

1 **SUPP**

2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 STEVEN S. OWENS  
6 Chief Deputy District Attorney  
7 Nevada Bar #004352  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 DONTE JOHNSON,  
13 #01586283

14 Defendant.

CASE NO: 98C153154

DEPT NO: VI

**SUPPLEMENTAL EXHIBITS**

15  
16 Pursuant to this Court's request, attached are the appeal briefs from Donte Johnson's  
17 first appeal.

18 DATED this 5<sup>th</sup> day of April, 2013.

19 STEVEN B. WOLFSON  
20 Clark County District Attorney  
21 Nevada Bar #001565

22 BY 

23 STEVEN S. OWENS  
24 Chief Deputy District Attorney  
25 Nevada Bar #004352  
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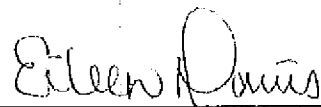
**EXHIBIT LIST**

Exhibit 1 SCT #36991, Opening Brief, filed 7/18/01  
Exhibit 2 SCT #36991, Answering Brief, filed 11/27/01  
Exhibit 3 SCT #36991, Reply Brief, filed 1/15/02  
Exhibit 4 SCT #36991, Supplemental Opening Brief, filed 7/30/02  
Exhibit 5 SCT #36991, Supplemental Answering Brief, filed 8/29/02  
Exhibit 6 SCT #36991, Supplemental Reply Brief, filed 10/2/02

**CERTIFICATE OF MAILING**

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CHRISTOPHER R. ORAM, ESQ.  
520 South 4th Street, 2nd Fl.  
Las Vegas, Nevada 89101



Employee for the District Attorney's  
Office

SSO//ed

# EXHIBIT 1

# EXHIBIT 1

ORIGINAL

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,

Case No. 36991

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JUL 18 2001

JANETTE M. BLOOM  
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APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

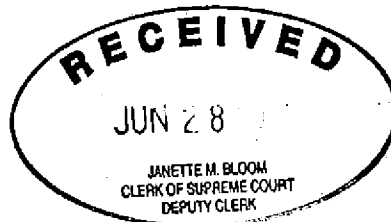
PHILIP J. KOHN  
CLARK COUNTY, NEVADA  
SPECIAL PUBLIC DEFENDER  
Nevada Bar #0556  
LEE-ELIZABETH McMAHON  
Nevada Bar #1765  
309 South Third Street, 4th Floor  
Las Vegas, Nevada 89155-2316

Attorney for Appellant

STEWART L. BELL  
CLARK COUNTY, NEVADA  
DISTRICT ATTORNEY  
Nevada Bar #0477  
200 South Third Street  
Las Vegas, Nevada 89155  
(702) 455-4711

FRANKIE SUE DEL PAPA  
Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717  
(702) 486-3420

Counsel for Respondent



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SPECIAL PUBLIC  
DEFENDER

CLARK COUNTY  
NEVADA

01-11010  
NSC Case No. 65168--7863

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2  
3 DONTÉ JOHNSON,

4 Appellant,

5 vs.

6 THE STATE OF NEVADA,

7 Respondent.

Case No. 36991

8  
9 APPELLANT'S OPENING BRIEF

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11 CLARK COUNTY, NEVADA  
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13 Nevada Bar #0556  
14 LEE-ELIZABETH McMAHON  
15 Nevada Bar #1765  
16 309 South Third Street, 4th Floor  
17 Las Vegas, Nevada 89155-2316

18 Attorney for Appellant

STEWART L. BELL  
CLARK COUNTY, NEVADA  
DISTRICT ATTORNEY  
Nevada Bar #0477  
200 South Third Street  
Las Vegas, Nevada 89155  
(702) 455-4711

FRANKIE SUE DEL PAPA  
Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717  
(702) 486-3420

Counsel for Respondent

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SPECIAL PUBLIC  
DEFENDER

CLARK COUNTY  
NEVADA

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1                                    IN THE SUPREME COURT OF THE STATE OF NEVADA  
2                                    \_\_\_\_\_

3        DONTE JOHNSON,

4                                    Appellant,

5                                    vs.

6        THE STATE OF NEVADA,

7                                    Respondent.  
8        \_\_\_\_\_

Case No. 36991

9                                    APPELLANT'S OPENING BRIEF

10                                   STATEMENT OF THE ISSUES

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

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

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

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

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

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



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

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

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

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

14          11. The Statutory Reasonable Doubt Instruction is  
15 Unconstitutional.

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

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

24                           STATEMENT OF THE CASE

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

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

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

15           On September 16, 1998, in open court, neither Appellant or  
16 counsel present, the prosecutor filed a superseding Indictment which  
17 added an additional charge; conspiracy to commit robbery and/or  
18 kidnapping and/or murder in violation of NRS 199.480, 200.380,  
19 200.310, 200.320, 200.010, 200.030 respectively.

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

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

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

1 outside counsel.

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

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

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

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

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

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

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

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

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

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

1 conspirators statement.

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

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

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

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

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

15 On July 24, 2000, the three-judge panel assembled consisting  
16 of the Honorable Judges: Jeffrey D. Sobel, Michael R. Griffin, and  
17 Steve Elliot. On the record the prosecutor disclosed the inducement  
18 regarding Charla Severs and defense counsel stated his objection  
19 regarding the constitutionality of the three-judge panel. On July 28,  
20 2000, the three-judge panel, having found that the aggravating  
21 circumstances or circumstances outweigh any mitigating circumstance  
22 or circumstances imposed a sentence of death as to counts XI through  
23 XIV, murder of the first degree with use of a deadly weapon.

24 STATEMENT OF FACTS

25 SYNOPSIS

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

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

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

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

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

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

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

28           The fingerprint found on the Black and Mild cigar box

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

7           Each of the four young men died from a single gunshot wound  
8 to the back of the head from close range. Projectile pieces were  
9 removed from each skull. Ballistic expert Richard Goode concluded the  
10 cartridge cases, all four, were .380 all fired by the same gun. The  
11 .380 handgun was never found.

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

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

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

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

5           The answer from the court:

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

8           The second note:

9           What happens if we cannot resolve our deadlock?

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

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

21           An additional note was received from the jury:

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

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

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

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

3 The jury was recalled and a hung jury was declared.

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

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

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

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

27 FACTS RELEVANT TO ISSUE ONE

28 Prior to trial, Appellant filed a motion to suppress

1 evidence seized from the master bedroom at 4815 Everman on August 18,  
2 1998 on the ground that it was illegally seized. The State filed an  
3 opposition. The court, on January 6, 2000, held an evidentiary hearing  
4 (A. App., Vol. 6, pp. 1340-1346, 1503; Vol. 7, pp. 1612-1622, 1632-  
5 1651, 1723-1726).

6 The prosecution called Las Vegas Metropolitan Police  
7 Department Homicide Detective Thomas Thowsen and Las Vegas  
8 Metropolitan Police Homicide Sergeant Ken Hefner. Appellant's  
9 girlfriend at the time of the seizure, Charolette Severs and  
10 Appellant testified in support of the motion (A. App., Vol. 6, pp.  
11 1503-1504).

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

16 When Thowsen arrived at the residence the SWAT team was  
17 inside the house; Appellant, Charolette Severs, and a third person had  
18 been restrained in flexcuffs and were outside of the residence.  
19 Appellant was taken into custody for questioning (A. App., Vol. 6, pp.  
20 1510, 1540-1541).

