IN THE SUPREME COURT OF THE STATE OF NEVADA

TODD MITCHELL LEAVITT,
APPELLANT,
VS.
THE STATE OF NEVADA,
RESPONDENT.

CASE NO: 69218

FILED

MAR 14 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

APPELLANT'S AMENDED OPENING BRIEF

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COUNSEL FOR RESPONDENT

16-08036

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STATEMENT OF THE ISSUES

ISSUES ON APPEAL:

1. WHETHER THE JURY INSTRUCTION (#) DEFINING THE ELEMENTS OF FIRST DEGREE MURDER OMITTED THE ELEMENT OF DELIBERATION AND ERASED THE DISTINCTION BETWEEN FIRST AND SECOND DEGREE MURDER IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION?

2. WHETHER THE ERRONEOUS, UNCONSTITUTIONAL "KAZALYN" JURY INSTRUCTION HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT?

3. WHETHER THE DISTRICT COURT ERRED WHEN IT CITED A DIFFERENT CASE LAW THAN RELIED UPON AND CITED BY APPELLANT AS THE BASIS FOR HER DENIAL OF THE HABEAS PETITION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION?

4. WHETHER THE DISTRICT COURT SHOULD HAVE GIVEN RETROACTIVE EFFECT TO NEW SUBSTANTIVE RULES OF CONSTITUTIONAL LAW FORBIDDING CRIMINAL PUNISHMENT OF CERTAIN CRIMINAL CONDUCT?

STATEMENT OF CASE/FACTS

THIS CASE INVOLVES MORE THAN FIFTEEN YEARS of POST-CONVICTION HISTORY. WHILE THIS STATEMENT IS ONLY A BRIEF OVERVIEW, PETITIONER/APPELLANT CONSIDERS IT VITAL TO THE ANALYSIS OF THE CASE TO REVIEW THE RELEVANT PROCEDURAL HISTORY.

TODD MITCHELL LEAVITT, (APPELLANT) WAS CONVICTED, PURSUANT TO A JURY VERDICT, IN THE EIGHTH JUDICIAL DISTRICT COURT ON MAY 26, 1998 ON ONE COUNT of FIRST DEGREE MURDER WITH USE of A DEADLY WEAPON.

APPELLANT WAS SENTENCED ON JUNE 15, 1998 TO TWO CONSECUTIVE LIFE SENTENCES WITHOUT THE POSSIBILITY of PAROLE. APPELLANTS COURT APPOINTED TRIAL COUNSEL, JAMES W. ERBECK, WAS SUBSTITUTED BY COURT APPOINTED APPELLATE COUNSEL, CRAIG D. CREEL, TO HANDLE THE DIRECT APPEAL.

ON SEPTEMBER 28, 1989, THE NEVADA SUPREME COURT DISMISSED THE APPEAL #19493. APPELLANT WAS NEVER PROVIDED COPIES of RECORDS, INCLUDING TRIAL TRANSCRIPTS, FROM NEITHER TRIAL OR APPELLATE COUNSEL. ON JUNE 17, 1992, APPELLANT FILED A PRO SE STATE PETITION FOR WRIT of HABEAS CORPUS. (AS VEGAS ATTORNEY ANDREW MYERS WAS APPOINTED TO REPRESENT APPELLANT, BUT FOR UNRELATED REASONS, WITHDREW AND PATRICK E. McDONALD WAS APPOINTED.

ON MAY 31, 1996, AN EVIDENTIARY HEARING WAS HELD; JUDGE MICHAEL DOUG WAS PRESIDED. ON OCTOBER 2, 1996, THE JUDGE DENIED THE PETITION AND A SECOND APPEAL FOLLOWED. ON FEBRUARY 10, 1999, THE NEVADA SUPREME COURT DISMISSED THE APPEAL (#28987). ON JANUARY 19, 1999, APPELLANT FILED HIS FEDERAL PETITION FOR WRIT of HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254 (CV-N-99-0031), RAISING VIOLATIONS of HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE of COUNSEL, DUE PROCESS of LAW, A FAIR TRIAL AND EQUAL PROTECTION of THE LAWS. ON AUGUST 29, 2002, THE U.S. DISTRICT COURT DENIED THE HABEAS PETITION AND ALSO DENIED MY APPLICATION FOR COA ON JUNE 11, 2003. THE NINTH CIRCUIT COURT of APPEALS RECEIVED A NOTICE of APPEAL AND MOTION FOR RECONSIDERATION . . .

... ON JUNE 30, 2003. THE NINTH CIRCUIT GRANTED THE COA UPON FINDING THAT APPELLANT HAD DEMONSTRATED A DEBATABLE, NONCONSTITUTIONAL PROCEDURAL ISSUE WHICH APPELLANT HAD "FACIALLY ALLEGED THE DENIAL OF A CONSTITUTIONAL RIGHT", IN LIGHT OF ITS HOLDING IN LAMBRIGHT V. STEWART 220 F.3d 1022, 1026 (9TH CIR. 2000).

ON REVIEW OF HIS CASE BY THE NINTH CIRCUIT, THE OPENING BRIEF WAS FILED BY ATTORNEY DOUGLAS H. CLARK ON DECEMBER 15, 2003. ON DECEMBER 22, 2004, THE NINTH CIRCUIT FILED AN ORDER DISMISSING THE CASE (#03-16150) FOR FAILURE TO PROSECUTE AND SENT A CERTIFIED COPY OF THE ORDER TO THE DISTRICT COURT AS AND FOR THE MANDATE OF THE COURT. AFTERWARDS, DOUGLAS CLARK DID NOT REPLY TO ANY OF MY COMMUNICATIONS REGARDING THIS CASE UNTIL OVER FIVE (5) YEARS HAD PASSED. IN FACT, MY FAMILY HAD TO CONTINUOUSLY REQUEST CLARK TO TURN OVER RELEVANT APPELLATE DOCUMENTS AND RECORDS ON MY BEHALF. I WROTE NUMEROUS LETTERS FOR UPDATES AND STATUS OF MY CASE.

ON SEPTEMBER 2015, APPELLANT LEARNED ABOUT A RECENT NINTH CIRCUIT COURT OF APPEALS DECISION IN RILEY V. MCDANIEL, 2015 WL 2262549 (C.A.9 (NEV) (MAY 15, 2015). THE COURT HELD THAT NEVADA TRIAL COURTS INSTRUCTION CONFLATING PREMEDITATION AND DELIBERATION ELEMENTS OF FIRST DEGREE MURDER VIOLATED DUE PROCESS AND THAT THE ERRONEOUS, UNCONSTITUTIONAL INSTRUCTION HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT. APPELLANT FILED A PETITION FOR WRIT OF HABEAS CORPUS IN THE STATE DISTRICT COURT ON OCTOBER 15, 2015.

ON NOVEMBER 10, 2015, APPELLANT RECEIVED FACTS AND FINDINGS, CONCLUSIONS OF LAW AND ORDER DENYING MY PETITION, BASED ON POLK V. SANDOVAL (NOT RILEY V. MCDANIEL!) DATED NOVEMBER 3, 2015 AND SIGNED BY JUDGE MICHELLE LEAVITT. NO HEARING. NO OPPOSITION FROM THE STATE. NO NOTICE OF HEARING.

ARGUMENT

1. IN MY PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) MAILED ON OCTOBER 14, 2015 TO THE 8TH JUD. DIST. CT. CLERK'S OFFICE, I CHALLENGED THE USE OF AN UNCONSTITUTIONAL JURY INSTRUCTION COMMONLY REFERRED TO AS THE "KAZALYN" INSTRUCTION IN NEVADA.

