital case is only advisory. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, "[notwithstanding] the recommendation of a majority of the jury," is to enter a sentence of life imprisonment or death; in the latter case, specified written findings are required. Fla. Stat. §§ 921.141(3) (1983); Spaziano v. Florida, 468 U.S. 447, 452 (1984).

As Apprendi makes clear, Nevada created an ill-conceived hybrid where the legislature creates a statutory right to have a jury make not only the factual findings of aggravators and mitigators, but also conduct the weighing of these factors. Unlike Arizona and Florida, the Nevada jury is charged with imposing the sentence. The Nevada legislature, therefore, has determined that in Nevada aggravators and mitigators and the weighing thereof are elements for the jury and the jury alone to decide.

The problem of course is that the Nevada legislature has attempted to nullify the

jury's charge when unanimity is not reached by the creation of the three-judge panel. While the State correctly cites pre-Apprendi decisions in setting forth that "the aggravating factors necessary to impose a death sentence need not be made 'elements' of the capital offenses in question and may be found by sentencing judges," the possibility of a legislative body converting the particular aggravators into elements does exist. Apprendi states in unequivocal terms that when the elements are left for the jury, a judge cannot thereafter impose a maximum sentence. Apprendi at page 12. Nevada has failed to avoid the implications of a sentencing scheme where a judge(s) can increase punishment beyond the maximum sentence.[1]

In the present case, the jury's lack of unanimity resulted in the failure to "qualify" Donte Johnson for the death penalty and therefore, the maximum sentence by their inaction (absent the statutory provision codified at N.R.S. 175.556) would be life without the possibility of parole. The Nevada legislature has attempted to salvage this finding by then giving the judge(s) (by way of N.R.S. 175.556) the power to impose death (a more severe punishment) despite the jury's determination that death is not an option. Such is disallowed by the black letter of Apprendi.

The State's reliance on Walton, Spaziano and Almendarez-Torrez is of no moment.[2] The Nevada legislature has clearly defined that in Nevada, the finding of the aggravators and the weighing thereof are elements and not mere sentencing factors. First, there is absolutely no precedent for bestowing a determination of "sentencing factors" on a jury. Second, the jury has to find that these elements exist "beyond a reasonable doubt." See Wittier v. State, 112 Nev. 908 (1996). There is no such requirement placed on "sentencing factors" as applied in Arizona and Florida.

Additionally, the Nevada legislature still requires a finding of unanimity amongst the

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[1] It must be noted that if the jury does not unanimously return a verdict beyond a reasonable doubt that at least one aggravator exists, the maximum sentence for first degree murder is life without the possibility of parole.

[2] Additionally, the Court in Apprendi did not state that Walton remains fully intact, only that "the capital cases are not controlling." Apprendi at 16.

three-judge panel in order to impose the maximum sentence which further distinguishes Nevada's scheme from the others. It is clear that in Nevada the existence of an aggravator and the subsequent weighing are elements and not mere sentencing factors.

The State argues that Nevada and the aforementioned schemes are "functionally identical to judicial capital sentencing." The reality, however, is that the United States Supreme Court has placed great weight on the technical distinction in what does and does not amount to elements properly before the jury. As such, the United States Supreme Court has deemed Nevada's three-judge panel component to be an unconstitutional granting of authority to the judges to impose death when the jury's actions have resulted in the maximum sentence of life without the possibility of parole.

As Justice O'Connor pointed out in her dissent, the distinction of Walton is "baffling, to say the least." Apprendi at 33. Justice O'Connor continues:

> The court's proffered distinction of Walton v. Arizona suggests that it means to announce a rule of only this limited effect. The Court claims the Arizona capital sentencing scheme is consistent with the constitutional principle underlying today's decision because Arizona's first-degree murder statute itself authorizes both life imprisonment and the death penalty. See Ariz.Rev.Stat. Ann. § 13-1105(C) (1989). " "[O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.' " Ante, at ___ 31 (emphasis in original) (quoting Almendarez-Torres, 523 U.S., at 257, n. 2, 118 S.Ct. 1219 (SCALIA, J., dissenting)). Of course, as explained above, an Arizona sentencing judge can impose the maximum penalty of death only if the judge first makes a statutorily required finding that at least one aggravating factor exists in the defendant's case. Thus, the Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense. In real terms, however, the Arizona sentencing scheme removes from the jury the assessment of a fact that determines whether the defendant an receive that maximum punishment. The only difference, then, between the Arizona scheme and the New Jersey scheme we consider here - -apart from the magnitude of punishment at stake – is that New Jersey has not prescribed the 10-year maximum penalty in the same statute that it defines the crime to be punished. It is difficult to understand, and the Court does not explain, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

Nonetheless, it is now the law. The State proclaims that the Court "did not intend to undo twenty years of precedent in capital sentencing." (Opposition at page 8). It may be possible that the intention was not there, but the application is inescapable. Nevada has

adopted so peculiar a system, it appeared inevitable that the three-judge panel as implemented would run afoul of some constitutional safeguard. These due process concerns are manifested in the Apprendi decision and mandate under the supremacy clause of the United States Constitution that it be followed.

Because the three-judge panel cannot constitutionally make the findings of elements necessary to impose a death sentence, this Court should proceed to impose sentence. See Nev. Rev. Stats. § 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.") This Court cannot induce the waste of judicial resources that would result from holding a full sentencing proceeding before three district judges, when any findings as to the elements making the offense capital - eligible will necessarily be void under Apprendi.

The Statute therefore provides that the default after a directive of unconstitutionality must and can only be a sentence of life without the possibility of parole.

DATED this 18 day of July, 2000.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By _____
DAVID J. FIGLER
Deputy Special Public Defender
State Bar No. 004264
309 South Third Street, 4th Floor
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Defendant

RECEIPT OF COPY of the foregoing **REPLY TO STATE'S OPPOSITION TO DEFNDANT'S MOTION FOR IMPOSITION OF LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCE** is hereby acknowledged this 18th day of July, 2000.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By _____

SPECIAL PUBLIC DEFENDER

CLARK COUNTY NEVADA

ORIGINAL

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CLERK

MEMO
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

MEMORANDUM REGARDING A STAY OF THE PENALTY PROCEEDINGS

DATE OF HEARING: N/A
TIME OF HEARING: N/A

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through GARY L. GUYMON, Chief Deputy District Attorney, and files this Memorandum Regarding a Stay of the Penalty Proceedings.

This Memorandum is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing,

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if deemed necessary by this Honorable Court.

DATED this 19 day of July, 2000.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
GARY L. GUYMON
Chief Deputy District Attorney
Nevada Bar #003726

MEMORANDUM

A stay of the penalty proceeding in the present case pending a decision by the Nevada Supreme Court on the issues raised in Apprendi is precluded by the final judgment rule.

Nevada Supreme Court Rule 250 outlines the procedures to be followed in capital cases in Nevada. See Riley v. Nevada Supreme Court, 763 F. Supp. 446 (D. Nev. 1991), cert. denied, 514 U.S. 1052, 115 S. Ct. 1431, 131 L. Ed. 2d 312 (1995). Rule 250 does not address, however, the propriety of a stay of the second penalty hearing pending review of issues raised concerning the constitutionality of the hearing. The usual course is for such issues to be raised on post-sentence appeal. NRS 176.486; NRS 177.055; NRS 34.820, 34.360-.830; see also Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996) (Appellate court may reweigh aggravating and mitigating evidence and uphold death sentence based in part on invalid aggravator; automatic affirmance based on remaining valid aggravator not constitutional); Parker v. Dugger, 498 U.S. 308 (1991) (reweighing erroneous where appellee court overlooked finding of mitigating evidence).

A review of the present case by the Nevada Supreme Court in light of the decision in Apprendi at this point in the trial would be of the nature of an interlocutory appeal. Such appeals

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are prohibited, except in limited circumstances, by the final judgment rule contained in NRS 177.015 which provides in relevant part:

> The party aggrieved in a criminal action, whether that party be the state or the defendant, may appeal as follows:
> 1. To the district court of the county from a final judgment of the justice's court.
> 2. To the supreme court from: (a) A final judgment of the district court in all criminal cases. (b) An order of the district court granting a motion to dismiss, a motion for acquittal or a motion in arrest of judgmet, or granting or refusing a new trial.

Nevada caselaw gives little guidance as to the applicability or purpose for the rule, except for defining it. The Nevada Supreme Court has stated, "[t]his section is the only statute which provides for an appeal from a final judgment in a criminal case." Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990), appeal dismissed, 106 Nev. 1017, 835 P.2d 31 (1990) (addressing NRS 177.015). "An appeal in a criminal case lies from the final judgment of the district court, not from an order finally resolving an issue in a criminal case." Id. The court has also said that appellate review should be postponed, except in narrowly defined circumstances, until after final judgment has been rendered by the trial court. Franklin v. District Court, 85 Nev. 401, 403 (1969). "Piecemeal review does not promote the orderly handling of a case, and is particularly disruptive in criminal cases where the defendant is entitled toa speedy resolution of the charges against him." Id, citing Will v. United States, 389 U.S. 90, 88 S.Ct. 269, (1967).

With the lack of caselaw in Nevada, a look at the United States Supreme Court's discussion of the final judgement rule is appropriate. Assuming arguendo that an appeal of the issue in Apprendi case could result in an adverse ruling, it is probably necessary to consider the Supreme Court's decisions on the rule. An adverse ruling on the Apprendi issue would put into question the constitutionality of Nevada's three-judge panel proceding further delaying the completion of this trial and requiring review by the Supreme Court.

The Supreme Court, in discussing the federal final judgment rule, 28 U.S.C. § 1291, has

said that the purpose of the rule is "to prevent piecemeal appellate review of trial court decisions that do not terminate the litigation. This policy is at its strongest in the field of criminal law." Flanagan v. United States, 465 U.S. 259, 104 S. Ct. 1051 (1984). The rule requires that a party must raise all claims of error in a single appeal following final judgment on the merits. Firestone Tire & Rubber Co. v. Risjord, 449 U.S., at 374, 101 S.Ct., at 673 (1981). In a criminal case the rule prohibits appellate review until conviction and imposition of sentence. Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.Ed. 204 (1937). The final judgment rule serves several important interests. "It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice." Flanagan, 104 S.Ct 1054, quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S., at 374, 101 S.Ct., at 673. The final judgment rule prohibits interlocutory appeals of issues that can be resolved on appeal.

The issue in Apprendi, as stated in States Opposition does not render Nevada's capital sentencing procedure unconstitutional and, therefore, is not a pivotal question that need be decided prior to proceeding with the penalty hearing. See States Opposition for Imposition of Life Without and Opposition to Empanel Jury and/or Disclosure of Evidence Material to Constitutionality of the Three-Judge Panel. A decision by the district judge on the applicability of Apprendi at this stage of the trial is subject to review on appeal.

The defendant would not be prejudiced by having to wait for his appeal to have this issue decided, because upon his conviction by the jury his sentencing options were already determined. The least of which requires 40 years of incarceration before the possibility of parole. Even if the three-judge panel issues the death penalty, the defendant will not see the ultimate conclusion to that penalty until a decade of appeals are exhausted. At any time during that period the decision of the panel may be reversed and a new sentencing hearing ordered. On the other hand, a delay of the penalty phase could result in unfair prejudice to the Defendant. An appeal to the Nevada Supreme Court at this time could result in an indeterminably lengthy delay that could affect the

availability of witnesses.

A stay of the penalty hearing could similarly prejudice the State. Justice Cardozo recognized that prejudice to the State is a legitimate consideration in Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 122, 54 S.Ct 330, 338 (1934), when he stated: "[b]ut justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." The Nevada statute that defines the procedure for the selection of the three-judge sentencing panel is silent as to when the penalty hearing must take place. NRS 175.556. However, the primary statute outlining the procedure for the penalty phase of a capital murder case provides that a penalty hearing must be conducted "as soon as practicable." NRS 175.552(1)(a).

The Supreme Court has recognized an exception to § 1291 which authorizes review of some types of interlocutory orders. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) ("collateral order" exception to the final judgment rule). In Cohen, the Supreme Court carved out a narrow exception to the normal application of the final judgment rule, which has come to be known as the collateral order doctrine. This exception considers as final judgments, even though they do not end the litigation on the merits, decisions "which finally determine claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated." Id., at 546, 69 S.Ct., at 1225. To fall within the limited class of final collateral orders, an order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. at 468, 98 S.Ct., at 2458 (1978).

The Supreme Court has thus far found only three types of pre-trial orders in federal criminal prosecutions that meet the requirements, and each involves a legal and practical value that would be irretrievably lost if review were postponed. United States v. Hollywood Motor Car Co., 458 U.S. 263, 265-66, 102 S.Ct. 3081, 3082-83, 73 L.Ed.2d 754 (1982). An order denying a motion to reduce bail may be reviewed before trial. Stack v. Boyle, 342 U.S. 1, 72

S.Ct. 1, 96 L.Ed. 1 (1951). Orders denying motions to dismiss an indictment on double jeopardy, Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), or speech and debate grounds, Helstoski v. Meanor, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979), are likewise immediately appealable. See also Flanagan, 465 U.S. at 265, 104 S.Ct., at 1054 (We have interpreted the collateral order exception "with the utmost strictness" in criminal cases). These decisions, along with the far more numerous ones in which the Court has refused to permit interlocutory appeals, manifest the general rule that the third prong of the Coopers & Lybrand test is satisfied only where the order at issue involves "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." United States v. MacDonald, 435 U.S. 850, 860, 98 S.Ct. 1547, 1552, 56 L.Ed.2d 18 (1978).

The issue at hand as raised in Apprendi satisfies the first two prongs of the Coopers & Lybrand test, but fails as to the third. A decision by the district court on the issue of whether Apprendi renders Nevada's three-judge panel procedure is reviewable from a final judgment regardless of who is the losing party as to the issue. The test requires that all three requirements be met for the collateral order exception to permit an interlocutory appeal. Coopers & Lybrand, 437 U.S. at 468, 98 S.Ct., at 2458.

Nevada does not have such a well defined exception to NRS 177.015. In Nevada, an interlocutory appeal may be had by way of extraordinary relief. Such an appeal is usually taken by filing for a writ of mandamus. The Nevada Supreme Court has said that a writ of mandamus may be issued to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion. Such matters should be resolved on direct appeal unless the standards for extraordinary relief can be met. See State ex rel. Dep't Transp.v. Thompson, 99 Nev. 358, 662 P.2d 1338 (1983); Round Hill Gen. Imp. Dist. V. Newman, 97 Nev. 601, 637 P.2d 534 (1981). Petitions for extraordinary writs are addressed to the sound discretion of the court and may only issue where there is no "plain, speedy, and adequate remedy" at law, NRS 34.330; State ex rel. Dep't Transp. V. Thompson, 99 Nev. 358, P.2d 1338 (1983); however, "each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be

granted." Jeep Corp. V. District Court, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982) (citing Shelton v. District Court, 64 Nev. 487, 185 P.2d 320 (1947)).

In the present case, a decision by the district court on the Apprendi issue would not be an arbitrary or capricious excercise of discretion. If the court finds that the issue has such an effect on the three-judge sentencing procedure to warrant granting the Defendant's motion, the State will have grounds for immediate appeal. If the court denies Defendant's motion, the issue can and should be resolved on direct appeal following the completion of the sentencing hearing and imposition of sentence.

CONCLUSION

For the foregoing reasons the penalty hearing should not be stayed pending a decision by the Nevada Supreme Court on the issues raised in Appendi v New Jersey.

DATED this 19 day of July, 2000.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
GARY L. GUYMON
Chief Deputy District Attorney
Nevada Bar #003726

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of MEMORANDUM REGARDING A STAY OF THE PENALTY PROCEEDINGS, was made this 19th day of July, 2000, by facsimile transmission to:

DAYVID FIGLER
JOSEPH SCISCENTO
DEPUTY SPECIAL PUBLIC DEFENDERS
SPECIAL PUBLIC DEFENDER'S OFFICE
FAX #455-6273

Patti Mania
Secretary for the District Attorney's Office

\SCHUD:pm

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*** TX REPORT ***
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MEMO

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

MEMORANDUM REGARDING A STAY OF THE PENALTY PROCEEDINGS

DATE OF HEARING: N/A
TIME OF HEARING: N/A

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through GARY L. GUYMON, Chief Deputy District Attorney, and files this Memorandum Regarding a Stay of the Penalty Proceedings.

This Memorandum is made and based upon all the papers and pleadings on file herein,

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Shirley B. Parraguirre
CLERK

ORDR
PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER
Nevada Bar #0556
JOSEPH S. SCISCENTO
Deputy Special Public Defender
Nevada Bar #4380
DAYVID J. FIGLER
Deputy Special Public Defender
Nevada Bar #4264
309 South Third Street, 4th Floor
Las Vegas, Nevada 89155
Attorneys for Donte Johnson

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON, aka
John White, ED# 1586283,

Defendant.

Case No. C153154

Dept. No. V

ORDER

This matter having come before this Honorable Court on the 20th day of July, 2000, and good cause appearing therefor,

IT IS HEREBY ORDERED that Defendant's Motion for Imposition of Life Without the Possibility of Parole Sentence; or, in the Alternative Motion to Empanel Jury

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for Sentencing Hearing and/or for Disclosure of Evidence Material to Constitutionality of Three Judge Panel Procedure is hereby denied.

DATED this 20th day of July, 2000.

JEFFREY D. SOBEL

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By
DAYVID J. FIGLER
Deputy Special Public Defender
Nevada Bar #4264
309 South Third Street, 4th Floor
Las Vegas, Nevada 89155

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ROC
PHILIP J. KOHN
Special Public Defender
Nevada Bar #0556
JOSEPH S. SCISCENTO
Deputy Special Public Defender
Nevada Bar #04380
DAYVID J. FIGLER
Deputy Special Public Defender
Nevada Bar #04264
309 S. Third Street, Fourth Floor
Las Vegas, Nevada 89155-2316
(702) 455-6265
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff

vs.

DONTE JOHNSON, aka
John White, ID#1586283

Defendant.

CASE NO. C153154
DEPT NO. V

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing **ORDER** is hereby acknowledged this 20th day of July, 2000.

STEWART L. BELL
District Attorney
200 South Third Street
Las Vegas, Nevada 89155
Attorney for Plaintiff

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SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

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ROC
PHILIP J. KOHN
Special Public Defender
Nevada Bar No. 0556
JOSEPH S. SCISCENTO
Deputy Special Public Defender
Nevada Bar No. 04380
DAYVID J. FIGLER
Deputy Special Public Defender
Nevada Bar No. 04264
309 South Third Street, Fourth Floor
Las Vegas, Nevada 89155
(702) 455-6265
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

VS.

DONTE JOHNSON, aka
John White, ID# 1586283

Defendant.

CASE NO. C153154

DEPT NO. V

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing **ORDER FOR CONTACT VISIT** is hereby acknowledged this 20th day of July, 2000.

CLARK COUNTY DETENTION CENTER

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SPECIAL PUBLIC DEFENDER
CLARK COUNTY
NEVADA

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ORDR
PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER
State Bar No. 000556
JOSEPH S. SCISCENTO
State Bar No. 004380
DAYVID J. FIGLER
State Bar No. 004264
309 South Third Street
P. O. Box 552316
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Defendant

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Jul 20 11 02 AM '00
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

****

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON, aka
John White, ID # 1586283,

Defendant.

CASE NO: C153154
DEPT. NO: V

ORDER FOR CONTACT VISIT

Upon the ex-parte application of the above-named Defendant, by and through his attorneys of record, PHILIP J. KOHN, Special Public Defender, JOSEPH S. SCISCENTO, Deputy Special Public Defender, and DAYVID J. FIGLER, Deputy Special Public Defender, requesting an order from this court allowing a contact visit with Nancy Hunterton from the Life Skills Program for the purpose of administering a Life Skills treatment.

IT IS HEREBY ORDERED that the Clark County Detention Center shall allow a contact visit between the Defendant, DONTE JOHNSON, and Nancy Hunterton of the Life Skills Program for the purpose of administering a Life Skills treatment.

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SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

IT IS FURTHER ORDERED that said contact visit shall take place on July 21, 2000 at the hour of 12:30 p.m.

DISTRICT COURT JUDGE

SUBMITTED BY:

JOSEPH S. SCISCENTO
Deputy Special Public Defender
Nevada Bar No. 004380
309 S. Third Street, Fourth Floor
Las Vegas, NV 89155
Attorney for Defendant

SPECIAL PUBLIC DEFENDER

CLARK COUNTY NEVADA

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * * *

STATE OF NEVADA,

PLAINTIFF,

VS.

DONTE JOHNSON, aka JOHN LEE WHITE

DEFENDANT.

CASE NO. C153154

DEPT. V

Transcript of Proceedings

BEFORE THE HONORABLE JEFFREY D. SOBEL, DISTRICT COURT JUDGE

DEFENDANT'S MOTION FOR A NEW TRIAL

THURSDAY, JULY 13, 2000, 8:00 A.M.

APPEARANCES:

FOR THE STATE: ROBERT DASKAS, ESQ.
DEPUTY DISTRICT ATTORNEY

FOR DEFENDANT JOHNSON: DAYVID FIGLER, ESQ.
DEPUTY SPECIAL PUBLIC DEFENDER

COURT RECORDER: SHIRLEE PRAWALSKY

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LAS VEGAS, NEVADA, THURSDAY, JULY 13, 2000, 8:00 A.M.

THE COURT: State versus Donte Johnson.

MR. FIGLER: Good morning, Judge.

THE COURT: Two matters – well, one matter is on today, but I want to discuss the other one because it's been set, to me, inappropriately.

The Motion for New Trial is denied.

MR. FIGLER: Judge, could I submit an exhibit? This is the door to the jury room that's right outside your door and I want to just make that part of the record.

MR. DASKAS: I have not seen that, Judge.

That's the door to the jury room, Judge.

MR. FIGLER: It's marked with signs that say "Do Not Enter." And that was for part four of our motion to have a new trial.

THE COURT: Now, the Motion for Imposition of Life, etcetera, is set for the 24th which is when we're going to start the hearing. And, obviously, we're going to litigate this first.

Mr. Daskas, when can you have an answer in to their motion?

MR. DASKAS: Judge, it will probably be finished today; we're going to file it on Monday morning if that's okay with the Court.

THE COURT: Monday morning and I'll want a written reply as there will be no oral argument. Is it possible to get it in by the end of Tuesday, Mr. Figler?

MR. FIGLER: We could try, Judge. I was counting on some oral argument instead of having to do a reply because they had called us and asked us –

THE COURT: I'll tell you it's nothing more than I think better when I read and think about things and not responding to oral argument. That's my preference and that's the way we're going to do it. Can you do it by Tuesday? If you can't do it by Tuesday –

MR. FIGLER: If I could have it by Wednesday A.M. Our only concern is

that whenever Your Honor would make a decision on the merits of the motion, if either side wanted to take that up on a writ, what that would do with the actual penalty hearing.

THE COURT: We'll consider it at that time. Anybody who feels aggrieved by the ruling can make a motion for a stay to pursue extraordinary relief. It's the rules that it's required to be addressed to me first. If not, if I don't grant it, you'll have to go up real quick to the Supreme Court and ask them for a stay. I don't know what we're going to do. But I understand the rules, so.

MR. FIGLER: No, I understand that, Judge, but in speaking with the prosecutor ahead of time, since both sides expressed interest to each other that we may take it up on a writ and ask for a stay. But we also have out-of-state witnesses on both sides coming in.

THE COURT: Oh. I'm going to make a decision on Thursday.

MR. FIGLER: So, what I was asking is if your inclination was to grant the stay if either side asks for it, if you could tell us that now.

THE COURT: Well, I don't really know. It depends on which issue. If I were to - if what you want to take up is the right to a jury assessment, because I looked briefly at your 33 pages, I read more about it in the newspapers pursuant to your obvious press release. But I haven't looked at the document itself as much as I read the newspaper and - do you have a press agent, by the way, or is this all your own doing?

MR. FIGLER: Judge, the press is very vigilant in this particular case.

THE COURT: I see.

MR. DASKAS: Apparently just with one side, though, Judge.

THE COURT: They get his name right. And they repeat it over and over and over.

If I were to rule one way or the other, the basis of my ruling, for example, I'm not going to stay it, no way in the world, if I refuse to disclose some of the things that you've asked for in terms of the Judges' backgrounds

and attitudes.

If the purpose of going to the Supreme Court pursuant to extraordinary relief and the basis for the request for the stay dealt specifically with whether the jury has a – whether a jury should decide the predicates for whether the death penalty is imposed pursuant to that new U.S. Supreme Court case –

MR. FIGLER: Apprendi.

THE COURT: -- it would depend on my analysis of that case. If it clearly, to me, does not apply, I'm not going to grant a stay and if I deny it, you can appeal it through the ordinary course unless the Supreme Court stays it.

So, I'm going to have to read it before accede, at least on the district court level, to a stay because I want to be clear on what I'm ruling on. And I haven't read that Opinion. Again, like your motion, I've primarily just seen it in the newspaper when it came out. And, of course, when that ruling came out, it occurred to me it might impact on this kind of a thing.

So, I can't give you an answer now, Dayvid

MR. FIGLER: Okay. There was one other aspect to it. Pursuant to our motion, we had made a request upon the Nevada Supreme Court with regard to the process for selecting a three-judge panel. I have received a document from Jeanette Bloom yesterday and I'm going to share that with the prosecutors today and also make that part of our response to their opposition to our motion for the –

THE COURT: I can't wait to find out. What is it, basically, the response?

MR. FIGLER: It's all very curious. But the one aspect of it that sticks out to us the most is that based on this new information, we're going to request of the Court an order requiring additional information from the Supreme Court Clerk's office for us to be able to do an actual statistical analysis based on this process.

THE COURT: And you're going to be wanting me to order something from the Clerk's office?

MR. FIGLER: Well, you're the only court of jurisdiction right now. So, you're the only one that could do that. But at any rate –

THE COURT: But I don't have jurisdiction over the Supreme Court, would that I did.

MR. FIGLER: Well, I think that you do because it's just another state agency.

THE COURT: Okay, we'll take that up then later, too.

MR. FIGLER: But the point of that is –and I'm just giving the Court a little advance notice that there may be a request for more time to compile that information if the Court was inclined to order it one way or the other, it will all be part of the response if that's okay with you, as opposed to a separate motion.

THE COURT: Sure.

MR. FIGLER: Okay. That's it, Judge. Thank you.

THE COURT: Thursday, the 20th for a decision on the 7/24 motion. That date is vacated.

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording of the proceedings in the above case.

SHIRLEE PRAWALSKY, COURT RECORDER

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * * *

STATE OF NEVADA,

PLAINTIFF,

VS.

DONTE JOHNSON, aka JOHN LEE WHITE

DEFENDANT.

CASE NO. C153154

DEPT. V

Transcript of Proceedings

BEFORE THE HONORABLE JEFFREY D. SOBEL, DISTRICT COURT JUDGE

DECISION: DEFENDANT'S MOTION FOR IMPOSITION OF LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCE; OR, IN THE ALTERNATIVE, MOTION TO EMPANEL JURY FOR SENTENCING HEARING AND/OR FOR DISCLOSURE OF EVIDENCE MATERIAL TO CONSTITUTIONALITY OF THREE-JUDGE PANEL PROCEDURE

STATE'S MOTION IN LIMINE SUMMARIZING THE FACTS ESTABLISHED DURING THE GUILTY PLEA

THURSDAY, JULY 20, 2000, 8:15 A.M.

APPEARANCES:

FOR THE STATE: ROBERT DASKAS, ESQ.
GARY GUYMON, ESQ.
DEPUTY DISTRICT ATTORNEYS

FOR DEFENDANT JOHNSON: DAYVID FIGLER, ESQ.
DEPUTY SPECIAL PUBLIC DEFENDER

COURT RECORDER: SHIRLEE PRAWALSKY

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LAS VEGAS, NEVADA, THURSDAY, JULY 20, 2000, 8:15 A.M.

THE COURT: State versus Donte Johnson.

Just have a seat. As I indicated, there will be no oral argument.

THE COURT: If you can find a seat.

MR. GUYMON: Do you mind if I sit - how's that?

THE COURT: So there's no suspense for either side or for the defendant, I'm going to tell you - because I am going to make a few brief remarks. But, so as to not keep anyone in suspense, the Motion for Imposition of Life Without the Possibility of Parole Sentence, or in the Alternative, Motion to Empanel Jury for Sentencing Hearing and/or Disclosure of Evidence Material to the Constitutionality of the Three-Judge Panel Procedure is denied in its entirety as is the Motion for Stay Pending - although there is much discussion in the opposition to the stay, if the motion is denied by the State having to do with direct appeal.

take it that what would have to be sought is what's discussed on the last page of the State's opposition, which is extraordinary relief and for reasons that I think will be obvious from my discussion of Apprendi I'm not going to order a stay. I will sign an order denying relief today if you want to pursue it in the next few days. Otherwise, we're going to start at 9:30 on Monday.

The only thing that I want to discuss orally, briefly, is Apprendi I read it last weekend. I read it a couple of days ago at a break in some of the proceedings in the Zane Floyd case. I read it again this morning at 5:30. And I also read other cases that are cited in Apprendi and that are discussed, to some extent in both the motion itself and the Points and Authorities filed by the State.

And let me preface it by saying what I've indicated before. If I were a legislator, I wouldn't have the statutory scheme that we have: a three-judge panel. I think the best way to handle a hung jury in a capital case is to have another jury.

If I were on the Nevada Supreme Court, which I'm also not on, I disagree with much of their analysis on the three-judge panel. I don't think it's constitutional if I were operating with a blank slate in this area. But I'm neither a legislator, nor am I on the Supreme Court and viewing this situation for the first time.

I agree with Mr. Figler that the particular issue that is addressed in Apprendl, or is raised, I think, by implication, in Apprendl has never been decided by our Supreme Court, so I'm not bound by our own decisions on this. And I also agree that if a fair reading of the holding on Apprendi is that the three-judge panel goes, I am bound by the supremacy clause to call of the three-judge panel.

But for the Court affirming right at the end of Steven's opinion the vitality, or continuing vitality of Walton v. Arizona, totally gratuitously and beside the holding, I would, after reading the whole opinion of Stevens, which barely carries the day in a 5/4 decision, I would think the reasoning would really lead me to the conclusion that I've had which is that it's inappropriate to have a three-judge panel decide a death sentence when a jury has hung up on it.

But, Stevens throws in, at the end, this gratuitous comment which is beyond the holding. The narrow question that is presented is discussed by Stevens early in the decision. The question presented, he says, is whether the due process clause of the fourteenth amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.

But, when he gets to the end of the opinion, he, for some reason, wants to forecast that the 10-year old Walton case, which grew out of the Arizona sentencing structure where judges like in our state under some or all circumstances, decide the penalty for first degree murder, he says, "For reasons we've explained, that capital cases are not controlling." And then he

cites Salia's dissent in Almendarez-Torres.

Now, I agree with Justice O'Conner that the distinction between Apprendi and its reasoning and Walton is, in her words, as cited by Mr. Figler, "baffling, to say the least." The only question is once we accept that there's been an indication by the highest court in the country that Walton is still good law, do we say that the Arizona statute and the Nevada statute are meaningfully different?

Now, I suppose some of the opinions other than Stevens -- because it really doesn't address it – would find that it is. I don't find that it is and I'm not controlled by those concurring or dissenting opinions. I see absolutely no meaningful difference between the Arizona statute and the Nevada statute.

And if I had to forecast what's going to happen in the future, it's going to go back to the Supreme Court and if the composition of the Court were just as it is now and despite what Stevens says now, I'll bet they have more than five votes to strike down judicial sentencing under the logic of Apprendi and Walton isn't going to survive and neither is the three-judge panel in Nevada. But I guess that's going to be years of litigation starting with what happens after the three-judge panel.

And I'd note if Mr. Johnson is given life without, we have a moot issue, or any other penalty other than death. And I think because it's so clear that there's no meaningful distinction between Nevada and Arizona's statutes that there's no reason for a stay. If the three-judge panel gives death, it will go up on direct appeal and it can be handled then. And as I said, if it gives something less than death, then it's moot anyway. And rather than stay it for a period of months as it would surely have to be stayed while you litigate it up there, we're going to have the three-judge panel down here.

I pulled the Arizona statute and there's just – there's no difference to me between the two. 13-1105(C) in Arizona says, "First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided

by Section 13-703." And so, when you go to 13-703, you find a list of aggravators very similar to those in our state, not quite the same in number; they have 10, at least as of last year, we have a few more. But, very similar.

Things like "in the commission of the offense, the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense." Now, that was the one that I struck in this case. But, the reason I read it is, not only are they similar, the aggravators in Arizona, but they are fact-based, some of them.

I think that eventually, the Supreme Court will probably, if it's composed as it is not, find that a fact-based aggravator has to be decided by the jury. And I think we have two fact-based aggravators in this case. We have one that relates to the murder being perpetrated during the commission of a crime and there's another one.

MR. GUYMON: To avoid lawful arrest, Your Honor?

THE COURT: Right. I think that should be a jury verdict. But, the way you get from first degree murder to the death penalty in Arizona is you have judges pick - or review the aggravators. In Nevada, the way you get from first degree murder to death is in a hung jury or a guilty plea, you have a three-judge panel review the aggravators. And, as a matter of fact, the only difference is the defendant is better protected in our state rather than Arizona, as I read it, because it has to be proof beyond a reasonable doubt.

So, you can exalt form above substance and try to focus as, I guess it was Thomas' concurring opinion does with this element analysis. I see no difference whatsoever. If a jury should decide fact-based aggravators under the reasoning of Apprendi, then our three-judge panel falls and does the statutory structure in Arizona. If not, then both of them are good. So, that's the reasoning on the Motion.

The next thing before us this morning is the Motion in Limine filed by the State. Now, although you say you need 17 witnesses if this motion

isn't granted, hearsay is permissible in sentencings hearings. But I take the drift of the motion to be - and you haven't filed a response to this, have you, Dayvid?

MR. FIGLER: No, Your Honor. We were waiting for today's ruling.

THE COURT: Okay. I guess the drift of what you're doing here, Gary, is rather than put on more rather than less witnesses, you would like the three-judge panel - of course, I don't really need to read it because I saw the whole trial - you want the three-judge panel to read this motion and accept this as the facts that were elicited in the guilt phase so as to minimize the number of witnesses. Is that the drift?

MR. GUYMON: That is the drift, Your Honor, yes.

THE COURT: Okay. Now, my gut feeling would be if I were a defense lawyer, I'd rather have them read a cold record rather than see witnesses. Guilt has already been decided. But, what is your response to this, Mr. Figler?

MR. FIGLER: Well, our preference would be to have the other two judges read the entirety of the record with the exception of the arguments that was set forth by both the defense and the State. In other words, they can read exactly what was presented as evidence, what evidence is in the case, but not be swayed by any manner of argument on the part of either party, therefore, making sure that they have the cleanest account of what the facts actually do hold.

THE COURT: Okay. So, that's one alternative. And the other alternative is he could put on witnesses such as the detective who investigated it and he could summarize most of the things and they could call a few witnesses that they think are persuasive. So, those are the three alternatives. You want to, in lieu of witnesses, just give them the whole transcript?

MR. FIGLER: With regard to anything that doesn't need to be supplemented at the time of the penalty hearing. Now, we certainly have the intent to bring in those witnesses that we brought in at the penalty hearing so that the other two judges can evaluate those witnesses for themselves with

regard to –

THE COURT: I'm not talking about the penalty hearing. These witnesses are just witnesses from the guilt phase.

MR. FIGLER: Correct, Your Honor.

MR. GUYMON: They are, Your Honor, yes.

THE COURT: Right. Now –

MR. FIGLER: Right. So, with regard to the guilt phase, yeah, that's our position.

THE COURT: That you want to have these judges who are flying in Monday morning, you want to indulge in the – what shall we call it – fiction that they're going to sit there and read a several-hundred page transcript? Would that even be acceptable to the State?

MR. GUYMON: Well, Judge, it's really not. I mean, even if – let me say this way. If they want to read the transcript, I can tell you that it will take them, even if they are rapid readers, it will take them six-plus hours. Even if they read it, I will still put at least a lead detective on to establish the facts of the case. If the judges want to read that transcript, I have no opposition to them reading the transcript, but –

THE COURT: Well, then, we'll give them that option. But if you don't stipulate to letting them read this summary, I'm not going to let them read it. And we'll just the State call whoever they want with the understanding that there is no reason, in my opinion – but I'm not running their case – once guilt has been decided, to put on more than the lead detective and a few other folks that they might with to give the flavor of it. But, if you want them to have the opportunity to produce that flavor here in court for the other two judges rather than just reading the rather dry recitation that's contained in this Motion in Limine, we're going to leave it up to you.

MR. FIGLER: Well, everyone proclaims that the judges will follow the law. And if the law says that they have to be familiar with the guilt phase, then I think that the transcript would suffice without the argument in it.

THE COURT: Yeah, it would suffice. And I believe so would the recitation and summary which I think is a fair summary here. What I'm saying is: I'll make the transcript available to them and they can read that if they want to. I will not make this summary available to them unless you have no objection.