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

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

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

8 Thowsen said Armstrong did not give him any information that  
9 led him to believe Appellant lived at the Everman residence, either  
10 permanently or temporarily, that he would just show up sometimes.  
11 Thowsen was present, when Sergeant Hefner questioned Appellant, after  
12 Appellant was taken out of the Everman residence and cuffed and placed  
13 at the curb. Thowsen said Hefner specifically asked Appellant if he  
14 lived there and Appellant said he did not (A. App., Vol. 6, pp. 1518-  
15 1519).

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

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

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

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

11 Thowsen believed that it was Tod Armstrong who told him  
12 about a duffle bag containing weapons that belonged to either Young  
13 or the Appellant. He did not recall if Armstrong told him that it  
14 would be found in the master bedroom (A. App., Vol. 6, pp. 1529-1530,  
15 1532-34, 1537, 1539).

16 Thowsen did not get a search warrant because he didn't need  
17 one. Tod Armstrong signed a consent to search (A. App., Vol. 6, pp.  
18 1543-1544).

19 Sergeant Hefner supervised and monitored the investigation,  
20 he was given a key to the Everman residence by Tod Armstrong who told  
21 him it was the only key. He was going to the residence to arrest  
22 Appellant; he was not going to let him go. Appellant was placed under  
23 arrest for outstanding warrants after homicide took custody of him  
24 from the SWAT officers who had placed him in flexcuffs (A. App., Vol.  
25 6, pp. 1558-1561, 1574-1575).

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

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

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

10 Charlotte Severs declared a hostile witness by the court,  
11 stayed at the Everman residence, sleeping there every night for  
12 fourteen days prior to being pulled out of there on August 18th by the  
13 SWAT team. Appellant and Johnson slept there with her. She testified  
14 that Appellant provided drugs to Tod Armstrong as a way of paying rent  
15 to stay in the Everman house. Appellant stayed in the master bedroom  
16 and kept the kept the clothes that he had there. There was a lock on  
17 the bedroom door which Appellant would only lock the door when "me and  
18 him was doing something." Severs kept her clothing and personal  
19 things in the master bedroom. She considered that room her space.  
20 She had come to the Everman residence to stay there at Appellant's  
21 request. Appellant slept at the Everman residence everyone of the  
22 fourteen days that preceded August 18th (A. App., Vol. 6, pp. 1585-  
23 1588, 1590).

24 Severs gave a taped statement to the police the night of the  
25 18th. She told them she only stayed there a couple of nights. Tod  
26 Armstrong and Ace Hart kept clothes in the master bedroom. They, and  
27 others, went into the master bedroom, hang out, use the stereo. She  
28 and Donte did not have a key to the house. Tod was home a lot so a



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

5 Appellant, Donte Johnson, testified that he did not recall  
6 being asked, while being handcuffed and sitting on the curb, if he  
7 lived in the house. He said he was living at the Everman residence  
8 on August 18, 1998, had been for close to a month. Appellant said  
9 there was one key to the residence. Prior to September 18, 1998, the  
10 last time he saw the key was when Tod Armstrong gave the key to him  
11 when he was going to his girlfriend's (A. App., Vol. 6, pp. 1604-  
12 1606).

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

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

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

20 Further:

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

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

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

1 and master bedroom at the Everman residence (A. App., Vol. 7, pp.  
2 1723-1726).

3 FACTS RELEVANT TO ISSUE TWO

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

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

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

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

26 Defense counsel argued that the possibility of the mistake and  
27 confusion was evident with this picture (A. App., Vol. 3, pp. 746-  
28 756).

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

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

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

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

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

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

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

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

11 The court denied the motion in limine (A. App., Vol. 7, pp. 1813-  
12 1818).

13 FACTS RELEVANT TO ISSUE THREE

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

19 The State filed an opposition to the motion premised upon  
20 NRS 175.141(5) (A. App., Vol. 6, pp. 1386-1388).

21 On March 2, 2000, the Court denied the motion (A. App., Vol.  
22 7, p. 1670).

23 FACTS RELEVANT TO ISSUE FOUR

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

1 Vol. 5, pp. 1143-1145).

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

8 On March 2, 2000, the court denied the motion (A. App., Vol.  
9 7; p. 1680).

10 FACTS RELEVANT TO ISSUE FIVE AND SIX

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

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

1 bedroom before the police showed up.

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

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

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

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

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

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

25 The court denied the motion (A. App., Vol. 13, pp. 3203-  
26 3204).

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

1 that I need to bring to your attention as soon as possible." The  
2 juror was interviewed in open court outside the presence of the other  
3 jurors. She stated that last week when the jury was dismissed and  
4 left for the evening they went to the parking garage. Most of the  
5 group went to the first elevator; she went to the second elevator due  
6 to the location of her vehicle. Juror number 7 came p behind her and  
7 startled her. While waiting for the elevator they were talking when  
8 the elevator arrived everyone got out except one African American man  
9 who had some kind of a bag with him. It was the day of the testimony  
10 regarding the duffel bag and the guns. It startled her that he did  
11 not get off the elevator but then thought the other juror being there  
12 she would get in the elevator. When she got on the elevator she  
13 pushed the button for the third floor and asked the other juror what  
14 floor he wanted. He said he was on three also. When the elevator  
15 stopped at the third floor she got off. The other juror did not.  
16 About a minute later the elevator opened again and he got off. She  
17 said it was odd that he said he was on three, then stayed on the  
18 elevator with the other gentleman and then got off on three later.  
19 She indicated she had a fear of the African American (A. App., Vol.  
20 17, pp. 3578, 3997, 4000-4001).

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

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

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

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

17 Nothing further occurred regarding the incident with the  
18 exception of defense counsel's question as to why a victim's family  
19 member would be in the jury lounge. The court stated there was no  
20 real segregation of the jurors from witnesses, family members or  
21 lawyers. In the new courthouse, this would be remedied (A. App., Vol.  
22 15, pp. 3590-3592).

23 On June 23, 2000, Appellant filed a motion for new trial and  
24 a request for an evidentiary hearing (A. App., Vol. 15, pp. 3570-  
25 3593).

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

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



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

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

4 FACTS RELEVANT TO ISSUES SEVEN, EIGHT, NINE AND TEN

5 The aggravating circumstances alleged by the prosecution in  
6 seeking imposition of a sentence of death after the court struck NRS  
7 200.033(3) were:

8 The murder was committed while the person was  
9 engaged, alone or with others, in the commission  
10 of or an attempt to commit or flight after  
11 committing or attempting to commit, any robbery,  
arson in the first degree, burglary, invasion of  
the home or kidnaping in the first degree, and  
the person charged:

12 (a) Killed or attempted to kill the person  
13 murdered;

14 (b) Knew or had reason to know that life would  
be taken or lethal force used.

15 NRS 200.033(4).

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

18 NRS 200.033(5).

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

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

24 On July 10, 2000, after a mistrial in the penalty phase,  
25 Appellant filed a "motion for imposition of life without the  
26 possibility of parole sentence; or, in the alternative, motion to  
27 empanel jury for sentencing hearing and/or for disclosure of evidence  
28

1 material to constitutionality of three judge panel procedure."

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

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

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

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

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

10 FACTS RELEVANT TO ISSUE ELEVEN

11 On June 8, 2000, defense counsel objected to the reasonable  
12 doubt instruction; and proffered an additional instruction, marked A,  
13 which the court did not believe to be proper under established law.  
14 The statutory instruction was given (A. App., Vol. 10, p. 2543; Vol.  
15 13, pp. 3148, 3150).