THIS JURY INSTRUCTION DEFINED DELIBERATION AS A PART OF PREMEDITATION, RATHER THAN AS A SEPERATE ELEMENT. ON PAGE 6 OF MY PETITION AND ON PAGE 4 OF MY MEMORANDUM IN SUPPORT OF THE PETITION, I CITED THE RECENTLY DECIDED NINTH CIRCUIT RULING IN RILEY V. MCDANIEL, 2015 WL 2262549 (C.A.9 (NEV)), WHICH WAS FILED ON MAY 15, 2015, LESS THAN SIX (6) MONTHS BEFORE I FILED MY PETITION.

THE NINTH CIRCUIT COURT OF APPEALS HELD THAT THE USE OF THIS JURY INSTRUCTION CONFLATING PREMEDITATION AND DELIBERATION ELEMENTS OF FIRST DEGREE MURDER VIOLATED DUE PROCESS AND HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT.

IN MY CASE, THE INSTRUCTION GIVEN READ AS FOLLOWS:

PREMEDITATION IS A DESIGN, A DETERMINATION TO KILL, DISTINCTLY FORMED IN THE MIND AT ANY MOMENT BEFORE OR AT THE TIME OF THE KILLING.

PREMEDITATION NEED NOT BE FOR A DAY, AN HOUR OR EVEN A MINUTE. IT MAY BE AS INSTANTANEOUS AS SUCCESSIVE THOUGHTS OF THE MIND, FOR IF THE JURY BELIEVES FROM THE EVIDENCE THAT THE ACT CONSTITUTING THE KILLING HAS BEEN PRECEDED BY AND HAS BEEN THE RESULT OF PREMEDITATION, NO MATTER HOW RAPIDLY THE PREMEDITATION IS FOLLOWED BY THE ACT CONSTITUTING THE KILLING, IT IS WILLFUL, DELIBERATE AND PREMEDITATED MURDER.

NO OTHER INSTRUCTION IN MY TRIAL GAVE AN INDEPENDENT MEANING TO "DELIBERATE". IT IS EXTREMELY CLEAR THAT, AT THE TIME OF MY TRIAL IN 1988 AND AT THE TIME MY CONVICTION BECAME FINAL IN 1988, DELIBERATION WAS A DISCRETE ELEMENT OF FIRST DEGREE MURDER IN NEVADA.

THE NEVADA SUPREME COURT HAD DECIDED IN KAZALYN V. STATE, 635 P.2d 278 (1981), SEVEN YEARS BEFORE MY TRIAL, THAT ALL THREE ELEMENTS; WILLFULNESS, DELIBERATION AND PREMEDITATION, MUST BE PROVEN BEYOND A REASONABLE DOUBT BEFORE AN ACCUSED CAN BE CONVICTED OF FIRST DEGREE MURDER.

SINCE THE TRIAL COURT APPROVED THE USE OF THE UNCONSTITUTIONAL JURY INSTRUCTION, THIS ERROR RENDERED MY JURY TRIAL CONSTITUTIONALLY UNFAIR, REQUIRING REVERSAL OF MY FIRST DEGREE MURDER CONVICTION. SEE RILEY V. McDANIEL, 2015 WL 2262549 (C.A.9 (NEV.)).

I BELIEVE, FROM THE RECORD PROVIDED TO ME FROM THE CLERK'S OFFICE, 8TH JUD. DIST. CT. JUDGE MICHELLE LEAVITT DENIED MY PETITION WITHOUT GIVING THE PETITION A FULL AND FAIR REVIEW OF THE GROUND/CLAIMS WITHIN THAT DOCUMENT. IF THE JUDGE HAD DONE AN ADEQUATE REVIEW OF MY PETITION, SHE WOULD HAVE KNOWN THAT THE BASIS OF MY CLAIM IN GROUND ONE WAS BASED ON THE RILEY DECISION, WHICH WAS LESS THAN SIX(6) MONTHS OLD AT THE TIME I FILED MY PETITION. NRS 34.740 STATES: THE PETITION MUST BE EXAMINED EXPEDITIOUSLY BY THE JUDGE OR JUSTICE TO WHOM IT IS ASSIGNED.

NEVADA TRIAL COURTS INSTRUCTION TO THE JURY THAT IF IT FOUND PREMEDITATION UNDER NEVADA'S FIRST DEGREE MURDER STATUTE, IT HAD NECESSARILY FOUND DELIBERATION, VIOLATED DEFENDANT'S DUE PROCESS RIGHT, SINCE NEVADA LAW TREATED DELIBERATION AS A DISTINCT ELEMENT OF FIRST DEGREE MURDER AT THE TIME DEFENDANT WAS CONVICTED AND AT THE TIME HIS CONVICTION BECAME FINAL. U.S.C.A. CONST. AMEND. 14; WEST'S NRSA 200.030, SUBD. 1 (A)

I MAINTAIN THAT THE OUTCOME OF MY TRIAL WOULD HAVE BEEN DIFFERENT IF THE JURY HAD BEEN PROPERLY INSTRUCTED AND THAT JUDGE MICHELLE LEAVITT DID NOT EXAMINE MY PETITION BEFORE SHE DENIED IT IN THE MANNER SHE DID. I ASK THIS COURT FOR AN ORDER VACATING MY CONVICTION AND SENTENCE DUE TO THE CONSTITUTIONAL VIOLATION STATED WITHIN THIS ISSUE.

2.

THE UNITED STATES SUPREME COURT HAS HELD, IN BRECHT V. ABRAHAMSON, 113 S.CT. 1710 (1993), THAT FOR A PETITIONER TO OBTAIN RELIEF, HE OR SHE MUST SHOW THAT THIS INSTRUCTIONAL ERROR "HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT".

TO CONVICT A DEFENDANT OF FIRST DEGREE MURDER UNDER NEVADA LAW, A JURY MUST FIND THAT HE COMMITTED THE MURDER WITH "COOLNESS AND REFLECTION". BYFORD, 994 P.2d 714. IN MY CASE, THE JURY WAS NOT ASKED UNDER WHICH THEORY IT FOUND ME GUILTY OF FIRST DEGREE MURDER; IT COMPLETED ONLY A GENERAL VERDICT FORM." A CONVICTION BASED ON A GENERAL VERDICT IS SUBJECT TO CHALLENGE IF THE JURY WAS INSTRUCTED ON ALTERNATIVE THEORIES OF GUILT AND MAY HAVE RELIED ON AN INVALID ONE." HEDGPETH V. PULIDO, 129 S.CT. 530 (2008).

THE PROSECUTOR RELIED HEAVILY ON THE PREMEDITATED MURDER THEORY AND INSTRUCTION, AND THE JURY WAS NOT TOLD TO CONSIDER THE ALTERNATIVE THEORIES IN A PARTICULAR ORDER. AS SUCH, THE USE OF THE KAZALYN INSTRUCTION HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE ON THE JURY'S DELIBERATION AND VERDICT.

IN FACT, ON JULY 28, 1993, INVESTIGATOR PHILIP KASHNER PRODUCED A STATEMENT OF HIS INTERVIEW WITH JUROR NUMBER 3, JEROLD DWAYNE STEGEMAN, FOREMAN OF THE JURY IN MY CASE. (EXHIBIT A). AMONGST OTHER SHOCKING AND PREJUDICIAL REVELATIONS, THE FOREMAN STATED THAT THE TRIAL JUDGE GUY TOLD ALL OF THE JURORS "YOU DO NOT HAVE TO FIND THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT". THE JURY FOREMAN STATED FIRMLY AND CLEARLY THAT THIS STATEMENT WAS HEAVILY USED IN THE JURY DELIBERATIONS TO REACH A VERDICT.

ADDITIONALLY, ON DECEMBER 12, 2003, OVER A DECADE AFTER HIS ORIGINAL STATEMENT ABOVE, MR. STEGEMAN MADE A SECOND STATEMENT, IN THE FORM OF A DECLARATION, TO THE FACTS OF HIS RECOLLECTIONS OF THIS INJUSTICE, PREJUDICE AND CONTITUTIONAL VIOLATION HE WITNESSED, FIRST HAND, AS THE

FOREMAN OF THE JURY IN MY TRIAL.