MR. FIGLER: Okay. Well, there are aspects of that summary that we find to be somewhat slanted towards the argumentative State theory of the case.

THE COURT: All right. Well, maybe you can, with Mr. Guymon and Mr. Daskas, work out some summary that you think is fairer that we can present to the judges. Because I don't think it's probable or reasonable that they're going to sit there and just read the whole transcript. But, you have four days between now and Monday. All day Thursday, all day Friday, all day Saturday, all day Sunday to resolve that issue.

So that we're clear, Mr. Guymon can, if he cannot be satisfied today that he has your and Mr. Sciscento's agreement to do it another way, get ready to call the lead detective or whoever else he wants to call and any other witnesses that he feels are necessary to give a flavor for the trial or the facts of the case to the judges on Monday morning at 9:30.

Anything else that needs to come before the Court?

MR. FIGLER: Yes, Your Honor.

THE COURT: Yes?

MR. FIGLER: We will request whatever order that you're making today with regard to the Apprendi issue, if we could just refer to it that for simplicity. It's our position that - and especially based on your commentary today, that it is an important issue of law which does, in fact, need clarification within our state. And that public policy would be served by a determination by the Nevada Supreme Court as to whether or not the holding of Apprendi renders the three-judge panel as applied in Nevada to be unconstitutional.

So, we will be seeking a Writ of Mandamus from the Nevada

Supreme Court. In that light, we get it filed today. You know, hopefully, we get a response by Monday. And if that occurs – or Tuesday – we may very well have to stop the penalty proceeding if we have a stay from the Nevada Supreme Court.

So, it is a concern to the defense that we are being forced to go forward on Monday, especially after Your Honor raises that this is an important issue of law, that probably needs clarification, that may very well not be upheld.

THE COURT: Well, maybe you misheard me. I thought that eventually this will reach the U.S. Supreme Court again. I don't think it needs any clarification from our Court and if they feel like me, it's real easy to say that our law continues to have vitality. If I thought otherwise, I would give you a stay. I think it's a real clear issue after reading Apprendi several times that the lower courts, given Stevens' analysis will continue to uphold, at the state level, will continue to uphold our three-judge panel just as they have on every other issue.

So, I'm not sure what you're making a record for.

MR. FIGLER: Well, the reason is, Judge, in the –

THE COURT: I mean, I've ruled. What are you making a record for?

MR. FIGLER: Well, I have to ask you the question then. With regard to the body that considers eligibility for the death penalty, in Nevada it's initially a jury. In Arizona, any other states, it's automatically death-eligible in any of those cases. Whether it's applied or not is something different. So, Nevada is quite distinct from those particular –

THE COURT: This is the same argument that you made in better part of 40 pages of pleadings which I've now considered on three separate occasions. So, what I'm asking you again, Dayvid, is: who are you making this record for?

MR. FIGLER: Well, Your Honor –

THE COURT: Are you speaking to the public –

MR. FIGLER: No, no, we're –

THE COURT: – are you speaking for the cameras? What is the purpose of this? I've ruled.

MR. FIGLER: Well, Your Honor, I think, with all due respect, that the particular ruling that you made bolsters our position that a stay is, in fact, necessary in this particular case.

THE COURT: Then argue that to the Supreme Court, Mr. Figler.

MR. FIGLER: And we will. Additionally, as I mentioned last time in court, the Nevada Supreme Court had provided us with some statistical information. In addition to that, the procedure for picking the three-judge panel. It was indicated to us that the way the three-judge panel works is to have the alphabetical list. And if a judge does not want to serve, that they can give a reason. Those reasons have not been provided to us. And we don't know what judges haven't actually applied.

And based on this new information, we believe that the defense is entitled to a statistical analysis from someone who is an expert in the area of statistical analysis to see if it is even possible for Judges Griffin and Elliott to have been appointed in this particular case based on the procedure as set forth by the Nevada Supreme Court in response to our discovery request. We don't have the time to do that statistical analysis. And, you know, when we go forward with the penalty hearing on Monday and we want to provide that information with regard to the statistical analysis for the Court to consider with regards to this motion. I think it's very important for us to have the time to be able to do that.

As a result, we'd ask for a continuance so that we can do a statistical analysis based on this brand new information that the Nevada Supreme Court has given us.

THE COURT: Motion denied.

MR. FIGLER: Okay. Can we count on an order then? If we were to send one over to Your Honor, at exactly what time would you have the opportunity

to review it and sign it so we can immediately send it out to the Nevada Supreme Court?

THE COURT: 9:15?

MR. FIGLER: I'll have it here at 9:10, Your Honor.

THE COURT: Are you going to bet on that?

MR. FIGLER: Yes, sir.

THE COURT: Then you must have dictated it in advance.

MR. FIGLER: Thank you, Your Honor.

THE COURT: Thank you.

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording of the proceedings in the above case.

SHIRLEE PRAWALSKY, COURT RECORDER

deliberations might result in a fair verdict in this case? Yes, I see, Mr. --

JUROR CHASTAIN: I believe further deliberations could result in a fair verdict, yeah.

THE COURT: Okay. Then I'm gonna ask you, you deliberated, you know, one day, I'm gonna ask you to continue deliberations. There may be about a five minute break until you do that, we have to discuss one or two more little things but we will have you back in deliberations by between five after 10:00 and ten after 10:00.

As I told you before, five minutes, five hours, five days, it's in your hands. Whenever you feel you can reach a fair verdict fine. If you can't reach a fair verdict, fine. There's not pressure either way.

Put 'em in the jury deliberation room because they can get started soon that way.

THE BAILIFF: Yes, sir.

THE COURT: Thank you.

(Jury retired to commence further deliberations)

THE COURT: Okay. Last -- what?

(Off-record colloquy)

MR. SCISCENTO: I've provided the State with a copy of --

THE COURT: All right. That's the last thing before we start them deliberating again. What's the parties'

position on an Allen charge?

MR. SCISCENTO: I provided the State with a copy of the Wilkins case and that is the language I think that they have to follow. Although we do oppose an Allen charge and we probably would oppose it at any time. I think more needs to be put in, but at this time we would oppose an Allen charge.

THE COURT: Well, I have no particular inclination to give it.

MR. GUYMON: We also oppose it.

THE COURT: Unless you folks want to urge it, fine.

MR. GUYMON: I can tell the Court though doesn't --

THE COURT: We're all in agreement.

MR. GUYMON: Okay. Then I won't tell the Court anything more.

THE COURT: But tell me for future reference, what did you guys develop in terms of -- because we're going to do everything on the record for now 'til we get a verdict. What have you believed -- what do you believe you've learned as to the propriety of a dynamite or Allen charge at any point?

MR. GUYMON: Judge, I will tell you that in doing a lot of research in capital cases Allen charges have been discouraged. Never has an Allen charge been given in the State of Nevada during a penalty phase, so I turned to other jurisdictions, both Ninth Circuit, Fourth Circuit and the likes, as well as Supreme Court cases, and it seems to me that

the totality of them is this, that an Allen charge begins to very coercive on a jury because what a judge is saying is go, go, go, charge, you know, charge, charge, charge, fight, fight, fight; and my concern even heightens when we've now told 'em never must they impose death; that we're saying keep going, keep going, keep going and the coercive nature then, I think, heightens and I become increasingly concerned because of the cases.

I can tell the Court that there are cases in penalty phase where an Allen charge has been given and it's been upheld, but I can also tell you that there --

THE COURT: In Nevada?

MR. GUYMON: Never.

THE COURT: No.

MR. GUYMON: Never. And I can also tell you there's a number of jurisdictions who have discouraged it strongly and in fact said it was reversible error.

THE COURT: Yeah, I didn't -- as I said, I usually have the Allen charge on my desk and give it routinely in normal cases. I think the preference that has been stated by Nevada, at least as of 1980, was if you're gonna give an Allen charge in any case, you give it with the original instructions, I didn't even give it with the original instructions because of that concern in this case. What do you think you've found in the law, Mr. Sciscento or Mr.

Figler?

MR. SCISCENTO: We'll submit it, Your Honor. I don't know what you're asking. We've provided --

THE COURT: What I'm asking you is, I indicated to you that I'd appreciate some assistance with reference to the Allen charge. Yesterday, I believe around 3 o'clock, my question is very simple is, do you have anything that might assist me if this comes up. Not submitted.

MR. FIGLER: No, Judge, there's nothing --

THE COURT: I'm asking you, did you do any research?

MR. FIGLER: -- there's nothing further. If an Allen charges does come forward.

THE COURT: I want to ask you is --

MR. FIGLER: Our research is the same as theirs.

THE COURT: Okay . Thank you.

MR. GUYMON: Judge, being that we all agree, do you want any of the cases? I didn't --

THE COURT: No. No. That's my thinking too.

ATTORNEYS: Thank you, Judge. Thank you, Your Honor.

(Court recessed)

THE COURT: And before we start them deliberating, let's go back on the record.

The final issue, which to me is a non-issue, it is my understanding that, at some point late in the day, the

victim -- some member of the one of the victim's families found themselves in the jury lounge where this magazine was sitting. Now, Stony has represented to me they -- they sit in the jury lounge where they are all assembled and then they start deliberating, that he didn't see this, whatever that's worth, in the morning. To me it's a non-issue.

I mean there is (a), no doubt that for the last six months at least, there's been a pretty raging controversy in this country about the propriety of the death penalty if you have a -- any degree in the news -- of interest in news at all, you know that the State of Illinois has a moratorium on the death penalty now and you know that it's an issue in the presidential campaign with Bush. And you know that there's been daily newspaper articles for the last week, not concerning Mr. White, but concerning the death penalty practice in Nevada and if people are exposed to this it has nothing to do with this case particularly, of course. In part, because the major emphasis is cases can be a bad result because they didn't use DNA evidence. We had, at least according to the State positive DNA evidence in this case, to me it's a non-issue. Does anybody wish to pursue it?

MR. DASKAS: No, Judge.

MR. FIGLER: No, Judge, I mean I'm curious as to why a victim's family member would be in the jury lounge, but.

THE COURT: Well, I would say Mr. Figler, because if

you've been around this courthouse longer, you would form the perception that his courthouse has many problems with it. One of them is that there's no real segregation of the jurors, from the witnesses, from the family members, from the lawyers and in the new courthouse it's gonna be remedied. But that is a problem. People are free, thinking that they are taxpayers to wander almost anywhere in this building.

They should be deliberating.

(Court recessed at 10:10 a.m., until 11:35 a.m.)

(Jury is not present)

THE COURT: All right. As you know, we have a note -- well, we have two.

"We find ourselves stalemated. There does not appear to be any possibility of movement by either side." That came out about 11:00 o'clock.

And about the same time we get from Juror Number 1, Kathleen Bruce, "I have an incident that occurred last week that I need to bring to your attention as soon as possible." I have no idea what Kathleen Bruce, it's signed Juror Number 1, wants to tell us, but I would assume, as long as we're doing everything on the record, I'm -- I have the feeling it's nothing that's going to in any way impact on this, but I gather we should hear from her before we hear from the others. Don't you think?

MR. GUYMON: I would think that'd be appropriate,

Judge. If it's a disclosure she feels like she needs to make.

THE COURT: Yeah. Now, if we go into chambers with that one microphone, Debbie, is it a big hassle to record out here?

COURT RECORDER: No, Judge.

THE COURT: It's set up right now?

COURT RECORDER: I believe so. I need to check it, though.

THE COURT: Go check it.

(Off the record)

COURT RECORDER: All right, Judge.

(Off-record colloquy)

THE COURT: Would you tell Stony to bring in Kathleen -- well, somebody's got to bring her in.

(Off-record colloquy)

THE COURT: Are we on the record?

COURT RECORDER: Yes, Judge.

THE COURT: Assuming it's deadlocked, do you guys have your calendar here? I've talked to the Supreme Court, we can set the penalty hearing in front of the three-judge panel almost any time. You got your calendars here?

MR. SCISCENTO: No --

THE COURT: We can also do it at some other time.

MR. SCISCENTO: I -- I don't, Your Honor.

MR. GUYMON: We're able to do it now, Judge. I

don't have a calendar with me, but I know what my calendared events are.

THE COURT: You'd rather have your calendar with you?

MR. SCISCENTO: Well, yeah, and seeing that -- I want to know what -- it's going to take about two days, so, yeah, I need to know what I have coming up, and --

THE COURT: Well, I assume it's gonna take a little longer than two days, because the other judges have to be made familiar with certain things.

MR. SCISCENTO: Well, I meant the hearing itself.

MR. FIGLER: And we'll probably have a sequence of motions prior to that time, too.

THE COURT: That going to be based on authorities, or rhetoric alone?

MR. FIGLER: I think it'll be points and authorities.

THE COURT: Excellent.

(Juror Number 1, Kathleen Bruce, is present)

THE COURT: Hi, ma'am, how are you?

JUROR BRUCE: Hi. Okay. Very nervous.

THE COURT: Don't be nervous, this is no big deal.

JUROR BRUCE: Okay.

THE COURT: We're going to get everybody in in a few minutes and discuss the note about the deadlock, but before we

do that, logically we might as well take up whatever you have to tell us. And I'm in receipt of a note that's signed by you -- you are Kathleen Bruce?

JUROR BRUCE: Right.

THE COURT: It says, "I have an incident that occurred last week that I need to bring to your attention as soon as possible." So we've cleared the courtroom, there's no one else around, the cameras are off. Don't worry about it, just tell us what you felt you have to tell us.

JUROR BRUCE: Okay. A week ago last Wednesday when we all were dismissed, we all left for the evening, we went to the normal parking garage. Most of the group went to the first elevator; my car was on the other side, so I went to the other elevator. I was standing there, didn't realize somebody was standing behind me. I got startled, I turned around, it was Tim, Juror Number 7. I said, oh, you scared me. He says, oh, I -- he says, I sneak up on people a lot, and he laughed.

Okay. We were waiting for the elevator to come down from the roof, we were talking a little bit. It finally came down to the first floor, everybody got out of the elevator except one African -- African-American man; he had some kind of a bag with him. It was the day of the duffel bag and the guns and everything, so it kind of startled me at first, that he was on the elevator, did not get off at 1. But I thought for a second, Tim's here, okay, I'll get in -- I'll get in the

elevator.

At that point I asked -- I pushed number 3, for the third floor, I asked Tim what floor he was on. He said, I'm on 3. I said, oh, you're on 3, too. And he said, yeah. And I said, okay.

Well, it got to 3, I got off. My car was right in the handicapped spot right there. He didn't get off, he stayed on the elevator. I was rifling around in my purse for stuff, I called my husband to let him know I was coming home. About a minute later the elevator opened again, and he got off.

I don't know, it just was very odd --

THE COURT: Okay.

JUROR BRUCE: -- that he said he was on 3 and then he stayed on the elevator with the other gentleman and then got off on 3 later.

THE COURT: Okay. Thank you very much. We'll see you in a minute or two.

JUROR BRUCE: Okay.

THE COURT: Matter of fact, just stay there in your seat. And just --

JUROR BRUCE: Oh, okay.

THE COURT: -- bring the other jurors in.

(Off-record colloquy)

MR. SCISCENTO: Don't we have another note?

THE COURT: What?

MR. SCISCENTO: No -- we have another note.

THE COURT: Yeah. That doesn't have to be done in closed, does it? You want it done in closed?

Hold on one second.

MR. SCISCENTO: Yeah. Yeah, we've got him here, if we can just bring him in, it'll be quick, Your Honor.

THE COURT: Okay. Let's leave the public out. Just bring the jury in.

(Jury is present)

THE COURT: Okay. Mr. Young, we've got a note that came out about 11:00 o'clock signed by you on today's date. "We find ourselves stalemated. There does not appear to be any possibility of movement by either side." Is that what you wrote?

JUROR YOUNG: That's correct.

THE COURT: Generally, folks, is there anyone that disagrees with that conclusion?

No affirmative response.

MR. FIGLER: Well, there was, Judge.

THE COURT: Was there? Where?

JUROR CHASTAIN: Kind of. But, I mean, it seems like the majority there, they --

THE COURT: Well, let's not get into splits or anything like that. But you are the one person who believes

that maybe further discussion might move things along?

JUROR CHASTAIN: So -- I don't -- I don't see anything by tomorrow, but I would -- maybe I would think maybe two, three weeks down the line, possibly, but I think that right now as it stands --

THE COURT: But you don't think --

JUROR CHASTAIN: I believe in the --

THE COURT: Without --

JUROR CHASTAIN: -- in the judicial system. I think --

THE COURT: Okay. But without maybe another ten, fifteen days of deliberation, you don't think --

JUROR CHASTAIN: No.

THE COURT: -- in the foreseeable future?

JUROR CHASTAIN: But I think if you worked at it, I think anybody can come to a conclusion down on the end.

THE COURT: Okay. And, of course, as I've already indicated to you, I cannot give you any more evidence, we can't reopen these proceedings and give you anything more.

But let me ask you this. We've given you these instructions that you've been working with the last few days, is there anybody that believes that maybe if we gave you an additional instruction of law or some clarification of law, that this would assist you?

JUROR: No, sir.

THE COURT: Is there anybody that believes that?

Is there any additional questions that any of you would suggest?

MR. DASKAS: No, Judge.

THE COURT: All right. We'll get right back to you in about five minutes, folks, if you'd just go back to the jury deliberation room. We just have to have a little discussion, we'll be right back with you; it won't be five minutes.

(Jury recessed)

THE COURT: Okay. They have handed the verdicts back, by the way. And it's apparent they have reached the point where they have checked certain aggravators and certain mitigators. But -- so they're in one of the rooms, but it doesn't appear from my impression that they are able to make a final decision.

Is that your feeling, State?

MR. DASKAS: That is, Judge.

THE COURT: And to me, the fact that one juror says if they deliberated several more weeks he's hopeful that any group could reach a decision doesn't meaningfully detract me from the conclusion that it's a hung jury.

What's the defense's feeling?

MR. FIGLER: I'd like to address it first. From the tone of the very first note from this foreperson, and then the

second note where he misstated the juror's position and then also declared that they were at a deadlock when they weren't at a deadlock, what they were really --

THE COURT: But in terms of a deadlock, my observation was, the only person this morning who really was of a mind that they were possibly going to gain by more discussion was the same Juror Number 12 who indicated just a few minutes ago that maybe several weeks more would help; in fact, they were out forty-five minutes before they were deadlocked after the first one.

MR. FIGLER: Your Honor, I disagree, I think I noted at least a half a dozen heads nodding, the one next to that juror, a couple in the back row with regard to the fact that they can continue, including the juror in 10, 11, 12 --

THE COURT: Okay.

MR. FIGLER: -- some people in the back.

THE COURT: If there was one or there was twelve, Mr. Figler, forty-five minutes later they sent the deadlock note. So what is this --

MR. FIGLER: Well, at any rate, what I --

THE COURT: -- what is this leading to?

MR. FIGLER: The defense's position is that the jury clearly isn't taking to heart the Bennett instruction in this particular case where they don't have to reach the death penalty. If one individual has decided that he's not gonna do

it, they need to know that they can consider life without and life with, and that they can't consider the death penalty at that point. I think we just need to reiterate to them the Bennett instruction at this time, and then see if that allows them to continue their deliberations. Because if they're stuck --

THE COURT: So you would read them --

MR. FIGLER: The Bennett --

THE COURT: -- number 7(b) again --

MR. FIGLER: That's correct.

THE COURT: -- and without any kind of dynamite charge, just say, let me read you instruction 7(b) again, and although you haven't requested any clarification on the instructions, and when you've all unanimously said that no clarification of the law would make any difference, your suggestion is, I should single out the instruction most favorable to the defendant and read that to them without further instruction, then send them back --

MR. FIGLER: I --

THE COURT: -- for some more deliberations.

MR. FIGLER: I think they're asking for additional instructions. I just think that -- that that response --

THE COURT: No, I'm saying that's your procedural suggestion.

MR. FIGLER: Well, that -- their response. If you

want to impose this -- and couch it in some type of Allen terms, fine. But I think that it's really clear from this jury that they're not following this law. That if one person, for whatever reason, and we think he's following the law, doesn't want to impose death, that they can consider these other penalties before they declare themselves to be deadlocked. And that is the law, so I'm just asking them to be informed about the law in this particular case.

THE COURT: They've been --

MR. FIGLER: They've only been deliberating a grand total of six hours now.

THE COURT: I haven't personally, I know your office has, and Mr. Kohn, this year seen longer deliberations. This is, by about twice, longer than the deliberations in any of the death cases I've observed in the last ten years. So my experience isn't the same as your experience. This is, to me, a long period of deliberation, given my experience.

My perception of it really is, not that they misconceive probably the Bennett instruction, but that the majority of them feel one way about this case, and probably we'll find out a minority view it another way. But I'm certainly not going to do what you say.

Anything else to come before the Court?

MR. DASKAS: No, Judge.

MR. SCISCENTO: Court's indulgence.

THE COURT: Defense?

MR. SCISCENTO: The Court's indulgence for one moment.

Your Honor, at this time, in light of what was said by Juror Number 6, I think it's proper at this time that we state -- or that the Court entertain a motion for a mistrial. My understanding is that what the juror had said is when --

THE COURT: Juror Number 6. Now why is --

MR. SCISCENTO: I believe it was --

MR. FIGLER: Number 1.

MR. SCISCENTO: No, I'm sorry, Number 1.

THE COURT: Okay.

(Off-record colloquy)

THE COURT: You can step up, boss, and just speak for yourself.

MR. SCISCENTO: Your Honor, I've got five chiefs and no Indians, so basically what I'm saying is --

THE COURT: Well, there's the chief, he wants to speak --

MR. SCISCENTO: All right.

THE COURT: -- I mean, he's --

MR. SCISCENTO: I know. We're just moving for a mistrial of this based on the conversation and the statements made by the jurors.

MR. FIGLER: No, Your Honor, that's not correct.

Can we please just take a couple --

THE COURT: Why don't you all huddle and come up with a spokesperson.

MR. KOHN: May we have a recess, Your Honor?

THE COURT: What?

MR. KOHN: Can we have a recess?

THE COURT: No.

(Off-record counsel colloquy)

(Off the record)

(Off-record colloquy)

THE COURT: Okay. Is there any further record you'd like to make?

MR. FIGLER: No, Your Honor, that was not a motion for mistrial on our part. We'd submit based on the record previously made now.

THE COURT: Wait a minute.

MR. FIGLER: That they should continue.

THE COURT: Wait a minute, wait a minute.

MR. FIGLER: We are not moving for a mistrial.

THE COURT: I heard it --

MR. SCISCENTO: We withdraw the mistrial --

THE COURT: Oh, I see. Okay. Certainly you may withdraw it.

MR. FIGLER: We are not --

THE COURT: I just didn't think --

MR. FIGLER: -- I want to make it very clear for the record --

MR. SCISCENTO: We withdraw that motion.

THE COURT: -- even at my advanced age that I had -- I thought I had heard it, so.

MR. FIGLER: If it was said, it's been withdrawn completely --

THE COURT: I understand that now.

MR. FIGLER: -- before any discussion or argument on it.

THE COURT: I see.

MR. FIGLER: We ask that the jury be --

THE COURT: Now that's not one of those bells --

MR. FIGLER: -- required to --

THE COURT: -- that can't be unrung that --

MR. FIGLER: You're the Judge --

THE COURT: -- Mr. Sciscento --

MR. FIGLER: -- you can do that.

THE COURT: -- referred to before.

MR. FIGLER: That's correct. We would request that this jury be allowed to continue to deliberate, that either the Bennett instruction, or a hybrid of Bennett with part of the Allen be read to this jury, because they haven't fully deliberated yet and they aren't following the law pursuant to the questions that have been asked of the -- of the -- of the

jury at this point.

THE COURT: Well, you've made your record, and it actually appears to me to be more than frivolous, but that's not for me to decide.

I'm going to declare --

MR. FIGLER: Does that mean it's better than frivolous?

THE COURT: No, no, that means it's very frivolous, extraordinarily frivolous.

Let's get the jury back in, and the public is welcome, and we will declare a mistrial.

Now, I am actually available next week for -- we're still on the record -- for the penalty hearing. Would you wish some time to address some motions to the Court that that schedule would not accommodate, Mr. Figler?

MR. FIGLER: Yes, Your Honor.

THE COURT: And they will be both points and authorities, plural in both cases?

MR. FIGLER: Yes, Your Honor.

THE COURT: Excellent.

(Off-record colloquy)

THE BAILIFF: Let 'em in?

COUNSEL: Off the record?

THE COURT: No. No.

MR. GUYMON: How -- Judge, how soon will we be able

to set a schedule for when we can in fact hear this? In other words, can we bring the parties together, say on --

THE COURT: Oh, we can put it on like Tuesday, and we can have some concrete idea how long they are suggesting that they need to file motions. They've been through three-judge panels before.

MR. KOHN: And, Your Honor, all I wanted to say was that the Supreme Court has to be informed that we need a three-judge panel, and then what they need to do is, they need to find two other judges to --

THE COURT: They've --

MR. KOHN: -- assist this Judge.

THE COURT: -- I -- I understand that, Phil, 'cause I've been involved in this before as well, it just never got to a three-judge panel. And in the last half hour we've been discussing with the Supreme Court, and it was based on that discussion that I'm telling you we could do it very quickly.

MR. KOHN: We just needed to know that.

THE COURT: What?

MR. KOHN: We just needed to know that.

MR. FIGLER: Are the verdicts to be made court exhibits?

THE COURT: They'll be here.

MR. DASKAS: How long do you need for your motion argument?

MR. FIGLER: You know, Your Honor, I do have an extraordinarily important hearing at the end of this month in Conan Pope, which is another high profile case, in which I have to -

THE COURT: Is it high profile that makes it important to you, Mr. Figler --

MR. FIGLER: Well, no, Your Honor --

THE COURT: -- or is it the client?

MR. FIGLER: -- there's so much attention on it, it's so contentious that it's made it a high profile case. And as such, it deserves our full attention --

THE COURT: Now, you see, to me --

MR. FIGLER: -- as every one of our cases do.

THE COURT: -- Mr. Figler, "high profile" doesn't mean it merits any more attention.

MR. FIGLER: There's a lot more pressure on us --

THE COURT: -- than anything else.

MR. FIGLER: -- Your Honor.

THE COURT: But I'm not sure that that's my observation of your value system.

MR. FIGLER: Well, Your Honor, in addition, we have been inundated with very lengthy responses with regard to our motions that are currently pending, and that hearing is going to occur on the 26th of this month. Again, I have just done a number of trials in a row, including this one. I think that

we're not gonna be able to adequately be able to present a fair defense for John White in this particular case until probably September. I have another death penalty case in August --

THE COURT: Well --

MR. FIGLER: -- Shanley --

THE COURT: -- it seems --

MR. FIGLER: -- and it's going in front of Department XV.

THE COURT: We'll take it up on Tuesday, Mr. Figler, but it seems -- and the Court's calendar is rather crowded. It seems to me that, leaving aside your legal motions, you'll be doing exactly the same thing at the penalty hearing that you've already been through in the last two days.

MR. FIGLER: Of course, we have to coordinate all witnesses again, and --

THE COURT: Yeah, I understand that, Mr. Figler.

MR. FIGLER: -- it's not an easy task, Judge. It isn't.

THE COURT: And, of course, you are the -- although it has not been always apparent, because of your zest and eagerness, you are only -- and I don't mean that in a demeaning sense, second chair here. Mr. Sciscento is the lead counsel.

MR. FIGLER: Well, that might flip now that I'm 250

qualified, Judge.

THE COURT: I see. And maybe -- maybe pigs will fly, or Mr. Kohn will come in and be lead counsel himself in this case.

MR. FIGLER: Perhaps, Judge.

THE COURT: Either of those.

Is -- we're ready, yeah. Let people in, and let's let 'em know we're ready for the jury.

By the way, the jury has indicated that they do not wish to go out front and be talking to those folks, but that if counsel wishes to talk to them back in the jury room, I don't know that they are hearing this, but you're welcome to do so --

MR. GUYMON: Thank you, Judge.

MR. DASKAS: Thank you, Judge.

THE COURT: -- according to the jury.

MR. GUYMON: That's helpful to us. We appreciate --

MR. SCISCENTO: That's great, Judge.

MR. GUYMON: We appreciate that admonishment.

(Off-record colloquy, pause in the proceeding)

(Jury is present)

THE COURT: All right, folks, we have decided, after you left, that -- or I have decided, seeing as the decisions, technically, are always mine, I guess, that we're going to release you and accept the fact that you are hung and unable

to reach a verdict.

I want to thank you for being with us during both phases of this trial and giving things your best effort. If anybody thinks these things are fun, they're crazy. It's a very, very hard process to deal with, the facts are difficult to deal with, the stakes are high, obviously, emotionally, and in reality to everybody. And you've done a tough thing.

I personally would be lying to you if I told you that I hadn't wished you'd reach a verdict, because in this state now we go to a three-judge panel, and myself and two other judges will have the decision that you deadlocked on. And it's a big decision, as you know.

So I thank you on behalf of everybody in this room, and the people who are the ones who sign those minuscule jury checks, the State of Nevada and the County of Clark thank you very much.

I understand that you want to, if you do -- and you -- as I've told you before, you don't have to discuss, any of you, your verdict with anyone. It's been indicated, at least informally, that you wouldn't mind perhaps spending a few minutes talking with counsel here, who of course still have to go on with this case. And if you wanted to do that, you'll do that in an area where the public, the media and people like that won't be involved. So Stony will probably take you back there for a few minutes, we have one more little thing to do

outside your presence.

Thank you again. And you are excused.

We'll be in recess -- we'll be in session briefly outside your presence.

(Jury excused)

THE COURT: Let me just throw out some dates that look like -- that you can check before Tuesday, seem to work. Sometime during the week of July 24th works for the Court's calendar. Parts of, enough to accommodate probably three days, which I estimate this'll probably go, because you're gonna need two days plus enough from the guilt phase to familiarize the three-judge panel with the facts underlying the case. Part of the week of August the 7th, part of the week of August the 14th, and if we get into September it would probably have to be towards the end of September. I don't know if anybody really has an appetite to try this during the week of August 14th.

All right, we'll see you Tuesday morning at 9:00 o'clock to advance the question of when we're gonna have the three-judge panel.

MR. DASKAS: Thanks, Judge.

PROCEEDING CONCLUDED AT 12:02 P.M.

* * * * * * * * * * *

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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0001
PHILIP J. KOHN, ESQ.
SPECIAL PUBLIC DEFENDER
State Bar No. 000556
JOSEPH S. SCISCENTO
State Bar No. 004380
DAYVID J. FIGLER
State Bar No. 004264
309 South Third Street
P. O. Box 552316
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Defendant

FILED
JUL 10 3 32 PM '00
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

****

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON, aka
John White, ID # 1586283,

Defendant.

CASE NO: C153154
DEPT. NO: V

Date of Hearing:
Time of Hearing:

MOTION FOR IMPOSITION OF LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCE; OR, IN THE ALTERNATIVE, MOTION TO EMPANEL JURY FOR SENTENCING HEARING AND/OR FOR DISCLOSURE OF EVIDENCE MATERIAL TO CONSTITUTIONALITY OF THREE JUDGE PANEL PROCEDURE

COMES NOW, the Defendant Donte Johnson, by and through his attorneys of record, PHILIP J. KOHN, Special Public Defender, JOSEPH S. SCISCENTO, Deputy Special Public Defender and DAYVID J. FIGLER, Deputy Special Public Defender and hereby submits his Motion for Imposition of Life Without the Possibility of Parole Sentence; Or, in the Alternative, Motion to Empanel Jury for Sentencing Hearing And/or for Disclosure of Evidence Material to Constitutionality of Three Judge Panel Procedure. This Motion is based upon the entire file in this matter and upon the attached memorandum of points and

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SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

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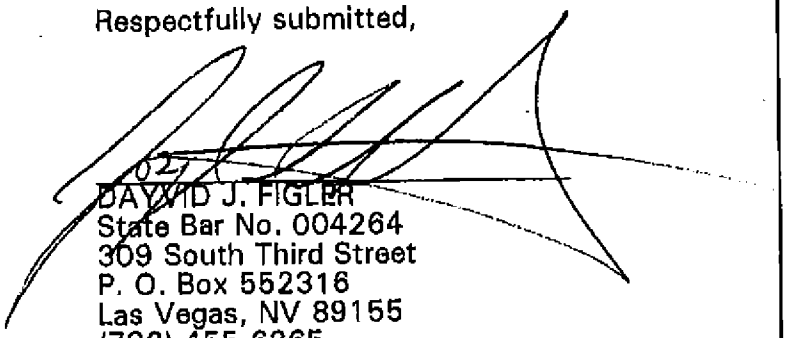
authorities as well as U.S. Const. Amends. 5, 6, 8, 14; Nev. Const. Art. 1 §§ 6, 8.

Dated this 10 day of July, 2000.

Respectfully submitted,



DAYVID J. FIGLER
State Bar No. 004264
309 South Third Street
P. O. Box 552316
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Defendant

NOTICE OF MOTION

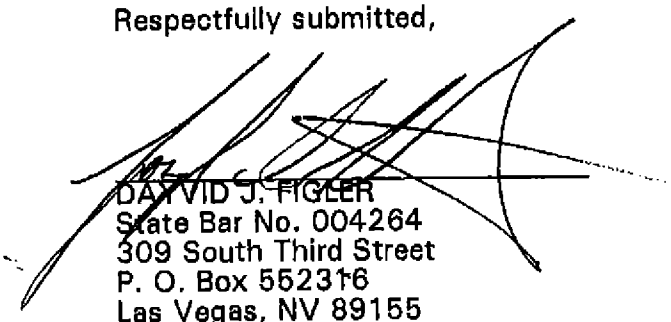
TO: STATE OF NEVADA, Plaintiff; and

TO: STEWART L. BELL, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing Motion for Imposition of Life Without the Possibility of Parole Sentence; Or, in the Alternative, Motion to Empanel Jury for Sentencing Hearing And/or for Disclosure of Evidence Material to Constitutionality of Three Judge Panel Procedure on the 24 day of July, 2000 at the hour of 9:30 a.M., in Department No. V of the above-entitled Court, or as soon thereafter as counsel may be heard.

DATED this 10 day of July, 2000

Respectfully submitted,



DAYVID J. FIGLER
State Bar No. 004264
309 South Third Street
P. O. Box 552316
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Defendant

POINTS AND AUTHORITIES

SYNOPSIS OF ARGUMENTS

1. The recent United States Supreme Court case of Apprendi v. New Jersey (2000 WL 807189) 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.

2. The lack of any statutory or common law procedures for the three-judge panel creates a jurisdictional ambiguity that renders the sentencing body powerless to perform the sentencing functions; the absence of true random appointment of the two additional District Court judges renders the appointment process unconstitutional.

3. The oath to follow the law does not encompass the personal bias and feelings that are paramount to establishing a trier of fact in accordance with the standards mandated by Morgan v. Illinois.

4. The duty to have a "reasoned moral response" as a guidepost for sentencing is violated by the Nevada three-judge panel scheme rendering it unconstitutional.

STATEMENT OF CASE

Defendant client was found guilty of murder by a jury on June 9, 2000. The state is seeking the death penalty against the defendant. After the penalty hearing, the jury was unable to agree on a sentence and this court has requested that the Supreme Court appoint a three-judge panel to impose sentence. NRS 175.556. Defendant client submits that imposition of a sentence by a three-judge panel would deprive him of equal protection, due process, effective assistance of counsel and a reliable sentence under the state and federal constitutions. Accordingly, defendant submits that this court should impose a sentence of life in prison without the possibility of parole.

In the alternative, defendant requests that this Court empanel a jury to hear the penalty proceedings in defendant's case. Finally, defendant submits that disclosure and discovery proceedings must be conducted in order to ensure that the panel satisfies constitutional standards of impartiality.

LEGAL ARGUMENT

1. **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.**

The three-judge panel procedure prescribed by Nev. Rev. Stat. § 175.556(1) cannot be followed in this case because it violates the due process clause of the Fourteenth Amendment to the United States Constitution. In Apprendi v. New Jersey, ___ U.S. ___ 2000 WL 807189 (June 26, 2000) (a copy of which is attached), the United States Supreme Court unequivocally held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt." Id. at *13. Citing its previous decision in Jones v. United States, 526 U.S. 227 (1999), the Court held:

> With that exception [of the fact of a prior conviction], we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-253, 119 S.Ct. 1215 (opinion of STEVENS, J.); see also id., at 253, 119 S.Ct. 1215 (opinion of SCALIA, J.).

Id. (footnote omitted).

The concurring opinions of the Court's most conservative justices were equally unequivocal:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee -- what it has been assumed to guarantee throughout our history -- the right to have a jury determine those facts that determine the maximum sentence the law allows.
>
> . . . .
>
> [T]he guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury" has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.

Id. at *17 (Scalia, J., concurring) (emphasis supplied).

> In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury.
>
> . . . .
>
> [A] "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact - - of whatever sort, including the fact of a prior conviction - - the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crime, has provided for setting the punishment of a crime based on some fact - - such as a fine that is proportional to the value of stolen goods - - that fact is also an element. No multi-factor parsing of statutes, of the sort that we have attempted since McMillan [v. Pennsylvania, 477 U.S. 79 (1986)], is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

Id. at *18-19 (Thomas, J., concurring).