16 FACTS RELEVANT TO ISSUE TWELVE

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

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

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

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

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

7 The motion is denied. With reference to the  
8 record, it's going to stand the way it is. I  
9 don't know whether the judges read the transcript  
10 or not. As the record already indicates, they  
11 had ample opportunity and expressed the desire to  
12 read the record. I know that because there had  
13 been a mis-communication in the Public Defender's  
14 Office, that we had to chop the hearing up, that  
15 the judges actually had more time than usual to  
16 read the transcript.

17 I don't read Holloway the way, apparently,  
18 Mr. Sciscento and you do, Mr. Figler. But Mr.  
19 Sciscento authored the Points and Authorities.  
20 We have had, in this state for many years,  
21 remands for penalty hearings and three-judge  
22 panels where I would assume that neither the new  
23 jury who is only hearing the penalty phase - and  
24 this has been for many decades - never heard all  
25 of the guilt evidence. And I think probably the  
26 judges here had more of an examination of the  
27 record than normally would take place either on  
28 a remand or before a three-judge panel. For  
those reasons and the reasons stated in the  
opposition, it's denied (A. App., Vol. 19, pp.  
4638-4639).

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

24 FACTS RELEVANT TO ISSUE THIRTEEN

25 The trial court held fifty-nine (59) unrecorded bench  
26 conferences during the guilt and penalty phases of the trial (A. App.,  
27 Vol. 8, pp. 1855, 1888, 1911, 1916, 1933, 1941, 1948, 1961, 1989,  
28 2029, 2036, 2081; Vol. 9, pp. 2306, 2340, 2341-42; Vol. 10, pp. 2396,

1 2461, 2469, 2516; Vol. 13, pp. 3024, 3051, 3053, 3056, 3063, 3108,  
2 3133, 3144, 3146, 3198; Vol. 14, pp. 3298, 3310, 3328, 3335, 3345,  
3 3368; Vol. 15, pp. 3379, 3389, 3396, 3406, 3423, 3440, 3454, 3465,  
4 3468, 3469, 3499, 3520; Vol. 16, pp. 3649, 3675, 3685, 3816, 3823,  
5 3839, 3845, 3847, 3853, 3862).

6 ARGUMENT

7 I.

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

10 The trial court erred in finding that Donte Johnson was not  
11 a person with an expectation of privacy with respect to the master  
12 bedroom of the Everman residence. The capacity to claim the  
13 protection of the Fourth Amendment depends not upon a property right  
14 in the invaded place but upon whether the person who claims the  
15 protection of the Amendment has a legitimate expectation of privacy  
16 in the invaded place. See, Rakas v. Illinois, 439 U.S. 128, 99 S. Ct.  
17 421, 58 L.Ed.2d 387 (1978) citing, Katz v. United States, 389 U.S.  
18 347, 353, 88 S. Ct. 507, 512, 19 L.Ed. 576 (1967).

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

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

26 Id. at 430.

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

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

6 In order for a third party to give consent to a search of  
7 the defendant's property the consenting party must have joint access  
8 or control over the property for most purposes, so that the third  
9 party can consent to the search in his own right. U.S. v. Matlock,  
10 415 U.S. 164, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974).

11 In Matlock, the Supreme Court declared:

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

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

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

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

1 like husband and wife and child parents.

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

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

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

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

1 to protection from an unreasonable search and seizure.

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

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

19 II.

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

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

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



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

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

13 Clearly the guns had no proper probative value.  
14 Although both Suk Lee and Jung Lee testified that  
15 they had seen Tai carrying a gun, neither of them  
16 described the gun nor in any way compared it to  
17 the guns displayed during closing argument.  
18 Thus, as of the time the guns were admitted, no  
19 connection had been drawn between Tai's  
20 possession of them and his acts of extortion.  
21 Nor could the guns have been admitted as  
22 conditionally relevant, for no further testimony  
23 was to be heard in the case. And, although the  
24 government was kind enough to explain, while  
25 displaying the guns to the jury, that Tai  
26 "carried them when he was with Suk Kyong Lee"  
27 (cite omitted) no such evidence had been  
28 introduced and closing argument was not the time  
to introduce it. United State v. Van Whye, 965  
F.2d 528, 533 (7th Cir. 1992).

So the guns were relevant only to the extent they  
showed Tai to be the kind of person who would  
carry such weapons, thus making it more likely  
that he was the kind of person who committed  
extortion. Yet for that purpose, of course, the  
guns were not admissible. Fed. R.Civ. P. 404(b).  
Tai at 1209. (Emphasis added).

27 Id. at 1211.

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

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

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

12 III.

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

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

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

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

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

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

7 Furthermore, the Court has repeatedly held:

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

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

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

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

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

3       The prosecuting attorney shall open and the  
4       defendant shall conclude the argument.

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

6 California has reached the same result through judicial  
7 interpretation. In People v. Bandhauer, 66 Cal.2d 524, 530-531  
8 (1967), the court stated:

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

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

19       Appellant was denied due process and is entitled to relief.

20 IV.

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

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

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

1 (1993); Middleton v. State, 114 Nev. 1089, 968 P.2d 296, 314 (1998).  
2 Character evidence must not be used to determine whether a defendant  
3 is death eligible. It is of questionable value in establishing an  
4 appropriate penalty. See, Allen v. State, 99 Nev. 485, 665 P.2d 238  
5 (1983).

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

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

13 Petitioner initially recognizes, as he must, that  
14 our cases have distinguished between two  
15 different aspects of the capital sentencing  
16 process, the eligibility phase and the selection  
17 phase. Tuilaepa v. California, 512 U.S. 967,  
18 971, 114 S. Ct. 2630, 2634, 129 L.Ed.2d 750  
19 (1994). In the eligibility phase, the jury  
20 narrows the class of defendants eligible for the  
21 death penalty, often through consideration of  
22 aggravating circumstances. Id. at 971, 114 S.  
23 Ct. at 2634. In the selection phase, the jury  
24 determines whether to impose a death sentence  
25 upon an eligible defendant. Id. at 972, 114 S.  
26 Ct. at 2634-2635.

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

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

28 It is the position of Appellant that the failure to

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

6 V.

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

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

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

The United States Constitution, Amendment VI, right to a

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

7 Whether a defendant is prejudiced by juror misconduct is a  
8 fact question to be determined by the trial court. . . . See,  
9 Rowbottom v State, 105 Nev. 472, 779 P.2d 934 (1989); Barker v. State,  
10 95 Nev. 309, 313, 594 P.2d 719, 721-22 (1979). The trial court herein  
11 failed to make that determination. The sentence of death should be  
12 vacated and the matter remanded to the District Court for a hearing  
13 in which the trial court determines the circumstances of what  
14 transpired, the impact on the jurors, and whether or not it was  
15 prejudicial.

16 VI.

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

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

1 120 F.3d 1045 (9th Cir. 1997) (A. App., Vol. 7, pp. 1612-1622; Vol.  
2 13, pp. 3173-3180, 3181, 3194-95, 3196-97, 3202). It was improper to  
3 allow the prosecutor to change position in the same trial. The court  
4 should have granted the motion for a new trial.

5 The court further abused its discretion in failing to make  
6 inquiry upon learning that a family member of one of the victims was  
7 in the clearly marked, restricted jury lounge area; calling it a "non-  
8 issue." Appellant was charged with four homicides and the State was  
9 seeking imposition of the death penalty; the court had a duty to  
10 ascertain whether there had been contact or influence upon the jurors  
11 and whether it was prejudicial. See, Isbell v. State, 97 Nev. 222,  
12 626 P.2d 1274 (1981). Appellant is entitled to relief.

