ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

MACK MASON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 37964

FILED

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APPELLANT'S OPENING BRIEF

DAVID M. SCHIECK, ESQ.
LAW OFFICE OF DAVID M. SCHIECK
302 EAST CARSON AVE., STE. 600
LAS VEGAS, NEVADA 89101

ATTORNEY FOR APPELLANT

STEWART BELL, ESQ.
DISTRICT ATTORNEYS OFFICE
200 S. THIRD STREET
LAS VEGAS, NEVADA 89155

FRANKIE SUE DEL PAPA, ESQ.
NEVADA ATTORNEY GENERAL
Nevada Bar No. 0192
100 N. CARSON STREET
CARSON CITY, NV 89701
(702)687-3538

ATTORNEYS FOR RESPONDENT

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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DAVID M. SCHIECK, ESQ.
LAW OFFICE OF DAVID M. SCHIECK
302 EAST CARSON AVE., STE. 600
LAS VEGAS, NEVADA 89101

ATTORNEY FOR APPELLANT

STEWART BELL, ESQ.
DISTRICT ATTORNEYS OFFICE
200 S. THIRD STREET
LAS VEGAS, NEVADA 89155

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NEVADA ATTORNEY GENERAL
Nevada Bar No. 0192
100 N. CARSON STREET
CARSON CITY, NV 89701
(702)687-3538

ATTORNEYS FOR RESPONDENT

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

STATUTES

OTHER

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

MACK MASON, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	Case No. 37964

STATEMENT OF ISSUES

1. WAS THE MALICE INSTRUCTION GIVEN TO THE JURY VAGUE AND AMBIGUOUS AND VIOLATED MASON'S PRESUMPTION OF INNOCENCE

2. WHETHER THE REASONABLE DOUBT INSTRUCTION VIOLATED THE DUE PROCESS CLAUSE OF THE UNITED STATES AND NEVADA CONSTITUTION

3. WHETHER THE UNANIMITY INSTRUCTION GIVEN TO THE JURY VIOLATED MASON'S DUE PROCESS RIGHTS AND RELIEVED THE STATE OF ITS BURDEN OF PROOF

4. WHETHER THE COURT ERRED IN DECLINING TO INSTRUCT THE JURY REGARDING CONFLICTING EVIDENCE

5. WAS THERE SUFFICIENT EVIDENCE TO CONVICT MASON OF FIRST DEGREE MURDER

6. WAS IT PROPER TO ADMIT THE PHOTOGRAPH OF THE DECEASED LAYING ON A GURNEY AT THE MORGUE WITH A BLOODY FACE WHEN IDENTITY WAS NOT AN ISSUE

7. WHETHER THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE PENALTY HEARING EVIDENCE IN VIOLATION OF RULE 250

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

STATEMENT OF THE CASE

MACK C. MASON (hereinafter referred to as MASON) was charged by way of an Information with two counts of Burglary while in Possession of a Firearm, Grand Larceny of a Firearm, Murder With Use of a Deadly Weapon, Second Degree Kidnaping with Use of a Deadly Weapon, and Possession of a Firearm by an Ex-Felon (1 APP 2-8). The State filed a Notice of Intent to Seek Death Penalty alleging two aggravating circumstances: (1) the murder was committed while the person was engaged in the commission of or attempt to commit burglary; and (2) the murder was committed by a person who had been previously convicted of a felony involving the use or threat of violence to the person of another (1 APP 9-10). After preliminary hearing, MASON was bound over to trial and arraigned on an information setting forth the same charges on September 7, 1999 (1 APP 94).

The case proceeded to trial on February 14, 2001 and concluded with closing arguments on February 22, 2001 (1 APP 102-103). The jury deliberated for two full days and parts of two other days and returned verdicts on February 27, 2001 (1 APP 103-104). MASON was convicted of two counts of Burglary while in Possession of a Firearm, First Degree Murder and Second Degree Kidnapping with use of a Deadly Weapon. He was found not guilty of Grand Larceny of a Firearm (1 APP 104).

The Penalty hearing was conducted on March 5, 2001 and on the following day the jury returned a verdict of Life Without the Possibility of Parole (1 APP 105-106). Formal sentencing

was held on April 30, 2001, and the Court sentenced MASON to concurrent sentences on the two burglary counts, however, imposed consecutive forty (40) month to One hundred eighty (180) month sentences to the life sentences on the murder count (1 APP 107). The Judgement of Conviction was entered on May 9, 2001 (1 APP 90-91), and the Notice of Appeal timely filed on May 25, 2001 (1 APP 92-93).