Under this analysis, there can be no doubt that the aggravating circumstances prescribed by Nev. Rev. Stat. § 200.033 are "elements" of capital murder. Nev. Rev. Stat. § 200.030 defines the degrees of murder and prescribes the maximum punishments allowed.[1] First degree murder is punishable by various terms of imprisonment, §

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[1] Nev. Rev. Stat. § 200.030(4) provides:

> A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:
>
> (a) 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; or
>
> (b) By imprisonment in the state prison;
>
> (1) For life without the possibility of parole;
>
> (2) For life with the possibility of parole, with eligibility for parole beginning when a maximum of 20 years has been served; or
>
> (3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.
>
> A determination of whether aggravating circumstances exist is not necessary to fix

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...." § 200.030(4)(a) (emphasis supplied). The crucial role of aggravating circumstances as elements of capital-eligible first degree murder is further demonstrated by the last sentence of § 200.030(4): "A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole."

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 Apprendi, the due process guarantee of the federal Constitution requires those elements to be decided by a jury. Accordingly, the three-judge panel procedure, which would allow judges to make those findings, is unconstitutional.

The unconstitutionality of the Nevada procedure is further demonstrated by the distinction drawn in Apprendi between its holding and the holding in Walton v. Arizona, 497 U.S. 639 (1990). In Apprendi, the Court distinguished Walton, holding that the rule it announced would not "render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." Id. at *16 (citation omitted; emphasis added). The court relied on the reasoning in Justice Scalia's opinion in Almendarez-Torres v. United States, 523 U.S. 224, 257 n. 2 (Scalia, J., dissenting):

> "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum

---

the penalty at imprisonment for life with or without the possibility of parole.

> penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."

Apprendi at *16 (emphasis supplied). Under the Arizona scheme at issue in Walton, the statute provides that the maximum penalty for first degree murder is death. Ariz. Rev. Stat. § 13-1105(C)("First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703"); Walton v. Arizona, 497 U.S. at 643.

By contrast, under Nevada law the penalty of death is not the maximum penalty for first degree murder simpliciter: the statute itself provides that the penalty is not available for first degree murder unless additional elements - - the existence of aggravating circumstances, and the failure of mitigating circumstances to outweigh the aggravating circumstances - - are found. See Apprendi at *29 (Thomas, J., concurring) ("If a fact is by law the basis for imposing or increasing punishment - - for establishing or increasing the prosecution's entitlement - - it is an element.") Simply put, a jury's verdict of first degree murder under Nevada law is not "a jury verdict holding a defendant guilty of a capital crime," id. at *16, because the statute itself provides that the punishment of death is not available simply on the basis of that verdict, but can be imposed "only if" further findings are made to increase the available maximum punishment.

Under Apprendi, this Court cannot constitutionally proceed to make the findings in this case - - the existence of aggravating factors and the failure of mitigating factors to outweigh aggravating factors - - which are necessary to increase the maximum punishment for the offense to a death sentence. Since findings of these elements of capital murder can constitutionally be made only by a jury, the three-judge panel procedure allowed by Nev. Rev. Stat. § 175.556(1) cannot be given effect under the due process clause.

The Nevada Supreme Court's previous decisions upholding the three-judge panel procedure do not control this Court's resolution of this issue. Those decisions did not address or resolve the issue decided in Apprendi. See, e.g., Williams v. State, 113 Nev.

1008, 1017-1018 and nn. 5, 6 (1997); Kirksey v. State, 112 Nev. 980, 1001, 923 P.2d 1102 (1996); Paine v. State, 110 Nev. 609, 617 877 P.2d 1025 (1994); Redmen v. State, 108 Nev. 227, 235-236, 828 P.2d 395 (1992). Since the Nevada Supreme Court's decisions relating to the three-judge panel issue did not address the issue decided in Apprendi, they do not control this Court's resolution of the issue here. E.g., Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288 (9th Cir. 1985) (decisions not controlling authority on issues not decided); Vegas Franchise v. Culinary Workers, 83 Nev. 422, 424, 433 P.2d 263 (1967) (overruling language in previous decision resting upon "false premise"); Jackson v. Harris, 64 Nev. 339, 183 P.2d 161 (1947) (cases not authority on points "that may be found lurking in the record" when issue not placed before court).[2]

Further, the major principle relied on in the Nevada Supreme Court's decision - - that the federal constitution does not require capital sentences to be imposed by juries, see Hill v. State, 102 Nev. 377, 379-380, 724 P.2d 734 (1986) - - does not affect the issue decided in Apprendi: even if a capital sentence can constitutionally be imposed by a judge, under Apprendi all of the elements of a capital crime must be decided by a jury. Since a verdict of guilty of first degree murder does not expose the defendant to the death sentence without findings of additional qualifying factors, those factors are elements of the capital crime and must be found by a jury, whatever the ultimate sentencing body may

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[2] Even if those decisions were on point, the doctrine of stare decisis does not apply when "an intervening Supreme Court decision undermines an existing precedent of the [court] and both cases are closely on point." United States v. Lancelloti, 761 F.2d 1363, 1366 (9th Cir. 1985); accord Spinelli v. Gaughan, 12 F.3d 853, 855 n. 1 (9th Cir. 1993); Leggett v. Badger, 798 F.2d 1387, 1389, 1390 (11th Cir. 1986) (district court correctly declined to follow mandate of court of appeals in light of intervening Supreme Court authority). See also Litteral v. State, 97 Nev. 503, 505-508, 634 P.2d 1226 (1981) (upholding district court's refusal to instruct on specific intent element of robbery based on language of statute, despite Supreme Court decisions requiring instruction on that element, and disapproving prior decisions). "In such a case, to continue to follow the earlier case blindly until it is formally overruled is to apply the dead, not the living, law." Norris v. United States, 677 F.2d 899, 904 (9th Cir. 1982) (per Posner, J.) The intervening Supreme Court decision in Apprendi, which the Nevada Supreme Court has not yet addressed, prescribes the analysis that this Court must conduct under the Fourteenth Amendment.

be.

Finally, however the Nevada Supreme Court might resolve the issue presented here, this Court is bound to follow Apprendi under the supremacy clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI; Powell v. Nevada, 511 U.S. 79 (1994) (state court cannot refuse to apply federal constitutional retroactivity doctrine); Nev. Const. Art. 1 § 2.

Because the three-judge panel cannot constitutionally make the findings of elements necessary to impose a death sentence, this Court should proceed to impose sentence. See Nev. Rev. Stats. § 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.") This Court cannot induce the waste of judicial resources that would result from holding a full sentencing proceeding before three district judges, when any findings as to the elements making the offense capital - eligible will necessarily be void under Apprendi.

The Statute therefore provides that the default after a directive of unconstitutionality must and can only be a sentence of life without the possibility of parole.

2. **The Three-Judge Jury Sentencing Procedure is too ambiguous**

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

has been unable to reach a unanimous decision as to the sentence to be imposed[3] or where the first degree murder conviction is based upon a guilty plea.[4] Although the statutory scheme refers to this sentencing body as a "panel" of judges, it functions in the same way as a jury: it is required to make the same findings to support the sentence as a jury;[5] and the statutory scheme does not suggest that the procedure for reaching the

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[3] NRS 175.556 provides:

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

[4] NRS 175.558 provides:

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

[5] NRS 175.554 provides, in pertinent part:

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

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

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

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

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

A) Is the Three-Judge Panel a Court?

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

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circumstance or circumstances found.

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

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

warrant for establishing a three-judge court of any kind renders the legislative attempt to create such a court a nullity. See, e.g., State of Nevada v. Hallock, 14 Nev. 202, 205-206 (1879). This fundamental absence of legislative power to create a new, non-constitutional court was the basis of the decision in People ex rel. Rice v. Cunningham, 61 Ill.2d 353, 336 N.E.2d 1 (1975). Under the law then in effect, 1973 Ill. Rev. Stats. Ch. 38, ¶ 1005-8-1A, following a conviction of murder with specified aggravating circumstances, sentence would be imposed by a three-judge court composed of the trial judge and two other trial judges assigned by the chief judge of the judicial circuit.[7] The Illinois Supreme Court held this provision unconstitutional, reasoning as follows:

> "The constitution of 1970 ... provides that `[t]he judicial power is vested in a Supreme Court, an Appellate Court, and Circuit Courts.' (Art. VI, sec. 1.) The present judicial article contains no provision for legislative creation of new courts. [Citation]. It is clear, therefore, that the legislature has no constitutional authority to create a new court under Article VI of the 1970 Constitution.
>
> While the organization and the number of judges required for a determination of a proceeding in the Supreme Court and in the appellate court are expressly stated (Ill. Const. (1970), art. VI, secs. 3 and 5), the present Constitution is silent as to the number of judges required for the determination of a proceeding in the circuit court. This court, however, has consistently held that circuit (and superior, as classified under the previous constitution) court judges occupy independent offices with equal powers and duties, and that they cannot and do not act jointly or as a group. [Citations] .... The State has not cited nor has our research disclosed any authority that the judicial amendment of 1962 or the provisions of the judicial article of the 1970 Constitution were intended to contravene the long-standing view that proceedings in the circuit court are to be conducted by one judge.
>
> In the present case the provision of the death penalty statute providing for the three-judge panel requires that they act collectively in determining the existence of any of the enumerated circumstances and in pronouncing sentence. This is not merely a procedural requirement, but rather it involves the scope of a circuit judge's jurisdiction. The provision, therefore, is constitutionally defective because each of the judges constituting the panel is deprived of the jurisdiction vested in him by the 1970 Constitution."

336 N.E.2d at 5-6. The court followed Rice in In re Contest of Election for Off. of Gov., 93 Ill.2d 463, 444 N.E.2d 170, 173-174 (1983), holding unconstitutional a statute

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

providing for the submission of election contests to a "state election contest panel," which was composed of a panel of three circuit judges exercising the jurisdiction of a circuit court.[8]

The Nevada constitutional scheme is precisely analogous to the Illinois one. Our Constitution vests the relevant judicial power in the Supreme Court and the district courts. Art. 6 § 1. Nothing in the Nevada Constitution remotely suggests a legislative power to create new courts. In fact, the specific provisions allowing the establishment and regulation of municipal courts and justice courts, the establishment of family court divisions of the district courts, and the use of referees by family divisions, Art. 6 §§ 1, 6(2), 8, 9, imply the absence of power in the legislature to create other courts, through application of the rule that the expression of one thing amounts to the exclusion of others. E.g., Galloway v. Truesdell, 83 Nev. 13, 26, 422 P.2d 237 (1967) (expressio unius est exclusio alterius applied to jurisdictional provisions of constitution).

Just as the Illinois court recognized that the circuit judges have "equal powers and duties," the Nevada Supreme Court has recognized that the district judges have "equal and coextensive jurisdiction." E.g., State Engineer v. Sustacha, 108 Nev. 223, 225, 826 P.2d 959 (1992); Rohlfing v. District Court, 106 Nev. 902, 906, 803 P.2d 659 (1990); Warden v. Owens, 93 Nev. 255, 256, 563 P.2d 81 (1977); NRS 3.230. In Warden v. Owens, the Supreme Court relied on this constitutional rule in concluding, under Article 6, § 6 of the constitution, that a district court could not revive a defendant's right of appeal in a habeas corpus proceeding by "remanding" the case to another district court for reimposition of sentence: the court held that the district court had "no jurisdiction to

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

... direct that court how to proceed." 93 Nev. at 256 (citations omitted).[9] Thus, as the Illinois Supreme Court concluded, if three judges preside together over the same case, each judge is deprived of the constitutional jurisdiction which he or she wields in presiding over a constitutional court, to the extent that the other judges exercise their equal, constitutional power in the same case. People ex rel Rice v. Cunningham, supra, 336 N.E.2d at 6. "This is not merely a procedural requirement, but rather involves the scope of a circuit judge's jurisdiction." Id.; see also Ex parte Gardner, 22 Nev. 280, 284, 39 P. 570 (1895) ("It is not possible for one court to reach out and draw to itself jurisdiction of an action pending in another court ...").[10]

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

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

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

the constitutional power of a court.

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

The Nevada Constitution, however, has always been interpreted as strictly as the Illinois Constitution in rejecting courts not specifically authorized by the Constitution. Thus the Nevada Supreme Court's unique attempt in the context of capital sentencing to disregard all of its constitutional jurisprudence in order to save a manifestly unfair and death-prone procedure fails the basic federal constitutional due process and equal protection test of rationality: there is no rational distinction between the Court's previous applications of the constitution to invalidate legislation purporting to create non-constitutional courts and the situation presented by the non-constitutional three-judge "court" prescribed by the capital sentencing statute. Put differently, a capital defendant, has a liberty interest under the state constitution in not being sentenced by a body which is not constitutionally authorized. Since the Nevada Constitution contains no warrant for establishing a three-judge court, the imposition of sentence by such a non-constitutional court would therefore violate the federal constitutional right to due process of law. Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227 (1980). Finally, the use of such a death-prone mechanism violates the reliability guarantee of the Eighth Amendment.

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

As shown above, a three-judge panel in which all three judges exercise judicial

power is an unconstitutional monstrosity. It is equally problematic, however, if the three judges do not all act in a judicial capacity. It is barely conceivable that the statutory scheme could contemplate that the trial judge would preside over the penalty hearing as the constitutional "district court," while the other two district judges participated in the sentencing decision not as judicial officers exercising judicial functions but as quasi-jurors or assessors.[11] This construction would present equally difficult constitutional problems.

It is clear from the statutory scheme that the three-judge panel conducts exactly the same analysis in sentencing as a jury. NRS 175.554, 175.558; cf. NRS 175.556. This structure contemplates a "highly subjective" decision as to the appropriate punishment, e.g., Dawson v. State, 103 Nev. 76, 80, 734 P.2d 221 (1987) (citations omitted), and it includes an untrammeled power to decline to impose a death sentence, whatever the result of the sentencing calculus may be. Bennett v. State, 106 Nev. 135, 144, 787 P.2d 797 (1990). In reaching this decision, the statute does not suggest that the jurors, or the members of a three-judge panel, exercise a judicial - - or, as it were, professional - - discretion. Cf. NRS 176.033(1)(a); 176.035; 176.045.[12] There is certainly nothing in the legislative history of the provision to suggest that the legislature contemplated any role for the panel different from that of the jury. See Nev. Legislature,

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

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

59th Sess., Senate Judiciary Committee, Minutes at 1-2 (March 16, 1977) (referring to sentencer using "same criteria" as jury.)[13]

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

It is clear that the separation of powers provision of the Nevada Constitution prohibits the assignment by the legislature of non-judicial duties to district judges. Nev. Const. Art. 3 § 1. In Desert Chrysler-Plymouth v. Chrysler Corp., 95 Nev. 640, 644-645, 600 P.2d 1189 (1979), the legislature gave district courts the duty of determining, in an application for injunctive relief, whether "good cause" existed for establishing a new automobile dealership in a market area. Although the court proceeding was in form one for injunctive relief, the Supreme Court held that the proceeding was in fact a "pre-licensing fact-finding," which was prohibited under the separation of powers doctrine as a non-judicial function. Id; Galloway v. Truesdell, 83 Nev. 13, 23-31, 422 P.2d 237 (1967) (legislative imposition of duty on district court to examine qualifications of ministers to be certified to perform marriages, and to find facts on those issues, invalid under separation of powers); see also Esmeralda Co. v. District Court, 18 Nev. 438, 439 (1884) ("The duties performed by the district judge in pursuance of the statute did not become judicial acts merely because they were performed by a judicial officer.")

In the case of the three-judge panel, nothing in the statute suggests that the

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

sentencing function it performs is a judicial function, in the manner of a normal judicial sentencing. See NRS 176.033(1)(a); 176.035; 176.045. Rather, the panel functions essentially as a surrogate jury; and since the two judges designated to sit with the trial judge do not, and cannot, exercise judicial power as judicial officers presiding over a court, they have a role indistinguishable from that of a lay juror. Accordingly, however much the factfinding and weighing conducted in the capital sentencing proceeding resembles a judicial act in form, in fact it is no more an exercise of judicial power than the factfinding conducted in Desert Chrysler-Plymouth. The statute therefore violates the constitutional separation of powers doctrine by imposing non-judicial duties upon judicial officers.

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

disqualification. Cf. NRS 1.225, 1.235.

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

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

C) Conclusion

As shown above, the three-judge jury panel statutes are unconstitutional whether they require district judges to share their exclusive and co-extensive jurisdiction as judicial officers presiding over a court or to act in a non-judicial role as surrogate jurors. In addition to the confusion generated by this ambiguity as to the role of the district judges

in itself, it also produces unconstitutional vagueness and confusion as to how counsel can attempt to ensure the impartiality of the panel. For instance, the statues give no guidance as to whether the assigned members of the panel sit as judges and if counsel is therefore limited to pursuing disqualification pursuant to NRS 1.230, or to seek to litigate the question whether a capital defendant is entitled to a peremptory challenge of the judges. Cf. SCR 48.1.[14] If the judges serve in a non-judicial role, the statutes given no indication how the parties are to ensure the impartiality of the panel, either by invoking the procedures for conducting voir dire of jurors, or by invoking the judicial duty to disclose all information which the parties could consider relevant to the question of disqualification. Code of Judicial Conduct, Canon 3(E)(1). The failure of the statutory scheme to define the role of the members of the panel, in a way which permits adequate analysis of the procedure and adequate means for ensuring its impartiality, renders it unconstitutional.

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

Even assuming arguendo that the judicial-jury panel proceeding does not in itself violate the constitution, the absence of neutral and effective mechanisms for selecting and qualifying the panel members to act as jurors in a capital case violates the state and

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

federal guarantees of due process of law, equal protection of the laws, and a reliable sentence. Nev. Const. Art. 1 §§ 6, 8; U.S. Const. Amends VIII, XIV.

A) Selection of Judges

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

First, counsel is aware of no situation in which litigants are forced to accept a decisionmaker's assertion that a secret proceeding, in which the manner of proceeding is not disclosed, is both procedurally fair and produces proper results. Secrecy with respect to the standards employed and the actual procedure for selection is presumptively improper:

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

Matter of Chiovero, 524 Pa. 181, 570 A.2d 57, 60 (1990), quoted in Whitehead v. Comm'n on Judicial Discipline, 111 Nev. 70, n.46, 893 P.2d 866 (1995). "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification." Id. at 269. (Shearing, J., dissenting), quoting Matter of Krynicki, 983 F.2d 74, 75 (7th Cir. 1992) (on motion to seal) (Easterbrook, J.) Where there are no published standards or procedures for judicial action, secrecy exacerbates the lack of adequate procedural protections. "Unbridged discretion, however benevolently motivated, is frequently a poor substitute

for principle and procedure." In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 1438 (1967). Such unbridled discretion exercised in a secret proceeding, of which there is no record, is fundamentally inconsistent with our historical traditions and with the adversary process. See generally In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 489 (1948).[15]

Second, the absence of procedural standards and the secrecy of the selection process deprive the parties of all the constitutional protections which the adversary system provides, such as adequate notice of the proceedings, adequate opportunity to litigate the issues arising in those proceedings, and an adequate record upon which the matter can be reviewed. In capital cases, a complete record of the proceedings is clearly necessary for adequate review under the federal constitution, see Dobbs v. Zant, 506 U.S. 357, 113 S.Ct. 835, 836 (1993) (per curiam), and a record of the selection process for members of a three-judge panel is clearly necessary to any review of the propriety of

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

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

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

that procedure. See State v. Smith, 326 N.C. 792, 392 S.E.2d 362, 363 (N.C. 1990) (trial court's failure to record private conversations with prospective jurors precluded meaningful appellate review). In turn, the combination of the standardlessness of the selection proceedings with the secrecy of the procedure and the absence of adversary litigation leaves any error in that proceeding immune from identification or correction.

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

Finally, the circumstantial evidence of the effects of the selection process - - whatever that process is - - contradicts the Supreme Court's mere assertion that the selection process is proper. In general, it can hardly be gainsaid that a tribunal which imposes a sentence of death in almost 90% of the cases which come before it, Beets v. State, 107 Nev. 957, 975, 821 P.2d 1044 (1991) (Young, J., dissenting); see id. at 970-971 (Steffen, J., concurring), is a "tribunal organized to return a verdict o f death."[16] A procedure which produces such a result is, prima facie, not working rationally to select "the few cases in which [a death sentence] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 314, 92 S.Ct. 2726 (1972) (White, J.,

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

concurring) (emphasis supplied).[17]

More particularly, the normal protection against use of impermissible factors in the selection of judges or jurors from an available pool is random selection. Under state law, when a method of judge assignment is specified, it is random selection. See SCR 48.1(2)(a) (random selection of replacement for challenged judge); Washoe District Court Rules, Rule 2(1) (random assignment of cases); Eighth Judicial District Court Rules, Rule 1.60(a) (same). Generally speaking, random selection ensures against arbitrary action because it "affords no room for impermissible discrimination against individuals or groups." United States v. Eyster, 948 F.2d 1196, 1213 (11th Cir. 1991) (citations omitted). Random selection does not contemplate that judges may volunteer for duty, no more than it would allow the same panel to be selected each time.[18] Similarly, public access to the selection process ensures that the selection is based solely upon objective and permissible criteria. Cf. United States v. Davis, 546 F.2d 583, 589 (5th Cir), cert. denied 431 U.S. 906 (1977) (no indication that court was "left in the dark about the procedures employed behind closed doors" in computerized drawing of names for jury pool).

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

[18] These data strongly indicate that the Supreme Court relies on those judges who are actively willing to be appointed to three-judge panels as the method of selection. Reliance upon self-selection for participation in capital sentencing proceedings, however, is virtually the antithesis of using objective and neutral selection criteria. See State v. Lopez, 107 Idaho 726, 692 P.2d 370, 380 (App. 1984); United States v. Branscome, 682 F.2d 484 (4th Cir. 1982) (use of volunteers on grand jury introduces "subjective criterion" for service not authorized by statute); United States v. Kennedy, 548 F.2d 608, 609-610 (5th Cir.), cert. denied 434 U.S. 865 (1977); see also Duren v. Missouri, 439 U.S. 357, 367-370, 99 S.Ct. 664 (1979) (state practice allowing women to decline jury service unconstitutional where exemption not "appropriately tailored" to "important state interest"); Taylor v. Louisiana, 419 U.S. 522, 531-537, 95 S.Ct. 692 (1975) (state system excluding women from jury service unless they filed declaration volunteering for service unconstitutional). Thus the empirical evidence indicates that the Supreme Court selection process is not neutral. See, Castaneda v. Partida, 430 U.S. 482, 497, 97 S.Ct. 1272 (1977) ("selection procedure that is susceptible of abuse" supports showing of discrimination based upon statistical evidence).

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

B) Qualification of Judges

In addition to the absence of constitutionally-adequate selection criteria, the statute fails to provide for adequate inquiry by the Supreme Court or by the parties into the impartiality of the individual members of the three-judge jury. The necessity for such exploration in particular cases is, again, a function of the role of the judges in the panel proceeding: in the sentencing proceeding the judges do not act as judges but as jurors. **The law guides the sentencer up to a point, but a decision not to impose the death penalty may be made on any basis at all: no legal principle or set of facts ever requires a sentencer to impose death.**[19] Since the panel's discretion, at that point, is as untrammelled as a jury's, the same protections used to ensure the jury's impartiality must also be applied to the judges. The need for exploration of the panel judges' biases and

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

prejudices is also compelled by the fact that the judges have no track record to examine in capital cases. In the normal death penalty case, the judge plays no role at all in the sentencing and is required only to pronounce the sentence imposed by the jury. Hardison v. State, 104 Nev. 530, 534-535, 763 P.2d 52 (1988). Thus there is generally no public basis for investigating a judge's sentencing biases in capital cases; and because of the judge's limited role in the normal capital cases, a judge may not have examined his or her own attitudes regarding capital sentencing. This is true in particular of the judges who are assigned from other judicial districts: the parties are likely to have no familiarity at all with the records or known biases of those judges from communities foreign to the district of conviction.

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

Irrespective of prior Nevada Supreme Court decisions, inquiry by the parties is absolutely crucial to determine if any of the judges' biases and attitudes are inconsistent with the constitutionally-required degree of impartiality above and beyond and oath to follow the law. See Morgan v. Illinois, supra, 112 S.Ct. at 2235.[20]

The constitutional inadequacy of relying upon the judge's general oath to follow the

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

law as a guarantee of impartiality is equally apparent with respect to disclosure by the judges of specific bias. Courts routinely recognize that judges can be swayed by biases and prejudices which affect lesser mortals. See, e.g., In Interest of McFall, 556 A.2d 1370, 1376 (Pa. Super. 1989), affirmed 617 A.2d 707, 714 (Pa. 1992) (pending criminal investigation of judge); Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985) (potential employment relationship with law firm in pending case); United States v. Murphy, 768 F.2d 1518, 1538 (7th Cir. 1984) (close personal relationship between judge and prosecutor); Spires v. Hearst Corp., 420 F.Supp. 304, 306-307 (C.D. Cal. 1976) (flattering publicity about judge in party's newspaper); see generally In re Murchison, 349 U.S. 133 (1955); Tumey v. Ohio, 273 U.S. 510, 532 (1927).[21]

The Supreme Court in Paine assumed that the general judicial oath to follow the law and the availability of judicial disqualification proceedings were adequate to prevent imposition of sentence by a biased panel. Once again, the available empirical evidence shows that the Supreme Court's assumption is false. In general, of course, neither the parties nor the judge may be fully aware of a disqualifying condition. See PETA v. Bobby Berosini, Ltd., supra, 111 Nev. 431. This problem is particularly acute with respect to the panel members from outside the district, about whom the parties may know nothing, and who themselves will know nothing about the case at the time of their appointment.[22]

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

[22] The lack of available information about judges from other districts, in which community standards may be vastly different from those in the district of conviction, is particularly troublesome because district judges must run in contested elections. Nev. Const. Art. 6 § 5. Whether a judge from another district has expressed opinions during election campaigns which would be grounds for disqualification (or the likely reaction in

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

C) Conclusion

There is no question that a capital sentencing proceeding must comply with the requirements of due process of law. E.g., Morgan v. Illinois, 504 U.S. __, 112 S.Ct. 2222, 2228 (1992); Gardner v. Florida, 430 U.S. 349, 351, 97 S.Ct. 1197 (1977) (plurality opn.) Under the Eighth Amendment, heightened scrutiny of procedural

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the judge's home district to the imposition of a sentence less than death), is information not reasonably available to the parties and counsel in the district of conviction.

requirements reflects the "a special `need for reliability in the determination that death is the appropriate punishment' in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584, 108 S.Ct. 1981 (1988), quoting Gardner v. Florida, 430 U.S. 349, 363-364, 97 S.Ct. 1197 (1977) (plurality), and Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978 (1976) (White, J., concurring); accord, Ford v. Wainwright, 477 U.S. 399, 411, 414, 106 S.Ct. 2595 (1986) (plurality) (in capital cases, Eighth Amendment requires "heightened standard of reliability"). The absence of any substantive or procedural standards for the selection and qualification of members of three-judge panels, and the concealment by the Supreme Court of its procedures and criteria for making the selection of panel members, deprive the parties of any opportunity to litigate the propriety of the court's actions, and explicitly afford a "lowered standard of reliability" with respect to these proceedings. In light of the extraordinary rate of imposition of capital sentences by three-judge panels, the evidence that the selection of panel members does not proceed on a neutral basis, and the evidence that factors relevant to disqualification are routinely not disclosed, the absence of procedural protections in the selection and qualification of panel members deprives the defendant of the most fundamental requirement of due process, an impartial tribunal. E.g., Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610 (1980); In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623 (1955); In re Ross, 99 Nev. 1, 7-18, 656 P.2d 832 (1983). Rather, these procedures result in the defendant being sentenced by "a tribunal organized to return a verdict of death." Morgan v. Illinois, supra, 112 S.Ct. at 2231, quoting Witherspoon v. Illinois, 391 U.S. 510, 520, 88 S.Ct. 1770 (1968).

Accordingly, the three-judge panel procedure cannot constitutionally be applied to the defendant. In the alternative, any proceeding to appoint a three-judge panel must, at minimum, include a complete disclosure of the Supreme Court's procedures and criteria for selection of panel members (including the substance of all contacts with prospective panel members, Code of Judicial Conduct, Canon 3(B)(7), Commentary ¶ 9), and complete disclosure by all prospective panel members of the information specified in part

E, below, which counsel and the defendant consider "relevant to the question of disqualification." Code of Judicial Conduct, Canon 3(E)(1), Commentary ¶ 2.

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

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

For example, the three-judge jury procedure deprives a defendant of a reliable sentence which is an expression of the "conscience of the community," Witherspoon v. Illinois, supra, 391 U.S. at 519, with respect to the offense and the offender: a judge from Reno or Carson City as much as one from Yerington or Tonopah or Elko cannot function as the "link between contemporary community values and the penal system," id. at 519 n.15, with respect to a homicide committed in Las Vegas. A legislature may determine that the "conscience of the community" should be expressed by committing the sentencing decision to the presiding judge. See Spaziano v. Florida, supra, 468 U.S. at 464. But there is nothing in the Supreme Court's jurisprudence which suggests that the legislature may constitutionally replace an expression of the "conscience of the community" as to the appropriate sentence with a mechanism which routinely substitutes

a sentencer who will express the conscience of a different community,[23] which has an entirely different "reasoned moral response" to the offense and the offender. Cf. Alvarado v. State, 486 P.2d 891, 899-905 (Alaska 1971) (vicinage).

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

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

5. Conclusion

Based upon the authorities cited above, defendant submits that the three-judge jury sentencing procedure cannot be employed in this case and an automatic default to life without the possibility for parole on each count be imposed. In the alternative, the defendant would request the empaneling of a new jury. Assuming arguendo that the three-judge jury procedure can be constitutionally applied, the defendant and counsel consider the following information "relevant to the question of disqualification." Code of Judicial Conduct, Canon 3(E)(1), Commentary ¶ 2, and defendant submits that this court must enter an order:

A. Directing the clerk of the Nevada Supreme Court to disclose to counsel for the defendant:,

1. The method and procedures employed by the office of the clerk and by the

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

Nevada Supreme Court in selecting and appointing judges for service on panels pursuant to NRS 175.556 and 175.558;

2. The substantive criteria, if any, prescribed and employed by the Nevada Supreme Court in making such selection and appointments; and

3. The substance of all contacts between Nevada Supreme Court personnel and any and all prospective members of the three-judge panels which have been appointed pursuant to NRS 175.556 and 175.558, including the panel members appointed in this case. Code of Judicial Conduct, Canon 3(B)(7), Commentary ¶ 9.

B. Directing each member of the panel appointed in this case to respond to the following questions:

1. Whether any panel member is the subject of an informal or formal arrangement to compromise a disciplinary action, or is the subject of an investigation by the Judicial Discipline Commission, the Attorney General, or any law enforcement agency.

2. Whether any panel member has participated in disciplinary proceedings in any capacity - - either as subject of a discipline complaint, complainant, member of the Judicial Discipline Commission, informal negotiator with any participant, or in any other official or unofficial capacity - - in which any judicial officer agreed to a secret and undisclosed arrangement subjecting him or her to the supervision of the Commission, the Attorney General, or any law enforcement agency.

3. Whether any panel member has made any judicial or extrajudicial statements to any person that might indicate that the panel member has formed an opinion about any aspect of this case, about the propriety of the death penalty in this case, about the desirability of imposing the death penalty in general, or about the undesirability of considering any type of evidence or theory in mitigation.

4. Whether any panel member is a member of any racially-exclusive clubs, or clubs where - - even though not avowedly discriminatory - - there are no minority members.

5. Whether any panel member has ever used derogatory language in reference to members of a minority group.

6. Whether any panel member has ever expressed an opinion on the amount of funds used to defend capital cases as being wasted or excessive.

7. Whether any panel member has any relationship to any lawyers or witnesses for the prosecution in this case that might raise the appearance of impropriety.

8. Whether any panel member has any links to the victim in this case, or has made any statements to or about victims or victims' advocacy groups that would create an appearance of bias.

9. Whether there is any information relating to the panel member or to this case which would cause a reasonable person to harbor a doubt as to the member's impartiality, whether or not the member believes that any doubt as to his or her impartiality should actually exist.

10. Whether there were any ex parte contacts between the Nevada Supreme Court personnel and the member with regard to the appointment to the panel, and the substance of any and all such contacts. Code of Judicial Conduct, Canon 3(B)(7), Commentary ¶ 9.

DATED this 10 day of July, 2000.

Respectfully submitted,

DAVID J. FIGLER
State Bar No. 004264
309 South Third Street
P. O. Box 552316
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Defendant

Charles C. APPRENDI, Jr., Petitioner,
v.
NEW JERSEY.

No. 99-478.

Supreme Court of the United States

Argued March 28, 2000.

Decided June 26, 2000.

Defendant was convicted pursuant to guilty plea in the Superior Court, Law Division, Cumberland County, of possession of firearm for unlawful purpose and unlawful possession of prohibited weapon, and defendant was sentenced to extended term under New Jersey's hate crime statute. Defendant appealed. The Superior Court, Appellate Division, 304 N.J.Super. 147, 698 A.2d 1265, affirmed. Defendant appealed. The New Jersey Supreme Court, 159 N.J. 7, 731 A.2d 485, affirmed. Upon granting certiorari, the United States Supreme Court, Justice Stevens, held that: (1) other than fact of prior conviction, any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury and proved beyond reasonable doubt, and (2) state hate crime statute which authorized increase in maximum prison sentence based on judge's finding by preponderance of evidence that defendant acted with purpose to intimidate victim based on particular characteristics of victim violated due process clause.

Reversed and remanded.

Justice Scalia filed concurring opinion.

Justice Thomas filed concurring opinion in which Justice Scalia joined in part.

Justice O'Connor filed dissenting opinion in which Chief Justice Rehnquist and Justices Kennedy and Breyer joined.

Justice Breyer filed dissenting opinion in which Chief Justice Rehnquist joined.

[1] CRIMINAL LAW ⚿561(1)
110k561(1)
Criminal defendant is entitled to jury determination that he is guilty of every element of crime with which he is charged, beyond reasonable doubt. U.S.C.A. Const.Amends. 6, 14.

[1] JURY ⚿34(2)
230k34(2)
Criminal defendant is entitled to jury determination that he is guilty of every element of crime with which he is charged, beyond reasonable doubt. U.S.C.A. Const.Amends. 6, 14.

[2] CRIMINAL LAW ⚿561(1)
110k561(1)
Criminal defendant has right to have jury verdict based on proof beyond reasonable doubt.

[3] CRIMINAL LAW ⚿977(1)
110k977(1)
Judge's role in sentencing is constrained at its outer limits by facts alleged in indictment and found by jury.

[4] CRIMINAL LAW ⚿749
110k749
Other than the fact of prior conviction, any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury, and proved beyond reasonable doubt.

[4] CRIMINAL LAW ⚿1208.6(5)
110k1208.6(5)
Other than the fact of prior conviction, any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury, and proved beyond reasonable doubt.

[5] CRIMINAL LAW ⚿749
110k749
It is unconstitutional for legislature to remove from jury the assessment of facts, other than the fact of prior conviction, that increase prescribed range of penalties to which criminal defendant is exposed, and such facts must be established by proof beyond reasonable doubt. U.S.C.A. Const.Amend. 14.

[5] CRIMINAL LAW ⚿1208.6(5)
110k1208.6(5)
It is unconstitutional for legislature to remove from jury the assessment of facts, other than the fact of prior conviction, that increase prescribed range of penalties to which criminal defendant is exposed, and such facts must be established by proof beyond reasonable doubt. U.S.C.A. Const.Amend. 14.

[6] CIVIL RIGHTS ⚿472.1
78k472.1
New Jersey hate crime statute which allowed judge to make factual determination, based on preponderance

of evidence, which would increase maximum sentence of defendant convicted of second degree offense of unlawful possession of prohibited weapon from ten to 20 years, thereby imposing punishment identical to that state imposed for first degree crime, violated due process; due process clause required such factual determinations to be made by jury on basis of proof beyond reasonable doubt. U.S.C.A. Const.Amend. 14; N.J.S.A. 2C:43-6, subd. a(1), 2C:43-7, subd. a(3), 2C:44-3, subd. e.

[6] CONSTITUTIONAL LAW ⚿270(1)
92k270(1)
New Jersey hate crime statute which allowed judge to make factual determination, based on preponderance of evidence, which would increase maximum sentence of defendant convicted of second degree offense of unlawful possession of prohibited weapon from ten to 20 years, thereby imposing punishment identical to that state imposed for first degree crime, violated due process; due process clause required such factual determinations to be made by jury on basis of proof beyond reasonable doubt. U.S.C.A. Const.Amend. 14; N.J.S.A. 2C:43-6, subd. a(1), 2C:43-7, subd. a(3), 2C:44-3, subd. e.

[6] CRIMINAL LAW ⚿1206.1(1)
110k1206.1(1)
New Jersey hate crime statute which allowed judge to make factual determination, based on preponderance of evidence, which would increase maximum sentence of defendant convicted of second degree offense of unlawful possession of prohibited weapon from ten to 20 years, thereby imposing punishment identical to that state imposed for first degree crime, violated due process; due process clause required such factual determinations to be made by jury on basis of proof beyond reasonable doubt. U.S.C.A. Const.Amend. 14; N.J.S.A. 2C:43-6, subd. a(1), 2C:43-7, subd. a(3), 2C:44-3, subd. e.