13 VII.

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

17 The three-judge panel procedure of NRS 175.556(1) violates  
18 the Due Process Clause of the Fourteenth Amendment to the United  
19 States Constitution. In Apprendi v. New Jersey, 530 U.S. 466, 120 S.  
20 Ct 2348, 147 L.Ed.2d 435 (2000), the court held: "other than the fact  
21 of a prior conviction, any fact that increases the penalty for a crime  
22 beyond the prescribed statutory maximum must be submitted to a jury  
23 and proven beyond a reasonable doubt," (Id. at 2362-63) citing to its  
24 earlier decision in Jones v. United States, 526 U.S. 227, 119 S. Ct.  
25 1215, 143 L.Ed.2d 311 (1999) stating: "with that exception, [fact of  
26 a prior conviction] we endorse the statement of the rule set forth in  
27 the concurring opinions in that case." [I]t is unconstitutional for  
28 a legislature to remove from the jury the assessment of facts that



1 increase the prescribed range of penalties to which a criminal  
2 defendant is exposed. It is equally clear that such facts must be  
3 established by proof beyond a reasonable doubt." 526 U.S. at 252-253,  
4 119 S. Ct. 1215 (opinion of Stevens, J.); see also, Id. at 253, 119  
5 S. Ct. 1215 (opinion of Scalia, J.) Id. at 2363. Id. (footnote  
6 omitted).

7 Justice Scalia, in his concurring opinion cogently asserts:  
8  
9 What ultimately demolishes the case for the  
10 dissenters is that they are unable to say what  
11 the right to trial by jury does guarantee if, as  
12 they assert, it does not guarantee - what it has  
13 been assumed to guarantee throughout our history  
14 - the right to have a jury determine those facts  
15 that determine the maximum sentence the law  
16 allows . . . .

17 The guarantee that "[I]n all criminal  
18 prosecutions, the accused shall enjoy the right  
19 to . . . trial, by an impartial jury" has no  
20 intelligible context unless it means that all the  
21 facts which must exist in order to subject the  
22 defendant to a legally prescribed punishment must  
23 be found by a jury. Id. at 2367.

24 Justice Thomas, in a concurring opinion, admits that he was  
25 wrong in Almendarez-Torres v. United States, 534 U.S. 224, 118 S. Ct.  
26 1219, 140 L.Ed.2d 350 (1998), where he was the deciding fifth vote for  
27 the majority. He now is confident that all elements which impose or  
28 increase punishment must go to the jury. Id. at 2379.

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

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

1 Second, and related, one of the chief errors of  
2 Almendarez-Torres - an error to which I succumbed  
3 - was to attempt to discern whether a particular  
4 fact is traditionally (or typically) a basis for  
5 a sentencing court to increase an offender's  
6 sentence. For the reasons I have given, it  
7 should be clear that this approach just defines  
8 away the real issue. What matters is the way by  
9 which a fact enters into the sentence. If a fact  
10 is by law the basis for imposing or increasing  
11 punishment - for establishing or increasing the  
12 prosecutor's entitlement - it is an element. (To  
13 put the point differently, I am aware of no  
14 historical basis for treating as a non-element a  
15 fact that by law sets or increases punishment.)  
16 When one considers the question from this  
17 perspective, it is evident why the fact of a  
18 prior conviction is an element under a recidivism  
19 statute. . . .

20 Third, I think it clear that the common-law rule  
21 would cover the McMillan situation of a mandatory  
22 minimum sentence. . . . [It] is expected  
23 punishment has increased as a result of the  
24 narrow range and that the prosecution is  
25 empowered, by invoking the mandatory minimum, to  
26 require the judge to impose a higher punishment  
27 than he might wish, i.e., minimum mandatory  
28 triggers are elements of the offense. Id. at  
2378-2379.

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

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

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

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

10 It cannot be refuted that the existence or non-existence of  
11 these aggravating circumstances is a factual determination. The three  
12 judge panel deprived appellant of his right to a jury determination  
13 under both the sixth and fourteenth amendments to the United States  
14 Constitution. Appellant's conviction was not final when Apprendi,  
15 supra was announced; therefore the decision is applicable herein.  
16 See, Powell v. Nevada, 511 U.S. 79, 114 S. Ct. 1280, 128 L.Ed.2d 1  
17 (1994). Appellant's death sentence should be reversed and remanded  
18 to the district court for a jury determination of the appropriate  
19 penalty.

20 VIII.

21 THE THREE-JUDGE PANEL SENTENCING PROCEDURE IS  
22 CONSTITUTIONALLY DEFECTIVE.

23 The Nevada capital sentencing scheme contains unique  
24 provisions allowing imposition of sentence by a panel of three  
25 district court judges in situations where the jury has been unable to  
26  
27  
28

1 reach a unanimous decision as to the sentence to be imposed<sup>1</sup> or where  
2 the first degree murder conviction is based upon a guilty plea.<sup>2</sup>  
3 Although the statutory scheme refers to this sentencing body as a  
4 "panel" of judges, it functions in the same way as a jury: it is  
5 required to make the same findings to support the sentence as a jury;<sup>3</sup>  
6 and the statutory scheme does not suggest that the procedure for  
7

8 <sup>1</sup> NRS 175.556 provides:

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

16 <sup>2</sup> NRS 175.558 provides:

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

25 <sup>3</sup> NRS 175.554 provides, in pertinent part:

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

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

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

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

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

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

17       A) Is the Three-Judge Panel a Court?

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

25  
26       <sup>4</sup> This is in clear contrast to the federal system. The United States Constitution provides only  
27 for the establishment of the Supreme Court and leaves to the legislative branch the power to create, and  
28 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

1 a three-judge court of any kind renders the legislative attempt to  
2 create such a court a nullity. See, e.g., State of Nevada v.  
3 Hallock, 14 Nev. 202, 205-206 (1879). This fundamental absence of  
4 legislative power to create a new, non-constitutional court was the  
5 basis of the decision in People ex rel. Rice v. Cunningham, 61 Ill.2d  
6 353, 336 N.E.2d 1 (1975). Under the law then in effect, 1973 Ill.  
7 Rev. Stats. Ch. 38, § 1005-8-1A, following a conviction of murder with  
8 specified aggravating circumstances, sentence would be imposed by a  
9 three-judge court composed of the trial judge and two other trial  
10 judges assigned by the chief judge of the judicial circuit.<sup>5</sup> The  
11 Illinois Supreme Court held this provision unconstitutional, reasoning  
12 as follows:

13 "The constitution of 1970 ... provides that  
14 "[t]he judicial power is vested in a Supreme  
15 Court, an Appellate Court, and Circuit Courts."  
16 (Art. VI, sec. 1.) The present judicial article  
17 contains no provision for legislative creation of  
18 new courts. [Citation]. It is clear, therefore,  
19 that the legislature has no constitutional  
20 authority to create a new court under Article VI  
21 of the 1970 Constitution.

22 While the organization and the number of  
23 judges required for a determination of a  
24 proceeding in the Supreme Court and in the  
25 appellate court are expressly stated (Ill. Const.  
26 (1970), art. VI, secs. 3 and 5), the present  
27 Constitution is silent as to the number of judges  
28 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

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

<sup>5</sup> In Illinois, the courts of general jurisdiction are called circuit courts, analogous to our district  
courts.