I FIRMLY BELIEVE THAT IF THE JURY HAD BEEN PROPERLY INSTRUCTED, THE OUTCOME OF MY TRIAL WOULD HAVE BEEN DIFFERENT. ONE OF THE JURY INSTRUCTIONS FAILED TO IDENTIFY DELIBERATION AS AN INDEPENDENT ELEMENT; THE PROSECUTOR'S RELIANCE ON THAT JURY INSTRUCTION IN ARGUING THE PREMEDITATED MURDER THEORY HAD A SUBSTANTIAL AND INJURIOUS EFFECT ON DETERMINING THE JURY'S VERDICT AND BECAUSE THE GENERAL VERDICT OF GUILT DOESN'T DETERMINE THAT THE JURY BASED ITS VERDICT ON A DIFFERENT THEORY, I ASK THIS COURT FOR AN ORDER VACATING MY CONVICTION AND SENTENCES DUE TO THE CONSTITUTIONAL VIOLATIONS HEREIN.

NOTE → * FURTHERMORE, I ASK THIS COURT TO PLEASE, PLEASE REVIEW THE AFFIDAVIT OF COUNSEL (ANDREW S. MYERS) DATED AUGUST 6, 1993. A COPY WAS SENT TO THE DA'S OFFICE, SPECIFICALLY BILL BERRETT WITH THE LETTER MYERS MAILED TO JUDGE LEE GATES ON AUGUST 5, 1993.

THIS AFFIDAVIT FULLY SUPPORTS THE VIOLATIONS OF MY CONSTITUTIONAL RIGHTS FROM THE START. I NEED YOUR FULL AND FAIR REVIEW OF THE FACTS!

(EXHIBIT C)

2. I SUBMITTED MY PETITION FOR WRIT of HABEAS CORPUS ON OCTOBER 15, 2015, TO THE DISTRICT COURT CLERKS OFFICE. (LESS THAN THREE WEEKS LATER, IT APPEARS FROM THE RECORD THAT JUDGE LEAVITT SIGNED A FACTS AND FINDINGS, CONCLUSIONS OF LAW, DATED NOVEMBER 3, 2015. I RECEIVED THE FACTS AND FINDINGS WITH THE COURTS ORDER DENYING MY PETITION ON NOVEMBER 10, 2015.

IN HER FACTS AND FINDINGS, THE JUDGE STATED THAT APPELLANT/PETITIONER CITED THE CASE of Polk v. SANDOVAL, 503 F.3d 903 (9TH CIR. 2007) AS THE BASIS FOR MY PETITION (AS A "RECENT DECISION"), WHICH IT WAS NOT A RECENT CASE.

JUDGE LEAVITT CHOSE TO NOTE/CITE Polk INSTEAD of Riley v. McDANIEL, WHICH IS VERY RECENT (MAY 15, 2015) AND WAS CLEARLY CITED AS THE BASIS OF MY ARGUMENT ON THE STATES USE of THE UNCONSTITUTIONAL JURY INSTRUCTION ON PAGE 6 of THE PETITION AND, AGAIN, ON PAGE 4 of THE MEMORANDUM SUPPORTING THE PETITION. I DO NOT UNDERSTAND HOW JUDGE LEAVITT DID NOT SEE THIS CITED IF SHE EXAMINED THE PETITION PROPERLY, BUT CHOSE TO CITE A CASE INSIDE of Riley INSTEAD of THE Riley DECISION ITSELF. I BELIEVE THAT THE DISTRICT COURT ERRED IN REGARDS TO THIS UNUSUAL ASSESSMENT of WHAT SHE DID ENTER INTO HER ORDER DENYING MY PETITION.

I BELIEVE THE DISTRICT COURT ERRED IN THIS REGARD AND THAT MY CONVICTION AND SENTENCE SHOULD BE VACATED DUE TO THIS ERROR OR AN EVIDENTIARY HEARING CONDUCTED SO MY PETITION CAN BE PROPERLY REVIEWED AND CONSIDERED BY ANOTHER JUDGE IN THIS MATTER.

3A. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED MY PETITION WITHOUT A HEARING BEING CONDUCTED; NO OPPOSITION TO IT BY THE STATE; AND WITHOUT ANY NOTICE of A HEARING BEING CONDUCTED. I BELIEVE THE STATE COURT JUDGE SHOULD HAVE SET A DATE FOR MY PETITION TO BE HEARD AND ORDERED THE STATE TO FILE AN OPPOSITION OR ANSWER TO THE PETITION IN A TIMELY MANNER.

IF THE DISTRICT COURT JUDGE HAD SCHEDULED A HEARING ON MY PETITION, THERE IS A VERY GOOD CHANCE THAT SHE WOULD NOT HAVE RELIED ON A CASE THAT WAS NOT THE BASIS FOR MY CLAIMS AND WOULD HAVE CONDUCTED A FULL AND FAIR REVIEW OF THE ARGUMENT SUPPORTED BY THE RECENT RILEY DECISION.

THE DISTRICT COURT JUDGE WAS UNREASONABLE IN HER DENIAL OF MY PETITION WITHOUT HEARING THE EVIDENCE OF VALUE TO MY CLAIM THAT AN UNCONSTITUTIONAL JURY INSTRUCTION WAS USED DURING MY TRIAL NEARLY 30 YEARS AGO.

I HAVE SUFFERED SUBSTANTIAL AND INJURIOUS EFFECTS FROM THE USE OF THIS UNCONSTITUTIONAL "KAZALYN" INSTRUCTION AS I WAS GIVEN A PRISON TERM OF TWO (2) CONSECUTIVE LIFE WITHOUT PAROLE EVEN THOUGH I DID NOT COMMIT THIS CRIME AND IT WAS NEVER PROVEN BEYOND A REASONABLE DOUBT THAT I WAS DIRECTLY OR INDIRECTLY INVOLVED IN THIS INCIDENT.

THE DECLARATION BY THE JURY FOREMAN IN MY TRIAL, JEROLD D. STEGEMAN, PH.D., (EXHIBIT B) DEMONSTRATES THE INJUSTICE, PREJUDICIAL, FLAWED AND UNCONSTITUTIONAL DIRECTIVES GIVEN TO THE JURY BY THE TRIAL JUDGE. THE IMPACT AND TRUTH OF THE FOREMANS' AFFIDAVIT/DECLARATION CANNOT GO WITHOUT A FULL AND FAIR REVIEW OF ITS DEGREE OF TRUTHFULNESS AND ITS IMPACT UPON THE JURY VERDICT AND THE OUTCOME OF THE CASE. THIS IS VERY IMPORTANT TO MY DEFENSE BECAUSE, IF NOT FULLY REVIEWED, THEN A TRUE MISCARRIAGE OF JUSTICE WILL CONTINUE TO GO UNCORRECTED WHEN IT SHOULD HAVE BEEN CORRECTED, RESOLVED, VACATED AND REMANDED DECADES AGO.

DUE TO THE RECENT DECISION BY THE NINTH CIRCUIT COURT of APPEALS IN RILEY V. MCDANIEL AND THE VERY RECENT DECISION AND HOLDING IN MONTGOMERY V. LOUISIANA, 577 U.S. _____ 2016 BY THE SUPREME COURT OF THE UNITED STATES, I ASK THIS COURT TO REVIEW THE FACTS OF MY CASE AND TO GIVE RETROACTIVE EFFECT TO THE CLEAR SUBSTANTIVE CLAIMS I HAVE RAISED IN THIS APPEAL AND OVER THE YEARS OF LITIGATION AGAINST THESE CONSTITUTIONAL VIOLATIONS.