[7] CRIMINAL LAW ⚿568
110k568
Relevant inquiry in determining whether finding is essential element of offense which must be decided by jury beyond reasonable doubt is one not of form, but of effect, namely whether required finding exposes defendant to greater punishment than that authorized by jury's guilty verdict.

[8] CIVIL RIGHTS ⚿472.1
78k472.1
Mere fact that state legislature placed its hate crime sentence enhancer within sentencing provisions of criminal code does not mean that finding of biased purpose to intimidate which is required for hate crime sentence enhancement is not essential element of offense which must be decided by jury beyond reasonable doubt. N.J.S.A. 2C:43-6, subd. a(1), 2C:43-7, subd. a(3), 2C:44- 3, subd. e.

[8] CRIMINAL LAW ⚿1208.6(1)
110k1208.6(1)
Mere fact that state legislature placed its hate crime sentence enhancer within sentencing provisions of criminal code does not mean that finding of biased purpose to intimidate which is required for hate crime sentence enhancement is not essential element of offense which must be decided by jury beyond reasonable doubt. N.J.S.A. 2C:43-6, subd. a(1), 2C:43-7, subd. a(3), 2C:44- 3, subd. e.

Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

*1 Petitioner Apprendi fired several shots into the home of an African- American family and made a statement--which he later retracted--that he did not want the family in his neighborhood because of their race. He was charged under New Jersey law with, inter alia, second-degree possession of a firearm for an unlawful purpose, which carries a prison term of 5 to 10 years. The count did not refer to the State's hate crime statute, which provides for an enhanced sentence if a trial judge finds, by a preponderance of the evidence, that the defendant committed the crime with a purpose to intimidate a person or group because of, inter alia, race. After Apprendi pleaded guilty, the prosecutor filed a motion to enhance the sentence. The court found by a preponderance of the evidence that the shooting was racially motivated and sentenced Apprendi to a 12-year term on the firearms count. In upholding the sentence, the appeals court rejected Apprendi's claim that the Due Process Clause requires that a bias finding be proved to a jury beyond a reasonable doubt. The State Supreme Court affirmed.

Held: The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Pp. ---- - ---- 7-31.

(a) The answer to the narrow constitutional question presented--whether Apprendi's sentence was permissible, given that it exceeds the 10-year maximum for the offense charged--was foreshadowed by the holding in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311, that, with regard to federal law, the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. The Fourteenth Amendment commands the same answer when a state statute is involved. Pp. ---- - ---- 7-9.

(b) The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. E.g., In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368. The historical foundation for these principles extends down centuries into the common law. While judges in this country have long exercised discretion in sentencing, such discretion is bound by the range of sentencing options prescribed by the legislature. See, e.g., United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed.2d 592. The historic inseparability of verdict and judgment and the consistent limitation on judges' discretion highlight the novelty of a scheme that removes the jury from the determination of a fact that exposes the defendant to a penalty exceeding the maximum he could receive if punished according to the facts reflected in the jury verdict alone. Pp. ---- - ---- 9-18.

(c) McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67, was the first case in which the Court used "sentencing factor" to refer to a fact that was not found by the jury but could affect the sentence imposed by the judge. In finding that the scheme at issue there did not run afoul of Winship's strictures, this Court did not budge from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, id., at 85-88, 106 S.Ct. 2411, and (2) a state scheme that keeps from the jury facts exposing defendants to greater or additional punishment may raise serious constitutional concerns, id., at 88, 106 S.Ct. 2411. Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350--in which the Court upheld a federal law allowing a judge to impose an enhanced sentence based on prior convictions not alleged in the indictment--represents at best an exceptional departure from the historic practice. Pp. ---- - ----, 19-24.

*2 (d) In light of the constitutional rule expressed here, New Jersey's practice cannot stand. It allows a jury to convict a defendant of a second- degree offense on its finding beyond a reasonable doubt and then allows a judge to impose punishment identical to that New Jersey provides for first-degree crimes on his finding, by a preponderance of the evidence, that the defendant's purpose was to intimidate his victim based on the victim's particular characteristic. The State's argument that the biased purpose finding is not an "element" of a distinct hate crime offense but a "sentencing factor" of motive is nothing more than a disagreement with the rule applied in this case. Beyond this, the argument cannot succeed on its own terms. It does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict, as does the sentencing "enhancement" here. The degree of culpability the legislature associates with factually distinct conduct has significant implications both for a defendant's liberty and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment. That the State placed the enhancer within the criminal code's sentencing provisions does not mean that it is not an essential element of the offense. Pp. ---- - ----, 25-31.

159 N.J. 7, 731 A.2d 485, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. SCALIA, J., filed a concurring opinion. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined as to Parts I and II. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined.

Joseph D. O'Neill, for petitioner.

Lisa S. Gochman, Trenton, NJ, for respondent.

Edward C. DuMont, for United States as amicus curiae, by special leave of the Court.

Justice STEVENS delivered the opinion of the Court.

*3 A New Jersey statute classifies the possession of a firearm for an unlawful purpose as a "second-degree" offense. N.J. Stat. Ann. § 2C:39- 4(a) (West 1995). Such an offense is punishable by imprisonment for "between five years and 10 years." § 2C:43-6(a)(2). A separate statute, described by that State's Supreme Court as a "hate crime" law, provides for an "extended term" of imprisonment if the trial judge finds, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." N.J. Stat. Ann. § 2C:44-3(e) (West Supp.2000). The extended term authorized by the hate crime law for second-degree offenses is imprisonment for "between 10 and 20 years." § 2C:43-7(a)(3).

The question presented is whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.

I

At 2:04 a.m. on December 22, 1994, petitioner Charles C. Apprendi, Jr., fired several .22-caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood in Vineland, New Jersey. Apprendi was promptly arrested and, at 3:05 a.m., admitted that he was the shooter. After further questioning, at 6:04 a.m., he made a statement-- which he later retracted-- that even though he did not know the occupants of the house personally, "because they are black in color he does not want them in the neighborhood." 159 N.J. 7, 10, 731 A.2d 485, 486 (1999).

A New Jersey grand jury returned a 23-count indictment charging Apprendi with four first-degree, eight second-degree, six third-degree, and five fourth-degree offenses. The charges alleged shootings on four different dates, as well as the unlawful possession of various weapons. None of the counts referred to the hate crime statute, and none alleged that Apprendi acted with a racially biased purpose.

The parties entered into a plea agreement, pursuant to which Apprendi pleaded guilty to two counts (3 and 18) of second-degree possession of a firearm for an unlawful purpose, N.J. Stat. Ann. § 2C:39-4a (West 1995), and one count (22) of the third-degree offense of unlawful possession of an antipersonnel bomb, § 2C:39-3a; the prosecutor dismissed the other 20 counts. Under state law, a second-degree offense carries a penalty range of 5 to 10 years, § 2C:43-6(a)(2); a third-degree offense carries a penalty range of between 3 and 5 years, § 2C:43-6(a)(3). As part of the plea agreement, however, the State reserved the right to request the court to impose a higher "enhanced" sentence on count 18 (which was based on the December 22 shooting) on the ground that that offense was committed with a biased purpose, as described in § 2C:44- 3(e). Apprendi, correspondingly, reserved the right to challenge the hate crime sentence enhancement on the ground that it violates the United States Constitution.

At the plea hearing, the trial judge heard sufficient evidence to establish Apprendi's guilt on counts 3, 18, and 22; the judge then confirmed that Apprendi understood the maximum sentences that could be imposed on those counts. Because the plea agreement provided that the sentence on the sole third-degree offense (count 22) would run concurrently with the other sentences, the potential sentences on the two second-degree counts were critical. If the judge found no basis for the biased purpose enhancement, the maximum consecutive sentences on those counts would amount to 20 years in aggregate; if, however, the judge enhanced the sentence on count 18, the maximum on that count alone would be 20 years and the maximum for the two counts in aggregate would be 30 years, with a 15-year period of parole ineligibility.

*4 After the trial judge accepted the three guilty pleas, the prosecutor filed a formal motion for an extended term. The trial judge thereafter held an evidentiary hearing on the issue of Apprendi's "purpose" for the shooting on December 22. Apprendi adduced evidence from a psychologist and from seven character witnesses who testified that he did not have a reputation for racial bias. He also took the stand himself, explaining that the incident was an unintended consequence of overindulgence in alcohol, denying that he was in any way biased against African-Americans, and denying that his statement to the police had been accurately described. The judge, however, found the police officer's testimony credible, and concluded that the evidence supported a finding "that the crime was motivated by racial bias." App. to Pet. for Cert. 143a. Having found "by a preponderance of the evidence" that Apprendi's actions were taken "with a purpose to intimidate" as provided by the statute, id., at 138a, 139a, 144a, the

trial judge held that the hate crime enhancement applied. Rejecting Apprendi's constitutional challenge to the statute, the judge sentenced him to a 12-year term of imprisonment on count 18, and to shorter concurrent sentences on the other two counts.

Apprendi appealed, arguing, inter alia, that the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt, In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Over dissent, the Appellate Division of the Superior Court of New Jersey upheld the enhanced sentence. 304 N.J.Super. 147, 698 A.2d 1265 (1997). Relying on our decision in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), the appeals court found that the state legislature decided to make the hate crime enhancement a "sentencing factor," rather than an element of an underlying offense--and that decision was within the State's established power to define the elements of its crimes. The hate crime statute did not create a presumption of guilt, the court determined, and did not appear "tailored to permit the ... finding to be a tail which wags the dog of the substantive offense." 304 N.J.Super., at 154, 698 A.2d, at 1269 (quoting McMillan, 477 U.S., at 88, 106 S.Ct. 2411). Characterizing the required finding as one of "motive," the court described it as a traditional "sentencing factor," one not considered an "essential element" of any crime unless the legislature so provides. 304 N.J.Super., at 158, 698 A.2d, at 1270. While recognizing that the hate crime law did expose defendants to "greater and additional punishment," id., at 156, 698 A.2d, at 1269 (quoting McMillan, 477 U.S., at 88, 106 S.Ct. 2411), the court held that that "one factor standing alone" was not sufficient to render the statute unconstitutional, Ibid.

A divided New Jersey Supreme Court affirmed. 159 N.J. 7, 731 A.2d 485 (1999). The court began by explaining that while due process only requires the State to prove the "elements" of an offense beyond a reasonable doubt, the mere fact that a state legislature has placed a criminal component "within the sentencing provisions" of the criminal code "does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." Id., at 20, 731 A.2d, at 492. "Were that the case," the court continued, "the Legislature could just as easily allow judges, not juries, to determine if a kidnapping victim has been released unharmed." Ibid. (citing state precedent requiring such a finding to be submitted to a jury and proved beyond a reasonable doubt). Neither could the constitutional question be settled simply by defining the hate crime statute's "purpose to intimidate" as "motive" and thereby excluding the provision from any traditional conception of an "element" of a crime. Even if one could characterize the language this way--and the court doubted that such a characterization was accurate--proof of motive did not ordinarily "increase the penal consequences to an actor." Ibid. Such "[l]abels," the court concluded, would not yield an answer to Apprendi's constitutional question. Ibid.

*5 While noting that we had just last year expressed serious doubt concerning the constitutionality of allowing penalty-enhancing findings to be determined by a judge by a preponderance of the evidence, Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), the court concluded that those doubts were not essential to our holding. Turning then, as the appeals court had, to McMillan, as well as to Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the court undertook a multifactor inquiry and then held that the hate crime provision was valid. In the majority's view, the statute did not allow impermissible burden shifting, and did not "create a separate offense calling for a separate penalty." 159 N.J., at 24, 731 A.2d, at 494. Rather, "the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor." Ibid., 731 A.2d, at 494-495. As had the appeals court, the majority recognized that the state statute was unlike that in McMillan inasmuch as it increased the maximum penalty to which a defendant could be subject. But it was not clear that this difference alone would "change the constitutional calculus," especially where, as here, "there is rarely any doubt whether the defendants committed the crimes with the purpose of intimidating the victim on the basis of race or ethnicity." 159 N.J., at 24-25, 731 A.2d, at 495. Moreover, in light of concerns "idiosyncratic" to hate crime statutes drawn carefully to avoid "punishing thought itself," the enhancement served as an appropriate balance between those concerns and the State's compelling interest in vindicating the right "to be free of invidious discrimination." Id., at 25- 26, 731 A.2d, at 495.

The dissent rejected this conclusion, believing instead that the case turned on two critical characteristics: (1) "a defendant's mental state in committing the subject offense ... necessarily involves a finding so integral to

the charged offense that it must be characterized as an element thereof"; and (2) "the significantly increased sentencing range triggered by ... the finding of a purpose to intimidate" means that the purpose "must be treated as a material element [that] must be found by a jury beyond a reasonable doubt." Id., at 30, 731 A.2d, at 498. In the dissent's view, the facts increasing sentences in both Almendarez-Torres (recidivism) and Jones (serious bodily injury) were quite distinct from New Jersey's required finding of purpose here; the latter finding turns directly on the conduct of the defendant during the crime and defines a level of culpability necessary to form the hate crime offense. While acknowledging "analytical tensions" in this Court's post-Winship jurisprudence, the dissenters concluded that "there can be little doubt that the sentencing factor applied to this defendant--the purpose to intimidate a victim because of race--must fairly be regarded as an element of the crime requiring inclusion in the indictment and proof beyond a reasonable doubt." 159 N.J., at 51, 731 A.2d, at 512.

*6 We granted certiorari, 528 U.S. 1018, 120 S.Ct. 525, 145 L.Ed.2d 407 (1999), and now reverse.

II

It is appropriate to begin by explaining why certain aspects of the case are not relevant to the narrow issue that we must resolve. First, the State has argued that even without the trial judge's finding of racial bias, the judge could have imposed consecutive sentences on counts 3 and 18 that would have produced the 12-year term of imprisonment that Apprendi received; Apprendi's actual sentence was thus within the range authorized by statute for the three offenses to which he pleaded guilty. Brief for Respondent 4. The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count. The finding is legally significant because it increased--indeed, it doubled--the maximum range within which the judge could exercise his discretion, converting what otherwise was a maximum 10-year sentence on that count into a minimum sentence. The sentences on counts 3 and 22 have no more relevance to our disposition than the dismissal of the remaining 18 counts.

Second, although the constitutionality of basing an enhanced sentence on racial bias was argued in the New Jersey courts, that issue was not raised here. [FN1] The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is. The strength of the state interests that are served by the hate crime legislation has no more bearing on this procedural question than the strength of the interests served by other provisions of the criminal code.

FN1. We have previously rejected a First Amendment challenge to an enhanced sentence based on a jury finding that the defendant had intentionally selected his victim because of the victim's race. Wisconsin v. Mitchell, 508 U.S. 476, 480, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993).

Third, we reject the suggestion by the State Supreme Court that "there is rarely any doubt" concerning the existence of the biased purpose that will support an enhanced sentence, 159 N.J., at 25, 731 A.2d, at 495. In this very case, that issue was the subject of the full evidentiary hearing we described. We assume that both the purpose of the offender, and even the known identity of the victim, will sometimes be hotly disputed, and that the outcome may well depend in some cases on the standard of proof and the identity of the factfinder.

*7 Fourth, because there is no ambiguity in New Jersey's statutory scheme, this case does not raise any question concerning the State's power to manipulate the prosecutor's burden of proof by, for example, relying on a presumption rather than evidence to establish an element of an offense, cf. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), or by placing the affirmative defense label on "at least some elements" of traditional crimes, Patterson v. New York, 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The prosecutor did not invoke any presumption to buttress the evidence of racial bias and did not claim that Apprendi had the burden of disproving an improper motive. The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.

Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the

maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id., at 243, n. 6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

III

In his 1881 lecture on the criminal law, Oliver Wendell Holmes, Jr., observed: "The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed." [FN2] New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

FN2. O. Holmes, The Common Law 40 (M. Howe ed.1963).

[1] At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. [FN3] Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); see also Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); Winship, 397 U.S., at 364, 90 S.Ct. 1068 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

FN3. Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. He relies entirely on the fact that the "due process of law" that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to a trial by jury, Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and the right to have every element of the offense proved beyond a reasonable doubt, In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). That Amendment has not, however, been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" that was implicated in our recent decision in Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). We thus do not address the indictment question separately today.

*8 As we have, unanimously, explained, Gaudin, 515 U.S., at 510-511, 115 S.Ct. 2310, the historical foundation for our recognition of these principles extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter Blackstone) (emphasis added). See also Duncan v. Louisiana, 391 U.S. 145, 151-154, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

[2] Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. "The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.' C. McCormick, Evidence § 321, pp. 681-682 (1954); see also 9 J. Wigmore, Evidence § 2497 (3d ed.1940)." Winship, 397 U.S., at 361, 90 S.Ct. 1068. We went on to explain that the reliance on the "reasonable doubt" standard among common-law jurisdictions " 'reflect[s] a profound judgment about the way in which law should be enforced and justice administered.' " Id., at 361-362, 90 S.Ct. 1068 (quoting Duncan, 391 U.S., at 155, 88 S.Ct. 1444).

Any possible distinction between an "element" of a

felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court [FN4] as it existed during the years surrounding our Nation's founding. As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, ... stated with such certainty and precision, that the defendant ... may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly ... and that there may be no doubt as to the judgment which should be given, if the defendant be convicted." J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) (emphasis added). The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime. See 4 Blackstone 369-370 (after verdict, and barring a defect in the indictment, pardon or benefit of clergy, "the court must pronounce that judgment, which the law hath annexed to the crime " (emphasis added)).

FN4. "[A]fter trial and conviction are past," the defendant is submitted to "judgment" by the court, 4 Blackstone 368--the stage approximating in modern terms the imposition of sentence.

*9 Thus, with respect to the criminal law of felonious conduct, "the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction- specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence (unless he thought in the circumstances that the sentence was so inappropriate that he should invoke the pardon process to commute it)." Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, In The Trial Jury in England, France, Germany 1700-1900, pp. 36-37 (A. Schioppa ed.1987). [FN5] As Blackstone, among many others, has made clear, [FN6] "[t]he judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law." 3 Blackstone 396 (emphasis deleted). [FN7]

FN5. As we suggested in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), juries devised extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant. Id., at 245, 119 S.Ct. 1215 ("This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part. 4 Blackstone 238-239").

FN6. As the principal dissent would chide us for this single citation to Blackstone's third volume, rather than his fourth, post, at ----, 3 (dissenting opinion), we suggest that Blackstone himself directs us to it for these purposes. See 4 Blackstone 343 ("The antiquity and excellence of this [jury] trial, for the settling of civil property, has before been explained at large.") See id., at 379 ("Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And, if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases!") 4 id., at 343 ("And it will hold much stronger in criminal cases: since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property"); 4 id., at 344 ("What was said of juries in general, and the trial thereby, in civil cases, will greatly shorten our present remarks, with regard to the trial of criminal suits; indictments, informations, and appeals").

FN7. The common law of punishment for misdemeanors--those "smaller faults, and omissions of less consequence," 4 Blackstone 5--was, as we noted in Jones, 526 U.S., at 244, 119 S.Ct. 1215, substantially more dependent upon judicial discretion. Subject to the limitations that the punishment not "touch life or limb," that it be proportionate to the offense, and, by the 17th century, that it not be "cruel or unusual," judges most commonly imposed discretionary "sentences" of fines or whippings upon misdemeanant offenders. J. Baker, Introduction to English Legal History 584 (3d ed.1990). Actual sentences of imprisonment for such offenses, however, were rare at common law until the late 18th century, ibid., for "the idea of prison as a punishment would have seemed an absurd expense," Baker, Criminal Courts and Procedure at Common Law 1550-1800, in Crime in England 1550-1800, p. 43 (J. Cockburn ed. 1977).

This practice at common law held true when indictments were issued pursuant to statute. Just as the circumstances of the crime and the intent of the defendant at the time of commission were often

essential elements to be alleged in the indictment, so too were the circumstances mandating a particular punishment. "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown *170]." Archbold, Pleading and Evidence in Criminal Cases, at 51. If, then, "upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only." Id., at 188. [FN8]

FN8. To the extent the principal dissent appears to take issue with our reliance on Archbold (among others) as an authoritative source on the common law of the relevant period, post, at ---- - ---- 3-4, we simply note that Archbold has been cited by numerous opinions of this Court for that very purpose, his Criminal Pleading treatise being generally viewed as "an essential reference book for every criminal lawyer working in the Crown Court." Biographical Dictionary of the Common Law 13 (A. Simpson ed.1984); see also Holdsworth, The Literature of the Common Law, in 13 A History of English Law 464-465 (A. Goodhart & H. Hanbury eds.1952).

We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion--taking into consideration various factors relating both to offense and offender--in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case. See, e.g., Williams v. New York, 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949) ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law " (emphasis added)). As in Williams, our periodic recognition of judges' broad discretion in sentencing--since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range, Note, The Admissibility of Character Evidence in Determining Sentence, 9 U. Chi. L.Rev. 715 (1942)--has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature. See, e.g., United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) (agreeing that "[t]he Government is also on solid ground in asserting that a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review" (emphasis added)); Williams, 337 U.S., at 246, 247, 69 S.Ct. 1079 (explaining that, in contrast to the guilt stage of trial, the judge's task in sentencing is to determine, "within fixed statutory or constitutional limits[,] the type and extent of punishment after the issue of guilt" has been resolved). [FN9]

FN9. See also 1 J. Bishop, Criminal Law §§ 933-934(1) (9th ed. 1923) ("With us legislation ordinarily fixes the penalties for the common law offences equally with the statutory ones .... Under the common-law procedure, the court determines in each case what within the limits of the law shall be the punishment,--the question being one of discre-tion") (emphasis added); id., § 948 ("[I]f the law has given the court a discretion as to the punishment, it will look in pronouncing sentence into any evidence proper to influence a judicious magistrate to make it heavier or lighter, yet not to exceed the limits fixed for what of crime is within the allegation and the verdict. Or this sort of evidence may be placed before the jury at the trial, if it has the power to assess the punishment. But in such a case the aggravating matter must not be of a crime separate from the one charged in the indictment,--a rule not applicable where a delinquent offence under an habitual criminal act is involved") (footnotes omitted).

The principal dissent's discussion of Williams, post, at ---- - ----24- 26, fails to acknowledge the significance of the Court's caveat that judges' discretion is constrained by the "limits fixed by law." Nothing in Williams implies that a judge may impose a more severe sentence than the maximum authorized by the facts found by the jury. Indeed, the commentators cited in the dissent recognize precisely this same limitation. See post, at ---- 23 (quoting K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998) ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion ..., permitting the sentencing judge to impose any term of imprisonment and any fine up to the statutory maximum " (emphasis added)); Lynch, Towards A Model Penal Code, Second (Federal?), 2 Buff.Crim. L.Rev. 297, 320 (1998) (noting that judges in discretionary sentencing took account of facts relevant to a particular offense "within the spectrum of conduct covered by the statute of conviction")).

*10 [3] The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone. [FN10]

FN10. In support of its novel view that this Court has "long recognized" that not all facts affecting punishment need go to the jury, post, at ---- - ---- 1-2, the principal dissent cites three cases decided within the past quarter century; and each of these is plainly distinguishable. Rather than offer any historical account of its own that would support the notion of a "sentencing factor" legally increasing punishment beyond the statutory maximum--and Justice THOMAS' concurring opinion in this case makes clear that such an exercise would be futile--the dissent proceeds by mischaracterizing our account. The evidence we describe that punishment was, by law, tied to the offense (enabling the defendant to discern, barring pardon or clergy, his punishment from the face of the indictment), and the evidence that American judges have exercised sentencing discretion within a legally prescribed range (enabling the defendant to discern from the statute of indictment what maximum punishment conviction under that statute could bring), point to a single, consistent conclusion: The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition "elements" of a separate legal offense.

We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears "that the jury right could be lost not only by gross denial, but by erosion." Jones, 526 U.S., at 247-248, 119 S.Ct. 1215. [FN11] But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt. As we made clear in Winship, the "reasonable doubt" requirement "has a vital role in our criminal procedure for cogent reasons." 397 U.S., at 363, 90 S.Ct. 1068. Prosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and ... the certainty that he would be stigmatized by the conviction." Ibid. We thus require this, among other, procedural protections in order to "provid[e] concrete substance for the presumption of innocence," and to reduce the risk of imposing such deprivations erroneously. Ibid. If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not--at the moment the State is put to proof of those circumstances--be deprived of protections that have, until that point, unquestionably attached.

FN11. As we stated in Jones, "One contributor to the ratification debates, for example, commenting on the jury trial guarantee in Art. III, § 2, echoed Blackstone in warning of the need 'to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY.' A [New Hampshire] Farmer, No. 3, June 6, 1788, quoted in The Complete Bill of Rights 477 (N. Cogan ed.1997)." 526 U.S., at 248, 119 S.Ct. 1215.

Since Winship, we have made clear beyond peradventure that Winship's due process and associated jury protections extend, to some degree, "to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." Almendarez-Torres, 523 U.S., at 251, 118 S.Ct. 1219 (SCALIA, J., dissenting). This was a primary lesson of Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), in which we invalidated a Maine statute that presumed that a defendant who acted with an intent to kill possessed the "malice aforethought" necessary to constitute the State's murder offense (and therefore, was subject to that crime's associated punishment of life imprisonment). The statute placed the burden on the defendant of proving, in rebutting the statutory presumption, that he acted with a lesser degree of culpability, such as in the heat of passion, to win a reduction in the offense from murder to manslaughter (and thus a reduction of the maximum punishment of 20 years).

*11 The State had posited in Mullaney that requiring a defendant to prove heat-of-passion intent to overcome a presumption of murderous intent did not implicate Winship protections because, upon conviction of either offense, the defendant would lose his liberty and face societal stigma just the same. Rejecting this argument, we acknowledged that criminal law "is concerned not only with guilt or

innocence in the abstract, but also with the degree of criminal culpability" assessed. 421 U.S., at 697-698, 95 S.Ct. 1881. Because the "consequences " of a guilty verdict for murder and for manslaughter differed substantially, we dismissed the possibility that a State could circumvent the protections of Winship merely by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." 421 U.S., at 698, 95 S.Ct. 1881. [FN12]

FN12. Contrary to the principal dissent's suggestion, post, at ---- - ---- 8-10, Patterson v. New York, 432 U.S. 197, 198, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), posed no direct challenge to this aspect of Mullaney. In upholding a New York law allowing defendants to raise and prove extreme emotional distress as an affirmative defense to murder, Patterson made clear that the state law still required the State to prove every element of that State's offense of murder and its accompanying punishment. "No further facts are either presumed or inferred in order to constitute the crime." 432 U.S., at 205-206, 97 S.Ct. 2319. New York, unlike Maine, had not made malice aforethought, or any described mens rea, part of its statutory definition of second-degree murder; one could tell from the face of the statute that if one intended to cause the death of another person and did cause that death, one could be subject to sentence for a second-degree offense. Id., at 198, 97 S.Ct. 2319. Responding to the argument that our view could be seen "to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes," the Court made clear in the very next breath that there were "obviously constitutional limits beyond which the States may not go in this regard." Id., at 210, 97 S.Ct. 2319.

IV

It was in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), that this Court, for the first time, coined the term "sentencing factor" to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge. That case involved a challenge to the State's Mandatory Minimum Sentencing Act, 42 Pa. Cons.Stat. § 9712 (1982). According to its provisions, anyone convicted of certain felonies would be subject to a mandatory minimum penalty of five years imprisonment if the judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" in the course of committing one of the specified felonies. 477 U.S., at 81-82, 106 S.Ct. 2411. Articulating for the first time, and then applying, a multifactor set of criteria for determining whether the Winship protections applied to bar such a system, we concluded that the Pennsylvania statute did not run afoul of our previous admonitions against relieving the State of its burden of proving guilt, or tailoring the mere form of a criminal statute solely to avoid Winship's strictures. 477 U.S., at 86-88, 106 S.Ct. 2411.

We did not, however, there budge from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, id., at 85-88, 106 S.Ct. 2411, and (2) that a state scheme that keeps from the jury facts that "expos[e] [defendants] to greater or additional punishment," id., at 88, 106 S.Ct. 2411, may raise serious constitutional concern. As we explained:

*12 "Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm.... The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense. Petitioners' claim that visible possession under the Pennsylvania statute is 'really' an element of the offenses for which they are being punished--that Pennsylvania has in effect defined a new set of upgraded felonies--would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment, cf. 18 U.S.C. § 2113(d) (providing separate and greater punishment for bank robberies accomplished through 'use of a dangerous weapon or device'), but it does not." Id., at 87-88, 106 S.Ct. 2411. [FN13]

FN13. The principal dissent accuses us of today "overruling McMillan." Post, at ---- 11. We do not overrule McMillan. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict--a limitation identified in the McMillan opinion itself. Conscious of the likelihood that legislative decisions may have been made in reliance on McMillan, we reserve for another day the question whether stare decisis considerations preclude reconsideration of its narrower holding.

Finally, as we made plain in Jones last Term, Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), represents

at best an exceptional departure from the historic practice that we have described. In that case, we considered a federal grand jury indictment, which charged the petitioner with "having been 'found in the United States ... after being deported,' " in violation of 8 U.S.C. § 1326(a)--an offense carrying a maximum sentence of two years. 523 U.S., at 227, 118 S.Ct. 1219. Almendarez- Torres pleaded guilty to the indictment, admitting at the plea hearing that he had been deported, that he had unlawfully reentered this country, and that "the earlier deportation had taken place 'pursuant to' three earlier 'convictions' for aggravated felonies." Ibid. The Government then filed a presentence report indicating that Almendarez-Torres' offense fell within the bounds of § 1326(b) because, as specified in that provision, his original deportation had been subsequent to an aggravated felony conviction; accordingly, Almendarez-Torres could be subject to a sentence of up to 20 years. Almendarez- Torres objected, contending that because the indictment "had not mentioned his earlier aggravated felony convictions," he could be sentenced to no more than two years in prison. Ibid.

Rejecting Almendarez-Torres' objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of Winship in that case. Because Almendarez-Torres had admitted the three earlier convictions for aggravated felonies--all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own--no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court. Although our conclusion in that case was based in part on our application of the criteria we had invoked in McMillan, the specific question decided concerned the sufficiency of the indictment. More important, as Jones made crystal clear, 526 U.S., at 248-249, 119 S.Ct. 1215, our conclusion in Almendarez-Torres turned heavily upon the fact that the additional sentence to which the defendant was subject was "the prior commission of a serious crime." 523 U.S., at 230, 118 S.Ct. 1219; see also id., at 243, 118 S.Ct. 1219 (explaining that "recidivism ... is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence"); id., at 244, 118 S.Ct. 1219 (emphasizing "the fact that recidivism 'does not relate to the commission of the offense ...' "); Jones, 526 U.S., at 249-250, n. 10, 119 S.Ct. 1215 ("The majority and the dissenters in Almendarez-Torres disagreed over the legitimacy of the Court's decision to restrict its holding to recidivism, but both sides agreed that the Court had done just that"). Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range. [FN14]

FN14. The principal dissent's contention that our decision in Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998), "demonstrates that Almendarez-Torres was" something other than a limited exception to the jury trial rule is both inaccurate and misleading. Post, at ---- 14. Monge was another recidivism case in which the question presented and the bulk of the Court's analysis related to the scope of double jeopardy protections in sentencing. The dissent extracts from that decision the majority's statement that "the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence." 524 U.S., at 729, 118 S.Ct. 2246. Far from being part of "reasoning essential" to the Court's holding, post, at ---- 13, that statement was in response to a dissent by Justice SCALIA on an issue that the Court itself had, a few sentences earlier, insisted "was neither considered by the state courts nor discussed in petitioner's brief before this Court." 524 U.S., at 728, 118 S.Ct. 2246. Moreover, the sole citation supporting the Monge Court's proposition that "the Court has rejected" such a rule was none other than Almendarez-Torres; as we have explained, that case simply cannot bear that broad reading. Most telling of Monge's distance from the issue at stake in this case is that the double jeopardy question in Monge arose because the State had failed to satisfy its own statutory burden of proving beyond a reasonable doubt that the defendant had committed a prior offense (and was therefore subject to an enhanced, recidivism-based sentence). 524 U.S., at 725, 118 S.Ct. 2246 ("According to California law, a number of procedural safeguards surround the assessment of prior conviction allegations: Defendants may invoke the right to a jury trial ...; the prosecution must prove the allegation beyond a reasonable doubt; and the rules of evidence apply"). The Court thus itself warned against a contrary double jeopardy rule that could "create disincentives that would diminish these important procedural protections." Id., at 734, 118 S.Ct. 2246.

*13 Even though it is arguable that Almendarez-Torres was incorrectly decided, [FN15] and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi

does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

> FN15. In addition to the reasons set forth in Justice SCALIA's dissent, 523 U.S., at 248-260, 118 S.Ct. 1219, it is noteworthy that the Court's extensive discussion of the term "sentencing factor" virtually ignored the pedigree of the pleading requirement at issue. The rule was succinctly stated by Justice Clifford in his separate opinion in United States v. Reese, 92 U.S. 214, 232-233, 23 L.Ed. 563 (1875): "[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." As he explained in "[s]peaking of that principle, Mr. Bishop says it pervades the entire system of the adjudged law of criminal procedure, as appears by all the cases; that, wherever we move in that department of our jurisprudence, we come in contact with it; and that we can no more escape from it than from the atmosphere which surrounds us. 1 Bishop, Cr. Pro., 2d ed., sect. 81; Archbold's Crim. Plead., 15th ed., 54; 1 Stark Crim. Plead., 236; 1 Am. Cr. Law, 6th rev. ed., sect. 364; Steel v. Smith, 1 Barn. & Ald. 99."

[4][5] In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in Jones. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, 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.). [FN16]

> FN16. The principal dissent would reject the Court's rule as a "meaningless formalism," because it can conceive of hypothetical statutes that would comply with the rule and achieve the same result as the New Jersey statute. Post, at ---- - ---- 17-20. While a State could, hypothetically, undertake to revise its entire criminal code in the manner the dissent suggests, post, at ---- 18--extending all statutory maximum sentences to, for example, 50 years and giving judges guided discretion as to a few specially selected factors within that range--this possibility seems remote. Among other reasons, structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose every defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged "to make its choices concerning the substantive content of its criminal laws with full awareness of the consequence, unable to mask substantive policy choices" of exposing all who are convicted to the maximum sentence it provides. Patterson v. New York, 432 U.S., at 228- 229, n. 13, 97 S.Ct. 2319 (Powell, J., dissenting). So exposed, "[t]he political check on potentially harsh legislative action is then more likely to operate." Ibid.
>
> In all events, if such an extensive revision of the State's entire criminal code were enacted for the purpose the dissent suggests, or if New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not, post, at ---- 20), we would be required to question whether the revision was constitutional under this Court's prior decisions. See Patterson, 432 U.S., at 210, 97 S.Ct. 2319; Mullaney v. Wilbur, 421 U.S. 684, 698-702, 95 S.Ct. 1881, 44 L.Ed.2d 508.
>
> Finally, the principal dissent ignores the distinction the Court has often recognized, see, e.g., Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987), between facts in aggravation of punishment and facts in mitigation. See post, at ---- - ---- 19-20. If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the Judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. See supra, at ---- - ---- 16- 17. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

V

*14 [6] The New Jersey statutory scheme that Apprendi asks us to invalidate allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon; after a subsequent and

separate proceeding, it then allows a judge to impose punishment identical to that New Jersey provides for crimes of the first degree, N.J. Stat. Ann. § 2C:43-6(a)(1) (West 1999), based upon the judge's finding, by a preponderance of the evidence, that the defendant's "purpose" for unlawfully possessing the weapon was "to intimidate" his victim on the basis of a particular characteristic the victim possessed. In light of the constitutional rule explained above, and all of the cases supporting it, this practice cannot stand.

New Jersey's defense of its hate crime enhancement statute has three primary components: (1) the required finding of biased purpose is not an "element" of a distinct hate crime offense, but rather the traditional "sentencing factor" of motive; (2) McMillan holds that the legislature can authorize a judge to find a traditional sentencing factor on the basis of a preponderance of the evidence; and (3) Almendarez-Torres extended McMillan's holding to encompass factors that authorize a judge to impose a sentence beyond the maximum provided by the substantive statute under which a defendant is charged. None of these persuades us that the constitutional rule that emerges from our history and case law should incorporate an exception for this New Jersey statute.