1 disclosed any authority that the judicial  
2 amendment of 1962 or the provisions of the  
3 judicial article of the 1970 Constitution were  
4 intended to contravene the long-standing view  
5 that proceedings in the circuit court are to be  
6 conducted by one judge.

7 In the present case the provision of the  
8 death penalty statute providing for the three-  
9 judge panel requires that they act collectively  
10 in determining the existence of any of the  
11 enumerated circumstances and in pronouncing  
12 sentence. This is not merely a procedural  
13 requirement, but rather it involves the scope of  
14 a circuit judge's jurisdiction. The provision,  
15 therefore, is constitutionally defective because  
16 each of the judges constituting the panel is  
17 deprived of the jurisdiction vested in him by the  
18 1970 Constitution."

19 336 N.E.2d at 5-6. The court followed Rice in In re Contest of  
20 Election for Off. of Gov., 93 Ill.2d 463, 444 N.E.2d 170, 173-174  
21 (1983), holding unconstitutional a statute providing for the  
22 submission of election contests to a "state election contest panel,"  
23 which was composed of a panel of three circuit judges exercising the  
24 jurisdiction of a circuit court.<sup>6</sup>

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

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25 <sup>6</sup> No other state has a three-judge panel statute which is the same as Nevada's in requiring judges  
26 from other judicial districts to be appointed to the panel. Only three other states currently have statutes  
27 providing for three-judge sentencing panels in capital cases, and none of them provides for resort to a  
28 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.

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

7 Just as the Illinois court recognized that the circuit  
8 judges have "equal powers and duties," the Nevada Supreme Court has  
9 recognized that the district judges have "equal and coextensive  
10 jurisdiction." E.g., State Engineer v. Sustacha, 108 Nev. 223, 225,  
11 826 P.2d 959 (1992); Rohlfing v. District Court, 106 Nev. 902, 906,  
12 803 P.2d 659 (1990); Warden v. Owens, 93 Nev. 255, 256, 563 P.2d 81  
13 (1977); NRS 3.230. In Warden v. Owens, the Supreme Court relied on  
14 this constitutional rule in concluding, under Article 6, § 6 of the  
15 constitution, that a district court could not revive a defendant's  
16 right of appeal in a habeas corpus proceeding by "remanding" the case  
17 to another district court for reimposition of sentence: the court held  
18 that the district court had "no jurisdiction to ... direct that court  
19 how to proceed." 93 Nev. at 256 (citations omitted).<sup>7</sup> Thus, as the  
20 Illinois Supreme Court concluded, if three judges preside together  
21 over the same case, each judge is deprived of the constitutional  
22 jurisdiction which he or she wields in presiding over a constitutional  
23 court, to the extent that the other judges exercise their equal,  
24 constitutional power in the same case. People ex rel Rice v.  
25 Cunningham, supra, 336 N.E.2d at 6. "This is not merely a procedural

26  
27 <sup>7</sup> There is also no constitutional authorization in Nevada for "collegial" decision-making by  
28 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.



1 requirement, but rather involves the scope of a circuit judge's  
2 jurisdiction." Id.; see also, Ex parte Gardner, 22 Nev. 280, 284,  
3 39 P. 570 (1895) ("It is not possible for one court to reach out and  
4 draw to itself jurisdiction of an action pending in another court  
5 ...").<sup>8</sup>

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

20       In short, by erecting a species of court not contemplated  
21 by the Constitution, the legislature has acted without constitutional  
22 authority in establishing the three-judge panel court and has violated  
23

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24       <sup>8</sup> Indeed, a district judge cannot exercise any judicial authority as a court outside the judicial  
25 district in which he or she is commissioned. Miller v. Ashurst, 86 Nev. 241, 243, 468 P.2d 357 (1970);  
26 Madison Nat'l Life v. District Court, 85 Nev. 6, 9, 449 P.2d 256 (1969); Ex parte Gardner, supra,  
27 22 Nev. at 284; cf. NRS 1.050(4) (stipulation to change place of holding court). While a district judge  
28 may exercise judicial power in another judicial district under assignment as an acting judge of that  
district by the chief justice or by stipulation, NRS 3.040(1); NRS 3.220; Walker v. Reynolds Elec. &  
Eng'r Co., 86 Nev. 228, 232-233, 468 P.2d 1 (1970), no such commission can serve to authorize a judge  
of another district to exercise jurisdiction in a pending case in which a judge of the district also exercises  
the same jurisdiction.

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

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

1 (1980). Finally, the use of such a death-prone mechanism violates the  
2 reliability guarantee of the Eighth Amendment.

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

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

16 It is clear from the statutory scheme that the three-judge  
17 panel conducts exactly the same analysis in sentencing as a jury. NRS  
18 175.554, NRS 175.558; cf. NRS 175.556. This structure contemplates a  
19 "highly subjective" decision as to the appropriate punishment, e.g.,  
20 Dawson v. State, 103 Nev. 76, 80, 734 P.2d 221 (1987) (citations  
21 omitted), and it includes an untrammelled power to decline to impose  
22 a death sentence, whatever the result of the sentencing calculus may  
23 be. Bennett v. State, 106 Nev. 135, 144, 787 P.2d 797 (1990). In  
24 reaching this decision, the statute does not suggest that the jurors,

25 <sup>9</sup> An assessor is "[A] person learned in some particular science or industry, who sits with the  
26 judge on the trial of a cause requiring such special knowledge and gives his advice." Black's Law  
27 Dictionary 117 (6th ed. 1990); see Calmer S.S. Corp. v. Scott, 345 U.S. 427, 432, 73 S.Ct. 739, 742  
28 (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).

1 or the members of a three-judge panel, exercise a judicial - - or, as  
2 it were, professional - - discretion. Cf. NRS 176.033(1)(a); NRS  
3 176.035; NRS 176.045.<sup>10</sup> There is certainly nothing in the legislative  
4 history of the provision to suggest that the legislature contemplated  
5 any role for the panel different from that of the jury. See Nev.  
6 Legislature, 59th Sess., Senate Judiciary Committee, Minutes at 1-2  
7 (March 16, 1977) (referring to sentencer using "same criteria" as  
8 jury.)<sup>11</sup>

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

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

20  
21 <sup>10</sup> Imposing equivalent standards for sentencing by a jury or a three-judge panel is also required  
22 to avoid constitutional problems. It goes without saying that a differential standard for sentencing based  
23 upon whether the defendant pleads guilty or not, or whether a defendant goes to trial but does not obtain  
24 a unanimous verdict, would violate the federal **Fifth and Sixth Amendment** guarantees. Cf. United  
25 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.

26 <sup>11</sup> The scanty legislative history on the use of the three-judge panel focuses primarily on the  
27 difficulty of empaneling sentencing juries. See Nev. Legislature, 59th Sess., Senate Judiciary  
28 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.