4. ON JANUARY 25, 2016, THE UNITED STATES SUPREME COURT HAS HELD, IN MONTGOMERY V. LOUISIANA, 577 U.S. (2016), THAT WHEN A NEW SUBSTANTIVE RULE OF CONSTITUTIONAL LAW CONTROLS THE OUTCOME OF A CASE, THE CONSTITUTION REQUIRES STATE COLLATERAL REVIEW COURTS TO GIVE RETROACTIVE EFFECT TO THAT RULE. THAT CONSTITUTIONAL COMMAND IS, LIKE ALL FEDERAL LAW, BINDING ON STATE COURTS.

"EVEN THE USE OF IMPECCABLE FACTFINDING PROCEDURES COULD NOT LEGITIMATE A VERDICT" WHERE "THE CONDUCT BEING PENALIZED IS CONSTITUTIONALLY IMMUNE FROM PUNISHMENT" UNITED STATES V. UNITED STATES COIN & CURRENCY, 401 U.S. 715, 724 (1971). NOR COULD THE USE OF FLAWLESS SENTENCING PROCEDURES LEGITIMATE A PUNISHMENT WHERE THE CONSTITUTION IMMUNIZES THE DEFENDANT FROM THE SENTENCE IMPOSED." NO CIRCUMSTANCES CALL MORE FOR THE INVOCATION OF A RULE OF COMPLETE RETROACTIVITY." Ibid.

THE U.S. SUPREME COURT ALSO HELD, IN GRIFFITH V. KENTUCKY 479 U.S. 314, 328 (1987), THAT ON DIRECT REVIEW, A NEW CONSTITUTIONAL RULE MUST BE APPLIED RETROACTIVELY "TO ALL CASES, STATE OR FEDERAL".) STATES MAY NOT DISREGARD A CONTROLLING, CONSTITUTIONAL COMMAND IN THEIR OWN COURTS.

APPELLANT TODD LEAVITT HAS BEEN IN PRISON SINCE 1988 SERVING AN UNCONSTITUTIONAL AND HARSH SENTENCE OF TWO CONSECUTIVE PRISON TERMS OF LIFE WITHOUT PAROLE, DUE TO THE STATE DISTRICT COURTS USE OF AN UNCONSTITUTIONAL JURY INSTRUCTION AND THE TRIAL JUDGES COMMENTS TO THE JURY THAT THEY DID NOT NEED TO FIND LEAVITT GUILTY BEYOND A REASONABLE DOUBT DURING THEIR DELIBERATIONS. THIS INJUSTICE IS ABSURD, AND SHOULD NOT BE ALLOWED TO CONTINUE BECAUSE SUBSTANTIVE RULES HAVE BEEN VIOLATED FOR DECADES IN THIS CASE. "THE WRIT HAS HISTORICALLY BEEN AVAILABLE FOR ATTACKING CONVICTIONS ON SUBSTANTIVE GROUNDS". SEE MACKEY V. UNITED STATES, 401 U.S. 667 (1971) AND DESIST V. UNITED STATES, 394 U.S. 244 (1969).

IN EX PARTE SIEBOLD, 100 U.S. 371 (1880), THE COURT ADDRESSED WHY SUBSTANTIVE RULES MUST HAVE RETROACTIVE EFFECT REGARDLESS OF WHEN THE DEFENDANT'S CONVICTION BECAME FINAL. WHEN A STATE ENFORCES A PROSCRIPTION OR PENALTY BARRED BY THE CONSTITUTION, THE RESULTING CONVICTION OR SENTENCE IS, BY DEFINITION, UNLAWFUL.

A CONVICTION OR SENTENCE IMPOSED IMPOSED IN VIOLATION OF A SUBSTANTIVE RULE IS NOT JUST ERRONEOUS BUT CONTRARY TO LAW AND, AS A RESULT, VOID. SEE SIEBOLD, 100 U.S. AT 376. AS A GENERAL PRINCIPLE, A COURT HAS NO AUTHORITY TO LEAVE IN PLACE A CONVICTION OR SENTENCE THAT VIOLATES A SUBSTANTIVE RULE, REGARDLESS OF WHETHER THE CONVICTION OR SENTENCE BECAME FINAL BEFORE THE RULE WAS ANNOUNCED.

IN THE INSTANT CASE, THE JURY TRIAL WAS CONSTITUTIONALLY UNFAIR FROM THE START; THE JURY VERDICT WAS NOT RELIABLE AT ALL IF ONE IS TO WEIGH THE JURY FOREMANS DECLARATION ATTACHED; AND THE SENTENCE IMPOSED CONSTITUTES CRUEL AND UNUSAL PUNISHMENT.

THE SIEBOLD COURT HELD THAT A PENALTY IMPOSED PURSUANT TO AN UNCONSTITUTIONAL LAW IS NO LESS VOID BECAUSE THE PRISONER'S SENTENCE BECAME FINAL BEFORE THE LAW WAS HELD UNCONSTITUTIONAL. THERE IS NO GRANDFATHER CLAUSE THAT PERMITS STATES TO ENFORCE PUNISHMENTS THE CONSTITUTION FORBIDS. TO CONCLUDE OTHERWISE WOULD UNDERCUT THE CONSTITUTION'S SUBSTANTIVE GUARANTEES.

UNDER THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION, STATE COLLATERAL REVIEW COURTS HAVE NO GREATER POWER THAN FEDERAL HABEAS COURTS TO MANDATE THAT A PRISONER CONTINUE TO SUFFER PUNISHMENT BARRED BY THE CONSTITUTION. WHERE STATE COLLATERAL REVIEW PROCEEDINGS PERMIT PRISONERS TO CHALLENGE THE LAWFULNESS OF THEIR CONFINEMENT, STATES CANNOT REFUSE TO GIVE RETROACTIVE EFFECT TO A SUBSTANTIVE CONSTITUTIONAL RIGHT DETERMINES THE OUTCOME OF THAT CHALLENGE.

SEE MONTGOMERY V. LOUISIANA, 577 U.S. ____ 2016; ALSO YATES V. AIKEN

484 U.S. 211, 218 (1988) ("WHEN A STATE HAS NOT PLACED ANY LIMITS ON THE ISSUES THAT IT WILL ENTERTAIN IN COLLATERAL PROCEEDINGS... IT HAS A DUTY TO GRANT THE RELIEF THAT FEDERAL LAW REQUIRES.").

WITH THE 2016 RULING IN MONTGOMERY, THE U.S. SUPREME COURT NOW HOLDS THAT WHEN A NEW SUBSTANTIVE RULE OF CONSTITUTIONAL LAW CONTROLS THE OUTCOME OF A CASE, THE CONSTITUTION REQUIRES STATE COLLATERAL REVIEW COURTS TO GIVE RETROACTIVE EFFECT TO THAT RULE.

"PROTECTION AGAINST DISPROPORTIONATE PUNISHMENT IS THE CENTRAL SUBSTANTIVE GUARANTEE OF THE EIGHTH AMENDMENT AND GOES FAR BEYOND THE MANNER OF DETERMINING A DEFENDANT'S SENTENCE. IT A STATE MAY NOT CONSTITUTIONALLY INSIST THAT A PRISONER REMAIN IN JAIL ON FEDERAL HABEAS REVIEW, IT MAY NOT CONSTITUTIONALLY INSIST ON THE SAME RESULT IN ITS OWN POSTCONVICTION PROCEEDINGS.

IN LIGHT OF THE STATED FACTS ABOVE, I ASK THIS COURT FOR AN ORDER GRANTING MY APPELLATE ISSUES AND VACATING MY CONVICTION AND SENTENCES IN THIS MATTER.