New Jersey's first point is nothing more than a disagreement with the rule we apply today. Beyond this, we do not see how the argument can succeed on its own terms. The state high court evinced substantial skepticism at the suggestion that the hate crime statute's "purpose to intimidate" was simply an inquiry into "motive." We share that skepticism. The text of the statute requires the factfinder to determine whether the defendant possessed, at the time he committed the subject act, a "purpose to intimidate" on account of, inter alia, race. By its very terms, this statute mandates an examination of the defendant's state of mind--a concept known well to the criminal law as the defendant's mens rea. [FN17] It makes no difference in identifying the nature of this finding that Apprendi was also required, in order to receive the sentence he did for weapons possession, to have possessed the weapon with a "purpose to use [the weapon] unlawfully against the person or property of another," § 2C:39-4(a). A second mens rea requirement hardly defeats the reality that the enhancement statute imposes of its own force an intent requirement necessary for the imposition of sentence. On the contrary, the fact that the language and structure of the "purpose to use" criminal offense is identical in relevant respects to the language and structure of the "purpose to intimidate" provision demonstrates to us that it is precisely a particular criminal mens rea that the hate crime enhancement statute seeks to target. The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element." [FN18]

FN17. Among the most common definitions of mens rea is "criminal intent." Black's Law Dictionary 1137 (rev. 4th ed.1968). That dictionary unsurprisingly defines "purpose" as synonymous with intent, id., at 1400, and "intent" as, among other things, "a state of mind," id., at 947. But we need not venture beyond New Jersey's own criminal code for a definition of purpose that makes it central to the description of a criminal offense. As the dissenting judge on the state appeals court pointed out, according to the New Jersey Criminal Code, "[a] person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result." N.J. Stat. Ann. § 2C:2-2(b)(1) (West 1999). The hate crime statute's application to those who act "with a purpose to intimidate because of" certain status-based characteristics places it squarely within the inquiry whether it was a defendant's "conscious object" to intimidate for that reason.

FN18. Whatever the effect of the State Supreme Court's comment that the law here targets "motive," 159 N.J. 7, 20, 731 A.2d 485, 492 (1999)--and it is highly doubtful that one could characterize that comment as a "binding" interpretation of the state statute, see Wisconsin v. Mitchell, 508 U.S., at 483-484, 113 S.Ct. 2194 (declining to be bound by state court's characterization of state law's "operative effect"), even if the court had not immediately thereafter called into direct question its "ability to view this finding as merely a search for motive," 159 N.J., at 21, 731 A.2d, at 492--a State cannot through mere characterization change the nature of the conduct actually targeted. It is as clear as day that this hate crime law defines a particular kind of prohibited intent, and a particular intent is more often than not the sine qua non of a violation of a criminal law.
When the principal dissent at long last confronts the actual statute at issue in this case in the final few pages of its opinion, it offers in response to this interpretation only that our reading is contrary to "settled precedent" in Mitchell. Post, at ---- 31. Setting aside the fact that Wisconsin's hate crime statute was, in text and substance, different from New Jersey's, Mitchell did not even begin to consider whether the Wisconsin hate crime requirement was an offense "element" or not; it did not have to--the required finding under the Wisconsin statute was made by the jury.

[7] The foregoing notwithstanding, however, the New Jersey Supreme Court correctly recognized that it does not matter whether the required finding is characterized as one of intent or of motive, because "[l]abels do not afford an acceptable answer." 159 N.J., at 20, 731 A.2d, at 492. That point applies as well to the constitutionally novel and elusive distinction between "elements" and "sentencing factors." McMillan, 477 U.S., at 86, 106 S.Ct. 2411 (noting that the sentencing factor--visible possession of a firearm--"might well have been included as an element of the enumerated offenses"). Despite what appears to us the clear "elemental" nature of the factor here, the relevant inquiry is one not of form, but of effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict? [FN19]

FN19. This is not to suggest that the term "sentencing factor" is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense. See post, at ---- 5 (THOMAS, J., concurring) (reviewing the relevant authorities).

*15 As the New Jersey Supreme Court itself understood in rejecting the argument that the required "motive" finding was simply a "traditional" sentencing factor, proof of motive did not ordinarily "increase the penal consequences to an actor." 159 N.J., at 20, 731 A.2d, at 492. Indeed, the effect of New Jersey's sentencing "enhancement" here is unquestionably to turn a second-degree offense into a first degree offense, under the State's own criminal code. The law thus runs directly into our warning in Mullaney that Winship is concerned as much with the category of substantive offense as "with the degree of criminal culpability" assessed. 421 U.S., at 698, 95 S.Ct. 1881. This concern flows not only from the historical pedigree of the jury and burden rights, but also from the powerful interests those rights serve. The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment.

The preceding discussion should make clear why the State's reliance on McMillan is likewise misplaced. The differential in sentence between what Apprendi would have received without the finding of biased purpose and what he could receive with it is not, it is true, as extreme as the difference between a small fine and mandatory life imprisonment. Mullaney, 421 U.S., at 700, 95 S.Ct. 1881. But it can hardly be said that the potential doubling of one's sentence--from 10 years to 20--has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance. When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as "a tail which wags the dog of the substantive offense." McMillan, 477 U.S., at 88, 106 S.Ct. 2411.

[8] New Jersey would also point to the fact that the State did not, in placing the required biased purpose finding in a sentencing enhancement provision, create a "separate offense calling for a separate penalty." Ibid. As for this, we agree wholeheartedly with the New Jersey Supreme Court that merely because the state legislature placed its hate crime sentence "enhancer" "within the sentencing provisions" of the criminal code "does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." 159 N.J., at 20, 731 A.2d, at 492. Indeed, the fact that New Jersey, along with numerous other States, has also made precisely the same conduct the subject of an independent substantive offense makes it clear that the mere presence of this "enhancement" in a sentencing statute does not define its character. [FN20]

FN20. Including New Jersey, N.J. Stat. Ann. § 2C:33-4 (West Supp.2000) ("A person commits a crime of the fourth degree if in committing an offense [of harassment] under this section, he acted with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation or ethnicity"), 26 States currently have laws making certain acts of racial or other bias freestanding violations of the criminal law, see generally F. Lawrence, Punishing Hate: Bias Crimes Under American Law 178-189 (1999) (listing current state hate crime laws).

*16 New Jersey's reliance on Almendarez-Torres is also unavailing. The reasons supporting an exception from the general rule for the statute construed in that

case do not apply to the New Jersey statute. Whereas recidivism "does not relate to the commission of the offense" itself, 523 U.S., at 230, 244, 118 S.Ct. 1219, New Jersey's biased purpose inquiry goes precisely to what happened in the "commission of the offense." Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); id., at 709-714, 110 S.Ct. 3047 (STEVENS, J., dissenting). For reasons we have explained, the capital cases are not controlling:

"Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge." Almendarez-Torres, 523 U.S., at 257, n. 2, 118 S.Ct. 1219 (SCALIA, J., dissenting) (emphasis deleted).

See also Jones, 526 U.S., at 250-251, 119 S.Ct. 1215; post, at ---- - ---- 25-26 (THOMAS, J., concurring). [FN21]

FN21. The principal dissent, in addition, treats us to a lengthy disquisition on the benefits of determinate sentencing schemes, and the effect of today's decision on the federal Sentencing Guidelines. Post, at ---- - ---- 23-30. The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held. See, e.g., Edwards v. United States, 523 U.S. 511, 515, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998) (opinion of BREYER, J., for a unanimous court) (noting that "[o]f course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. [United States Sentencing Guidelines Manual] § 5G1.1.").

* * *

*17 The New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system. Accordingly, the judgment of the Supreme Court of New Jersey is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ORDERED.

Justice SCALIA, concurring.

I feel the need to say a few words in response to Justice BREYER's dissent. It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State--and an increasingly bureaucratic part of it, at that.) The founders of the American Republic were not prepared to leave it to the State, which is why the jury- trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

As for fairness, which Justice BREYER believes "[i]n modern times," post, at ----, 1, the jury cannot provide: I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years--and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted governor if his sentence is commuted). Will there be disparities? Of course. But the criminal will never get more punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens.

In Justice BREYER's bureaucratic realm of perfect equity, by contrast, the facts that determine the length of sentence to which the defendant is exposed will be

determined to exist (on a more-likely-than-not basis) by a single employee of the State. It is certainly arguable (Justice BREYER argues it) that this sacrifice of prior protections is worth it. But it is not arguable that, just because one thinks it is a better system, it must be, or is even more likely to be, the system envisioned by a Constitution that guarantees trial by jury. What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee--what it has been assumed to guarantee throughout our history--the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.

Justice BREYER proceeds on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says. And the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury" has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.

Justice THOMAS, with whom Justice SCALIA joins as to Parts I and II, concurring.

*18 I join the opinion of the Court in full. I write separately to explain my view that the Constitution requires a broader rule than the Court adopts.

I

This case turns on the seemingly simple question of what constitutes a "crime." Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed." Amdts. 5 and 6. See also Art. III, § 2, cl. 3 ("The Trial of all Crimes ... shall be by Jury"). With the exception of the Grand Jury Clause, see Hurtado v. California, 110 U.S. 516, 538, 4 S.Ct. 111, 28 L.Ed. 232 (1884), the Court has held that these protections apply in state prosecutions, Herring v. New York, 422 U.S. 853, 857, and n. 7, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). Further, the Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

All of these constitutional protections turn on determining which facts constitute the "crime"--that is, which facts are the "elements" or "ingredients" of a crime. In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under Winship, proved beyond a reasonable doubt). See J. Story, Commentaries on the Constitution §§ 928-929, pp. 660-662, § 934, p. 664 (1833); J. Archbold, Pleading and Evidence in Criminal Cases *41, *99-* 100 (5th Am. ed. 1846) (hereinafter Archbold). [FN1]

FN1. Justice O'CONNOR mischaracterizes my argument. See post, at ---- - ---- 5-6 (dissenting opinion). Of course the Fifth and Sixth Amendments did not codify common law procedure wholesale. Rather, and as Story notes, they codified a few particular common-law procedural rights. As I have explained, the scope of those rights turns on what constitutes a "crime." In answering that question, it is entirely proper to look to the common law.

Thus, it is critical to know which facts are elements. This question became more complicated following the Court's decision in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), which spawned a special sort of fact known as a sentencing enhancement. See ante, at ----, 11, ----, 19, ----, 28. Such a fact increases a defendant's punishment but is not subject to the constitutional protections to which elements are subject. Justice O'CONNOR's dissent, in agreement with McMillan and Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), takes the view that a legislature is free (within unspecified outer limits) to decree which facts are elements and which are sentencing enhancements. Post, at ----, 2.

Sentencing enhancements may be new creatures, but the question that they create for courts is not. Courts have long had to consider which facts are elements in order to determine the sufficiency of an accusation (usually an indictment). The answer that courts have provided regarding the accusation tells us what an element is, and it is then a simple matter to apply that answer to whatever constitutional right may be at

issue in a case--here, Winship and the right to trial by jury. A long line of essentially uniform authority addressing accusations, and stretching from the earliest reported cases after the founding until well into the 20th century, establishes that the original understanding of which facts are elements was even broader than the rule that the Court adopts today.

*19 This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact--of whatever sort, including the fact of a prior conviction--the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact--such as a fine that is proportional to the value of stolen goods--that fact is also an element. No multi-factor parsing of statutes, of the sort that we have attempted since McMillan, is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

II

A

Cases from the founding to roughly the end of the Civil War establish the rule that I have described, applying it to all sorts of facts, including recidivism. As legislatures varied common-law crimes and created new crimes, American courts, particularly from the 1840's on, readily applied to these new laws the common-law understanding that a fact that is by law the basis for imposing or increasing punishment is an element. [FN2]

FN2. It is strange that Justice O'CONNOR faults me for beginning my analysis with cases primarily from the 1840's, rather from the time of the founding. See post, at ---- - ---- 5-6 (dissenting opinion). As the Court explains, ante, at ---- - ---- 11-13, and as she concedes, post, at ---- 3 (O'CONNOR, J., dissenting), the very idea of a sentencing enhancement was foreign to the common law of the time of the founding. Justice O'CONNOR therefore, and understandably, does not contend that any history from the founding supports her position. As far as I have been able to tell, the argument that a fact that was by law the basis for imposing or increasing punishment might not be an element did not seriously arise (at least not in reported cases) until the 1840's. As I explain below, from that time on-- for at least a century--essentially all authority rejected that argument, and much of it did so in reliance upon the common law. I find this evidence more than sufficient.

Massachusetts, which produced the leading cases in the antebellum years, applied this rule as early as 1804, in Commonwealth v. Smith, 1 Mass. *245, 1804 WL 709, and foreshadowed the fuller discussion that was to come. Smith was indicted for and found guilty of larceny, but the indictment failed to allege the value of all of the stolen goods. Massachusetts had abolished the common- law distinction between grand and simple larceny, replacing it with a single offense of larceny whose punishment (triple damages) was based on the value of the stolen goods. The prosecutor relied on this abolition of the traditional distinction to justify the indictment's omissions. The court, however, held that it could not sentence the defendant for the stolen goods whose value was not set out in the indictment. Id., at *246-*247.

The understanding implicit in Smith was explained in Hope v. Commonwealth, 50 Mass. 134 (1845). Hope was indicted for and convicted of larceny. The larceny statute at issue retained the single-offense structure of the statute addressed in Smith, and established two levels of sentencing based on whether the value of the stolen property exceeded $100. The statute was structured similarly to the statutes that we addressed in Jones v. United States, 526 U.S. 227, 230, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), and, even more, Castillo v. United States, --- U.S. ----, 120 S.Ct. 2090, ----, --- L.Ed.2d ---- (slip op., at 2), in that it first set out the core crime and then, in subsequent clauses, set out the ranges of punishments. [FN3] Further, the statute opened by referring simply to "the offence of larceny," suggesting, at least from the perspective of our post-McMillan cases, that larceny was the crime whereas the value of the stolen property was merely a fact for sentencing. But the matter was quite simple for the Massachusetts high court. Value was an element because punishment varied with value:

FN3. The Massachusetts statute provided: "Every person who shall commit the offence of larceny, by stealing of the property of another any money, goods or chattels [or other sort of property], if the property stolen shall exceed the value of one hundred dollars,

> shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding six hundred dollars, and imprisonment in the county jail, not more than two years; and if the property stolen shall not exceed the value of one hundred dollars, he shall be punished by imprisonment in the state prison or the county jail, not more than one year, or by fine not exceeding three hundred dollars." Mass.Rev.Stat., ch. 126, § 17 (1836).

*20 "Our statutes, it will be remembered, prescribe the punishment for larceny, with reference to the value of the property stolen; and for this reason, as well as because it is in conformity with long established practice, the court are of opinion that the value of the property alleged to be stolen must be set forth in the indictment." 50 Mass., at 137.

Two years after Hope, the court elaborated on this rule in a case involving burglary, stating that if "certain acts are, by force of the statutes, made punishable with greater severity, when accompanied with aggravating circumstances," then the statute has "creat[ed] two grades of crime." Larned v. Commonwealth, 53 Mass. 240, 242, 1847 WL 3926 (1847). See also id., at 241 ("[T]here is a gradation of offences of the same species" where the statute sets out "various degrees of punishment").

Conversely, where a fact was not the basis for punishment, that fact was, for that reason, not an element. Thus, in Commonwealth v. McDonald, 59 Mass. 365, 1850 WL 4438 (1850), which involved an indictment for attempted larceny from the person, the court saw no error in the failure of the indictment to allege any value of the goods that the defendant had attempted to steal. The defendant, in challenging the indictment, apparently relied on Smith and Hope, and the court rejected his challenge by explaining that "[a]s the punishment ... does not depend on the amount stolen, there was no occasion for any allegation as to value in this indictment." 59 Mass., at 367. See Commonwealth v. Burke, 94 Mass. 182, 183, 1866 WL 4830 (1866) (applying same reasoning to completed larceny from the person; finding no trial error where value was not proved to jury).

Similar reasoning was employed by the Wisconsin Supreme Court in Lacy v. State, 15 Wis. *13, 1862 WL 951 (1862), in interpreting a statute that was also similar to the statutes at issue in Jones and Castillo. The statute, in a single paragraph, outlawed arson of a dwelling house at night. Arson that killed someone was punishable by life in prison; arson that did not kill anyone was punishable by 7 to 14 years in prison; arson of a house in which no person was lawfully dwelling was punishable by 3 to 10 years. [FN4] The court had no trouble concluding that the statute "creates three distinct statutory offenses," 15 Wis., at *15, and that the lawful presence of a person in the dwelling was an element of the middle offense. The court reasoned from the gradations of punishment: "That the legislature considered the circumstance that a person was lawfully in the dwelling house when fire was set to it most material and important, and as greatly aggravating the crime, is clear from the severity of the punishment imposed." Id., at *16. The "aggravating circumstances" created "the higher statutory offense[s]." Id., at *17. Because the indictment did not allege that anyone had been present in the dwelling, the court reversed the defendant's 14-year sentence, but, relying on Larned, supra, the court remanded to permit sentencing under the lowest grade of the crime (which was properly alleged in the indictment). 15 Wis., at *17.

> FN4. The Wisconsin statute provided: "Every person who shall willfully and maliciously burn, in the night time, the dwelling house of another, whereby the life of any person shall be destroyed, or shall in the night time willfully and maliciously set fire to any other building, owned by himself or another, by the burning whereof such dwelling house shall be burnt in the night time, whereby the life of any person shall be destroyed, shall suffer the same punishment as provided for the crime of murder in the second degree; but if the life of no person shall have been destroyed, he shall be punished by imprisonment in the state prison, not more than fourteen years nor less than seven years; and if at the time of committing the offense there was no person lawfully in the dwelling house so burnt, he shall be punished by imprisonment in the state prison, not more than ten years nor less than three years." Wis.Rev.Stat., ch. 165, § 1 (1858). The punishment for second-degree murder was life in prison. Ch. 164, § 2.

*21 Numerous other state and federal courts in this period took the same approach to determining which facts are elements of a crime. See Ritchey v. State, 7 Blackf. 168, 169, 1844 WL 2999 (Ind.1844) (citing Commonwealth v. Smith, 1 Mass. *245 (1804), and holding that indictment for arson must allege value of property destroyed, because statute set punishment based on value); Spencer v. State, 13 Ohio 401, 406, 408, 1844 WL 47 (1844) (holding that value of goods intended to be stolen is not "an ingredient of the crime" of burglary with intent to steal, because punishment under statute did not depend on value; contrasting larceny, in which "[v]alue must be laid,

and value proved, that the jury may find it, and the court, by that means, know whether it is grand or petit, and apply the grade of punishment the statute awards"); United States v. Fisher, 25 F.Cas. 1086 (CC Ohio 1849) (McLean, J.) ("A carrier of the mail is subject to a higher penalty where he steals a letter out of the mail, which contains an article of value. And when this offense is committed, the indictment must allege the letter contained an article of value, which aggravates the offense and incurs a higher penalty"); Brightwell v. State, 41 Ga. 482, 483, 1871 WL 2314 (1871) ("When the law prescribes a different punishment for different phases of the same crime, there is good reason for requiring the indictment to specify which of the phases the prisoner is charged with. The record ought to show that the defendant is convicted of the offense for which he is sentenced"). Cf. State v. Farr, 12 Rich. 24, 29, 1859 WL 4316 (S.C.App.1859) (where two statutes barred purchasing corn from a slave, and one referred to purchasing from slave who lacked a permit, absence of permit was not an element, because both statutes had the same punishment).

Also demonstrating the common-law approach to determining elements was the well-established rule that, if a statute increased the punishment of a common- law crime, whether felony or misdemeanor, based on some fact, then that fact must be charged in the indictment in order for the court to impose the increased punishment. Archbold *106; see id., at *50; ante, at ---- - ---- 13-14. There was no question of treating the statutory aggravating fact as merely a sentencing enhancement--as a nonelement enhancing the sentence of the common-law crime. The aggravating fact was an element of a new, aggravated grade of the common-law crime simply because it increased the punishment of the common-law crime. And the common-law crime was, in relation to the statutory one, essentially just like any other lesser included offense. See Archbold *106.

***22** Further evidence of the rule that a crime includes every fact that is by law a basis for imposing or increasing punishment comes from early cases addressing recidivism statutes. As Justice SCALIA has explained, there was a tradition of treating recidivism as an element. See Almendarez-Torres, 523 U.S., at 256-257, 261, 118 S.Ct. 1219 (dissenting opinion). That tradition stretches back to the earliest years of the Republic. See, e.g., Commonwealth v. Welsh, 4 Va. 57, 1817 WL 713 (1817); Smith v. Commonwealth, 14 Serg. & Rawle 69, 1826 WL 2217 (Pa.1826); see also Archbold * 695-*696. For my purposes, however, what is noteworthy is not so much the fact of that tradition as the reason for it: Courts treated the fact of a prior conviction just as any other fact that increased the punishment by law. By the same reasoning that the courts employed in Hope, Lacy, and the other cases discussed above, the fact of a prior conviction was an element, together with the facts constituting the core crime of which the defendant was charged, of a new, aggravated crime.

The two leading antebellum cases on whether recidivism is an element were Plumbly v. Commonwealth, 43 Mass. 413, 1841 WL 3384 (1841), and Tuttle v. Commonwealth, 68 Mass. 505, 1854 WL 5131 (1854). In the latter, the court explained the reason for treating as an element the fact of the prior conviction:

> "When the statute imposes a higher penalty upon a second and third conviction, respectively, it makes the prior conviction of a similar offence a part of the description and character of the offence intended to be punished; and therefore the fact of such prior conviction must be charged, as well as proved. It is essential to an indictment, that the facts constituting the offence intended to be punished should be averred." Id., at 506.

The court rested this rule on the common law and the Massachusetts equivalent of the Sixth Amendment's Notice Clause. Ibid. See also Commonwealth v. Haynes, 107 Mass. 194, 198, 1871 WL 8641 (1871) (reversing sentence, upon confession of error by attorney general, in case similar to Tuttle).

Numerous other cases treating the fact of a prior conviction as an element of a crime take the same view. They make clear, by both their holdings and their language, that when a statute increases punishment for some core crime based on the fact of a prior conviction, the core crime and the fact of the prior crime together create a new, aggravated crime. Kilbourn v. State, 9 Conn. 560, 563, 1833 WL 68 (1833) ("No person ought to be, or can be, subjected to a cumulative penalty, without being charged with a cumulative offence"); Plumbly, supra, at 414 (conviction under recidivism statute is "one conviction, upon one aggregate offence"); Hines v. State, 26 Ga. 614, 616, 1859 WL 2341 (1859) (reversing enhanced sentence imposed by trial judge and explaining, "[T]he question, whether the offence was a second one, or not, was a question for the jury.... The allegation [of a prior offence] is certainly one of the first importance to the accused, for if it is true, he becomes subject to a greatly increased punishment"). See also Commonwealth v. Phillips, 28

Mass. 28, 33, 1831 WL 3456 (1831) ("[U]pon a third conviction, the court may sentence the convict to hard labor for life. The punishment is to be awarded upon that conviction, and for the offence of which he is then and there convicted").

*23 Even the exception to this practice of including the fact of a prior conviction in the indictment and trying it to the jury helps to prove the rule that that fact is an element because it increases the punishment by law. In State v. Freeman, 27 Vt. 523, 1855 WL 2492 (1855), the Vermont Supreme Court upheld a statute providing that, in an indictment or complaint for violation of a liquor law, it was not necessary to allege a prior conviction of that law in order to secure an increased sentence. But the court did not hold that the prior conviction was not an element; instead, it held that the liquor law created only minor offenses that did not qualify as crimes. Thus, the state constitutional protections that would attach were a "crime" at issue did not apply. Id., at 527; see Goeller v. State, 119 Md. 61, 66-67, 85 A. 954, 956 (1912) (discussing Freeman). At the same time, the court freely acknowledged that it had "no doubt" of the general rule, particularly as articulated in Massachusetts, that "it is necessary to allege the former conviction, in the indictment, when a higher sentence is claimed on that account." Freeman, supra, at 526. Unsurprisingly, then, a leading treatise explained Freeman as only "apparently" contrary to the general rule and as involving a "special statute." 3 F. Wharton, Criminal Law § 3417, p. 307, n. r (7th rev. ed. 1874) (hereinafter Wharton). In addition, less than a decade after Freeman, the same Vermont court held that if a defendant charged with a successive violation of the liquor laws contested identity--that is, whether the person in the record of the prior conviction was the same as the defendant--he should be permitted to have a jury resolve the question. State v. Haynes, 35 Vt. 570, 572-573 (1863). (Freeman itself had anticipated this holding by suggesting the use of a jury to resolve disputes over identity. See 27 Vt., at 528.) In so holding, Haynes all but applied the general rule, since a determination of identity was usually the chief factual issue whenever recidivism was charged. See Archbold *695-*696; see also, e.g., Graham v. West Virginia, 224 U.S. 616, 620-621, 32 S.Ct. 583, 56 L.Ed. 917 (1912) (defendant had been convicted under three different names). [FN5]

FN5. Some courts read State v. Smith, 8 Rich. 460, 1832 WL 1571 (S.C.App.1832), a South Carolina case, to hold that the indictment need not allege a prior conviction in order for the defendant to suffer an enhanced punishment. See, e.g., State v. Burgett, 22 Ark. 323, 324 (1860) (so reading Smith and questioning its correctness). The Smith court's holding was somewhat unclear because the court did not state whether the case involved a first or second offense--if a first, the court was undoubtedly correct in rejecting the defendant's challenge to the indictment, because there is no need in an indictment to negate the existence of any prior offense. See Burgett, supra, at 324 (reading indictment that was silent about prior offenses as only charging first offense and as sufficient for that purpose). In addition, the Smith court did not acknowledge the possibility of disputes over identity. Finally, the extent to which the court's apparent holding was followed in practice in South Carolina is unclear, and subsequent South Carolina decisions acknowledged that Smith was out of step with the general rule. See State v. Parris, 89 S.C. 140, 141, 71 S.E. 808, 809 (1911); State v. Mitchell, 220 S.C. 433, 434-436, 68 S.E.2d 350, 351-352 (1951).

B

*24 An 1872 treatise by one of the leading authorities of the era in criminal law and procedure confirms the common-law understanding that the above cases demonstrate. The treatise condensed the traditional understanding regarding the indictment, and thus regarding the elements of a crime, to the following: "The indictment must allege whatever is in law essential to the punishment sought to be inflicted." 1 J. Bishop, Law of Criminal Procedure 50 (2d ed. 1872) (hereinafter Bishop, Criminal Procedure). See id., § 81, at 51 ("[T]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted"); Id., § 540, at 330 ("[T]he indictment must ... contain an averment of every particular thing which enters into the punishment"). Crimes, he explained, consist of those "acts to which the law affixes ... punishment," id., § 80, at 51, or, stated differently, a crime consists of the whole of "the wrong upon which the punishment is based," id., § 84, at 53. In a later edition, Bishop similarly defined the elements of a crime as "that wrongful aggregation out of which the punishment proceeds." 1 J. Bishop, New Criminal Procedure § 84, p. 49 (4th ed. 1895).

Bishop grounded his definition in both a generalization from well-established common-law practice, 1 Bishop, Criminal Procedure §§ 81-84, at 51-53, and in the provisions of Federal and State Constitutions guaranteeing notice of an accusation in all criminal cases, indictment by a grand jury for

serious crimes, and trial by jury. With regard to the common law, he explained that his rule was "not made apparent to our understandings by a single case only, but by all the cases," id., § 81, at 51, and was followed "in all cases, without one exception," id., § 84, at 53. To illustrate, he observed that there are

> "various statutes whereby, when ... assault is committed with a particular intent, or with a particular weapon, or the like, it is subjected to a particular corresponding punishment, heavier than that for common assault, or differing from it, pointed out by the statute. And the reader will notice that, in all cases where the peculiar or aggravated punishment is to be inflicted, the peculiar or aggravating matter is required to be set out in the indictment." Id., § 82, at 52.

He also found burglary statutes illustrative in the same way. Id., § 83, at 52-53. Bishop made no exception for the fact of a prior conviction--he simply treated it just as any other aggravating fact: "[If] it is sought to make the sentence heavier by reason of its being [a second or third offence], the fact thus relied on must be averred in the indictment; because the rules of criminal procedure require the indictment, in all cases, to contain an averment of every fact essential to the punishment sought to be inflicted." 1 J. Bishop, Commentaries on Criminal Law § 961, pp. 564-565 (5th ed. 1872).

The constitutional provisions provided further support, in his view, because of the requirements for a proper accusation at common law and because of the common-law understanding that a proper jury trial required a proper accusation: "The idea of a jury trial, as it has always been known where the common law prevails, includes the allegation, as part of the machinery of the trial.... [A]n accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason." 1 Bishop, Criminal Procedure § 87, at 55. See id., § 88, at 56 (notice and indictment requirements ensure that before "persons held for crimes ... shall be convicted, there shall be an allegation made against them of every element of crime which the law makes essential to the punishment to be inflicted").

*25 Numerous high courts contemporaneously and explicitly agreed that Bishop had accurately captured the common-law understanding of what facts are elements of a crime. See, e.g., Hobbs v. State, 44 Tex. 353, 354, 1875 WL 7696 (1875) (favorably quoting 1 Bishop, Criminal Procedure § 81); Maguire v. State, 47 Md. 485, 497, 1878 WL 4667 (1878) (approvingly citing different Bishop treatise for the same rule); Larney v. Cleveland, 34 Ohio St. 599, 600, 1878 WL 65 (1878) (rule and reason for rule "are well stated by Mr. Bishop"); State v. Hayward, 83 Mo. 299, 307, 1884 WL 9488 (1884) (extensively quoting § 81 of Bishop's "admirable treatise"); Riggs v. State, 104 Ind. 261, 262, 3 N.E. 886, 887 (1885) ("We agree with Mr. Bishop that the nature and cause of the accusation are not stated where there is no mention of the full act or series of acts for which the punishment is to be inflicted" (internal quotation marks omitted)); State v. Perley, 86 Me. 427, 431, 30 A. 74, 75 (1894) ("The doctrine of the court, says Mr. Bishop, is identical with that of reason, viz: that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted" (internal quotation marks omitted)); see also United States v. Reese, 92 U.S. 214, 232-233, 23 L.Ed. 563 (1875) (Clifford, J., concurring in judgment) (citing and paraphrasing 1 Bishop, Criminal Procedure § 81).

C

In the half century following publication of Bishop's treatise, numerous courts applied his statement of the common-law understanding; most of them explicitly relied on his treatise. Just as in the earlier period, every fact that was by law a basis for imposing or increasing punishment (including the fact of a prior conviction) was an element. Each such fact had to be included in the accusation of the crime and proved to the jury.

Courts confronted statutes quite similar to the ones with which we have struggled since McMillan, and, applying the traditional rule, they found it not at all difficult to determine whether a fact was an element. In Hobbs, supra, the defendant was indicted for a form of burglary punishable by 2 to 5 years in prison. A separate statutory section provided for an increased sentence, up to double the punishment to which the defendant would otherwise be subject, if the entry into the house was effected by force exceeding that incidental to burglary. The trial court instructed the jury to sentence the defendant to 2 to 10 years if it found the requisite level of force, and the jury sentenced him to 3. The Texas Supreme Court, relying on Bishop, reversed because the indictment had not alleged such force; even though the jury had sentenced Hobbs within the range (2 to 5 years) that was permissible under the lesser crime that the indictment had charged, the court thought it

"impossible to say ... that the erroneous charge of the court may not have had some weight in leading the jury" to impose the sentence that it did. 44 Tex., at 355. [FN6] See also Searcy v. State, 1 Tex.App. 440, 444, 1876 WL 9086 (1876) (similar); Garcia v. State, 19 Tex.App. 389, 393, 1885 WL 6922 (1885) (not citing Hobbs, but relying on Bishop to reverse 10-year sentence for assault with a bowie-knife or dagger, where statute doubled range for assault from 2 to 7 to 4 to 14 years if the assault was committed with either weapon but where indictment had not so alleged).

> FN6. The gulf between the traditional approach to determining elements and that of our recent cases is manifest when one considers how one might, from the perspective of those cases, analyze the issue in Hobbs. The chapter of the Texas code addressing burglary was entitled simply "Of Burglary" and began with a section explicitly defining "the offense of burglary." After a series of sections defining terms, it then set out six separate sections specifying the punishment for various kinds of burglary. The section regarding force was one of these. See 1 G. Paschal, Digest of Laws of Texas, Part II, Tit. 20, ch. 6, pp. 462-463 (4th ed. 1875). Following an approach similar to that in Almendarez-Torres v. United States, 523 U.S. 224, 231-234, 242-246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and Castillo v. United States, --- U.S. ----, 120 S.Ct. 2090, ----, --- L.Ed.2d ---- (slip op., at 4-5), one would likely find a clear legislative intent to make force a sentencing enhancement rather than an element.

As in earlier cases, such as McDonald (discussed supra, at ---- - ---- 5-6), courts also used the converse of the Bishop rule to explain when a fact was not an element of the crime. In Perley, supra, the defendant was indicted for and convicted of robbery, which was punishable by imprisonment for life or any term of years. The court, relying on Bishop, Hope, McDonald, and other authority, rejected his argument that Maine's Notice Clause (which of course required all elements to be alleged) required the indictment to allege the value of the goods stolen, because the punishment did not turn on value: "[T]here is no provision of this statute which makes the amount of property taken an essential element of the offense; and there is no statute in this State which creates degrees in robbery, or in any way makes the punishment of the offense dependent upon the value of the property taken." 86 Me., at 432, 30 A., at 75. The court further explained that "where the value is not essential to the punishment it need not be distinctly alleged or proved." Id., at 433, 30 A., at 76.

*26 Reasoning similar to Perley and the Texas cases is evident in other cases as well. See Jones v. State, 63 Ga. 141, 143, 1879 WL 2442 (1879) (where punishment for burglary in the day is 3 to 5 years in prison and for burglary at night is 5 to 20, time of burglary is a "constituent of the offense"; indictment should "charge all that is requisite to render plain and certain every constituent of the offense"); United States v. Woodruff, 68 F. 536, 538 (D.Kan.1895) (where embezzlement statute "contemplates that there should be an ascertainment of the exact sum for which a fine may be imposed" and jury did not determine amount, judge lacked authority to impose fine; "[o]n such an issue the defendant is entitled to his constitutional right of trial by jury").

Courts also, again just as in the pre-Bishop period, applied the same reasoning to the fact of a prior conviction as they did to any other fact that aggravated the punishment by law. Many, though far from all, of these courts relied on Bishop. In 1878, Maryland's high court, in Maguire v. State, 47 Md. 485, stated the rule and the reason for it in language indistinguishable from that of Tuttle a quarter century before:

> "The law would seem to be well settled, that if the party be proceeded against for a second or third offence under the statute, and the sentence prescribed be different from the first, or severer, by reason of its being such second or third offence, the fact thus relied on must be averred in the indictment; for the settled rule is, that the indictment must contain an averment of every fact essential to justify the punishment inflicted." Maguire, supra, at 496 (citing English cases, Plumbly v. Commonwealth, 43 Mass. 413 (1841), Wharton, and Bishop).

In Goeller v. State, 119 Md. 61, 85 A. 954 (1912), the same court reaffirmed Maguire and voided, as contrary to Maryland's Notice Clause, a statute that permitted the trial judge to determine the fact of a prior conviction. The court extensively quoted Bishop, who had, in the court's view, treated the subject "more fully, perhaps, than any other legal writer," and it cited, among other authorities, "a line of Massachusetts decisions" and Riggs (quoted supra, at ---- 14). 119 Md., at 66, 85 A., at 955. In Larney, 34 Ohio St., at 600-601, the Supreme Court of Ohio, in an opinion citing only Bishop, reversed a conviction under a recidivism statute where the indictment had not alleged any prior conviction. (The defendant had also relied on Plumbly, supra, and Kilbourn v. State, 9 Conn. 560 (1833). 34 Ohio St., at 600.) And in State v. Adams, 64 N.H. 440, 13 A. 785 (1888), the court, relying on Bishop, explained that "[t]he former

conviction being a part of the description and character of the offense intended to be punished, because of the higher penalty imposed, it must be alleged." Id., at 442, 13 A., at 786. The defendant had been "charged with an offense aggravated by its repetitious character." Ibid. See also Evans v. State, 150 Ind. 651, 653, 50 N.E. 820 (1898) (similar); Shiflett v. Commonwealth, 114 Va. 876, 877, 77 S.E. 606, 607 (1913) (similar).

*27 Even without any reliance on Bishop, other courts addressing recidivism statutes employed the same reasoning as did he and the above cases--that a crime includes any fact to which punishment attaches. One of the leading cases was Wood v. People, 53 N.Y. 511, 1873 WL 10399 (1873). The statute in Wood provided for increased punishment if the defendant had previously been convicted of a felony then discharged from the conviction. The court, repeatedly referring to "the aggravated offence," id., at 513, 515, held that the facts of the prior conviction and of the discharge must be proved to the jury, for "[b]oth enter into and make a part of the offence.... subjecting the prisoner to the increased punishment." Id., at 513; see ibid. (fact of prior conviction was an "essential ingredient" of the offense). See also Johnson v. People, 55 N.Y. 512, 514, 1874 WL 11015 (1874) ("A more severe penalty is denounced by the statute for a second offence; and all the facts to bring the case within the statute must be [alleged in the indictment and] established on the trial"); People v. Sickles, 156 N.Y. 541, 544-545, 51 N.E. 288, 289 (1898) (reaffirming Wood and Johnson and explaining that "the charge is not merely that the prisoner has committed the offense specifically described, but that, as a former convict, his second offense has subjected him to an enhanced penalty").