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

17 In the case of the three-judge panel, nothing in the statute  
18 suggests that the sentencing function it performs is a judicial  
19 function, in the manner of a normal judicial sentencing. See NRS  
20 176.033(1)(a); NRS 176.035; NRS 176.045. Rather, the panel functions  
21 essentially as a surrogate jury; and since the two judges designated  
22 to sit with the trial judge do not, and cannot, exercise judicial  
23 power as judicial officers presiding over a court, they have a role  
24 indistinguishable from that of a lay juror. Accordingly, however much  
25 the fact-finding and weighing conducted in the capital sentencing  
26 proceeding resembles a judicial act in form, in fact it is no more an  
27 exercise of judicial power than the fact-finding conducted in Desert  
28 Chrysler-Plymouth. The statute therefore violates the constitutional

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

3         The unconstitutionality of the three-judge panel statute,  
4 which commits essentially the functions of jurors to assigned judges,  
5 is demonstrated by two contrasting of situations in which the  
6 Constitution does authorize judges to exercise authority which is not,  
7 strictly speaking, the adjudicative power which the Constitution  
8 grants to courts. Nev. Const. Art. 6 §§ 4, 6. The Commission on  
9 Judicial Discipline includes two members who are justices of the  
10 Supreme Court or judges. Nev. Const. Art. 6 § 21(2)(a), (8). The  
11 Commission is a "constitutionally established court of judicial  
12 performance and qualifications," with jurisdiction analogous to that  
13 given by the Constitution to the district courts, Whitehead v.  
14 Commission on Judicial Discipline, 110 Nev. 128, 160 n.24, 869 P.2d  
15 795 (1994); but the members (including the judicial personnel members)  
16 do not function as "judges" exercising the constitutional power given  
17 to courts. This is made clear by the fact that the members of the  
18 Commission are separately granted immunity for their official acts,  
19 id. at 159-160; Admin. and Proc. Rules for Nevada Commission on  
20 Judicial Discipline, Rule 13; and this would not be necessary for the  
21 judicial members if they were exercising the authority of their  
22 judicial offices. Similarly, the Commission gives no particular power  
23 to any of its individual members, including the judicial members, id.,  
24 Rule 3, and its members are subject to disqualification or peremptory  
25 challenge under the Commission's own rules, id., Rule 3(6,7,8), and  
26 not under the general rules for judicial disqualification. Cf. NRS  
27 1.225, NRS 1.235.

28         The constitutional provision for the Commission demonstrates

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

12 Similarly, the Constitution provides that the members of the  
13 Supreme Court sit on the Board of Pardons. Nev. Const. Art. 5 S  
14 14(1). Plainly, the justices do not exercise a judicial power in this  
15 capacity, cf. State v. Echaverria, 69 Nev. 253, 257, 248 P.2d 414  
16 (1952) (only pardons board and not court has power to commute  
17 sentence): they sit as individuals chosen ex officio but not  
18 exercising the power of their judicial office. See Kelch v. Director,  
19 107 Nev. 827, 834, 835, 822 P.2d 1094 (1991) (Steffen, J., concurring)  
20 (justices do not sit as court on Board of Pardons but as individual  
21 members of executive branch board); see also, Creps v. State, 94 Nev.  
22 351, 358 n.5, 581 P.2d 842 (1978). Here again, where judicial  
23 officers serve in a non-judicial capacity, and not as a constitutional  
24 court, constitutional authorization was required; and such authority  
25 was not obtained to establish the three-judge capital sentencing  
26 court. Accordingly, the attempt of the statute to assign the duties  
27 of judicial jurors to district judges violates the constitutional  
28 separation of powers provision.

1 C) Conclusion

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

20  
21 <sup>12</sup> SCR 48.1 provides for peremptory disqualification of the presiding judge in civil actions.  
22 This provision is "designed to insure a fair tribunal by allowing a party to disqualify a judge thought to  
23 be unfair or biased." Jahnke v. Moore, 737 P.2d 465, 467 (Idaho Ct. App. 1987). A movant may be  
24 said to properly take advantage of a peremptory challenge when the litigant is concerned that the judge  
25 may be biased or unfair for some real or imagined reason. *Id.* Smith v. District Court, 107 Nev. 674,  
26 677, 818 P.2d 849 (1991). The purpose of the rule is simply "promoting the concept of fairness." *Id.*  
27 at 678. It is not open to question that capital cases, in which the stakes for the litigants are nothing less  
28 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.



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

5 Appellant is entitled to relief.

6 IX.

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

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

19 A) Selection of Judges

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

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

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

4 "Unaccountable secrecy, with its attendant  
5 opportunity to harass, intimidate, favor, raise  
6 or lower standards in particular unreported  
7 cases, to satisfy their view of what ought to be  
8 or not be, is a power beyond any known to our  
9 law. A tribunal that operates in secrecy can  
10 indulge its suspicions, yield to public pressure,  
11 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."

12 Matter of Chiovero, 524 Pa. 181, 570 A.2d 57, 60 (1990), quoted in  
13 Whitehead v. Comm'n on Judicial Discipline, 111 Nev. 70, n.46, 893  
14 P.2d 866 (1995). "Any step that withdraws an element of the judicial  
15 process from public view makes the ensuing decision look more like  
16 fiat; this requires rigorous justification." Id. at 269. (Shearing,  
17 J., dissenting), quoting Matter of Krynicki, 983 F.2d 74, 75 (7th Cir.  
18 1992) (on motion to seal) (Easterbrook, J.) Where there are no  
19 published standards or procedures for judicial action, secrecy  
20 exacerbates the lack of adequate procedural protections. "Unabridged  
21 discretion, however benevolently motivated, is frequently a poor  
22 substitute for principle and procedure." In re Gault, 387 U.S. 1, 87  
23 S.Ct. 1428, 1438 (1967). Such unbridled discretion exercised in a  
24 secret proceeding, of which there is no record, is fundamentally  
25 inconsistent with our historical traditions and with the adversary  
26 process. See generally, In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 489

1 (1948).<sup>13</sup>

2 Second, the absence of procedural standards and the secrecy  
3 of the selection process deprive the parties of all the constitutional  
4 protections which the adversary system provides, such as adequate  
5 notice of the proceedings, adequate opportunity to litigate the issues  
6 arising in those proceedings, and an adequate record upon which the  
7 matter can be reviewed. In capital cases, a complete record of the  
8 proceedings is clearly necessary for adequate review under the federal  
9 constitution, see Dobbs v. Zant, 506 U.S. 357, 113 S.Ct. 835, 836  
10 (1993) (per curiam), and a record of the selection process for members  
11 of a three-judge panel is clearly necessary to any review of the  
12 propriety of that procedure. See, State v. Smith, 326 N.C. 792, 392  
13 S.E.2d 362, 363 (N.C. 1990) (trial court's failure to record private

14  
15 <sup>13</sup> There is no legal justification for such secrecy. The standards, policies and actions of the  
16 Nevada Supreme Court in the selection and appointment of panel members are not "declared by law to  
17 be confidential", and the information is therefore subject to public disclosure. NRS 239.010; Neal v.  
18 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

19 "[T]o the extent reasonably possible, all parties or their lawyers shall be included in  
20 communication with a judge

21 ....  
22 A judge must disclose all ex parte communications ... regarding a proceeding pending or  
impending before a judge

23 [and]

24 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."

25 Unlike conferences with court personnel, which are permitted "to aid the judge in carrying out the  
26 judge's adjudicative responsibilities," Canon 3(b)(7)(c), the contacts involved in selecting members of  
27 a three-judge panel do not relate to the adjudication of a substantive legal issue, but relate to the  
28 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.

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

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

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

25  
26 <sup>14</sup> This motion is based upon the currently available public information with respect to the  
27 selection of three-judge panels and the rate of imposition of the death penalty by those panels as  
28 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

1 which produces such a result is, prima facie, not working rationally  
2 to select "the few cases in which [a death sentence] is imposed from  
3 the many cases in which it is not." Furman v. Georgia, 408 U.S. 238,  
4 314, 92 S.Ct. 2726 (1972) (White, J., concurring) (emphasis  
5 supplied).<sup>15</sup>

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

19 \_\_\_\_\_  
20 for sophisticated statistical analysis by the defendant.