RESPECTFULLY SUBMITTED,

ON THIS 2ND DAY OF MARCH, 2016

BY Todd Mitchell Leavitt

P.O. BOX 208 / # 26131

INDIAN SPRINGS, NV 89070

PRO SE APPELLANT

Conclusion

Due to the Constitutional violations in this case which have caused substantial and injurious effects on me for three decades, I ask this Court to follow the Constitutional guarantees that I was NOT provided with 30 years ago and vacate my sentences and conviction in this matter or Order an Evidentiary Hearing to consider the same.

Todd Mitchell Leavitt

Certificate of Compliance

I hereby certify that I have read this Appellate Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose, I further certify that this Brief complies with all applicable Rules of Appellate Procedure, and I understand that the accompaning Brief is in conformity with the requirements of the Nevada Supreme Court.

Dated this 2nd Day of March, 2016

By Todd Mitchell Leavitt
#26131
Pro Se Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT ON THIS 2ND DAY of MARCH, 2016, I HAVE MAILED THE FOREGOING APPELLANT'S AMENDED OPENING BRIEF BY PLACING SAID DOCUMENT IN THE U.S. MAIL, FIRST CLASS POSTAGE PAID AND ADDRESSED TO:

SUPREME COURT of NEVADA
OFFICE of THE CLERK
201 S. CARSON STREET, SUITE 201
CARSON CITY, NV 89701

BY Todd Mitchell Leventhal
P.O. Box 208/#26131
INDIAN SPRINGS, NV 89070
PRO SE APPELLANT

July 28, 1993

TO: ANDREW MYERS, ESQ.
Bell, Davidson & Myers
601 East Bridger Avenue
Las Vegas, Nevada 89101

FROM: Phillip Kashner
INVESTIGATIVE ASSOCIATES, INC.
3800 South Decatur, 209
Las Vegas, Nevada 89103-5853

702-367-1770
FAX 221-8250

RE: TODD LEAVITT adv State of Nevada

SUBJECT: Interview with Juror Number 3, JEROLD DEWAYNE STEGEMAN.

Juror Jerold DeWayne Stegeman, telephone number 702-657-2261 (work), North Las Vegas Department of Engineering; home address 4434 Broken Bow, North Las Vegas, Nevada 89030.

I spoke with Mr. Stegeman on this date. He states the following:
*Defendant never in chains.
*Most of the jurors were young.
*Some of the jurors wanted to know if the defendant was a prisoner and in prison during the trial. They only saw him in a suit sitting at the defense table. The jury did not observe him as a "jailbird".
*They sat through two weeks of testimony by the prosecution.
*friends of the family,
*business associates.
*Then we got to the defense. We thought that we were going to be there for another two weeks.
*Then the defendant's mom came in.
*Then he [the defendant] got on the stand.

NOTE: Mr. Stegeman doesn't really remember the three cops who testified prior to Mrs. Brown. The cops didn't stick in his mind.

*That was basically it.
*We were all flabegasted. What's a fellow to do?
*All of the evidence was circumstantial.
*5 or 6 years later (after the murder).
*The prosecution witnesses must have had fantastic memories. To have remembered all of the details that they remembered all of the time they remembered them (the details).
*We expected more (defense).
*Nobody stood up for the defendant.
*Couldn't tell that the defendant's attorney was appointed.

Ex 4

P.1

July 28, 1993

TO: ANDREW MYERS, ESQ.
Bell, Davidson & Myers
FROM: Phillip Kashner
INVESTIGATIVE ASSOCIATES, INC.
RE: TODD LEAVITT adv State of Nevada
Page 2, (Re: Juror Number 3, JEROLD DEWAYNE STEGEMAN).

*The way the defense attorney acted; he didn't act as a pro-active attorney. He reacted instead of acting.
*Attorney for the defendant didn't counter to things which were thrown at him. The defendant's attorney didn't go after witnesses (vis-a-vie), I'm going to nail this guy.
*The defendant young; probably didn't have lots of money.
*"I don't want to throw fuel on the fire", but there was no smoking gun; not cut and dry.
*Defendant's mom says he is a good boy.
*Defendant said he didn't do it.
*We were convinced he was involved with it.
*We had a hard time sorting out everything.
*We thought that it was strange re: witness going with the defendant to throw the gun in the lake (a month or two after the killing).
*O'Callaghan told us after the trial that the state through that the gun which the defendant threw in the lake was not the one used in the killing.
*As a juror I understand he [the defendant] may have thrown something into the lake, but why would they [the state] even bring it up if they knew that the weapon thrown into the lake was not (even) the murder weapon.
*Information not substantiated, re: the murder weapon.
*(Mr. Stegeman's recollection of Mr. O'Callaghan's statement in his [Mr. O'Callaghan's] trial summary, No one saw him [the defendant] eat the cookies, but he had crumbs all over him.
*Nothing concrete, nothing specific, but the guy has to be guilty.
*If I had been defendant's attorney, I'd have marched a lot of character witnesses into the trial. I'd of defended it.
*The defendant was mixed up with a lot of unsavory guys, but not in trouble since. He [the defendant] may have been involved, but he [the defendant] is not a habitual criminal, not a threat. This would have weighed heavy on the jury.
*This was a very emotional experience for the jury.
They [the jurors -most of them] were young,
There were lots of fights among the jurors
*I streatched it (the deliberations) out so all of the jurors could feel comfortable with what they were doing.
*Mr. O'Callaghan told us after the trial that nothing we were doing could implement us.
*A couple of the people (once we started deliberating) thought (there was) not enough evidence to convict.
*Re: reasonable doubt. After being on this jury, I (have)

...

July 28, 1993

TO: ANDREW MYERS, ESQ.
Bell, Davidson & Myers
FROM: Phillip Kashner
INVESTIGATIVE ASSOCIATES, INC.
RE: TODD LEAVITT adv State of Nevada
Page 3, (Re: Juror Number 3, JEROLD DEWAYNE STEGEMAN).

lost almost all respect for the legal system.

NOTE: This is the same statement which Gordon Bobell reported to me (see my report of conversation with Mr. Bobell).
*The jury wasn't given enough information to make a decision with.
*Why even have a jury. All it is/was is just passing the buck so that the judge or the court didn't have to take responsibility for the decision. It looks like the system just transfers its responsibility from the judge to the jury.
*The jury didn't have all of the information that it needed.
*The judge (Judge Guy) slept through the trial.
*We (none of the jurors) could understand what the judge (Judge Guy) was saying; he slurred his words. "He is an off the wall judge".
*When we were breaking up to go to the deliberating room, the judge told us, "you do not have to find the defendant guilty beyond a reasonable doubt." We used that heavily in the jury room.
*We were 90% convinced that the defendant had something to do with it; not 100%.
*We expected a lot more information.
*All through the trial I thought that this could be (relating to the Movie "12 Angry Men"), 12 angry men [people] deliberating the case, where only one of the jurors was convinced that the defendant was not guilty and held out until the other jurors came over (slowly) to his side. We just didn't have all of the information which we should have had.

NOTE: Another juror stated that after the trial was (all) over, Mr. Stegeman stated to her that he had originally voted "not guilty, just to get the jury to deliberate".

*You always thing that the jury system is the way to go, but after this trial it just looks like a way of pushing off your (the state's) responsibility. You show a little piece of the information available, just enough to pass the responsibility.
PRK

B3 EXH 4 AND 4A

DECLARATION OF JEROLD D. STEGEMAN, Ph.D.

JEROLD D. STEGEMAN, Ph.D., pursuant to 28 U.S.C. 1746, declares as follows:

1. That I competent to testify to the matters herein stated, and know of my own personal knowledge that the statements herein are true and correct, except as to those matters stated upon information and belief, and as to those matters, I believe them to be true.