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

STATEMENT OF FACTS

TRIAL PHASE

In May, 1999 Flora Mason was living at 1916 West Lawry, North Las Vegas, Nevada (2 APP 127). Flora was the aunt of MASON (2 APP 128). MASON had lived with her for a period of a couple of months until March or April, 1999 and had a key to the home that was taken back from him about the same time. (2 APP 129-29) She kept a key outside of the house in a storage shed, but MASON did not know where the key was located (2 APP 130).

On May 10, 1999 Flora went to work at about 8:10 AM and her normal shift ended at 12:30 (2 APP 131). When she arrived home from work she noticed that the sliding glass door in the back was all the way opened (2 APP 131). The whole house was ramshackeled (2 APP 132). In the back bathroom one of the windows was off it's track and the curtains were knocked down from the windows in the bathtub (2 APP 139). Her deceased father's police .38 revolver and billy club were missing, along with a neighbor's shotgun (2 APP 132-33). She had last seen the items in March (2 APP 133). MASON had some of his clothes stored at her house and she could tell that some of them had been moved and were missing (2 APP 134-35).

Flora was acquainted with MASON'S girlfriend, Felicia Jackson (2 APP 149). Jackson had been over to Flora's house on at least three or four occasions (2 APP 150).

John Turner lived next door to Flora Mason (2 APP 152).

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

On the morning of May 10, 1999 was sitting outside of his house in his Cadillac smoking a cigarette, listening to music and had a beer or two (2 APP 154). He observed MASON going on the side of Flora's house toward the back (2 APP 155). He was used to MASON coming and going, so it really did not bother him (2 APP 156). MASON came out about 5 to 15 minutes later carrying something real long wrapped up in his arms (2 APP 156). MASON was talking to himself and seemed frustrated when he saw two police officers down the street (2 APP 157). Turner estimated the time to be around 8:45 to 9:00 a.m. (2 APP 163). MASON walked down the street toward Comstock and Lake Mead (2 APP 159-60).

Angela Bramlett, the manager at Bargain Pawn, testified that her records showed that on May 10, 1999 at 10:30 a.m. a transaction occurred with a person showing the Nevada identification card of Mack C. Mason for the pawn of a Mossberg shotgun (2 APP 182-83). It was the habit and custom of Bargain Pawn to be sure that the person who is pawning the item matches the picture identification (2 APP 183).

Felicia Jackson first met MASON in 1995 (2 APP 187). They developed a romantic relationship that, according to Jackson, only lasted about two and a half months (2 APP 188). She indicated that they remained friends through the early part of 1999 and that MASON wanted to renew the romantic relationship (2 APP 189). About the middle of April, 1999 she started a romantic relationship with Dudley Thomas known by the nickname

of Wolf (2 APP 190). Thomas was living at 903 D Street (2 APP 190). She had not known him for too long because he had just gotten out of prison (3 APP 272).

On May 10, 1999 Jackson first saw MASON at the store at the corner of F and Jackson while she was with Wolf (2 APP 191). She told MASON that she did not want to talk with him and got into the car with Wolf and drove to another location. She stayed in the car while Wolf got out and was talking to some guys, and she observed MASON approaching the car on the passenger side (2 APP 191). According to Jackson, MASON had a knife in one hand and a 40 ounce beer bottle in the other and lunged at her (2 APP 192; 3 APP 258). She got a little cut mark on her leg from the knife (2 APP 192). She got out of the car and ran past where Wolf was standing and talking and MASON and Wolf confronted each other (2 APP 192). Wolf asked MASON what was going on and MASON responded that he just wanted to talk to Jackson, and when she saw that MASON was going to go past Wolf, she took off running (2 APP 193). She ran down an alley and got a ride from two guys in a Bronco to Wolf's apartment (2 APP 194). About an hour and a half later she was walking up the street to her Aunt's house and saw MASON again and got a ride from Cynthia Coleman back to Wolf's apartment (2 APP 194).

Later on the evening of May 10, 1999 Felicia was at Wolf's apartment with Wolf and a friend of his named Kevin, who she thought lived there (2 APP 195; 3 APP 262). She was sitting on

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

the bed writing a letter and Wolf was standing at the dresser on the telephone (2 APP 195). According to Felicia, the bedroom door was pushed open and MASON walked in and asked Wolf if he still thought it was funny and raised his arm with a gun in his hand (2 APP 196). MASON shot Wolf who fell to the floor and MASON grabbed her and said let's go shoving her out the door (2 APP 197). When MASON got to the door the saw Kevin standing to the right and took off running after him (2 APP 198). Jackson went back into the apartment and told Wolf that she was going to call and get him some help, but MASON came back in and shoved her out the door again (2 APP 198).