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

23 <sup>16</sup> These data strongly indicate that the Supreme Court relies on those judges who are actively  
24 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);  
25 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,  
26 609-610 (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  
27 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  
28 declaration volunteering for service unconstitutional). Thus the empirical evidence indicates that the

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

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

23 B) Qualification of Judges

24 In addition to the absence of constitutionally-adequate  
25 selection criteria, the statute fails to provide for adequate inquiry  
26

27 Supreme Court selection process is not neutral. See, Castaneda v. Partida, 430 U.S. 482, 497, 97 S.Ct.  
28 1272 (1977) ("selection procedure that is susceptible of abuse" supports showing of discrimination based  
upon statistical evidence).

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

25 The necessity of inquiry into the panel members'

26  
27 <sup>17</sup> "Nevada's statute does not require the jury to impose the death penalty under any  
28 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).

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

11 Irrespective of prior Nevada Supreme Court decisions,  
12 inquiry by the parties is absolutely crucial to determine if any of  
13 the judges' biases and attitudes are inconsistent with the  
14 constitutionally-required degree of impartiality above and beyond and  
15 oath to follow the law. See Morgan v. Illinois, supra, 112 S.Ct. at  
16 2235.<sup>18</sup>

17 The constitutional inadequacy of relying upon the judge's  
18 general oath to follow the law as a guarantee of impartiality is  
19 equally apparent with respect to disclosure by the judges of specific  
20 bias. Courts routinely recognize that judges can be swayed by biases  
21 and prejudices which affect lesser mortals. See, e.g., In Interest  
22 of McFall, 556 A.2d 1370, 1376 (Pa. Super. 1989), affirmed 617 A.2d  
23 707, 714 (Pa. 1992) (pending criminal investigation of judge);

24  
25 <sup>18</sup> Of course the Eighth and Fourteenth Amendments do not require a categorical, conscious  
26 refusal to follow the law as a basis for disqualification: an opinion with respect to the death penalty (or  
27 to any subsidiary question involved in imposing it) is disqualifying if it will "prevent or substantially  
28 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).



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

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

19  
20 <sup>19</sup> The Nevada Supreme Court regularly recognizes the possibility that judicial officers can be  
21 biased against parties. E.g., Buschauer v. State, 106 Nev. 890, 896, 804 P.2d 1046 (1990) (remand for  
22 resentencing before different judge after erroneous consideration of polygraph results and victim impact  
23 statement by original judge); Wolf v. State, 106 Nev. 426, 428, 794 P.2d 721 (1990) (reversing denial  
24 of petition for postconviction relief and ordering new sentencing hearing before different judge, where  
25 original sentencing judge exposed to recommendation by prosecution in violation of plea agreement);  
26 Gamble v. State, 95 Nev. 904, 909, 604 P.2d 335 (1979) (same); Van Buskirk v. State, 102 Nev. 241,  
27 244, 720 P.2d 1215 (1986) (same); Collins v. State, 89 Nev. 510, 514, 515 P.2d 1269 (1973);  
28 Santobello v. New York, 404 U.S. 257, 263, 92 S.Ct. 495 (1971).

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

1 information is available, neither the judge's general oath to follow  
2 the law, nor the ethical requirement to disclose potentially  
3 disqualifying evidence, Code of Judicial Conduct, Canon 3(E)(1), has  
4 been adequate to secure an impartial panel. For instance, one of the  
5 most recent panels imposed the death penalty in a case in which the  
6 defendant killed two victims, including one woman, by inflicting head  
7 injuries. State v. Calambro, Washoe County Case No. CR-94-0198. One  
8 of the judges selected for the panel, In the Matter of Appointment of  
9 District Judges, Order (January 9, 1995), according to published and  
10 uncontradicted reports, had maintained a close personal relationship  
11 with a woman who was shot in the head, in an alleged attempted murder  
12 and suffered serious and permanent injury as a result. The  
13 prosecution of the assailant was still pending at the time of the  
14 Calambro sentencing. See "View From The Bench," Las Vegas Sun, p.4D  
15 (March 31, 1994); "Jury Gives Up On Gunman," Las Vegas Sun, p.1A (June  
16 2, 1994); State v. Schlafer, Clark County Case No. C118099. This  
17 situation would clearly justify excusal for cause of a juror, or, at  
18 minimum, a searching inquiry into the juror's capacity to be  
19 impartial. See e.g., Hunley v. Godinez, 975 F.2d 316, 319 (7th Cir.  
20 1992) (and cases cited); cf. Hall v. State, 89 Nev. 366, 370-371, 513  
21 P.2d 1244 (1973) (disqualification of juror who was crime victim not  
22 required where full voir dire on issue established that juror could  
23 be impartial). Review of the record in Calambro, however, reveals  
24 that there was no disclosure to the parties of this information, which  
25 would certainly be "relevant to the question of disqualification."  
26 Code of Judicial Conduct, Canon 3(E)(1), Commentary.

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

1 v. Illinois, 504 U.S. \_\_\_, 112 S.Ct. 2222, 2228 (1992); Gardner v.  
2 Florida, 430 U.S. 349, 351, 97 S.Ct. 1197 (1977) (plurality opn.)  
3 Under the Eighth Amendment, heightened scrutiny of procedural  
4 requirements reflects the "a special 'need for reliability in the  
5 determination that death is the appropriate punishment' in any capital  
6 case." Johnson v. Mississippi, 486 U.S. 578, 584, 108 S.Ct. 1981  
7 (1988), quoting Gardner v. Florida, 430 U.S. 349, 363-364, 97 S.Ct.  
8 1197 (1977) (plurality), and Woodson v. North Carolina, 428 U.S. 280,  
9 305, 96 S.Ct. 2978 (1976) (White, J., concurring); accord, Ford v.  
10 Wainwright, 477 U.S. 399, 411, 414, 106 S.Ct. 2595 (1986) (plurality)  
11 (in capital cases, Eighth Amendment requires "heightened standard of  
12 reliability"). The absence of any substantive or procedural standards  
13 for the selection and qualification of members of three-judge panels,  
14 and the concealment by the Supreme Court of its procedures and  
15 criteria for making the selection of panel members, deprive the  
16 parties of any opportunity to litigate the propriety of the court's  
17 actions, and explicitly afford a "lowered standard of reliability"  
18 with respect to these proceedings. In light of the extraordinary rate  
19 of imposition of capital sentences by three-judge panels, the evidence  
20 that the selection of panel members does not proceed on a neutral  
21 basis, and the evidence that factors relevant to disqualification are  
22 routinely not disclosed, the absence of procedural protections in the  
23 selection and qualification of panel members deprives the defendant  
24 of the most fundamental requirement of due process, an impartial  
25 tribunal. E.g., Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100  
26 S.Ct. 1610 (1980); In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623  
27 (1955); In re Ross, 99 Nev. 1, 7-18, 656 P.2d 832 (1983). Rather,  
28 these procedures result in the defendant being sentenced by "a

1 tribunal organized to return a verdict of death." Morgan v. Illinois,  
2 supra, 112 S.Ct. at 2231, quoting Witherspoon v. Illinois, 391 U.S.  
3 510, 520, 88 S.Ct. 1770 (1968).