2. That I am an Assistant Professor of Civil Engineering at Louisiana Tech University (a member of the University of Louisiana System) in the College of Engineering and Science. I hold an A.A.S. Degree in Civil Engineering Technology from Metropolitan State College (1979); a B.S. Degree in Civil Engineering from Colorado State University (1982); a M.S.E. Degree in Civil & Environmental Engineering from the University of Nevada Las Vegas (1993); and a Ph.D. in Civil & Environmental Engineering from the University Nevada Las Vegas (2001). I served as juror #3 in a criminal murder trial which took place in the Eighth Judicial District Court of Nevada, Department XI, in 1988, which was styled as "State of Nevada vs. Todd Mitchell Leavitt" in case number 87-C-079346-C. I served as the foreman of the jury in that case. I was working in North Las Vegas, and was a graduate student at the University of Nevada Las Vegas at the time of the trial.

3. That I do not now know Todd Mitchell Leavitt, nor have I ever known him outside of seeing him during the proceedings at the above-mentioned trial, nor do I know or have ever known any member of his family or any of his current or former friends or anyone closely associated with him. I make this Declaration freely and voluntarily, and for no hope or promise of any personal or pecuniary gain whatsoever. I have never been charged with, nor convicted of,

EXH [redacted] (EXH B)

a felony, nor any crime of moral turpitude. I further make this Declaration under penalty of Perjury, pursuant to 28 U.S.C. 1746.

4. That I remember the facts and circumstances of the trial in case 87-C-079346-C quite well, in fact, as is sometimes said, "as if it were yesterday." The reason I remember the trial so vividly is because it was an extremely disturbing episode which I will remember for the rest of my life. To this day, I am struck with the lack of a compelling defense which was put on for the Defendant. When the deliberation process started, I am informed and believe that there were serious doubts in the jury as to whether the Defendant had committed the murder with which he was charged. However, Judge Addeliar "Dell" D. Guy III, the District Court judge who presided over that trial, specifically told the jury, after the close of evidence and prior to deliberations, that the jury did **not** have to find the Defendant guilty beyond a reasonable doubt in order to convict him, and that we could have reasonable doubt and still convict him. This may not be an exact quote, but it is clearly the meaning of what Judge Guy told us, and was relied upon heavily by the jury in reaching its verdict.

5. That to this day I am firmly and absolutely convinced that the Defendant's conviction in case number 87-C-079346-C was based primarily upon that verbal admonition to the jury by Judge Guy. I further firmly and absolutely believe that there was reasonable doubt as to the Defendant's guilt, and without that verbal admonition to the jury by Judge Guy, there would have been an acquittal, or at a minimum, a hung jury in case number 87-C-079346-C. The jury absolutely relied upon that statement. As the foreman of the jury in case number 87-C-079346-C, there was then, and is now, no question whatsoever in my mind, and those of other jurors, that a reasonable doubt did exist of the Defendant's guilt.

Exh 5

6. That after the verdict, the prosecutor for the State of Nevada, Michael O'Calla[illegible] held a debriefing with most all of the jurors that the alleged gun, of which there had [illegible] testimony that Defendant was allegedly seen throwing it into a lake, may not have even [illegible] O'Callaghan stated "we don't even know if he [the Defendant] threw a gun or some[illegible] object into the lake." There was evidence that the lake had been "dragged" but that n[illegible] was ever found. Yet the jury was led to believe that the "murder weapon" gun had [illegible] disposed of by the Defendant's act of throwing it into the lake. To this day I am still tro[illegible] that the prosecutor led the jury to believe the validity of evidence which he himself ma[illegible] have believed.

7. That after my involvement with in case number 87-C-079346-C, I lost a great d[illegible] respect for the legal system. I am informed and believe, and thereon allege, that the t[illegible] case number 87-C-079346-C was a mockery of justice, and that we, as jurors, were as[illegible] decide a person's fate without adequate evidence to make such a momentous determinat[illegible] am further informed and believe that the jury did not see the Defendant as a real thr[illegible] society. Nevertheless, as the foreman of the jury in case number 87-C-079346-C, [illegible] convinced that the jury heavily and absolutely relied upon the verbal admonition to the [illegible] by Judge Guy which is set forth above in paragraph 4.

8. That pursuant to the provisions of 28 U.S.C. 1746, I hereby declare under pena[illegible] perjury that the foregoing is true and correct to the best of my recollection.

EXECUTED ON December 12, 2003 at Ruston, Louisiana.

Jerold D. Stegeman

JEROLD D. STEGEMAN, Ph.D.

E-H-5

LAW OFFICES
Bell, Davidson & Myers
AN ASSOCIATION OF PROFESSIONAL CORPORATIONS
601 EAST BRIDGER AVENUE
LAS VEGAS, NEVADA 89101

Stewart L. Bell
Michael D. Davidson
Andrew S. Myers

Telephone
(702) 382-5111

August 5, 1993

VIA HAND DELIVERY

The Honorable Lee Gates
District Court
Department VIII
200 S. Third Street
Las Vegas, Nevada 89155

RE: TODD LEAVITT POST CONVICTION CASE
AUGUST 9, 1993 @ 9:00 a.m.

Dear Judge Gates:

The enclosed Affidavit is submitted for your review prior to the Hearing on Monday, August 9, 1993. I do realize that You Honor is very busy, and I would not ask you to read this Affidavit if I did not think it was important.

For the record, I am sending a carbon copy to the Team Chief in the District Attorney's office, Bill Berrett, but a response to this Affidavit is not required. I simply want to advise the Court of where we are on this case, and I would like the Court to decide whether or not my investigator and I ought to be continued as counsel on this case.

My expectation at the time of dictating this letter is that you will have it in your possession by Friday morning, August 6, 1993. I will be happy to answer any questions that you or the District Attorney may have at the time of the hearing on Monday, August 9, 1993.

Thank you for taking the time to consider this document.

Respectfully,

BELL, DAVIDSON & MYERS

ANDREW S. MYERS, ESQ.

ASM:crs
cc: Bill Berrett, Esq.,
Chief Deputy District Attorney

(EXH C)

ANDREW S. MYERS, ESQ.
BELL, DAVIDSON & MYERS
Nevada Bar # 003546
601 E. Bridger Avenue
Las Vegas, Nevada 89101
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. TODD LEAVITT Defendant.	CASE NO: C7934C DEPT NO: VIII DOCKET C

AFFIDAVIT OF COUNSEL

COMES NOW Court appointed Counsel ANDREW S. MYERS, ESQ. of the law firm of BELL, DAVIDSON & MYERS and presents the attached interim AFFIDAVIT to the Court for its consideration.

DATED this 6th day of August, 1993.

Respectfully Submitted,

BELL, DAVIDSON & MYERS

ANDREW S. MYERS, ESQ.
601 E. Bridger Avenue
Las Vegas, Nevada 89101

(EXH C)

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Attorney for Defendant

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

AFFIDAVIT OF ANDREW S. MYERS, ESQ.

ANDREW S. MYERS, ESQ. being first duly sworn deposes and states as follows:

1. I am the Court appointed Attorney in the case of THE STATE OF NEVADA vs. TODD LEAVITT, a post-conviction murder case in which Mr. LEAVITT was sentenced to two consecutive life terms without the possibility of parole.

2. The Court Appointed Investigator in this case is PHILLIP KASHNER of Investigative Associates.

3. At this point in time, I am still working under the $750.00 (seven hundred fifty dollars) post-conviction Attorney fee limit, and Investigator KASHNER is working under a recently increased limit of $1,500.00 (one thousand five hundred dollars). At the present time, I would estimate that I have expended approximately $4,000.00 (four thousand dollars) at the Court appointed hourly rate of $60.00 (sixty dollars) per hour, and I would estimate that Investigator KASHNER, has expended approximately $3,000.00 (three thousand dollars) at the Court appointed investigation rate of $30.00 (thirty dollars) per hour.