Contemporaneously with the New York Court of Appeals in Wood and Johnson, state high courts in California and Pennsylvania offered similar explanations for why the fact of a prior conviction is an element. In People v. Delany, 49 Cal. 394, 1874 WL 1543 (1874), which involved a statute making petit larceny (normally a misdemeanor) a felony if committed following a prior conviction for petit larceny, the court left no doubt that the fact of the prior conviction was an element of an aggravated crime consisting of petit larceny committed following a prior conviction for petit larceny:

*28 "The particular circumstances of the offense are stated [in the indictment], and consist of the prior convictions and of the facts constituting the last larceny. ....

"[T]he former convictions are made to adhere to and constitute a portion of the aggravated offense." Id., at 395.

"The felony consists both of the former convictions and of the particular larceny.... [T]he former convictions were a separate fact; which, taken in connection with the facts constituting the last offense, make a distinct and greater offense than that charged, exclusive of the prior convictions." Id., at 396. [FN7]

FN7. The court held that a general plea of "guilty" to an indictment that includes an allegation of a prior conviction applies to the fact of the prior conviction.

See also People v. Coleman, 145 Cal. 609, 610-611, 79 P. 283, 284-285 (1904).

Similarly, in Rauch v. Commonwealth, 78 Pa. 490, 1875 WL 13105 (1875), the court applied its 1826 decision in Smith v. Commonwealth, 14 Serg. & Rawle 69, and reversed the trial court's imposition of an enhanced sentence "upon its own knowledge of its records." 78 Pa., at 494. The court explained that "imprisonment in jail is not a lawful consequence of a mere conviction for an unlawful sale of liquors. It is the lawful consequence of a second sale only after a former conviction. On every principle of personal security and the due administration of justice, the fact which gives rightfulness to the greater punishment should appear in the record." Ibid. See also id., at 495 ("But clearly the substantive offence, which draws to itself the greater punishment, is the unlawful sale after a former conviction. This, therefore, is the very offence he is called upon to defend against").

Meanwhile, Massachusetts reaffirmed its earlier decisions, striking down, in Commonwealth v. Harrington, 130 Mass. 35, 1880 WL 10897 (1880), a liquor law that provided a small fine for a first or second conviction, provided a larger fine or imprisonment up to a year for a third conviction, and specifically provided that a prior conviction need not be alleged in the complaint. The court found this law plainly inconsistent with Tuttle and with the State's Notice Clause, explaining that "the offence which is punishable with the higher penalty is not fully and substantially described to the defendant, if the complaint fails to set forth the former convictions which are essential features of it." 130 Mass., at 36. [FN8]

FN8. See also State v. Austin, 113 Mo. 538, 542, 21

S.W. 31, 32 (1893) (prior conviction is a "material fac[t]" of the "aggravated offense"); Bandy v. Hehn, 10 Wyo. 167, 172-174, 67 P. 979, 980 (1902) ("[I]n reason, and by the great weight of authority, as the fact of a former conviction enters into the offense to the extent of aggravating it and increasing the punishment, it must be alleged in the information and proved like any other material fact, if it is sought to impose the greater penalty. The statute makes the prior conviction a part of the description and character of the offense intended to be punished" (citing Tuttle v. Commonwealth, 68 Mass. 505 (1854))); State v. Smith, 129 Iowa 709, 711- 712, 106 N.W. 187, 188-189 (1906) (similar); State v. Scheminisky, 31 Idaho 504, 506-507, 174 P. 611, 611-612 (1918) (similar).

Without belaboring the point any further, I simply note that this traditional understanding--that a "crime" includes every fact that is by law a basis for imposing or increasing punishment--continued well into the 20th century, at least until the middle of the century. See Knoll & Singer, Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of McMillan v. Pennsylvania, 22 Seattle U.L.Rev. 1057, 1069-1081 (1999) (surveying 20th century decisions of federal courts prior to McMillan); see also People v. Ratner, 67 Cal.App.2d Supp. 902, 153 P.2d 790, 791-793 (1944). In fact, it is fair to say that McMillan began a revolution in the law regarding the definition of "crime." Today's decision, far from being a sharp break with the past, marks nothing more than a return to the status quo ante--the status quo that reflected the original meaning of the Fifth and Sixth Amendments.

III

*29 The consequence of the above discussion for our decisions in Almendarez-Torres and McMillan should be plain enough, but a few points merit special mention.

First, it is irrelevant to the question of which facts are elements that legislatures have allowed sentencing judges discretion in determining punishment (often within extremely broad ranges). See ante, at ---- - ---- 14-15; post, at ---- - ---- 23-25 (O'CONNOR, J., dissenting). Bishop, immediately after setting out the traditional rule on elements, explained why: "The reader should distinguish between the foregoing doctrine, and the doctrine ... that, within the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment .... The aggravating circumstances spoken of cannot swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy [in finding mitigating circumstances]. This is an entirely different thing from punishing one for what is not alleged against him." 1 Bishop, Criminal Procedure § 85, at 54.

See also 1 J. Bishop, New Commentaries on the Criminal Law §§ 600-601, pp. 370-371, § 948, p. 572 (8th ed. 1892) (similar). In other words, establishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things. [FN9] Cf. 4 W. Blackstone, Commentaries on the Law of England 371-372 (1769) (noting judges' broad discretion in setting amount of fine and length of imprisonment for misdemeanors, but praising determinate punishment and "discretion ... regulated by law"); Perley, 86 Me., at 429, 432, 30 A., at 74, 75-76 (favorably discussing Bishop's rule on elements without mentioning, aside from quotation of statute in statement of facts, that defendant's conviction for robbery exposed him to imprisonment for life or any term of years). Thus, it is one thing to consider what the Constitution requires the prosecution to do in order to entitle itself to a particular kind, degree, or range of punishment of the accused, see Woodruff, 68 F., at 538, and quite another to consider what constitutional constraints apply either to the imposition of punishment within the limits of that entitlement or to a legislature's ability to set broad ranges of punishment. In answering the former constitutional question, I need not, and do not, address the latter.

FN9. This is not to deny that there may be laws on the borderline of this distinction. In Brightwell v. State, 41 Ga. 482 (1871), the court stated a rule for elements equivalent to Bishop's, then held that whether a defendant had committed arson in the day or at night need not be in the indictment. The court explained that there was "no provision that arson in the night shall be punished for any different period" than arson in the day (both being punishable by 2 to 7 years in prison). Id., at 483. Although there was a statute providing that "arson in the day time shall be punished for a less period than arson in the night time," the court concluded that it merely set "a rule for the exercise of [the sentencing judge's] discretion" by specifying a particular fact for the judge to consider along with the many others that would enter into his sentencing decision. Ibid. Cf. Jones v. State, 63 Ga. 141, 143 (1879) (whether burglary occurred in day or at night is a "constituent of the offense"

because law fixes different ranges of punishment based on this fact). And the statute attached no definite consequence to that particular fact: A sentencing judge presumably could have imposed a sentence of seven years less one second for daytime arson. Finally, it is likely that the statute in Brightwell, given its language ("a less period") and its placement in a separate section, was read as setting out an affirmative defense or mitigating circumstance. See Wright v. State, 113 Ga.App. 436, 437-438, 148 S.E.2d 333, 335-336 (1966) (suggesting that it would be error to refuse to charge later version of this statute to jury upon request of defendant). See generally Archbold *52, *105-*106 (discussing rules for determining whether fact is an element or a defense).

Second, and related, one of the chief errors of Almendarez-Torres--an error to which I succumbed--was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. 523 U.S., at 243-244, 118 S.Ct. 1219; see id., at 230, 241, 118 S.Ct. 1219. For the reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment--for establishing or increasing the prosecution's entitlement--it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. Indeed, cases addressing such statutes provide some of the best discussions of what constitutes an element of a crime. One reason frequently offered for treating recidivism differently, a reason on which we relied in Almendarez-Torres, supra, at 235, 118 S.Ct. 1219, is a concern for prejudicing the jury by informing it of the prior conviction. But this concern, of which earlier courts were well aware, does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction. See, e.g., Maguire, 47 Md., at 498; Sickles, 156 N.Y., at 547, 51 N.E., at 290. [FN10]

FN10. In addition, it has been common practice to address this concern by permitting the defendant to stipulate to the prior conviction, in which case the charge of the prior conviction is not read to the jury, or, if the defendant decides not to stipulate, to bifurcate the trial, with the jury only considering the prior conviction after it has reached a guilty verdict on the core crime. See, e.g., 1 J. Bishop, Criminal Law § 964, at 566-567 (5th ed. 1872) (favorably discussing English practice of bifurcation); People v. Saunders, 5 Cal.4th 580, 587-588, 20 Cal.Rptr.2d 638, 853 P.2d 1093, 1095-1096 (1993) (detailing California approach, since 1874, of permitting stipulation and, more recently, of also permitting bifurcation).

*30 Third, I think it clear that the common-law rule would cover the McMillan situation of a mandatory minimum sentence (in that case, for visible possession of a firearm during the commission of certain crimes). No doubt a defendant could, under such a scheme, find himself sentenced to the same term to which he could have been sentenced absent the mandatory minimum. The range for his underlying crime could be 0 to 10 years, with the mandatory minimum of 5 years, and he could be sentenced to 7. (Of course, a similar scenario is possible with an increased maximum.) But it is equally true that his expected punishment has increased as a result of the narrowed range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum "entitl[es] the government," Woodruff, 68 F., at 538, to more than it would otherwise be entitled (5 to 10 years, rather than 0 to 10 and the risk of a sentence below 5). Thus, the fact triggering the mandatory minimum is part of "the punishment sought to be inflicted," Bishop, Criminal Procedure, at 50; it undoubtedly "enters into the punishment" so as to aggravate it, id., § 540, at 330, and is an "ac[t] to which the law affixes ... punishment," id., § 80, at 51. Further, just as in Hobbs and Searcy, see supra, at ---- - ---- 15-16, it is likely that the change in the range available to the judge affects his choice of sentence. Finally, in numerous cases, such as Lacy, Garcia, and Jones, see supra, at ---- - ----, 6-7, ----, 16, ----, 17, the aggravating fact raised the whole range--both the top and bottom. Those courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law. And in several cases, such as Smith and Woodruff, see supra, at ----, 4, ----, 17, the very concept of maximums and minimums had no applicability, yet the same rule for elements applied. See also Harrington (discussed supra, at ---- - ----, 20-21).

Finally, I need not in this case address the implications of the rule that I have stated for the Court's decision in Walton v. Arizona, 497 U.S. 639,

647-649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). See ante, at ---- - ----, 30-31. Walton did approve a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. In this sense, that fact is an element. But that scheme exists in a unique context, for in the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment--we have restricted the legislature's ability to define crimes. Under our recent capital-punishment jurisprudence, neither Arizona nor any other jurisdiction could provide--as, previously, it freely could and did--that a person shall be death eligible automatically upon conviction for certain crimes. We have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment. Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day. [FN11]

> FN11. It is likewise unnecessary to consider whether (and, if so, how) the rule regarding elements applies to the Sentencing Guidelines, given the unique status that they have under Mistretta v. United States, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). But it may be that this special status is irrelevant, because the Guidelines "have the force and effect of laws." Id., at 413, 109 S.Ct. 647 (SCALIA, J., dissenting).

***31** For the foregoing reasons, as well as those given in the Court's opinion, I agree that the New Jersey procedure at issue is unconstitutional.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join, dissenting.

Last Term, in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), this Court found that our prior cases suggested the following principle: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id., at 243, n. 6, 119 S.Ct. 1215. At the time, Justice KENNEDY rightly criticized the Court for its failure to explain the origins, contours, or consequences of its purported constitutional principle; for the inconsistency of that principle with our prior cases; and for the serious doubt that the holding cast on sentencing systems employed by the Federal Government and States alike. Id., at 254, 264-272, 119 S.Ct. 1215 (dissenting opinion). Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in Jones.

I

Our Court has long recognized that not every fact that bears on a defendant's punishment need be charged in an indictment, submitted to a jury, and proved by the government beyond a reasonable doubt. Rather, we have held that the "legislature's definition of the elements of the offense is usually dispositive." McMillan v. Pennsylvania, 477 U.S. 79, 85, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986); see also Almendarez-Torres v. United States, 523 U.S. 224, 228, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); Patterson v. New York, 432 U.S. 197, 210, 211, n. 12, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Although we have recognized that "there are obviously constitutional limits beyond which the States may not go in this regard," id., at 210, 97 S.Ct. 2319, and that "in certain limited circumstances Winship's reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged," McMillan, supra, at 86, 106 S.Ct. 2411, we have proceeded with caution before deciding that a certain fact must be treated as an offense element despite the legislature's choice not to characterize it as such. We have therefore declined to establish any bright-line rule for making such judgments and have instead approached each case individually, sifting through the considerations most relevant to determining whether the legislature has acted properly within its broad power to define crimes and their punishments or instead has sought to evade the constitutional requirements associated with the characterization of a fact as an offense element. See, e.g., Monge v. California, 524 U.S. 721, 728-729, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998); McMillan, supra, at 86, 106 S.Ct. 2411.

In one bold stroke the Court today casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule limiting the power of Congress and state legislatures to define criminal offenses and the sentences that follow from convictions thereunder. The Court states: "Other than

the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Ante, at ----, 24. In its opinion, the Court marshals virtually no authority to support its extraordinary rule. Indeed, it is remarkable that the Court cannot identify a single instance, in the over 200 years since the ratification of the Bill of Rights, that our Court has applied, as a constitutional requirement, the rule it announces today.

*32 According to the Court, its constitutional rule "emerges from our history and case law." Ante, at ----, 26. None of the history contained in the Court's opinion requires the rule it ultimately adopts. The history cited by the Court can be divided into two categories: first, evidence that judges at common law had virtually no discretion in sentencing, ante, at ---- - ---- 11-13, and, second, statements from a 19th-century criminal procedure treatise that the government must charge in an indictment and prove at trial the elements of a statutory offense for the defendant to be sentenced to the punishment attached to that statutory offense, ante, at ---- - ---- 13-14. The relevance of the first category of evidence can be easily dismissed. Indeed, the Court does not even claim that the historical evidence of nondiscretionary sentencing at common law supports its "increase in the maximum penalty" rule. Rather, almost as quickly as it recites that historical practice, the Court rejects its relevance to the constitutional question presented here due to the conflicting American practice of judges exercising sentencing discretion and our decisions recognizing the legitimacy of that American practice. See ante, at ---- - ---- 14-15 (citing Williams v. New York, 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)). Even if the Court were to claim that the common-law history on this point did bear on the instant case, one wonders why the historical practice of judges pronouncing judgments in cases between private parties is relevant at all to the question of criminal punishment presented here. See ante, at ---- - ---- 12-13 (quoting 3 W. Blackstone, Commentaries on the Laws of England 396 (1768), which pertains to "remed[ies] prescribed by law for the redress of injuries").

Apparently, then, the historical practice on which the Court places so much reliance consists of only two quotations taken from an 1862 criminal procedure treatise. See ante, at ---- - ---- 13-14 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)). A closer examination of the two statements reveals that neither supports the Court's "increase in the maximum penalty" rule. Both of the excerpts pertain to circumstances in which a common-law felony had also been made a separate statutory offense carrying a greater penalty. Taken together, the statements from the Archbold treatise demonstrate nothing more than the unremarkable proposition that a defendant could receive the greater statutory punishment only if the indictment expressly charged and the prosecutor proved the facts that made up the statutory offense, as opposed to simply those facts that made up the common-law offense. See id., at 51 (indictment); id., at 188 (proof). In other words, for the defendant to receive the statutory punishment, the prosecutor had to charge in the indictment and prove at trial the elements of the statutory offense. To the extent there is any doubt about the precise meaning of the treatise excerpts, that doubt is dispelled by looking to the treatise sections from which the excerpts are drawn and the broader principle each section is meant to illustrate. See id., at 43 ("Every offence consists of certain acts done or omitted under certain circumstances; and in an indictment for the offence, it is not sufficient to charge the defendant generally with having committed it, ... but all the facts and circumstances constituting the offence must be specially set forth"); id., at 180 ("Every offence consists of certain acts done or omitted, under certain circumstances, all of which must be stated in the indictment ... and be proved as laid"). And, to the extent further clarification is needed, the authority cited by the Archbold treatise to support its stated proposition with respect to the requirements of an indictment demonstrates that the treatise excerpts mean only that the prosecutor must charge and then prove at trial the elements of the statutory offense. See 2 M. Hale, Pleas of the Crown *170 (hereinafter Hale) ("An indictment grounded upon an offense made by act of parliament must by express words bring the offense within the substantial description made in the act of parliament"). No Member of this Court questions the proposition that a State must charge in the indictment and prove at trial beyond a reasonable doubt the actual elements of the offense. This case, however, concerns the distinct question of when a fact that bears on a defendant's punishment, but which the legislature has not classified as an element of the charged offense, must nevertheless be treated as an offense element. The excerpts drawn from the Archbold treatise do not speak to this question at all. The history on which the Court's opinion relies provides no support for its "increase in the maximum penalty" rule.

In his concurring opinion, Justice THOMAS cites additional historical evidence that, in his view, dictates an even broader rule than that set forth in the Court's opinion. The history cited by Justice THOMAS does not require, as a matter of federal constitutional law, the application of the rule he advocates. To understand why, it is important to focus on the basis for Justice THOMAS' argument. First, he claims that the Fifth and Sixth Amendments "codified" pre- existing common law. Second, he contends that the relevant common law treated any fact that served to increase a defendant's punishment as an element of an offense. See ante, at ---- - ---- 2-4. Even if Justice THOMAS' first assertion were correct--a proposition this Court has not before embraced--he fails to gather the evidence necessary to support his second assertion. Indeed, for an opinion that purports to be founded upon the original understanding of the Fifth and Sixth Amendments, Justice THOMAS' concurrence is notable for its failure to discuss any historical practice, or to cite any decisions, predating (or contemporary with) the ratification of the Bill of Rights. Rather, Justice THOMAS divines the common-law understanding of the Fifth and Sixth Amendment rights by consulting decisions rendered by American courts well after the ratification of the Bill of Rights, ranging primarily from the 1840's to the 1890's. Whatever those decisions might reveal about the way American state courts resolved questions regarding the distinction between a crime and its punishment under general rules of criminal pleading or their own state constitutions, the decisions fail to demonstrate any settled understanding with respect to the definition of a crime under the relevant, preexisting common law. Thus, there is a crucial disconnect between the historical evidence Justice THOMAS cites and the proposition he seeks to establish with that evidence.

*33 An examination of the decisions cited by JUSTICE THOMAS makes clear that they did not involve a simple application of a long-settled common-law rule that any fact that increases punishment must constitute an offense element. That would have been unlikely, for there does not appear to have been any such common-law rule. The most relevant common-law principles in this area were that an indictment must charge the elements of the relevant offense and must do so with certainty. See, e.g., 2 Hale *182 ("Touching the thing wherein or of which the offense is committed, there is required a certainty in an indictment"); id., at *183 ("The fact itself must be certainly set down in an indictment"); id., at *184 ("The offense itself must be alledged, and the manner of it"). Those principles, of course, say little about when a specific fact constitutes an element of the offense.

Justice THOMAS is correct to note that American courts in the 19th century came to confront this question in their cases, and often treated facts that served to increase punishment as elements of the relevant statutory offenses. To the extent Justice THOMAS' broader rule can be drawn from those decisions, the rule was one of those courts' own invention, and not a previously existing rule that would have been "codified" by the ratification of the Fifth and Sixth Amendments. Few of the decisions cited by Justice THOMAS indicate a reliance on pre-existing common-law principles. In fact, the converse rule that he identifies in the 19th American cases--that a fact that does not make a difference in punishment need not be charged in an indictment, see, e.g., Larned v. Commonwealth, 53 Mass. 240, 242-244 (1847)--was assuredly created by American courts, given that English courts of roughly the same period followed a contrary rule. See, e.g., Rex v. Marshall, 1 Moody C.C. 158, 168 Eng. Rep. 1224 (1827). Justice THOMAS' collection of state-court opinions is therefore of marginal assistance in determining the original understanding of the Fifth and Sixth Amendments. While the decisions Justice THOMAS cites provide some authority for the rule he advocates, they certainly do not control our resolution of the federal constitutional question presented in the instant case and cannot, standing alone, justify overruling three decades' worth of decisions by this Court.

In contrast to Justice THOMAS, the Court asserts that its rule is supported by "our cases in this area." Ante, at ---- 23. That the Court begins its review of our precedent with a quotation from a dissenting opinion speaks volumes about the support that actually can be drawn from our cases for the "increase in the maximum penalty" rule announced today. See ante, at ---- - ---- 17-18 (quoting Almendarez-Torres, 523 U.S., at 251, 118 S.Ct. 1219 SCALIA, J., dissenting). The Court then cites our decision in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), to demonstrate the "lesson" that due process and jury protections extend beyond those factual determinations that affect a defendant's guilt or innocence. Ante, at ----, 18. The Court explains Mullaney as having held that the due process proof-beyond-a-reasonable-doubt requirement applies to those factual determinations that, under a State's criminal law, make a difference in the degree of punishment the defendant receives. Ante, at ----, 18.

The Court chooses to ignore, however, the decision we issued two years later, Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), which clearly rejected the Court's broad reading of Mullaney.

*34 In Patterson, the jury found the defendant guilty of second-degree murder. Under New York law, the fact that a person intentionally killed another while under the influence of extreme emotional disturbance distinguished the reduced offense of first-degree manslaughter from the more serious offense of second-degree murder. Thus, the presence or absence of this one fact was the defining factor separating a greater from a lesser punishment. Under New York law, however, the State did not need to prove the absence of extreme emotional disturbance beyond a reasonable doubt. Rather, state law imposed the burden of proving the presence of extreme emotional disturbance on the defendant, and required that the fact be proved by a preponderance of the evidence. 432 U.S., at 198-200, 97 S.Ct. 2319. We rejected Patterson's due process challenge to his conviction:

"We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch." Id., at 210, 97 S.Ct. 2319.

Although we characterized the factual determination under New York law as one going to the mitigation of culpability, id., at 206, 97 S.Ct. 2319, as opposed to the aggravation of the punishment, it is difficult to understand why the rule adopted by the Court in today's case (or the broader rule advocated by Justice THOMAS) would not require the overruling of Patterson. Unless the Court is willing to defer to a legislature's formal definition of the elements of an offense, it is clear that the fact that Patterson did not act under the influence of extreme emotional disturbance, in substance, "increase[d] the penalty for [his] crime beyond the prescribed statutory maximum" for first- degree manslaughter. Ante, at ---- '24. Nonetheless, we held that New York's requirement that the defendant, rather than the State, bear the burden of proof on this factual determination comported with the Fourteenth Amendment's Due Process Clause. Patterson, 432 U.S., at 205-211, 216, 97 S.Ct. 2319; see also id., at 204-205, 97 S.Ct. 2319 (reaffirming Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), which upheld against due process challenge Oregon's requirement that the defendant, rather than the State, bear the burden on factual determination of defendant's insanity).

Patterson is important because it plainly refutes the Court's expansive reading of Mullaney. Indeed, the defendant in Patterson characterized Mullaney exactly as the Court has today and we rejected that interpretation:

*35 "Mullaney's holding, it is argued, is that the State may not permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt. In our view, the Mullaney holding should not be so broadly read." Patterson, supra, at 214-215, 97 S.Ct. 2319 (emphasis added) (footnote omitted).

We explained Mullaney instead as holding only "that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." 432 U.S., at 215, 97 S.Ct. 2319. Because nothing had been presumed against Patterson under New York law, we found no due process violation. Id., at 216, 97 S.Ct. 2319. Ever since our decision in Patterson, we have consistently explained the holding in Mullaney in these limited terms and have rejected the broad interpretation the Court gives Mullaney today. See Jones, 526 U.S., at 241, 119 S.Ct. 1215 ("We identified the use of a presumption to establish an essential ingredient of the offense as the curse of the Maine law [in Mullaney]"); Almendarez-Torres, 523 U.S., at 240, 118 S.Ct. 1219 ("[Mullaney] suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt. This Court's later case, ... Patterson v. New York, however, makes absolutely clear that such a reading of Mullaney is wrong"); McMillan, 477 U.S., at 84, 106 S.Ct. 2411 (same).

The case law from which the Court claims that its rule emerges consists of only one other decision--McMillan v. Pennsylvania. The Court's reliance on McMillan is also puzzling, given that our holding in that case points to the rejection of the Court's rule. There, we considered a Pennsylvania statute that subjected a defendant to a mandatory minimum

sentence of five years' imprisonment if a judge found, by a preponderance of the evidence, that the defendant had visibly possessed a firearm during the commission of the offense for which he had been convicted. Id., at 81, 106 S.Ct. 2411. The petitioners claimed that the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's jury trial guarantee (as incorporated by the Fourteenth Amendment) required the State to prove to the jury beyond a reasonable doubt that they had visibly possessed firearms. We rejected both constitutional claims. Id., at 84-91, 93, 106 S.Ct. 2411.

The essential holding of McMillan conflicts with at least two of the several formulations the Court gives to the rule it announces today. First, the Court endorses the following principle: " '[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.' " Ante, at ----, 24 (emphasis added) (quoting Jones, 526 U.S., at 252-253, 119 S.Ct. 1215 (STEVENS, J., concurring)). Second, the Court endorses the rule as restated in Justice SCALIA's concurring opinion in Jones. See ante, at ---- 24. There, Justice SCALIA wrote: "[I]t is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." Jones, 526 U.S., at 253, 119 S.Ct. 1215 (emphasis added). Thus, the Court appears to hold that any fact that increases or alters the range of penalties to which a defendant is exposed--which, by definition, must include increases or alterations to either the minimum or maximum penalties--must be proved to a jury beyond a reasonable doubt. In McMillan, however, we rejected such a rule to the extent it concerned those facts that increase or alter the minimum penalty to which a defendant is exposed. Accordingly, it is incumbent on the Court not only to admit that it is overruling McMillan, but also to explain why such a course of action is appropriate under normal principles of stare decisis.

*36 The Court's opinion does neither. Instead, it attempts to lay claim to McMillan as support for its "increase in the maximum penalty" rule. According to the Court, McMillan acknowledged that permitting a judge to make findings that expose a defendant to greater or additional punishment "may raise serious constitutional concern." Ante, at ----, 20. We said nothing of the sort in McMillan. To the contrary, we began our discussion of the petitioners' constitutional claims by emphasizing that we had already "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." 477 U.S., at 84, 106 S.Ct. 2411 (quoting Patterson, 432 U.S., at 214, 97 S.Ct. 2319). We then reaffirmed the rule set forth in Patterson--"that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive." McMillan, 477 U.S., at 85, 106 S.Ct. 2411. Although we acknowledged that there are constitutional limits to the State's power to define crimes and prescribe penalties, we found no need to establish those outer boundaries in McMillan because "several factors" persuaded us that the Pennsylvania statute did not exceed those limits, however those limits might be defined. Id., at 86, 106 S.Ct. 2411. The Court's assertion that McMillan supports the application of its bright-line rule in this area is, therefore, unfounded.

The Court nevertheless claims to find support for its rule in our discussion of one factor in McMillan--namely, our statement that the petitioners' claim would have had "at least more superficial appeal" if the firearm possession finding had exposed them to greater or additional punishment. Id., at 88, 106 S.Ct. 2411. To say that a claim may have had "more superficial appeal" is, of course, a far cry from saying that a claim would have been upheld. Moreover, we made that statement in the context of examining one of several factors that, in combination, ultimately gave "no doubt that Pennsylvania's [statute fell] on the permissible side of the constitutional line." Id., at 91, 106 S.Ct. 2411. The confidence of that conclusion belies any argument that our ruling would have been different had the Pennsylvania statute instead increased the maximum penalty to which the petitioners were exposed. In short, it is clear that we did not articulate any bright-line rule that States must prove to a jury beyond a reasonable doubt any fact that exposes a defendant to a greater punishment. Such a rule would have been in substantial tension with both our earlier acknowledgment that Patterson rejected such a rule, see 477 U.S., at 84, 106 S.Ct. 2411, and our recognition that a state legislature's definition of the elements is normally dispositive, see id., at 85, 106 S.Ct. 2411. If any single rule can be derived from McMillan, it is not the Court's "increase in the maximum penalty" principle, but rather the following: When a State takes a fact that has always been considered by sentencing courts to bear on punishment, and dictates the precise weight that a

court should give that fact in setting a defendant's sentence, the relevant fact need not be proved to a jury beyond a reasonable doubt as would an element of the offense. See id., at 89-90, 106 S.Ct. 2411.

*37 Apart from Mullaney and McMillan, the Court does not claim to find support for its rule in any other pre-Jones decision. Thus, the Court is in error when it says that its rule emerges from our case law. Nevertheless, even if one were willing to assume that Mullaney and McMillan lend some support for the Court's position, that feeble foundation is shattered by several of our precedents directly addressing the issue. The only one of those decisions that the Court addresses at any length is Almendarez-Torres. There, we squarely rejected the "increase in the maximum penalty" rule: "Petitioner also argues, in essence, that this Court should simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement. We have explained why we believe the Constitution, as interpreted in McMillan and earlier cases, does not impose that requirement." 523 U.S., at 247, 118 S.Ct. 1219. Whether Almendarez- Torres directly refuted the "increase in the maximum penalty" rule was extensively debated in Jones, and that debate need not be repeated here. See 526 U.S., at 248-249, 119 S.Ct. 1215; id., at 268-270, 119 S.Ct. 1215 (KENNEDY, J., dissenting). I continue to agree with Justice KENNEDY that Almendarez-Torres constituted a clear repudiation of the rule the Court adopts today. See Jones, supra, at 268, 119 S.Ct. 1215 (dissenting opinion). My understanding is bolstered by Monge v. California, a decision relegated to a footnote by the Court today. In Monge, in reasoning essential to our holding, we reiterated that "the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." 524 U.S., at 729, 118 S.Ct. 2246 (citing Almendarez-Torres). At the very least, Monge demonstrates that Almendarez-Torres was not an "exceptional departure" from "historic practice." Ante, at ---- 21.

Of all the decisions that refute the Court's "increase in the maximum penalty" rule, perhaps none is as important as Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). There, a jury found Walton, the petitioner, guilty of first-degree murder. Under Arizona law, a trial court conducts a separate sentencing hearing to determine whether a defendant convicted of first-degree murder should receive the death penalty or life imprisonment. See id., at 643, 110 S.Ct. 3047 (citing Ariz.Rev.Stat. Ann. § 13- 703(B) (1989)). At that sentencing hearing, the judge, rather than the jury, must determine the existence or nonexistence of the statutory aggravating and mitigating factors. See Walton, 497 U.S., at 643, 110 S.Ct. 3047 (quoting § 13-703(B)). The Arizona statute directs the judge to " 'impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in [the statute] and that there are no mitigating circumstances sufficiently substantial to call for leniency.' " Id., at 644, 110 S.Ct. 3047 (quoting § 13-703(E)). Thus, under Arizona law, a defendant convicted of first-degree murder can be sentenced to death only if the judge finds the existence of a statutory aggravating factor.

*38 Walton challenged the Arizona capital sentencing scheme, arguing that the Constitution requires that the jury, and not the judge, make the factual determination of the existence or nonexistence of the statutory aggravating factors. We rejected that contention: " 'Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.' " Id., at 647, 110 S.Ct. 3047 (quoting Clemons v. Mississippi, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)). Relying in part on our decisions rejecting challenges to Florida's capital sentencing scheme, which also provided for sentencing by the trial judge, we added that " 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' " Walton, supra, at 648, 110 S.Ct. 3047 (quoting Hildwin v. Florida, 490 U.S. 638, 640-641, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam)).

While the Court can cite no decision that would require its "increase in the maximum penalty" rule, Walton plainly rejects it. Under Arizona law, the fact that a statutory aggravating circumstance exists in the defendant's case " 'increases the maximum penalty for [the] crime' " of first-degree murder to death. Ante, at ---- 9 (quoting Jones, supra, at 243, n. 6, 119 S.Ct. 1215). If the judge does not find the existence of a statutory aggravating circumstance, the maximum punishment authorized by the jury's guilty verdict is life imprisonment. Thus, using the terminology that the Court itself employs to describe the constitutional fault in the New Jersey sentencing scheme presented here, under Arizona law, the judge's finding that a statutory aggravating circumstance exists "exposes the

criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Ante, at ---- 16 (emphasis in original). Even Justice THOMAS, whose vote is necessary to the Court's opinion today, agrees on this point. See ante, at ---- 26. If a State can remove from the jury a factual determination that makes the difference between life and death, as Walton holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed.

The distinction of Walton offered by the Court today is baffling, to say the least. The key to that distinction is the Court's claim that, in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence. See ante, at ---- 31 (quoting Almendarez-Torres, 523 U.S., at 257, n. 2, 118 S.Ct. 1219 (SCALIA, J., dissenting)). As explained above, that claim is demonstrably untrue. A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. Indeed, at the time Walton was decided, the author of the Court's opinion today understood well the issue at stake. See Walton, 497 U.S., at 709, 110 S.Ct. 3047 (STEVENS, J., dissenting) ("[U]nder Arizona law, as construed by Arizona's highest court, a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved"). In any event, the extent of our holding in Walton should have been perfectly obvious from the face of our decision. We upheld the Arizona scheme specifically on the ground that the Constitution does not require the jury to make the factual findings that serve as the " 'prerequisite to imposition of [a death] sentence,' " id., at 647, 110 S.Ct. 3047 (quoting Clemons, supra, at 745, 110 S.Ct. 1441), or " 'the specific findings authorizing the imposition of the sentence of death,' " Walton, supra, at 648, 110 S.Ct. 3047 (quoting Hildwin, supra, at 640- 641, 109 S.Ct. 2055). If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.

*39 The distinction of Walton offered by Justice THOMAS is equally difficult to comprehend. According to Justice THOMAS, because the Constitution requires state legislatures to narrow sentencing discretion in the capital- punishment context, facts that expose a convicted defendant to a capital sentence may be different from all other facts that expose a defendant to a more severe sentence. See ante, at ---- - ---- 26-27. Justice THOMAS gives no specific reason for excepting capital defendants from the constitutional protections he would extend to defendants generally, and none is readily apparent. If Justice THOMAS means to say that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence, his reasoning is without precedent in our constitutional jurisprudence.

In sum, the Court's statement that its "increase in the maximum penalty" rule emerges from the history and case law that it cites is simply incorrect. To make such a claim, the Court finds it necessary to rely on irrelevant historical evidence, to ignore our controlling precedent (e.g., Patterson), and to offer unprincipled and inexplicable distinctions between its decision and previous cases addressing the same subject in the capital sentencing context (e.g., Walton). The Court has failed to offer any meaningful justification for deviating from years of cases both suggesting and holding that application of the "increase in the maximum penalty" rule is not required by the Constitution.

II

*40 That the Court's rule is unsupported by the history and case law it cites is reason enough to reject such a substantial departure from our settled jurisprudence. Significantly, the Court also fails to explain adequately why the Due Process Clauses of the Fifth and Fourteenth Amendments and the jury trial guarantee of the Sixth Amendment require application of its rule. Upon closer examination, it is possible that the Court's "increase in the maximum penalty" rule rests on a meaningless formalism that accords, at best, marginal protection for the constitutional rights that it seeks to effectuate.

Any discussion of either the constitutional necessity or the likely effect of the Court's rule must begin, of course, with an understanding of what exactly that rule is. As was the case in Jones, however, that discussion is complicated here by the Court's failure to clarify the contours of the constitutional principle underlying its decision. See Jones, 526 U.S., at 267, 119 S.Ct. 1215 (KENNEDY, J., dissenting). In fact,

there appear to be several plausible interpretations of the constitutional principle on which the Court's decision rests.

For example, under one reading, the Court appears to hold that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt only if that fact, as a formal matter, extends the range of punishment beyond the prescribed statutory maximum. See, e.g., ante, at ---- 24. A State could, however, remove from the jury (and subject to a standard of proof below "beyond a reasonable doubt") the assessment of those facts that define narrower ranges of punishment, within the overall statutory range, to which the defendant may be sentenced. See, e.g., ante, at ---- 28, n. 19. Thus, apparently New Jersey could cure its sentencing scheme, and achieve virtually the same results, by drafting its weapons possession statute in the following manner: First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years' imprisonment for one who commits that criminal offense. Second, New Jersey could provide that only those defendants convicted under the statute who are found by a judge, by a preponderance of the evidence, to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence greater than 10 years' imprisonment.