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

6 Appellant is entitled to relief.

7 X.

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

13 Although the federal constitution does not prescribe the  
14 specific form which a state's capital punishment procedure must take,  
15 e.g., Spaziano v. Florida, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164  
16 (1984); Jurek v. Texas, 428 U.S. 262, 279, 96 S.Ct. 2950 (1976),  
17 whatever procedure is employed must comply with constitutional  
18 standards of due process and must result in a reliable determination  
19 which satisfies the Eighth Amendment requirement that the sentence  
20 reflect a "reasoned moral response" to the offense and the offender.  
21 Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934 (1989); quoting  
22 California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837 (1987)  
23 (O'Connor, J., concurring). The Nevada three-judge jury procedure  
24 satisfies neither of these requirements.

25 For example, the three-judge jury procedure deprives a  
26 defendant of a reliable sentence which is an expression of the  
27 "conscience of the community," Witherspoon v. Illinois, supra, 391  
28 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

1 values and the penal system," id. at 519 n.15, with respect to a  
2 homicide committed in Las Vegas. A legislature may determine that the  
3 "conscience of the community" should be expressed by committing the  
4 sentencing decision to the presiding judge. See Spaziano v. Florida,  
5 supra, 468 U.S. at 464. But there is nothing in the Supreme Court's  
6 jurisprudence which suggests that the legislature may constitutionally  
7 replace an expression of the "conscience of the community" as to the  
8 appropriate sentence with a mechanism which routinely substitutes a  
9 sentencer who will express the conscience of a different community,<sup>21</sup>  
10 which has an entirely different "reasoned moral response" to the  
11 offense and the offender. Cf. Alvarado v. State, 486 P.2d 891, 899-  
12 905 (Alaska 1971) (vicinage).

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

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

25 // //

26  
27 <sup>21</sup> Of course, when a particular community is so inflamed against a defendant that a change of  
28 venue is required, the trial and sentencing proceedings may be committed to a less prejudiced  
community; but this procedure is allowed only out of necessity, when an impartial tribunal cannot be  
obtained in the normal venue of the prosecution.

XI.

THE STATUTORY REASONABLE DOUBT INSTRUCTION IS UNCONSTITUTIONAL.

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

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

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

XII.

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

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

1 in fact, read the record.

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

8 In determining whether mitigating  
9 circumstances exist, jurors have an obligation to  
10 make an independent and objective analysis of all  
11 the relevant evidence. Arguments of counsel or  
12 a party do not relieve jurors of this  
13 responsibility. Jurors must consider the  
14 totality of the circumstances of the crime and  
15 the defendant, as established by the evidence  
16 presented in the guilt and penalty phases of the  
17 trial. Neither the prosecution's nor the  
18 defendant's insistence on the existence or  
19 nonexistence of mitigating circumstances is  
20 binding upon the jurors. (Emphasis added) Id. at  
21 10.

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

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

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

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

XIII.

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

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

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

See, SCR 250(5)(a).

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

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

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



1 ex rel Marshall v. Eighth Judicial District Court, 80 Nev. 478, 396  
2 P.2d 680 (1964). "Meaningful, effective appellate review depends upon  
3 the availability of an accurate record covering lower court  
4 proceedings relevant to the issues on appeal. Failure to provide an  
5 adequate record on appeal handicaps appellate review and triggers  
6 possible Due Process Clause violation." See, Lopez v. State, 105 Nev.  
7 68, 769 P.2d 1276, 1287 (1989).

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

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

14 CONCLUSION

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

18 Respectfully submitted,


19 PHILIP J. KOHN  
20 CLARK COUNTY SPECIAL PUBLIC DEFENDER

21 By

22 LEE-ELIZABETH McMAHON  
23 DEPUTY SPECIAL PUBLIC DEFENDER  
24 NEVADA BAR #1765  
25 309 SOUTH THIRD STREET, 4TH FLOOR  
26 LAS VEGAS, NEVADA 89155-2316  
27 (702) 455-6265  
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DATED this 27th day of June, 2001.

By 

By LEE-ELIZABETH McMAHON  
DEPUTY SPECIAL PUBLIC DEFENDER  
NEVADA BAR #1765  
309 SOUTH THIRD STREET, 4TH FLOOR  
LAS VEGAS, NEVADA 89155-2316  
(702) 455-6265

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# EXHIBIT 2

# EXHIBIT 2

CHRISTOPHER R. ORAM, LTD.  
520 SOUTH 4TH STREET | SECOND FLOOR  
LAS VEGAS, NEVADA 89101  
TEL. 702.384-5563 | FAX. 702.974-0623

IN THE SUPREME COURT OF THE STATE OF NEVADA

\* \* \* \* \*

DONTE JOHNSON,

S.C. CASE NO. 65168

Appellant,

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Tracie K. Lindeman  
Clerk of Supreme Court

vs.

THE STATE OF NEVADA,

Respondent.

APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS  
(POST-CONVICTION)  
EIGHTH JUDICIAL DISTRICT COURT  
THE HONORABLE JUDGE ELISSA CADISH, PRESIDING

~~~~~  
APPELLANT'S APPENDIX TO THE OPENING BRIEF  
VOLUME XXXIX  
~~~~~

**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

3<sup>rd</sup> 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

IN THE SUPREME COURT OF NEVADA

DONTE JOHNSON,

CASE NO. 65168

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

OPENING BRIEF APPENDIX

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3	3	REPORTER'S TRANSCRIPT OF OCTOBER 14, 1999 STATE'S MOTION TO VIDEOTAPE THE DEPOSITION OF CHARLA SEVERS (FILED 10/18/1999)	717-726
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6	4	REPORTER'S TRANSCRIPT OF OCTOBER 21, 1999 STATUS CHECK: FILING OF ALL MOTIONS (FILED 11/09/1999)	821-829
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8	4	REPORTER'S TRANSCRIPT OF OCTOBER 26, 1999 VIDEO DEPOSITION OF CHARLA SEVERS (FILED UNDER SEAL) (FILED 11/09/1999)	839-949
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22	7	REPORTER'S TRANSCRIPT OF JANUARY 18, 2000 PROCEEDINGS (FILED 01/25/2000)	1623-1624
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3	7	REPORTER'S TRANSCRIPT OF MAY 18, 2000 PROCEEDINGS (FILED 05/30/2000)	1803-1804
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5	7	REPORTER'S TRANSCRIPT OF MAY 23, 2000 PROCEEDINGS (FILED 06/01/2000)	1807-1812
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9	11&12	REPORTER'S TRANSCRIPT OF JUNE 5, 2000 JURY TRIAL-DAY-1- VOLUME I (FILED 06/12/2000)	2603-2981
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11	8	REPORTER'S TRANSCRIPT OF JUNE 6, 2000 JURY TRIAL- DAY 2- VOLUME II (FILED 06/07/2000)	1824-2130
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13	9&10	REPORTER'S TRANSCRIPT OF JUNE 7, 2000 JURY TRIAL-DAY 3- VOLUME III (FILED 06/08/2000)	2132-2528
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21	15	REPORTER'S TRANSCRIPT OF JUNE 13, 2000 JURY TRIAL PENALTY PHASE- DAY 1 VOL. II (FILED 06/14/2000)	3378-3537
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**CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 9<sup>th</sup> day of January, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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 4<sup>TH</sup> STREET | SECOND FLOOR  
LAS VEGAS, NEVADA 89101  
TEL. 702.384-5563 | FAX. 702.974-0623