4. My reason for presenting this Affidavit to the Court on an interim basis is so that the Court can make some fundamental decisions about the management of this case, and how it ought to proceed from here.

5. Initially, I was appointed on this case one day when I was

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sitting in the Court Room of the HONORABLE LEE GATES on another matter. JUDGE GATES called my name and asked me if I would take this case. Most of the post-conviction cases I have accepted have turned out to have little merit. Generally speaking, I read the transcript, consider the petition, interview the client, and conclude the case. There simply isn't a lot of merit to most of the complaints of the Defendants.

6. When I received this case, although it was a murder case wherein the Defendant was sentenced to two life terms without the possibility of parole, I assumed, initially, that this case would be no different than many others that I have handled. This has not turned out to be the case.

7. As my Investigator and I have proceeded through the many thousands of pages of documentation in this case, we have found that this is **one of the most egregious cases of ineffective assistance of counsel that either of us have ever seen**. These are strong words, and they ought to be strong words. It isn't my intent to argue the case in this Affidavit, but merely to set forth a few of the ugliest examples of why Mr. Leavitt was denied due process of law, denied effective assistance of counsel, denied a fair trial, and locked up in violation of the Constitution of the United States. Ultimately, it is my request that an Evidentiary Hearing be set in approximately March of 1994 so that this matter can be considered in its entirety.

8. This murder occurred approximately in March of 1983. The trial of this matter was held in 1988, some five years later. At

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the time of the trial MR. LEAVITT was convicted of Murder With Use Of A Deadly Weapon and sentenced to two life terms without the possibility of parol. There was no physical evidence connecting MR. LEAVITT with this crime, and each and every damaging witness against him was less than believable. In fact, some of the witnesses against MR. LEAVITT had ample opportunity to have committed the murder themselves.

9. Attached as Exhibit A and incorporated by reference is the face sheet from the first day of trial. A cursory review of this page will show that the trial in this case began on March 21, 1988. Attached as Exhibit B and incorporated by reference is the Motion for Investigator filed by trial counsel, JAMES ERBECK, in this case. A short review of that document and the accompanying Order will show that JUDGE GUY signed the Order Approving Investigator on March 24, 1988, some three days after the beginning of the trial. In other words, an Investigator, on a case involving two life sentences without the possibility of parol, was first requested three days into the trial.

The Court's attention is next directed to the substance of the Motion for an Investigator submitted by ATTORNEY ERBECK. On the first page of his Motion, continuing onto the next page, the following is set forth:

> As this Court is aware, the instant matter involves facts of a complex nature. The Las Vegas Metropolitan Police Department, in investigating this matter over a five year period of time, interviewed in excess of forty (40) individuals. Some of the individuals may possess a criminal history and/or reasons to fabricate their testimony. Many witnesses may no longer reside

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> where last known. The crime alleged (murder) involve [sic] complex facts surrounding the circumstances of the incident. Several individuals have indicated a hesitancy to discuss their knowledge or involvement in this matter and thus require additional investigation. **Counsel for the Defendant cannot involve himself in any investigative activity without the hazard of becoming witness to evidentiary matters** [emphasis added].

In one broad stroke, DEFENSE COUNSEL ERBECK has acknowledged that there are forty (40) witnesses to be interviewed and investigated, that the case is a complex one, that he hasn't done a thing in the way of investigating those people, and that he would like to have an investigator. This, on the third day of trial.

As it turns out, both my INVESTIGATOR PHILLIP KASHNER and I have spoken with DAVID GROOVER who was the Investigator ultimately retained on this case. MR. GROOVER has informed us, and we can present documentary evidence to support this, that his entire bill for his investigation in this case was approximately $200.00 (two hundred dollars). In other words, no investigation was done in this case. MR. LEAVITT is a thirty (30) year old man, a virtual boy when this occurred, who will spend the rest of his life in prison because his attorney didn't and do what was required by basic dictates pertaining to effective representation.

10. Additionally, as the Court already knows, MR. ERBECK finally acknowledged having lost his trial file in this case. This has made it absolutely impossible for me or my investigator to see exactly what was done on the case by MR. ERBECK. When I refer to his file, I am not making reference to police reports. I am making reference to memoranda which he may have created which would show

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what kind of investigation was done. But in reality, that's an academic point. His Motion for an Investigator says he didn't do anything because he would risk becoming a witness, and it isn't until three days into the trial that he requests an investigator.

11. INVESTIGATOR KASHNER makes that point that in addition to the many people who were never spoken to, there was physical evidence that was never appropriately examined. There were issues pertaining to a rug. There were issues pertaining to a firearm.

12. It appears that shortly after the murder in 1983, two sets of key witnesses left town under different circumstances. One of the witnesses entered the military a few weeks after the murder, and was later discharged because of problems with drugs. The record suggests that this individual had as much opportunity to have committed this murder as Defendant TODD LEAVITT. Two other witnesses left for San Diego. But they didn't leave until after going through Metro asking for relocation assistance. Why did these people leave town, and why would any of them have felt that Metro. was available to assist them? These are a couple of the hundreds of questions, literally, which should have been answered prior to the trial of this matter.

13. As a part of our effort in this case, I have directed the Investigator to simply list those items which ought to have been investigated prior to the trial of this matter. His memos to me, so far, take up nearly thirty (30) pages. INVESTIGATOR KASHNER is a professional who has been used by the office that I am a part of consistently over the last fourteen (14) years.

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14. As an additional part of his work on this case, MR. KASHNER has been conducting interviews with members of the jury who served in this case. He has discovered a number of things. First, he has discovered that it is the impression of a number of the jurors that there was no defense in this case. They expected one, but never saw one. And in fact, that is my impression from reviewing this file. MR. KASHNER has also discovered evidence of jury misconduct. One of the jurors repeatedly visited the alleged scene of this crime during the trial in order to gain insight which was not available through the evidence. Most extraordinary, in conducting an interview with the Jury Foreman, this gentleman was absolutely convinced that one of the last things stated by the trial judge was that the jury **DID NOT** have to find MR. LEAVITT guilty beyond a reasonable doubt.

13. As the Court may know, there was a Co-Defendant in this case who was tried separately. His name was RODNEY EMIL. Although MR. EMIL was tried first, trial attorney JAMES ERBECK did not have the transcript from the EMIL trial when he went to trial defending TODD LEAVITT. This prevented him from using any statements made at the first trial to impeach witnesses at the second trial were they to testify differently. One of the witnesses who testified at the first trial of MR. EMIL was one SHERRY FOULKROD, who did not even testify at MR. LEAVITT'S subsequent trial. More about that in a moment. The point is that MR. ERBECK should not have gone to trial in the second case without having the transcript in the first case. While I have found no record of his objecting to proceeding with

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the trial, even if the trial judge had denied a request to wait for the second transcript, MR. ERBECK should have filed a WRIT with the Supreme Court. It was that important to the conduct of his case to know what had been said about an alleged co-murderer at the first trial.

14. Moving back to the witness mentioned above, SHERRY FOULKROD, here is one of many, many problems for the Court to consider. MICHAEL HANLEY made statements to the Metropolitan Police Department, and in his testimony at the Preliminary Hearing of TODD LEAVITT, saying that he was engaged in a telephone conversation with SHERRY FOULKROD shortly after this murder took place. They were at different locations. Oddly enough, they were watching the same news broadcast at their respective homes. At some point during the newscast, there was an announcement made about a murder which had been committed. In his statement to the Metropolitan Police Department, MR. HANLEY says that when that announcement was made by the newscaster, he immediately said to SHERRY FOULKROD words to the effect that the murder must have involved TODD and RODNEY. The first thing that is strange about this is that the victims name had never been released at this point and time. This suggests that MR. HANLEY had evidence and information which may have well implicated him in the murder. As it turns out, MR. HANLEY is related to a Metropolitan Police Department detective, and he was apparently never seriously considered as a suspect.