The Court's proffered distinction of Walton v. Arizona suggests that it means to announce a rule of only this limited effect. The Court claims the Arizona capital sentencing scheme is consistent with the constitutional principle underlying today's decision because Arizona's first-degree murder statute itself authorizes both life imprisonment and the death penalty. See Ariz.Rev.Stat. Ann. § 13-1105(C) (1989). " '[O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.' " Ante, at ---- 31 (emphasis in original) (quoting Almendarez-Torres, 523 U.S., at 257, n. 2, 118 S.Ct. 1219 (SCALIA, J., dissenting)). Of course, as explained above, an Arizona sentencing judge can impose the maximum penalty of death only if the judge first makes a statutorily required finding that at least one aggravating factor exists in the defendant's case. Thus, the Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense. In real terms, however, the Arizona sentencing scheme removes from the jury the assessment of a fact that determines whether the defendant can receive that maximum punishment. The only difference, then, between the Arizona scheme and the New Jersey scheme we consider here--apart from the magnitude of punishment at stake--is that New Jersey has not prescribed the 20- year maximum penalty in the same statute that it defines the crime to be punished. It is difficult to understand, and the Court does not explain, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

*41 Under another reading of the Court's decision, it may mean only that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt if it, as a formal matter, increases the range of punishment beyond that which could legally be imposed absent that fact. See, e.g., ante, at ----, ---- 16, 24. A State could, however, remove from the jury (and subject to a standard of proof below "beyond a reasonable doubt") the assessment of those facts that, as a formal matter, decrease the range of punishment below that which could legally be imposed absent that fact. Thus, consistent with our decision in Patterson, New Jersey could cure its sentencing scheme, and achieve virtually the same results, by drafting its weapons possession statute in the following manner: First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years' imprisonment for one who commits that criminal offense. Second, New Jersey could provide that a defendant convicted under the statute whom a judge finds, by a preponderance of the evidence, not to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence no greater than 10 years' imprisonment.

The rule that Justice THOMAS advocates in his concurring opinion embraces this precise distinction between a fact that increases punishment and a fact that decreases punishment. See ante, at ---- 3 ("[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)"). The historical evidence on which Justice THOMAS relies, however, demonstrates both the difficulty and the pure formalism of making a constitutional "elements" rule turn on such a difference. For example, the Wisconsin statute considered in Lacy v. State, 15 Wis. *13 (1862), could plausibly qualify as either increasing or mitigating punishment on the basis of the same specified fact. There, Wisconsin provided that the willful and malicious burning of a dwelling house in

which "the life of no person shall have been destroyed" was punishable by 7 to 14 years in prison, but that the same burning at a time in which "there was no person lawfully in the dwelling house" was punishable by only 3 to 10 years in prison. Wis.Rev.Stat., ch. 165, § 1 (1858). Although the statute appeared to make the absence of persons from the affected dwelling house a fact that mitigated punishment, the Wisconsin Supreme Court found that the presence of a person in the affected house constituted an aggravating circumstance. Lacy, supra, at *15-*16. As both this example and the above hypothetical redrafted New Jersey statute demonstrate, see supra, at ---- 20, whether a fact is responsible for an increase or a decrease in punishment rests in the eye of the beholder. Again, it is difficult to understand, and neither the Court nor JUSTICE THOMAS explains, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

*42 If either of the above readings is all that the Court's decision means, "the Court's principle amounts to nothing more than chastising [the New Jersey Legislature] for failing to use the approved phrasing in expressing its intent as to how [unlawful weapons possession] should be punished." Jones, 526 U.S., at 267, 119 S.Ct. 1215 (KENNEDY, J., dissenting). If New Jersey can, consistent with the Constitution, make precisely the same differences in punishment turn on precisely the same facts, and can remove the assessment of those facts from the jury and subject them to a standard of proof below "beyond a reasonable doubt," it is impossible to say that the Fifth, Sixth, and Fourteenth Amendments require the Court's rule. For the same reason, the "structural democratic constraints" that might discourage a legislature from enacting either of the above hypothetical statutes would be no more significant than those that would discourage the enactment of New Jersey's present sentence-enhancement statute. See ante, at ----, 24, n. 16 (majority opinion). In all three cases, the legislature is able to calibrate punishment perfectly, and subject to a maximum penalty only those defendants whose cases satisfy the sentence-enhancement criterion. As Justice KENNEDY explained in Jones, "[n]o constitutional values are served by so formalistic an approach, while its constitutional costs in statutes struck down ... are real." 526 U.S., at 267, 119 S.Ct. 1215.

Given the pure formalism of the above readings of the Court's opinion, one suspects that the constitutional principle underlying its decision is more far reaching. The actual principle underlying the Court's decision may be that any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt. See, e.g., ante, at ---- 28 ("[T]he relevant inquiry is one not of form, but of effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"). The principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (e.g., the federal Sentencing Guidelines). Justice THOMAS essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the Sentencing Guidelines. See ante, at ---- 27, n. 11.

*43 I would reject any such principle. As explained above, it is inconsistent with our precedent and would require the Court to overrule, at a minimum, decisions like Patterson and Walton. More importantly, given our approval of--and the significant history in this country of--discretionary sentencing by judges, it is difficult to understand how the Fifth, Sixth, and Fourteenth Amendments could possibly require the Court's or Justice THOMAS' rule. Finally, in light of the adoption of determinate-sentencing schemes by many States and the Federal Government, the consequences of the Court's and Justice THOMAS' rules in terms of sentencing schemes invalidated by today's decision will likely be severe.

As the Court acknowledges, we have never doubted that the Constitution permits Congress and the state legislatures to define criminal offenses, to prescribe broad ranges of punishment for those offenses, and to give judges discretion to decide where within those ranges a particular defendant's punishment should be set. See ante, at ---- - ---- 14-15. That view accords with historical practice under the Constitution. "From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion. The great majority of federal criminal statutes have stated only a maximum term of years and a maximum monetary fine, permitting the sentencing judge to impose any term of imprisonment and any fine up to the statutory maximum." K. Stith & J. Cabranes, Fear of Judging:

Sentencing Guidelines in the Federal Courts 9 (1998) (footnote omitted). Under discretionary-sentencing schemes, a judge bases the defendant's sentence on any number of facts neither presented at trial nor found by a jury beyond a reasonable doubt. As one commentator has explained:

"During the age of broad judicial sentencing discretion, judges frequently made sentencing decisions on the basis of facts that they determined for themselves, on less than proof beyond a reasonable doubt, without eliciting very much concern from civil libertarians. ... The sentence in any number of traditional discretionary situations depended quite directly on judicial findings of specific contested facts. ... Whether because such facts were directly relevant to the judge's retributionist assessment of how serious the particular offense was (within the spectrum of conduct covered by the statute of conviction), or because they bore on a determination of how much rehabilitation the offender's character was likely to need, the sentence would be higher or lower, in some specific degree determined by the judge, based on the judge's factual conclusions." Lynch, Towards A Model Penal Code, Second (Federal?), 2 Buffalo Crim. L.Rev. 297, 320 (1998) (footnote omitted).

*44 Accordingly, under the discretionary-sentencing schemes, a factual determination made by a judge on a standard of proof below "beyond a reasonable doubt" often made the difference between a lesser and a greater punishment.

For example, in Williams v. New York, a jury found the defendant guilty of first-degree murder and recommended life imprisonment. The judge, however, rejected the jury's recommendation and sentenced Williams to death on the basis of additional facts that he learned through a pre-sentence investigation report and that had neither been charged in an indictment nor presented to the jury. 337 U.S., at 242-245, 69 S.Ct. 1079. In rejecting Williams' due process challenge to his death sentence, we explained that there was a long history of sentencing judges exercising "wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by law." Id., at 246, 69 S.Ct. 1079. Specifically, we held that the Constitution does not restrict a judge's sentencing decision to information that is charged in an indictment and subject to cross-examination in open court. "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." Id., at 251, 69 S.Ct. 1079.

Under our precedent, then, a State may leave the determination of a defendant's sentence to a judge's discretionary decision within a prescribed range of penalties. When a judge, pursuant to that sentencing scheme, decides to increase a defendant's sentence on the basis of certain contested facts, those facts need not be proved to a jury beyond a reasonable doubt. The judge's findings, whether by proof beyond a reasonable doubt or less, suffice for purposes of the Constitution. Under the Court's decision today, however, it appears that once a legislature constrains judges' sentencing discretion by prescribing certain sentences that may only be imposed (or must be imposed) in connection with the same determinations of the same contested facts, the Constitution requires that the facts instead be proved to a jury beyond a reasonable doubt. I see no reason to treat the two schemes differently. See, e.g., McMillan, 477 U.S., at 92, 106 S.Ct. 2411 ("We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance"). In this respect, I agree with the Solicitor General that "[a] sentence that is constitutionally permissible when selected by a court on the basis of whatever factors it deems appropriate does not become impermissible simply because the court is permitted to select that sentence only after making a finding prescribed by the legislature." Brief for United States as Amicus Curiae 7. Although the Court acknowledges the legitimacy of discretionary sentencing by judges, see ante, at ---- - ---- 14-15, it never provides a sound reason for treating judicial factfinding under determinate-sentencing schemes differently under the Constitution.

Justice THOMAS' attempt to explain this distinction is similarly unsatisfying. His explanation consists primarily of a quotation, in turn, of a 19th-century treatise writer, who contended that the aggravation of punishment within a statutory range on the basis of facts found by a judge " 'is an entirely different thing from punishing one for what is not alleged against him.' " Ante, at ---- 22 (quoting 1 J. Bishop, Commentaries on Law of Criminal Procedure § 85, p. 54 (rev.2d ed. 1872)). As our decision in Williams v. New York demonstrates, however, that statement does not accurately describe the reality of discretionary sentencing conducted by judges. A defendant's actual punishment can be affected in a very real way by facts never alleged in an indictment, never presented to a jury, and never proved beyond a reasonable doubt. In Williams' case, facts presented for the first time to the judge, for purposes of sentencing alone, made the

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ALONA CANDITO DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

STATE OF NEVADA Plaintiff vs. DONTE JOHNSON aka John Lee White Defendant	CASE NO. C153154 DEPT. V DOCKET "H" Transcript of Proceedings

BEFORE THE HONORABLE JEFFREY D. SOBEL, DISTRICT COURT JUDGE

JURY TRIAL - PENALTY PHASE - DAY 3
DELIBERATIONS AND DECLARATION OF MISTRIAL
FRIDAY, JUNE 16, 2000
VOLUME IV

APPEARANCES:

FOR THE PLAINTIFF: GARY L. GUYMON
Chief Deputy District Attorney
ROBERT J. DASKAS
Deputy District Attorney

FOR THE DEFENDANT: JOSEPH S. SCISCENTO
DAYVID J. FIGLER
Deputy Special Public Defenders

COURT REPORTER:

DEBBIE VAN BLARICON
District Court

TRANSCRIPTION BY:

NORTHWEST TRANSCRIPTS, INC.
Las Vegas Division
P.O. Box 35257
Las Vegas, Nevada 89133-5257
(702) 658-9626

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LAS VEGAS, NEVADA, FRIDAY, JUNE 16, 2000 AT 8:05 A.M.

(Jury is not present)

THE COURT: We're meeting in session, outside the presence of the jury and on the record.

For the record I had indicated that it would be my personal preference to discuss these things off the record in chambers, informally, and just to see what the positions of the parties were and engage in some discussion. Rule 250, sub (5), indicates that the Court shall ensure that all proceedings in a capital case are reported and transcribed, but with the consent of each party's counsel, the Court may conduct certain proceedings -- may conduct proceedings outside the presence of the jury or the court reporter.

As I indicated to the parties outside of Court, in a brief in-chambers meeting, that would be my preference, but that either party could veto that, obviously, because it requires the consent of each party's counsel and that if any objection is made or any issue is resolved in an unreported proceeding the Court shall ensure that the objection and resolution are made part of the record at the next reported proceeding. It was indicated by the Special Public Defender that the most they would agree with, that's Philip Kohn, is to sit in chambers on the record; and I indicated if we were going to be on the record we'd do it in open court and that's how we came to be here. The State would have consented. The

Special Public Defender asked that this be on the record.

Right, Mr. Sciscento?

MR. SCISCENTO: That's correct, Your Honor.

THE COURT: Okay. There's two notes.

The first note that was received from the jury after they began deliberations yesterday, and they began deliberating in the neighborhood of 8 o'clock, was a note that reads as follows:

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

In retrospect I should have sent it back because it wasn't signed by the foreman, but I answered it and it says, the answer:

"To the Members of the Jury, from Judge Jeffrey D. Sobel, I'm not permitted to answer your question."

Then about -- somewhere around 4:45 received another note in the same handwriting:

"What happens if we cannot resolve our deadlock?"

So, we agreed because the jury -- or I thought we agreed, but I'll set the record on that, that we would send them home. We -- I had concurred with the sending of the note, indicated through the people who were watching them, that it was getting close to 5 o'clock and as every other day of their deliberations I've indicated to them, whether they

deliberated at night or not was up to them and they indicated they wanted to go home and we agreed that we would get together this morning before they began to deliberate and discuss the issues raised by that note. Is that right, in your opinion, State?

MR. GUYMON: Yes, Your Honor.

THE COURT: And in your's Mr. Sciscento?

MR. SCISCENTO: Yes, Your Honor.

THE COURT: Okay. Now last night and without any discussion of it, the State proffered the statute in this case that they believe applies to this case and five or six, maybe eight or nine cases. The only communication that I had with the State was not substantive in nature. I did request of them about 9:30 last night, if they could get me a copy of the Barts case that is referred to in the Holden case that they had proffered.

Now, just so I have some notion as to where the parties wish to head, I get the feeling from the brief discussion we had before we agreed to get together this morning, and I'm really extrapolating from this, in part, the State's would be, if we could establish, through whatever procedure, that there is person or persons on the jury who are taking the position that they would invariably and -- they would invariably reject the death penalty in every case and never vote to impose it. In other words, the same grounds

that would have been an excusal for cause had they given those answers on voir dire. That we seat an alternate, instruct the jury to begin anew their deliberations and go from there. Is that right?

MR. DASKAS: That's exactly our position Judge.

THE COURT: And I take it, although I haven't been favored with any authority yet, but I'm just hazarding a guess that from the discussion we did have, when the note was sent back to them regarding the first note where I said I couldn't answer it, Mr. Figler had urged that we also -- rather than give that answer, that we actually reread to the jury or point to their direction again, one of the twenty or so instructions, that was 7(b), which specifically tells them that they never -- no juror ever is required to return the death penalty and absent that, the second or fallback request of the defense was to tell them also look at your instructions. Is that right, Mr. Figler?

MR. FIGLER: That's correct, Judge.

THE COURT: Okay. So I extrapolate from that, in thinking about this that it would probably be the preference of the defense to not go through the procedure that is being asked of the State, which is going to involve, I'm sure, getting in at least the foreperson and one other person and making some renewed voir dire inquiries. I'm hazarding the guess that I will ask you, if I'm wrong, that you would

rather, perhaps, just have them continue to deliberate and perhaps give them an Allen charge?

MR. FIGLER: Your Honor --

THE COURT: Yes or no?

MR. FIGLER: Yes, with an explanation as they say in Municipal Court, Judge.

THE COURT: You may have more experience in Municipal Court than I, so tell me what they -- you would have said in Municipal Court?

MR. FIGLER: Judge, with regard to the information that we have from the jury so far, right now the last thing that we're dealing with is, there's some ambiguity, "What happens if we cannot resolve our deadlock?" I think the inquiry needs to be made whether or not they actually are at a deadlock. It's a yes or no question to be put to the jury.

THE COURT: You're not saying that that would come before the inquiry the State is urging, are you?

MR. FIGLER: Certainly, Judge. We don't think that there is any authority, irrespective of the California cases that have been cited by the State, to probe into the mental processes of any individual juror, absent any information --

THE COURT: Well, no. No, maybe you misunderstand me. If I decide that that's an appropriate inquiry we don't reach the deadlock issue because it will be a different jury. So we really have to resolve that question procedurally first.

MR. FIGLER: Procedurally, it's the defense's position that there is no question that needs to be posed to any juror at this time.

THE COURT: I understand that. I'm saying --

MR. FIGLER: And I'll give you the authority.

THE COURT: -- I'm saying their bottom line is, they want an alternate on this jury to replace the person who's saying they'll never give the death penalty. I would assume your bottom line is the best thing you would want really is to have this person, if they exist, continue on the jury and deliver a dynamite charge which might urge the other jurors to agree with them. I'm just saying at --

MR. FIGLER: If Your Honor finds --

THE COURT: -- the parameters.

MR. FIGLER: If Your Honor finds they're deadlock, correct. I mean, I just want to make our position very clear. That the authority under the laws of the State of Nevada don't provide for this Court to make any inquiry with regard to any juror's mental processes at this time with this record.

THE COURT: I understand that.

MR. FIGLER: Okay, I just want to make that clear.

THE COURT: I mean we haven't reached that point. But that's about where we stand on the outside. That's what they would like and what you would probably prefer is, at the far other end, keep this person on the jury, make no inquires

of this person and say you've only been deliberating five and a half hours, here's an Allen charge, keep that person, if they exist, on the jury without further inquiry and try to get the other people to agree with them. Is that --

MR. FIGLER: Some version of an Allen charge, yes, Judge.

THE COURT: Right. Okay. So I guess pretty much the left and right field lines of the ballpark.

Okay. Now, let's stick to the first issue which is, do we have inquiry? Now, Mr. Figler has asserted that it's only California authority. Mr. Figler may not be a fan of the great southern part of this country where North Carolina and the Tarheels are located, because the primary authority, as I see it, that has been cited by the State comes out of North Carolina. You've read that case too, Mr. Figler?

MR. FIGLER: I've glanced through Barts. Which case are you referring to, Judge?

THE COURT: The case that cites Barts, which is Holden.

MR. GUYMON: And, Judge, the record should reflect that we gave both the defense --

MR. FIGLER: That's correct.

MR. GUYMON: -- and the State the same materials. I delivered those materials last night, leaving them at the door of the Special Public Defender's Office --

MR. FIGLER: That's correct, Judge.

MR. GUYMON: -- with their names on it.

THE COURT: Okay. Now, here's -- here's the problem and I would imagine I see it as a little more complicated than the State might see it. In Holden you have a person and I'm citing from page 17 -- oh, you know, this is -- these are those computer printouts, right? Page 17 must just mean that's the page it comes out on the computer on?

MR. DASKAS: That's correct, Judge.

MR. FIGLER: Yes, Your Honor.

MR. DASKAS: I believe it to be page -- either 530 or 531, if you'd look within the text of page 17.

THE COURT: Okay. It's actually, probably on 151.

MR. DASKAS: Okay. Okay.

THE COURT: So that would probably mean that it's coming out 321, North Carolina, at 131.

MR. DASKAS: Right.

THE COURT: The Court says to the juror who's eventually excused. "Well, then, you mean you've already formed an opinion without hearing any evidence?" And the factual situation in Holden is that in Holden, apparently, after the guilt phase and before the sentencing phase somebody overheard this woman make a comment, as I recall, that she wasn't able to impose the death penalty. And that factually was Holden, right?

MR. DASKAS: That's my understanding, Judge.

THE COURT: Okay. So, it wasn't in the midst of deliberations in the penalty phase, it was before she had heard any instructions, any opening statements, any evidence, whether it be aggravation or mitigation, or any arguments of counsel, and in those conditions that court indicated that it was appropriate to have that discussion.

And then in Barts, which I read this morning, while voir dire questioning was continuing the next day Ms. Mitchell asked to address the court, said she had become very agitated, said she'd come to the conclusion she would be unable, under any circumstance, to vote to impose the death penalty. And by the way, I'm addressing this all to you --

MR. DASKAS: I understand.

THE COURT: -- just as the context of what I'm getting at. Not the defense. And under those circumstances the Court held, as they did in many of these cases, that the decision of whether to reopen examination of a juror previously accepted by both parties is a matter within the discretion of the trial court.

Now, leaving aside the procedure by which we would ascertain what view is held by this juror, which is an issue that we don't have to reach yet, because the first issue is, do we get into this at all?

The context of this inquiry from the jury is not the

same as it was in Holden or in Barts. In this case it's in the midst of deliberations in a penalty phase. And the context, as I see it, of this penalty phase is, not only have they heard all the aggravators, whoever this person is if they exist, I mean if they don't exist this is all an exercise of futility, but if this person sits back there and this is actually their views, which we'll assume for the sake of this discussion, not only have they heard the opening statements, the whole aggravator and mitigating case, but they've had Mr. Sciscento, without objection, stand up in front of them and argue essentially that we shouldn't have the death penalty at all. Now that goes far beyond the Bennett instruction that's contained in 7(b), without objection. As I heard the final argument of Mr. Sciscento, what he was really saying to the jury was, without objection, that the death penalty has existed for something like 25 years, since it was re-instituted, that we still continue to have murders going on, that it's not working, that we shouldn't have the death penalty anymore. And so the context in which this inquiry comes, to me is not the same as in Holden and I'm wondering, and I don't think there's any authority on this, let's assume that this person answered honestly when their voir dire was conducted, here's not nameless, faceless hypothetical or what they read in the newspaper kind of facts, but hears the facts in this case, listens to argument of counsel. And now, four,

five hours into jury deliberations and maybe we'll find out when she first or he expressed first this opinion, now comes to the conclusion they're against the death penalty. Does that entitle you and, if so, what authority can you adduce to, at this point, take this person who is convinced by Mr. Sciscento's arguments and replace them with a person not yet convinced?

MR. DASKAS: Judge, we're assuming that the note that was given to the Court and relayed to us is accurate. And that is that this juror --

THE COURT: And I'm assuming that --

MR. DASKAS: Right.

THE COURT: -- for the purpose of this discussion.

MR. DASKAS: Right. And that's obviously significant because the note is that this juror cannot consider the death penalty, quote, "under any circumstances".

THE COURT: Yes, but part of the note also is -- where is the other note? It's not just -- that's the end of the note, Robert.

MR. DASKAS: I understand.

THE COURT: The beginning of the note is, "What do we do if someone's belief system has changed to where the death penalty is no longer an appropriate punishment?"

Again, I'm assuming from that, that at some point after voir dire and possibly during penalty phase

deliberations this person has become convinced by the argument of the defense that the death penalty should be thrown out.

Now, I personally think, but I hadn't thought it through enough, because I had never heard this argument before and I'd suggested on the phone yesterday, that actually this argument, when he asked for Bennett to be read again, that really part of Mr. Sciscento's argument is the jury nullification argument which is, let's rewrite the laws. But it wasn't objected to and now this jury has been told that's the defense's position which is, let's abolish the death penalty, you folks have the power to do it.

Now, if that argument worked and we now have a person back there who bought the defense's unobjected to argument, does that entitle you to throw this person off and get a new person in there?

MR. DASKAS: Yes, because our position is, regardless of the reason the juror can't follow the oath, the juror cannot follow the oath. Which means they're not following the instructions and law that this Court has given that particular juror. The reason they choose to no longer follow the oath is insignificant.

The point is, they are now --

THE COURT: Why is it insignificant if they've now bought the unobjected to argument of Mr. Sciscento?

MR. DASKAS: Because they're not longer willing to

follow the law that was given to them. Just like if we're in a guilt phase and they receive an instruction on burglary and they're convinced, for whatever reason, that burglary shouldn't be against the law, it is against the law and if they can't follow that instruction they should not be serving as a juror because they cannot abide by the oath that they took.

THE COURT: Okay, let's say we have a possession of marijuana case.

MR. DASKAS: Right.

THE COURT: And in voir dire you say to 'em regardless of what your views are as to whether the use of marijuana or the possession of marijuana should be illegal, would you follow the law of the State of Nevada and maybe it's a unique state, in the State of Nevada it's still a felony, will you follow the law. Then the defense stand up during final argument and says, pot is not a bad thing, that's old fashioned, that is a horrible thing to say, you people have it in your power to send a message to society that we're not gonna stand for this illegal marijuana anymore. Prosecution sits there, says nothing, and a juror sends out a note, a foreman, we're presuming this was the foreman, sends out a note and says, well, one of is saying now marijuana should be legal, they'll never vote for a conviction. Your argument would be that we can make inquiry of that jury and if they're

-- juror, and if they're no longer willing to find a person guilty of this offense, bring in the alternate?

MR. DASKAS: Right. Our position is we're entitled to twelve jurors who will abide by the oath that they took.

THE COURT: At every --

MR. DASKAS: And -- right. And despite the reason that juror cannot abide the oath that's not significant. What's significant is we have somebody who's not willing to follow the law. And I guess I see it the same as Holden really, because the point is at some point after voir dire, when the jury indicated that he or she could follow the instructions and would consider the death penalty, at some point after that that position changed.

THE COURT: See and I noticed both in the ALR discussion of Holden and in Holden itself, and maybe they aren't interpreting it correctly and maybe it should be more broadly read, but they both emphasize that this is before the person has heard any evidence. This individual's now heard all the evidence and I also really question -- and it's gonna require obviously some detailed questioning --

MR. DASKAS: Right.

THE COURT: -- which may actually -- absolutely poison the person for further deliberations.

MR. DASKAS: Right.

THE COURT: And there's some real risks involved in

it. This person may want -- not want to say to the other jurors it's this case that I want to apply the death penalty. If Charles Manson were sitting on the dock I'd do it. Certainly, if Adolf Hitler were here as the defendant I would do it, but look there's eleven of these people and it's a lot easier for me to say I'm just against the death penalty, but in real life I just don't want to impose the death penalty on Mr. White and in real life I still qualify, I couldn't be challenged for cause. And you would concede, if we had this person in here and they say the same thing that would not allow a challenge for cause during voir dire initially, that they can execute or vote for the death penalty on Adolf Hitler, they stay on the jury, right?

MR. DASKAS: That's correct, Judge. That's why I prefaced my comments by saying we're assuming that this note is accurate.

THE COURT: Right.

MR. DASKAS: That this person cannot vote under any circumstances. If it's just this case Judge, we would concede that that person is qualified to be a juror. Absolutely.

THE COURT: All right. I understand your position then.

MR. DASKAS: And that's why I'm saying I'm assuming the note is accurate.

THE COURT: Okay. I understand your position.

MR. DASKAS: And Judge, may I -- I apologize.

THE COURT: Yeah.

MR. DASKAS: May -- just one more matter. And I was referring to NRS 175.061, which indicates that jurors shall be replaced by alternate jurors when they can no longer -- when they become unable or are disqualified to perform their duties. And --

THE COURT: Right. I understand your argument. You're saying that disqualifies them.

MR. DASKAS: Absolutely.

THE COURT: I understand that part.

MR. DASKAS: And Judge, the reason we had two alternates sitting throughout penalty is because this type of situation might happen. It's no different in --

THE COURT: I think you're begging the question there.

MR. DASKAS: Oh, okay. I understand.

THE COURT: All right. Now, other than they have no Nevada authority for this procedure, do you have some authority that you just didn't give me last night when I wanted authority?

MR. FIGLER: Your Honor, I would refer you to --

THE COURT: Well, let me break it into two questions. A), do you have authority? And secondly, what is, in your opinion, hopefully based on authority, wrong with

bringing the foreperson in for the purposes of identification of this person or persons and then making inquiry at least, as to whether they have now an invariable opposition to the death penalty?

MR. FIGLER: Your Honor, this isn't a marijuana case. This isn't a burglary case. This is a death penalty case where a man's life is at stake.

THE COURT: I'll tell you, Mr. Figler, I'll give you a little room to talk the way you want to talk, but I'll look you in the eye and tell you you're not arguing to a jury. Listen to me, Mr. Figler, and it makes it hard for me to even concentrate or be persuaded when you engage in this kind of bologna. It's bologna to me, Mr. Figler. I want to focus on the legal issues and what I'm telling you is, it's not persuasive to me and it's disconcerting and it clouds my mind when you deal with those kinds of things.

I don't care whether it's a marijuana case or it's a death penalty case in the sense that the stakes do not impress me. I want to discuss the legal issue here.

MR. FIGLER: And that's exactly where I was going, Your Honor, because the analogies that were being made during the discourse are in applicable. Because in this particular case we do have an instruction called Bennett, which allows them to follow law in that they never have to impose the death penalty, nor do they ever have to give their reason for

imposing --

THE COURT: In any given case.

MR. FIGLER: -- the death penalty. That's correct, Your Honor.

THE COURT: In any given case. But you would concede that if they are invariably opposed to the death penalty the State can challenge them successfully for cause.

MR. FIGLER: I want to focus on what we have in our record right now. There were certain assumptions made by Your Honor and Mr. Daskas with regard to what this note meant.

THE COURT: No, no, no. I'm making no assumption, I'm saying --

MR. FIGLER: But, I --

THE COURT: I'm saying for the point of moving along procedurally --

MR. FIGLER: I understand that, Your Honor.

THE COURT: -- we will assume that this person is saying it.

MR. FIGLER: And I believe, that based on the record, we have to assume that and we can't take any other assumption from that because this juror has been indicated in the note from the jury, and this is the only information we have that this person has, as Your Honor pointed out, changed their position after hearing the evidence. That's the only assumption you can make.

I would point Your Honor to NRS 50.065 at this time. Subsection (2), essentially stating --

THE COURT: Can I read it please, Mr. Figler?

MR. FIGLER: I'm gonna inform the prosecutor.

THE COURT: I was hoping to read it before now, but let me read it now.

(Pause in the proceedings)

THE COURT: Isn't this nothing more, Mr. Figler, than the hundreds of years old rule that usually forbids impeachment of a jury's verdict after it's reached a verdict?

MR. FIGLER: Your Honor, the rule is very clear. That you cannot go behind the mental processes of the jury's at any time; and if we can't do it after the fact, after the jury has entered the verdict --

THE COURT: After a jury has reached a verdict it has been hundreds of year's policy that we're not going to relitigate whether they reached a proper verdict. They haven't reached a verdict here and the question is, do we, at this point, see if a juror could be disqualified for cause?

MR. FIGLER: Your Honor, this rule has been invoked during the course of a trial in Riebel v. Nevada, 106.258. It's annotated --

THE COURT: And do you have a copy of that?

MR. FIGLER: I just have this copy.

The bottom line, Judge, is, if you don't have

extrinsic fact information, a note from the juror that says something along the lines of this juror lied during voir dire, this juror is considering stuff outside of this record, then you cannot make the inquiry. And the reason is very important, the reason why this has been the law for so long, at least as it has been codified in Nevada, is that we cannot engage in this oppressive questioning of individuals regarding their particular thought process, especially when the law provides that they don't have to give a reason why they decide they don't want to kill somebody today.

Bennett is very clear. There is no indication on this record, as we have it right now, that a person who has changed their mind isn't following the law of Bennett; and as such, any inquiry by this Court, based on this record as we have it, is going to be intrinsically oppressive, because if that individual is taken off the jury, then the jurors are going to think that Bennett isn't the law. That they don't have to not have a reason to impose the death penalty. We don't know what the break up is right now, we're just assuming what the break up is.

But the record is really clear there is nothing extrinsic, like this case in North Carolina, like this case in California --

THE COURT: Let me read Riebel because I haven't had the opportunity to look at it before, Mr. Figler. Does he

have a copy of -- for you of this, by the way?

MR. DASKAS: No, Judge.

MR. FIGLER: We just printed this up, Judge.

THE COURT: What?

MR. FIGLER: I just printed this up, Judge.

THE COURT: It's 106, Nevada, 258, if you want to go pull one off the shelf there.

MR. DASKAS: May I --

THE COURT: Yeah, it's in chambers. 106.

MR. DASKAS: 258?

THE COURT: Yeah.

MR. DASKAS: Thank you, Judge.

(Pause in the proceedings)

THE COURT: Now they are not deliberating, right? What?

THE BAILIFF: They are here.

THE COURT: They are not deliberating?

THE BAILIFF: No.

(Pause in the proceedings)

(Off record)

THE COURT: ... reading this, Mr. Figler, this Riebel case, as authority for prohibiting interrogation during deliberations on this subject, even though factually it doesn't say that at all?

MR. FIGLER: It's any inquiry of the thought

processes of the jurors.

THE COURT: That's what the statute says, but --

MR. FIGLER: And Riebel is taking --

THE COURT: -- I thought maybe I misheard you, but I thought you had represented that this case factually was during deliberations when, in fact, these were jury notes or letters sent to the Judge after the return of the verdict and before sentencing. Is this your authority for saying -- I mean this isn't the authority.

MR. FIGLER: But, Your Honor, the evidence that they're referring to --

THE COURT: Don't shift to something else. I think you misrepresented the facts of this case, Mr. Figler.

MR. FIGLER: Your Honor, it's during the deliberations that this type of information came to light. What I'm saying is --

THE COURT: Right. And they followed it up later.

MR. FIGLER: What is the difference, Your Honor? Please, tell me. Because if the prohibition is on the mental thought processes, they arise -- time. It's not after the fact.

THE COURT: It's the same rule, which is you can't impeach a verdict by subsequent delving into their mental processes. It's the same rule as the statute.

MR. FIGLER: That's distinguishable, Judge. That

case that I've cited you is the essential -- what we're talking about, where after the fact jurors are saying, you know, what I really thought then or what I really want to say then, this is something contemporaneous and that's the position I made. Not a misrepresentation, but you're talking about contemporaneous mental thought processes.

And the Nevada Supreme Court says that this rule states -- and we don't know if this particular statute, NRS 50 that I've cited, is in the North Carolina, is in the California. What we do know is that the Nevada Supreme Court says you can't get into the heads of them if you don't have anything more. Period. Period.

THE COURT: Okay. Now what's the harm in, you assume that this person comes into court, they say they're invariably against the death penalty. They're posed the Hitler thing and they say, oh, yeah, I'd put Hitler away for life without. If we bring this person in here, of course, and they don't get disqualified for cause, then they go right back in after this and not only are the other jurors now thinking that Bennett doesn't apply, they still have this juror with them. I mean, that's not gonna hurt your position is it?

MR. FIGLER: I'm not following, Your Honor. If, you have a Morgan allowable on the jury then you don't have any problems. No. And if everyone is indicating, in this case they have, that they're gonna follow the law --

THE COURT: So why not find out, at least, whether we even have a problem?

MR. FIGLER: Because you don't have information right now, that indicates to you. The note is the note and we're stuck with the note. Because --

THE COURT: Why are we stuck with the note? Because of this statute and this case you have cited to me?

MR. FIGLER: The statute says we can't go into the mental processes. The note says that someone has changed their mind. Certainly if someone has changed their mind, we have the ability to change their minds with regard to the appropriateness of death being imposed and if -- and -- the point is this, Your Honor, if you start bringing individuals into the courtroom, you start interfering with their mental processes. Unless you have some evidence, even the North Carolina case, even the California cases talk about treading very lightly on any questioning done to a juror that is gonna impact the way that the deliberation process go. Whether it be during, whether it be after. But during is, of course, the most prejudicial time to the jurors' prerogative to never have to impose the death penalty. It's so straightforward.

If you had extrinsic evidence. If this juror, like in the California case, like in the North Carolina case, said before hearing any of this evidence, you know, I have changed my mind and I can't sit as a juror. I have been taking these

sedatives and these medications because I'm upset by the whole thing, before hearing any of the evidence? Then you've got this type of situation where we don't know if they have an equivalent to our NRS statute. But you don't have that situation here.

You have legitimate argument that has been made to them. You have the law of Bennett, which has been presented to them. And you have the only information that someone has changed their mind.

THE COURT: You keep harping on Bennett. Bennett says to me, in any given case and every case individually, you have no duty to impose the death penalty.

MR. FIGLER: Let me ask you this, Judge, if this person now, after seeing John White's case and hearing the argument of counsel has decided I can't apply it in this case and I can't think of now another case, because I think this was such a horrible case, but I am not convinced that I have to impose the death penalty here.

THE COURT: That's what I'm saying. If you say to them, Adolf Hitler it is --

MR. FIGLER: That's why we can't --

THE COURT: -- pretty well assumed killed ten million Jews, Gypsies and disabled, if that person were before you, do you think you could impose the death penalty and they say, no, which would have disqualified them for cause. You're

saying, without authority, as far as I can tell, other than this statute and how you read this one Nevada case, that is your authority for not doing it?

MR. FIGLER: Look at it this way, Judge.

THE COURT: I'm saying your authority. I understand your argument. Your rhetoric.

MR. FIGLER: My authority is, the mental processes of an individual concerned with an individual -- another individual's life has to be a very difficult, very tenuous process which has lots of conflicting emotions and they're dealing with a lot of different things in there. We can all agree to that. When we start making inquiry into that, based on a note like this, then we are completely discarding all the common law with regard to not interfering with the jurors' deliberation and what kind of thought processes go into their mind after they've heard all the evidence. And when you do that --

THE COURT: Now why are you going into their thought processes if you bring them out and say, no more then essentially how we phrase it, we could get to in another few minutes and say to them, as you sit there now, are you invariably opposed to the death penalty, we're not gonna talk about Mr. White, are you invariably opposed to the death penalty in every case?

MR. FIGLER: What if it's --

THE COURT: Listen to me.

MR. FIGLER: Okay.

THE COURT: Yes. Well, let me ask you a follow up question. If Adolf Hitler were the defendant and he was accused and you believed that he had killed ten million men, women and children, could you consider the death penalty for him and they say, oh, yes, and we say, you're still on the jury. What's -- how much are you delving into their thought processes by that limited inquiry?

MR. FIGLER: You're tinkering with the human mind and who knows what the impact is gonna be and that's why it's precluded. Because we don't know if that person is being beat up by the other eleven people. As Your Honor said, the other -- it might be an eleven/one split and that eleven people might be saying, look, you're wrong, you're wrong to have these opinions, you're wrong to have all this stuff. And that person comes into this courtroom and now we're starting to make inquiry, well, what do you think Hitler, don't you think. This person could be so confused and on edge to be able to exercise their -- their statutory prerogative to never impose the death penalty that we may irreparably do harm to that juror being able to follow the law. Follow the law which says that I don't have to give the death penalty against John White having hear [sic] all the evidence and having qualified and be sat as a juror because of truthful information that I gave on

voir dire.