Now while MR. HANLEY told the police department that he and

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SHERRY had been enlightened by this newscast and by his comments, that is not what SHERRY FOULKROD said at the trial of this matter in the RODNEY EMIL case. MS. FOULKROD indicated that HANLEY came to her house at some point in time and indicated that the murder was probably something that TODD and RODNEY had done, but she never mentions in her testimony any story about a newscast or a revelation in MR. HANLEY's mind. In fact, she never mentions a telephone conversation.

15. While it is difficult to go into all the detail on a case that the Court is not familiar with at this time, had MR. ERBECK read the trial transcript from the first trial, he would of been in the position to impeach MR. HANLEY's testimony at the LEAVITT trial with his prior inconsistent statement and testimony given at the trial of RODNEY EMIL.

16. In short, MR. ERBECK was not prepared to go to trial. Although it is not my intention to make this a personal attack, there is now a man spending the rest of his young life in the Nevada State Prison, on a defensible case, because his attorney was not prepared for trial. There is no conceivable excuse for what has been done to MR. LEAVITT. For even if there was an excuse, any lawyer in the position of not being prepared could have gone to the trial judge and said: "I am not prepared." Obviously, this was not done.

17. We now find ourselves in the position of having to meet the incredible onerous standard for showing ineffective assistance of counsel. This will require extensive additional investigation,

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some travel, and an enormous amount of legal time on the case. The reason that this time and money is required is because the job wasn't done the first time. And while it is often said on post-conviction relief that a case ought to be tried at the time of trial, this one was not. I am respectfully requesting that the Court approve whatever attorney and investigative fees are required to do a quality job in this case. I would project, but do not know, that the Investigator's fees would ultimately be in the neighborhood of $10,000.00 (ten thousand dollars), and the Attorney's fees would be in a like range. There may also be a need for expert testimony in this case, both in the form of a firearms expert, and in the form of what is now known in the legal trade as a "Strickland Expert."

18. I believe that I have demonstrated to the Court a good-faith basis for believing that MR. LEAVITT has not enjoyed the benefits of the American Justice System as we like to think about it. My comments in this Affidavit have barely scratched the surface. However, it is also true that I work at a very busy law office, where my usual rate is $150.00 (one hundred fifty dollars) per hour. MR. KASHNER is a busy investigator whose usual hourly rate is $100.00 (one hundred dollars) per hour. I am working on the LEAVITT case for $60.00 (sixty dollars) an hour, and MR. KASHNER is working for $30.00 (thirty dollars) per hour. Having said that, we have discussed this and decided that each of us does need to be paid <u>at the Court appointed rate</u> for the time which we put in. If the Court is inclined to approve those expenses, I

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would ask that we be allowed to continue on this case, and that an evidentiary hearing be set for March of 1994. If the Court feels that our efforts are excessive, and that MR. LEAVITT is not entitled to the defense he never had, than we would respectfully request that we be allowed to withdraw from the case and allow other counsel to pursue this in a manner which they find acceptable.

DATED this 6th day of August, 1993.

Respectfully Submitted,

BELL, DAVIDSON & MYERS

ANDREW S. MYERS, ESQ.
601 E. Bridger Avenue
Las Vegas, Nevada 89101
Attorney for Defendant

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COPY

DISTRICT COURT

CLARK COUNTY, NEVADA

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FILED

OCT 18 1988

LORETTA BOWMAN, CLERK
BY LINDA MARTINEZ DEPUTY

THE STATE OF NEVADA,

Plaintiff,

vs.

TODD MITCHELL LEAVITT,

Defendant.

CASE NO. C79346
DEPARTMENT NO. X
DOCKET NO. "S"

BEFORE THE HONORABLE ADDELIAR D. GUY, DISTRICT COURT JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

JURY TRIAL

MONDAY, MARCH 21, 1988

APPEARANCES:

For the Plaintiff: MICHAEL N. O'CALLAGHAN, Esq.
Deputy District Attorney

For the Defendant: JAMES W. ERBECK, Esq.
302 East Carson Avenue, Suite 702
Las Vegas, Nevada 89101

Reported by:

THEDA MOSS, CSR No. 196
Official Court Reporter

Volume I
Pages 1 - 80, Incl.

Exhibit "C"

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED
MAR 23 2 16 PM '88
CLERK

STATE OF NEVADA, Plaintiff, vs. TODD LEAVITT, Defendant.	Case No. C79346 Dept. No. XI EX PARTE MOTION FOR EMPLOYMENT OF INVESTIGATOR

COMES NOW the Defendant, TODD LEAVITT, by and through his attorney, **JAMES WILLIAM ERBECK, ESQ.**, and respectfully moves this Court in his Ex Parte Motion for Employment of Investigator, pursuant to NRS 7.135, and requests this Court issue an Order permitting employment by the Defendant of an investigator to provide such services as may be necessary for the adequate presentation of a defense during the trial of this matter.

NRS 7.135 provides, in pertinent part:

> The attorney appointed by ... the district court to represent a defendant is entitled, ... to be reimbursed for expenses reasonably incurred by him in representing the defendant and may employ, subject to the prior approval of the ... district court in an ex parte application, such investigative ... services as may be necessary for an adequate defense.

As this Court is aware, the instant matter involves facts of a complex nature. The Las Vegas Metropolitan Police Department, in investigating this matter over a five year period of time, interviewed in excess of forty (40) individuals. Some of the individuals may possess a criminal history and/or reasons to fabricate their testimony. Many

(E)

Exhibit "2"

witnesses may no longer reside where last known. The crime alleged (murder) involve complex facts surrounding the circumstances of the incident. Several individuals have indicated a hesitancy to discuss their knowledge or involvement in this matter and thus require additional investigation. Counsel for the Defendant cannot involve himself in any investigative activity without the hazard of becoming witness to evidentiary matters.

NRS 7.135 provides that "compensation to any person furnishing such investigative ... services must not exceed $300.00, exclusive of reimbursement of expenses reasonably incurred ... unless ... certified by the trial judge of the court ... as necessary to provide fair compensation for services of an unusual character or duration; ... ."

The Defendant respectfully requests this Court permit and order excess investigative compensation due to the complex nature of the factual circumstances surrounding the conduct alleged. At present rates of compensation for investigative services the statutory maximum would provide for approximately six hours of investigation. This amount is not adequate in the instant case where there exists a question of guilt or innocence.

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WHEREFORE, the Defendant respectfully requests this Court issue an Order authorizing payment of reimbursement for investigative services in the amount of One Thousand Dollars ($1,000.00).

DATED this 23rd day of March, 1988.

Respectfully Submitted,

By _____
JAMES WILLIAM ERBECK, ESQ.
302 East Carson, Suite 702
Las Vegas, Nevada 89101
(702) 388-2028

Attorney for Defendant;
TODD LEAVITT

FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

MAR 23 12 47 PM '88

CLERK

STATE OF NEVADA,

Plaintiff,

vs.

TODD LEAVITT,

Defendant.

Case No. C79346

Dept. No. IV

O R D E R

IT IS HEREBY ORDERED that the Defendant's Ex Parte Motion for Employment of Investigator is granted.

IT IS FURTHER ORDERED that an investigator, Groover and Associates, be employed by **JAMES WILLIAM ERBECK, ESQ.**, counsel for the Defendant, TODD LEAVITT, and reimbursement be provided in the maximum amount of up to One Thousand Dollars, ($1,000.00).

DATED this 24th day of March, 1988.

DISTRICT COURT JUDGE

Respectfully Submitted,

By

JAMES WILLIAM ERBECK, ESQ.
302 East Carson, Suite 702
Las Vegas, Nevada 89101
(702) 388-2028

Attorney for Defendant;
TODD LEAVITT