There's no way for us, as lawyers, to know what the impact of any questioning on a person who has been in that situation which we know nothing about. Once we start tinkering into the purview of how the jury operates, the dynamic of the jury, we have completely discarded our obligation to stay out of the deliberation of the minds of each and every one of those jurors. There's no way to know how that is gonna impact that individual because there's no way to know what the history of the entire deliberation process has been.

So, only if Your Honor is willing to go in there and have them give us an account of how it started, from the very moment they went in there to the point where that note was written, can you make an intelligent type of questioning, not you but all of us, an intelligent questioning of that individual --

THE COURT: Well, I couldn't do it alone, I need your input.

MR. FIGLER: What I'm saying is, any intelligent questioning of that individual that doesn't offend these principles, these basic principles of jury deliberation, would necessarily include exactly how it went up there. And the thought processes of the other individuals, because she or he may have very well have reflected upon something that some

other juror said at that time and now we have to go through this entire process. That's why, without extrinsic evidence -- without extrinsic evidence in this case that this juror lied at voir dire, refused to listen to the evidence, refused to basically do what the law says, which is you don't have to impose a death penalty, you can't make inquiry. We can't tinker with their minds. We can't go behind their mental processes.

THE COURT: Okay. So, let me skip to another subject. It's down the line a little, Mr. Figler.

If we do what you say, we don't make inquiry of this jury in terms of the death penalty position, and I just touched on this yesterday when you said, you wanted to get in here before they deliberate this morning. I mean we have Mr. Pescetta in the audience here, the court of -- the lawyer of last resort before somebody gets executed. The public defender, the Special Defender, the -- Pescetta's office has been arguing that the three-judge panel is a horrible system, it's unconstitutional, it almost invariably hands down death sentences.

If we follow your suggestion -- well, you may want to skip over this, but the next note is what do we do about the deadlock and I think we have to get in here. You recognize that if they say they're deadlocked, the likely consequence is this is headed to a three-judge panel that your

office, Mr. Pescetta and everybody who works the defense side has already indicated they think that's unconstitutional. So rather than make this inquiry and have the possible benefit to the defense that you have a juror on there who's taking their Bennett's instruction very seriously, it is your choice strategically and in the interest of your client to request that instead we skip over it and get to the deadlock inquiry, which if they are deadlocked results in the three-judge panel.

MR. FIGLER: Your Honor, we have to live by the laws of the State of Nevada and we will attack or argue at every phase and every stage when a man's life is at stake what the appropriateness is of the application of those laws.

In this particular case we have no choice. The law is clear. This type of inquiry of an individual is improper and now we have to go forward with the deadlocking --

THE COURT: I wish the law were clear, Mr. Figler. I haven't really seen anything -- the concepts you're expressing are exactly the ones I expressed earlier when I was talking to Mr. Daskas that do concern me, which is, making inquiries of a jury who's out deliberating, after they've heard all the evidence and all the arguments of counsel. I don't think you've adduced any authority whatsoever on the question, so I guess I will rely on these authorities and for a few minutes think about the situation and we'll make a ruling.

MR. SCISCENTO: Your Honor?

THE COURT: Yes, Joe.

MR. SCISCENTO: If I may. The objection I have -- two matters I need to address and I'll address them quickly. The objection I have as to relying upon California is, once there's a deadlock in California, it's an automatic L-WP. That is not --

THE COURT What is an L-WP?

MR. SCISCENTO: Life without parole.

THE COURT: Yeah.

MR. SCISCENTO: That is not given in this state. If we are inquired or if you're going to follow the California formula I'd ask then also to follow the California outcome, which is a deadlock gives us L-WP.

THE COURT: To me the Holden case is the one that is closest.

MR. SCISCENTO: I understand, but still --

THE COURT: I don't see any authority directly on point.

MR. SCISCENTO: Well, and I believe in North Carolina it's very similar that if it's a deadlock you get life without the possibility of parole. Okay, but California, I know for a certainty, you get life without the possibility of parole.

THE COURT: What impact does this have on --

MR. SCISCENTO: What I'm saying is, if you're gonna rely upon the formulas put forth by California --

MR. FIGLER: Or North Carolina.

MR. SCISCENTO: -- you've got to also understand, Your Honor --

THE COURT: Whatever they do after that, how does that impact on whether you make the inquiry?

MR. SCISCENTO: -- you've got to also understand their statutory scheme is, if we have a problem we don't have to worry about it because there's not death involved in it, we go to life without the possibility of parole. That is what the legislature of California --

THE COURT: But how does that impact on the decision I have to make?

MR. SCISCENTO: Your Honor, because you're relying upon other jurisdictions statutes and case law based on their statutory scheme which is different than the Nevada statutory scheme.

THE COURT: But how does that part of the statutory scheme relate to this issue?

MR. SCISCENTO: Well, I'm trying to say to you, if you're going to rely upon it, you also have to understand that they have a different statutory scheme than Nevada does. That is, in Nevada we are totally different, we do go to the three-judge panel and so therefore we cannot get into the minds of

the jurors to make the determination. We have a process in place that if one -- if there was a change after it, that under 200.035 is other mitigation. And therefore, if they have found other mitigation, that is, that they don't believe in the death penalty any more, I believe that that is other mitigation which then means that they can only deliberate as to life with or life without.

Further, Your Honor, and I put that out there and I need to address an issue that this Court brought up and indicated that I argued, unopposed, as to some sort of nullification and I want to respond to that, Your Honor, because it's very important. The State had set out there and said it's time that we said to murderers, we're no longer gonna put up with this. And they're to argue aggravators only. My argument was in response to that. If they're saying that you've got to tell the other murderers out there that we're not gonna put up with this and that the only penalty is death, my argument in response was that, well, that is not the only other argument and showing them the other side of the coin that that doesn't change.

THE COURT: Well, they didn't object to it, but it's in, whatever it is. Let me, before I leave the bench, think something through.

You're saying, Mr. Figler, that if we brought this person in and they said, I could impose the death penalty on

Hitler, they stay on the jury; it's still poisoned because they might go back here now and be battered by the other eleven and say well, if you could do it to Hitler you do it to White and she rethinks it so you -- or he rethinks it and they're poisoned either way?

MR. FIGLER: Yes, Judge.

THE COURT: So, either way, either you replace them with an alternate, which you think is improper, or you leave this person on the jury and that's going to be screwed up once the inquiry has been made as well?

MR. FIGLER: Yes, Judge. So, all we can do is ask about the deadlock now.

THE COURT: All right. Let me think about it for a few minutes.

(Court recessed at 9:00 a.m., until 9:20 a.m.)

THE COURT: It is a very difficult decision because there isn't a lot of authority; and the more I read the Holden case the more I am convinced that it is based on the fact that it was prior to any guilty -- any penalty phase deliberations, instructions, evidence, things like that. So I reread all the authority again, and I guess the closest is the Keenan case out of California.

The case cited by the State, also the only Nevada case, is also a prior to deliberations case and I think there is quite a bit of sensitivity that should be shown for

interfering with their deliberations.

I think, however, the Keenan case -- by the way was this shephardized? I didn't have time to do it. It's twelve years old.

MR. DASKAS: Judge, we have some clerks pulling the cases. I'll have to double check.

THE COURT: But, I'm just saying you haven't shephardized it, as far as you know?

MR. DASKAS: I have not personally. No.

THE COURT: Okay. To me, the Keenan analysis is reasonable. It comes out of the Supreme Court of California. I don't think the statutory scheme makes any difference because they discussed that and obviously in California there was a motion for a mistrial and hung jury, which probably in that state either results in a new trial or, if your understanding is correct, results in an automatic life with. In our state we have a different statutory scheme and it's gonna result in a three-judge panel and we've already discussed that.

The court in California, I think on what would be pages 585 and 86, seems to be pretty reasonable and they say in pertinent part this:

"California cases construing the statutes have established that once a question of a juror's inability to perform his duty is called into

question, a hearing to determine the facts is clearly contemplated. Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion, subject to appellate review."

Now, the appellate review here obviously would have to come while the jury was sent home by the way of some kind of extraordinary relief petition by the State, if they wished to go through that kind of a procedure, but that's irrelevant. And I think it's also irrelevant that the focus of the facts in Keenan were on a person who might have either not heard the original indication to the jury that they had a duty to consider the death penalty under certain circumstances and maybe not factually the same as here, and we've already discussed in length the fact that here we may have a person who has formed this opinion at some point during jury deliberations on the penalty phase.

But the court continues:

"A sitting juror's actual bias, which would have supported a challenge for cause, renders him unable to perform his duty," which is very similar to the language cited from our statute on jury disqualification seating of the alternates. "A juror may be disqualified for bias and thus discharged from a capital case if his views on

capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Grounds for investigation or discharge of a juror may be established" -- etcetera, etcetera, etcetera.

"The foreman's notes," it continues at 586 in this case, "written in ambiguous style by a layman, could reasonably be construed --"

And by the way for the record, Stony indicated these notes were handed to him by the foreperson and if we get in here we'll clear up that one minor point on the record.

"-- as stating that one or more jurors, either harbored or disqualified bias or had misunderstood their obligations as capital penalty jurors. The first note suggested a juror was deviating from assurances made during juror -- jury selection about ability to vote for the death penalty. The second note said, flatly, that a juror, not necessarily the one previously described, cannot morally vote for the death penalty. Neither statement was limited by it's terms to the case at hand. Singly and in combination, the notes could mean that a juror or jurors were now expressing absolute refusal to consider the death penalty under any circumstances.

Defendant suggests that the foreman's notes reflected no more than the recalcitrant juror's moral reluctance to impose capital punishment based on the evidence of this case, an entirely proper basis for refusing to vote for death.

"The court thus had," which of course is their right, as Mr. Figler has been arguing under Bennett.

"The court, thus," and this is their conclusion, "had ample cause to pursue the matter further. It conducted a discreet and properly limited investigation which proved the inference of misconduct or misunderstanding unfounded."

I'm going to, but I will accept suggestions as to how we do it, pursue the matter further with -- and it would be my suggestion, first the foreperson to identify the person who is referred to in this note -- and that note has gone where? Okay. And if this person on limited inquiry, once identified, if it's only one of them, says they could impose the death penalty in some cases, we will discuss things after that. If they say, no, I would assume that you will want to try to rehabilitate this person just as you would in the original voir dire. And it seems to me that the rehabilitation that you would engage in, saying something along the lines, you know, that you wouldn't kill the worst of the worst, but you're saying that here you -- in this context,

you want to give the death penalty isn't going to hurt you. It's actually going to help you.

MR. FIGLER: I think what you're asking is invited error on our part or invited waiver, so we would --

THE COURT: What do you mean invited? I don't understand what you're saying.

MR. FIGLER: Well, we would -- we would protest having to make any inquiry based on what we said before.

THE COURT: Oh, if you don't want to make any inquiry, fine. I'm saying, if you wanted to get into it, it would seem to me that the questions that you would ask would only make stronger this person's feelings that she doesn't want to execute your client. It's not gonna harm you. If you don't want to ask any questions, it doesn't harm you. If you want to ask questions, those that I can anticipate wouldn't harm him, so I'm saying either way, I don't see that the defense is prejudiced.

MR. FIGLER: Well, our point is, on the record, that we think we're in an untenable position because any inquiry is going to be unduly coercive. I want to refer the Court to Keenan and if you read on a little bit further from where Your Honor cited, that court distinguished that this was not the situation --

THE COURT: And now where -- where do you want to point my attention to?

MR. FIGLER: Just a little further down from where you start. There was a suggestion on the bottom of what has been marked page 40, which is 586 by the Court -- by the California court analysis.

THE COURT: Where does it start? What you want me to read?

MR. FIGLER: "In the first place", at the bottom.

THE COURT: Okay. How far? Let me read it to myself.

MR. FIGLER: It's the very last starting paragraph on that page.

THE COURT: It begins, "in the first place"?

MR. FIGLER: Correct, Your Honor.

(Pause in the proceedings)

THE COURT: Now, I've read through footnote 26, do you wish me to read further?

MR. FIGLER: Yes, Your Honor. There, well --

THE COURT: How far?

MR. FIGLER: Let me just -- let me just leave it with that right now. The rest of the commentary after that talks about avoiding coercive connotations that there wasn't --

THE COURT: Yeah, and of course that's --

MR. FIGLER: -- the resolving of the deadlock --

THE COURT: -- this court did a lot of that and I

would imagine the California Supreme Court had some difficulty with it --

MR. FIGLER: Right, but what I'm saying --

THE COURT: -- and sent them home for the weekend, that there was expectations of they were gonna reach a verdict and all this kind of stuff.

MR. FIGLER: What the court in --

THE COURT: What does this tell you that you are trying to relate to me?

MR. FIGLER: In the California court they were very clear to say, look, this isn't the situation where we're singling out a lone juror or a minority position, the court is not going to know what the jury division is. And in that particular case the trial court said, look, defense counsel this is an eleven to one type situation. But here we have no other indication that this is plural, that there are jurors, all you -- the only implication that you could have is that someone has changed their belief system based on what they had received as the evidence.

Now, how does Keenan say that that didn't happen in Keenan? I mean we don't know what exactly happened in Keenan.

I think that the Court's initial observations that this is actually a seated juror who has heard everything, who has heard the law, who has been instructed in the law, has every right to change their opinion based on what they say --

what they see. If that juror says, look, I've seen how the Nevada system works now. I see how this death penalty is imposed and, quite frankly, I'm sickened by it. I don't think we should be killing people in this particular way, ever. Okay.

THE COURT: And that, of course, is perfectly permissible.

MR. FIGLER: That's perfectly permissible and it has nothing to do with any type of rehabilitation that we can do. But it is the nature of the inquiry that we are objecting to and I think Your Honor has noted that for the record, so I don't need to reiterate it.

I think that in this Keenan case you had a different situation. You didn't know if there was one single juror, you didn't know if there was a division, you don't know if there was a eleven to one.

THE COURT: I don't find that to be persuasive in terms of its authority.

Now, I'm going to get -- I would assume it would be appropriate to start with the foreperson to at least identify this person, given that my ruling is going to be we're gonna have an inquiry.

MR. FIGLER: I would note, Your Honor, that there is a pool feed camera in the courtroom, one, two -- appears to be two photographers, four -- four media people that I can

perceive. This is an open court, an open proceeding and we have no problem with that, but I believe that all that cumulatively impacts the course of nature of any inquiry that's gonna be done of any juror.

THE COURT: Well, I have no problem with having this done with no media present, in a locked courtroom. Is that your request?

MR. FIGLER: Yes, Your Honor.

THE COURT: Okay. That's no problem. Now, procedurally, the foreperson to identify who this person is --

MR. DASKAS: Yes, Judge.

THE COURT: -- and establish whether there maybe are more than one. Any objection, subject to your earlier objections, doing it that way?

MR. FIGLER: I would like to clear the courtroom of anyone who's not associated with the case with regard to legal counsel.

THE COURT: Would you, for a change, Dayvid, answer my question directly.

MR. FIGLER: Please ask me again, sir.

THE COURT: In terms of, you've made your record relative to the fact that you don't want me to do it at all. Do you agree, given that we're gonna do it, we start with the foreperson to identify the individual who's referred to in the note?

MR. FIGLER: The Court's indulgence. Since there's no authority, I'd like just a moment to confer with counsel.

THE COURT: Your life lines?

[Laughter]

MR. FIGLER: Well, if was just money, a millionaire, I think we'd be in better shape than, since it's a death penalty here today. Not even thirty seconds, Judge, we'll submit to the Court, however you want to do it --

THE COURT: All right.

MR. FIGLER: -- because we oppose to the procedure.

THE COURT: Okay. We'll do it -- well, I certainly welcome your intelligent input, Mr. Figler, as to how we go about this even though you've made your record.

Okay. Now, your next thing was what?

MR. FIGLER: To clear the courtroom of anyone who's not legal counsel or court personnel.

THE COURT: And that's very reasonable. We're dealing with a very sensitive area. The courtroom will be cleared of everyone, other than the counsel at this table, all media, all audience. We could do this in chambers, perhaps, also, it's just harder to record in there. So let's make it as close to chambers as we can.

After the courtroom is secured, get the foreperson in here, please. And, of course, the Special Defender and Mr. Pescetta and the head of the District Attorney's Office, if

they wish to stay can stay.

(Off record)

THE COURT: Just a second.

(Off record)

THE COURT: ... me to ask the questions?

MR. FIGLER: I'd submit it to the Court.

THE COURT: Do I take it, so that I don't waste my time, that you will give me no input as to the procedure here, unless I hear a specific objection so I don't have to waste my time trying to consult with you about step-by-step, Mr. Figler?

MR. FIGLER: That'd be fair, Judge.

THE COURT: Thank you. So the burden's on you, if you have some specific objection to something I'm indicating that I'm gonna do, to make a contemporaneous objection because I'm not gonna waste my time by looking over to you for input each and every time, given what you are indicating is your position.

MR. FIGLER: Thank you, Your Honor.

THE COURT: Now, in terms of the foreperson, I intend to ask him -- I intend to ask him to identify the note, "What do we do if someone's belief system has changed?" And just ask him if this is more than one person or one person, who that person is. Do you wish to suggest any additional questions for the foreperson?

MR. DASKAS: That's fine. That's fine, Judge.

THE COURT: Okay. Bring the foreperson in. Do you have a jury list?

(Off record colloquy)

(Off record)

(Juror Young is present)

THE COURT: ... sit wherever it's comfortable over there. You like your seat best, hey?

JURY FOREMAN YOUNG: It's home.

THE COURT: Mr. Young, I take it you're the foreperson on the penalty phase as well?

JURY FOREMAN YOUNG: Yes, sir.

THE COURT: Is this your handwriting, if you can see that far, on this first note that came out yesterday?

JURY FOREMAN YOUNG: Yes, I wrote both notes.

THE COURT: Okay. And this note says, "What do we do if someone's belief system has changed to where the death penalty is no longer an appropriate punishment under any circumstances?" Are you referring in this note to one person or more than one person? By the way, I don't want you to tell me how you're voting, you or the whole group, what the numerical division is.

JURY FOREMAN YOUNG: Okay.

THE COURT: But just in terms of this note, are you referring to one person or more than one person?

JURY FOREMAN YOUNG: One person.

THE COURT: And who is that person?

JURY FOREMAN YOUNG: Juror number 7.

THE COURT: That's Timothy Lockinger?

JURY FOREMAN YOUNG: Yes, sir.

THE COURT: That's the gentleman who sits over in the far side there. Okay, please, when you go back to the rest of the jury, of course, you're not deliberating, right?

JURY FOREMAN YOUNG: No, we're watching TV.

THE COURT: Okay. Really?

JURY FOREMAN YOUNG: Most of them are. Some of us are reading.

THE COURT: What?

JURY FOREMAN YOUNG: Some of us are reading, some are pacing, some are watching TV.

THE COURT: How do they, on the TV, make sure that there's nothing -- what channel is it on?

JURY FOREMAN YOUNG: TNN or one of those mindless cable channels.

THE COURT: I see. Okay. Better than an all news channel.

JURY FOREMAN YOUNG: No all news.

THE COURT: Okay. All right. Do not discuss what we discussed in here and we'll be getting back to you as we move along through this. Thank you.

JURY FOREMAN YOUNG: Okay.

(Juror Young leaves the courtroom)

THE COURT: Try to be patient.

Mr. Lockinger. Yes.

Stony?

THE BAILIFF: Yes, Judge.

THE COURT: Keep him just outside 'til you know that I'm ready for him.

All right. State, I intend to read him the note, say that he's -- I've been told that he's the person who's expressing these views, are these his views? Is he telling us that at this point invariably he is opposed to the death penalty, under no circumstances could he impose it, and then if he says, yes, that's what he's telling us, I'm going to pose an example like Hitler. Do you wish to say anything beyond that?

MR. DASKAS: I think that's perfect, Judge. Thank you.

THE COURT: And again for the record, if you wish to supplement that, even given my rulings because you think it's appropriate to ask something in addition, tell me now, Mr. Figler.

MR. FIGLER: If there is any necessary follow-up, I don't know, Judge. It's a very difficult position that we're in.

THE COURT: It's the same position you've been in for the last two weeks, isn't it? Did something change that I'm -- oh, you mean the legal position, not the physical position. I see.

MR. SCISCENTO: Your Honor?

THE COURT: Yes, Mr. Sciscento.

MR. SCISCENTO: I'm all right with that.

THE COURT: What?

MR. SCISCENTO: I'm all right with that. I mean, you know, face-to-face, I can understand.

(Juror Lockinger is present)

THE COURT: Mr. Lockinger, you don't have to take that seventh seat. Anywhere you're comfortable.

JUROR LOCKINGER: Okay.

THE COURT: Mr. Lockinger, we're not here to get into numerical divisions on the jury or which way it's leaning or anything like that and we don't want you to tell us that. There's a very specific issue that has come up that I want to address. We received, and I assume you know we received, but I'm going to ask you for the record, the first note that we received from the jury somewhere around 3:30 yesterday from your foreperson was, "What do we do if someone's belief system has changed to where the death penalty is no longer an appropriate punishment under any circumstances?"

Now, we had Mr. Young indicate to us that you were

the person referred to in that note, is he accurate?

JUROR LOCKINGER: Yes.

THE COURT: Okay. My question is this, and it really is the same sort of questions that were asked you in voir dire. Are you telling us, not in this case, but in no conceivable case could you consider or impose the death penalty?

JUROR LOCKINGER: I think that it would be very difficult. Basically, my decision started by looking at this particular case.

THE COURT: Well, what I'm saying is --

JUROR LOCKINGER: When we were in the voir dire, I believed in the death penalty, but I thought that the death penalty -- that there were, in fact, cases where it could be used. And in -- in considering the death penalty in this particular case, I looked at it and I said, I can't -- I can't see. I don't see it happening there.

THE COURT: And those are two entirely different things.

MR. FIGLER: Judge --

JUROR LOCKINGER: They --

THE COURT: Let me cut you off. Let me cut you off. What I'm saying to you is this, let's assume a case, let's not even go with --

MR. FIGLER: Your Honor?

THE COURT: What?

MR. FIGLER: We need to approach.

MR. SCISCENTO: Can we approach for a moment?

THE COURT: No.

MR. FIGLER: Judge, we object to any further questioning.

THE COURT: Okay, fine, come --

MR. SCISCENTO: If we could just approach for a moment.

THE COURT: -- let's -- let -- no, wait, wait. You're not gonna approach the bench.

MR. SCISCENTO: All right, we won't approach. Your Honor, I believe that's --

THE COURT: Mr. Lockinger, we'll get back to you in just a second.

MR. SCISCENTO: I believe the question is --

THE COURT: You're not going to approach the bench, thank you.

MR. SCISCENTO: Okay.

I believe --

(Juror Lockinger leaves the courtroom)

THE COURT: Wait a minute. Now the record should show, in concordance with Rule 250, we are on the record, outside the presence of Juror Number 7, because obviously we're not going to have any more bench conversations.

Now what is it that you wish to make on the record?

MR. SCISCENTO: Your Honor, I think it's clear now that Mr. Lockinger, Juror Number 7, has specifically stated that this case, he can't make that determination. He went in with an open mind, based on this case and the facts of this case, he can't make a determination as to death in this case and I think that is it. I think the questioning ends at that point. Any further inquiry will -- will be coercive and will invade the pre -- the province of the jury.

THE COURT: Debbie, play back his answer where he says difficult, I want to hear it again.

(Playback of the record)

* * * * *

THE COURT: Okay. It seems to be me that I welcome the State's input. If this were voir dire, when he says difficult we would then put a subsequent question to him or you would want to, posing a hypothetical like I was just about to do, which is not even Hitler but somebody that we know killed ten million people without cause and if he says, oh, I'd -- I would certainly consider it for that kind of a person, he's still on. If you agree with the defense that we have gotten enough, when he says "difficult", to keep him on the jury, I'll leave it where it is.

MR. DASKAS: I don't think we've got to the reason he led us to the note. Obviously he said, yeah, they were

talking about me, and the note says he can't consider it under any circumstance. I think at least one more question needs to be asked perhaps --

THE COURT: Along the lines that I'm saying?

MR. DASKAS: Absolutely, Judge.

THE COURT: Okay. That's what we'll do.

MR. DASKAS: Something led him, in other words, to this note and we need to get to that.

MR. SCISCENTO: Obviously, we object to that, Your Honor, because really --

THE COURT: Yeah, I just -- I heard the objection.

MR. SCISCENTO: I know, what I'm saying is, the requirement basically is, can he consider it and he said he could, it's difficult.

THE COURT: Right. And I am saying --

MR. SCISCENTO: And Your Honor --

THE COURT: -- I am saying that I think, just like on voir dire, even though we are in a different context, which is we're in the midst of deliberation, I think in fairness we are entitled to hear whether he could, when posed a more graphic example, consider the death penalty. Did you want some input on this Phil?

MR. KOHN: Yes, Your Honor. First of all for the -- for the -- Philip Kohn. For the record, the Court just went back and listened to this man's statement and as soon as he

said "difficult," the Court stopped. And I think the Court should listen to the whole context of what he said. Because what I heard him say live, was that it would be difficult, but when I started in voir dire, I can -- I believed in the death penalty. And then based on what I heard in this case, I don't believe the death penalty is right for this case. That's what I heard him say and Your Honor when you just replayed it --

THE COURT: Play it just for the record. I heard him say it and I didn't, in the two minute since then, lose my ability to remember that, but for the record, play it again.

MR. KOHN: Can I finish though?

THE COURT: Didn't you want to hear it? You want to --

MR. KOHN: Yes.

THE COURT: -- put in that context first?

MR. KOHN: Yeah, I do want the Court to hear the whole thing of what this man said.

THE COURT: Okay.

(Playback of the record)

* * * * *

THE COURT: Something else?

MR. KOHN: No, I just --

THE COURT: You just want me to listen to it first?

MR. KOHN: I just want to finish my thought.

THE COURT: Okay.

MR. KOHN: Was that, I listened to some voir dire in this case and I heard this Court talk about not using hypotheticals and Rule 770. And so my feeling is, if we're not going to use hypotheticals to --

THE COURT: That's a different kind of hypothetical to me, Mr. Kohn. A hypothetical, I objected to if we have four multiple -- if we have a multiple homicide, which are the facts of this case, that was my objection. Now, you and I are friends and you have -- we have not talked about this during trial.

MR. KOHN: Right.

THE COURT: Other than for me to needle you about your earlier Whittler decision.

MR. KOHN: Yes, Your Honor.

THE COURT: Some day we will discuss, after this is over, the whole context as I view it, but that was not, to me, what I was doing. I was forbidding the -- I was trying to clarify, with further questions, what I perceived to be the misleading and improper questioning of the defense, which has already been a record on. That is not the same as saying that in order to rehabilitate and try to preserve as a basis for a challenge for cause, that the defense was not allowed to say, well, what about Hitler, what about Manson and that was perfectly permissible.

MR. KOHN: Your Honor, may I finish for the record?

THE COURT: Sure.

MR. KOHN: All I'm saying is, if 770 says no hypotheticals, I think that it's wrong to give hypotheticals to allow Witherspoon objections, but not a hypothetical to say the complaint alleges a quadruple homicide. If you found the person guilty of four homicides, could you still consider all four penalties? And I believe the Court stops from doing that, so I think if we're not going to have hypotheticals, I believe that the prosecution in this case, what little I watched of voir dire, was asking a hypothetical about a robbery at a 7-Eleven or something like that. So that was my point, Your Honor.

THE COURT: I -- think, yeah, I think you watched --

MR. KOHN: That we should stay away from hypotheticals.

THE COURT: I think that it is always proper, as I perceive the Witherspoon, Morgan line of cases, to put the worst possible case to a juror to test whether or not they can ever impose the death penalty.

MR. DASKAS: Judge, can I make one more point before she rewinds --

THE COURT: Before you go back, yes.

MR. DASKAS: -- and that is this. I appreciate the question you want to ask and I think it's appropriate. The other question that he wasn't asked was, is the note accurate?

If he says the note's not accurate then perhaps he stays on the jury, but if the note is accurate --

THE COURT: What do you mean is the note not accurate?

MR. DASKAS: Well, in other words, it says that he, this juror, cannot consider death under any circumstances. Perhaps he'll tell that's not accurate.

THE COURT: Well, that's what I'm trying to get at. Right.

MR. DASKAS: And I understand. But I think he should be asked that question, is this note inaccurate or is this note accurate?

THE COURT: But, I --

MR. KOHN: No, I --

THE COURT: -- I don't want to do it that way. I want to --

MR. DASKAS: Okay. I understand.

MR. KOHN: Let's hear the playback.

THE COURT: Okay. Let's -- before -- let's hear this, Mr. Kohn. No, wait.

(Playback of the record)

* * * * *

THE COURT: Okay. Just let me think for a second. All right, we're on the record.

I think it's very close. I mean, I think, frankly,

in all real life, where we're headed is to get to the next issue, which is do we have a deadlocked jury, but I think it's very close to leaving him on the jury right now. I guess, I'm not a great fan of lose ends and I'm sort of leaning, but I would welcome the State's input in putting that further question to him, but I think the argument that's being made by the defense is pretty close to we've heard enough.

MR. DASKAS: Although, Judge, the cases we've provided to the Court are exactly the instance that we're now faced with. These jurors, just like this juror who was in this courtroom moments ago, said, during voir dire I thought I could consider it, I thought it was appropriate. What he started to tell us was what led him to the belief that he can no longer consider it under circumstance. We --

THE COURT: Yeah, except that's not --

MR. DASKAS: We were cut off though.

THE COURT: I'm not sure I'm not hearing it more like the defense hears it than the way your -- hears it, which is we have already heard him say -- what he's really saying is I can't do it in this case. And I've now, as a result of that, re-examined my general death penalty views and maybe now I'm opposed to the death penalty, because it shouldn't be applied. And I have a feeling that we're just sort of wasting our time by asking the next question, because I think he's going to, under the worst possible case, say I could consider

it and then it's not gonna make any difference. The only reason besides, sort of leaning their way in terms of I'm persuaded by what they're saying is I'm afraid of what happens if he says no.

MR. DASKAS: And I guess my point is because you and I interpret what he's about to say differently, that's why we need to ask the next question, Judge. Obviously, we'll defer to you. It's your decision, but because --

THE COURT: Well, no. I mean if you don't want to ask a further question, I'm definitely not gonna ask that further question.

MR. DASKAS: I understand that and it's our request that --

THE COURT: If you want to, I'll make a decision.

MR. DASKAS: It's our request that a further question be asked because you and I are guessing what he's gonna say and we're coming up with different answers.

THE COURT: No, I'm not guessing. I mean, I -- I am perceiving, as to one of his possible answers, where that's gonna lead us.

(Pause in the proceedings)

THE COURT: Bring him in.

(Juror Lockinger is present)

THE COURT: All right, Mr. Lockinger, where we were was this. You're a bright man, I think you've got several

years of college, right?

JUROR LOCKINGER: Yes.

THE COURT: We don't want to talk about this specific case. We don't want to talk about most of the death penalty cases in this country. We want to know when you say it would be difficult to imply -- apply the death penalty, are there situations that you can conceive of, and this is the lead up to the question really, not the question itself, what we're really wanting to know, and it's not a game, is are there any situations that you could impose the death penalty and as I said -- I started to say, I'm going to leave aside Hitler. If -- the question is this, if you had as a conceded fact, the worst possible murderer with no real justification, just enjoyed killing, who had killed millions of people, could you consider the death penalty and impose it in that case?

JUROR LOCKINGER: I could consider the death penalty and impose it if there was no other reasonable penalty available or if it could be proven to me that by putting that person to death it would benefit -- or make the community better, if it could -- if it could serve the common good, somehow. If that could be proven to me, yes, I could impose the death penalty.

THE COURT: Okay. Thank you. Would you go back to the jury. Do not discuss this inquiry with them and we'll get back to you in a few minutes. Thank you.

(Juror Lockinger leaves the courtroom)

THE COURT: He stays.

MR. DASKAS: Absolutely, Judge.

MR. GUYMON: Absolutely.

MR. DASKAS: And I appreciate you asking the question.

THE COURT: What should we ask in the deadlock? What I normally ask in a deadlock is pretty simple. I say we've received this note, are there any among you, this is the jury, are there any among you who think that some further consideration might lead to a verdict. If any of them say yes, I send them back with or without an Allen charge.

Did you, when I asked both sides to research Allen yesterday?

MR. SCISCENTO: Yes, Your Honor, I do have a case.

THE COURT: What is -- well, we'll worry about that after we get them in here. Is there anything else that you would like to address to this jury in terms of a deadlock?

MR. FIGLER: With regards to --

THE COURT: Are you back in play, Mr. Figler?

MR. FIGLER: I hope so, Your Honor. With regard to consideration, since they've only really deliberated for seven hours, I think that it's not the appropriate time for an Allen charge yet. I'm just gonna leave it at that.

THE COURT: Well, we're not at that stage.

MR. FIGLER: Irrespective of the response.

THE COURT: We're not at that stage.

MR. FIGLER: Okay.

MR. GUYMON: Joe, do you have a copy of the case that you have?

MR. SCISCENTO: Yeah.

MR. GUYMON: Can I --

THE COURT: Right now we're just going to establish if there is, in their minds, a deadlock.

MR. GUYMON: And I understand that.

THE COURT: We're taking it step by step. Would you bring the jury back in, please?

THE BAILIFF: Yes, sir.

(Pause in the proceedings)

MR. SCISCENTO: Oh, Your Honor?

(Off-record colloquy)

THE COURT: Oh, no, no, no, no, no, no. Just the jury.

MR. SCISCENTO: Your Honor, also --

THE COURT: Is this on the record, Debbie?

Yes.

MR. SCISCENTO: I would ask that maybe this Court impose some sort of a gag order as to the proceeding which just occurred right now. Last night on the news I noticed that there was a -- one of the news put up something that

there was seven men and five women and we believe that one of the women had made a decision not to impose the death penalty or something like that. I never spoke to the press. I know Mr. Figler didn't.

THE COURT: I mean they have their admonition which is still read to the --

(Jury is present)

THE COURT: Alternates, just for this one proceedings, will you wait outside please. Thank you.

You can just sit right in the hall.

UNKNOWN SPEAKER: Your Honor, it's crowded out there.

THE COURT: Then take them somewhere, please.

Right before you decided to go home last night, we received a note. Is this again from you, Mr. Young?

JURY FOREMAN YOUNG: Yes.

THE COURT: And it says, "What happens if we cannot resolve our deadlock?" I guess, what that says is, or what it assumes is, this is the jury, that there is a deadlock. Is that your feeling, Mr. Young?

JURY FOREMAN YOUNG: We were stalemated when we left last night, yes.

THE COURT: Okay. My question is very simple and there's not a whole bunch of them. It's just one simple question. Are there any among you who believe that further

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 65168

APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE ELISSA CADISH, PRESIDING

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APPELLANT'S APPENDIX TO THE OPENING BRIEF
VOLUME XVII

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ATTORNEY FOR APPELLANT
CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

ATTORNEY FOR RESPONDENT
CLARK COUNTY DISTRICT ATTORNEY
200 Lewis Avenue
3rd Floor
Las Vegas, Nevada 89101
(702) 671-2500

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 0003926
100 North Carson Street
Carson City, Nevada 89701-4717

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

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DONTE JOHNSON, Appellant, vs. THE STATE OF NEVADA Respondent.	CASE NO. 65168

OPENING BRIEF APPENDIX

VOLUME	PLEADING	PAGE NO
7	ADDENDUM TO NOTICE OF EVIDENCE IN SUPPORT OF AGGRAVATING CIRCUMSTANCES (FILED 04/26/2000)	1733-1734
6	AFFIDAVIT OF JOSEPH S. SCISCENTO IN SUPPORT OF THE MOTION TO CONTINUE (FILED 12/14/1999)	1428-1433
19	AMENDED EX PARTE ORDER ALLOWING WITHDRAWAL OF ATTORNEY OF RECORD FOR MATERIAL WITNESS CHARLA SEVERS (FILED 08/24/2000)	4585
7	AMENDED JURY LIST (FILED 06/06/2000)	1823
8	AMENDED JURY LIST (FILED 06/08/2000)	2131
3	AMENDED NOTICE OF MOTION AND MOTION TO VIDEOTAPE THE DEPOSITION OF CHARLA SEVERS (FILED 10/08/1999)	659-681
31	APPELLANT'S OPENING BRIEF (FILED 02/03/2006)	7174-7225
19	CASE APPEAL STATEMENT (FILED 11/08/2000)	4651-4653
42	CASE APPEAL STATEMENT (FILED 03/06/2014)	8200-8202
31	APPELLANT'S REPLY BRIEF (FILED 05/25/2006)	7254-7283

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TEL. 702.384-5563 | FAX. 702.974-0623

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CATHERINE CORTEZ-MASTO
Nevada Attorney General

STEVE OWENS
Chief Deputy District Attorney

CHRISTOPHER R. ORAM, ESQ.

BY:

/s/ Jessie Vargas
An Employee of Christopher R. Oram, Esq.

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623