MASON took her by her arm and went up the street and got a ride from Wilford (2 APP 200). MASON had Wilford drop them off in the downtown area (2 APP 201). They walked to two motels and ended up at the Vista Motel (2 APP 202). MASON had her rent the room in her name and gave her a $100 bill to pay for it (2 APP 202). When they got into the room she sat in the corner of the room and asked him why he did it, to which MASON replied that it was her fault, that she made him do it (2 APP 204).

After a couple of hours in the room, they got a cab and went back to the westside, and made a couple of stops and they went back to the motel (2 APP 206-207). Early the next day, they left the motel again to go buy some clothes (2 APP 207). MASON bought some clothes at little store on Fremont and they got something to eat (2 APP 208). She went to the Payless Shoe

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

Store and MASON went with her and she bought some shoes (2 APP 209). They went back to the motel room and then to the Greyhound bus station, but there was such a long line that they just left (2 APP 210). MASON wanted to find out how much the fare was to California for he and Jackson (2 APP 211).

On the way back to the motel, MASON stopped and used a pay phone and then when they got back to the motel, he had her make the deposit to turn the phone on (2 APP 211). She asked MASON why he asked Wolf if he still thought it was funny, and MASON told her that Wolf had tried to run him over with his car and was laughing about it (2 APP 213).

While in the room the police called and Jackson looked out the window and saw a lot of police gathering (2 APP 214). MASON refused to answer the phone any further and would not agree to exit the apartment and told her to get under a mattress so she wouldn't get hurt (2 APP 215). While under the mattress she heard something hit the wall real hard, and MASON told her that he was trying to make a hole in the wall to get next door (2 APP 216). He told her that the 2 by 4s where stopping him from squeezing through (2 APP 217). MASON eventually went out and was arrested and the police came into the room and a police dog found Jackson under the mattress (2 APP 218).

On cross-examination, Felicia claimed that there was no relationship other than friendship with MASON from 1995 until May, 1999 (3 APP 233). She admitted that they had opened a

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

savings and checking account together in February, 1999, and that they had done their taxes together (3 APP 234). Money was also put down on an engagement ring in February, 1999 (3 APP 235).

Felicia had been to Flora Mason's house five or six times with MASON (3 APP 238). At the preliminary hearing she testified that the last time she was at Flora's house was in April, 1999 and that she and MASON were in a relationship at the time (3 APP 242).

Patrick Braxton, a cousin of MASON was living in Sacramento, California on May 11, 1999 when he received a phone call from his sister stating that MASON was trying to get in touch with him (3 APP 301). MASON called Braxton after midnight and told him that he was coming to Sacramento and would be arriving at 9:30 the following day (3 APP 302-303). Braxton then called his Aunt Flora Mason to see if he could get a number to call MASON (3 APP 304). During a second phone call from MASON, Braxton was told that he had got him a motherfucker and that he would be coming to Sacramento (3 APP 305). After the second phone call, Braxton called Flora and gave her the number off of his caller ID for MASON (3 APP 306). The first time that Braxton had told anyone about the conversation with MASON about having "got" someone was the day before he testified at trial, when he told the prosecutors (3 APP 316).

Crime scene analyst David Horn processed the scene at 903 D Street, Apartment 3 on May 10, 1999 (3 APP 358). There were

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

no signs of a struggle in the apartment (3 APP 369). No firearms, casings or projectiles were recovered in the apartment (3 APP 371).

John Etchebarren was working at the Vista Motel in May, 1999 as a desk clerk (3 APP 329). On May 10, 1999 a black man and women came in to rent a room between 8:30 and 9:00 PM (3 APP 330-31). They rented a room, were given a key and about 15 to 20 minutes later the lady came back down to the office inquiring about a phone (3 APP 333). Etchebarren did not see anyone with the lady when she came back down, and she did not appear to be stressed or afraid (3 APP 338).

Eric Kerns was assigned to a LVMPD canine unit in May, 1999 (3 APP 344). He was dispatched to the Vista Motel, and an announcement was given over the PA system that a police dog was going to be sent into room 205 (3 APP 346). As soon as the dog started barking the occupant of the room called down and said that he would be coming out (3 APP 346). MASON came out of the room and was arrested and patted down and then the dog was sent into the room (3 APP 347). The dog went in and searched the room and started biting at the bed and patrol officers went in and lifted up the bed and found Felicia (3 APP 348).

The autopsy of Dudley Thomas was performed by Dr. Gary Telgenhoff on May 11, 1999 (4 APP 386). There was a gunshot entry wound in the forehead (4 APP 388). A projectile was recovered from the skull (4 APP 389). There was no stippling associated with the gunshot wound (4 APP 395). Thomas was six

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

foot, two inches and weighed 255 pounds with a rather developed physique (4 APP 399; 402).

Kevin Brown was basically homeless on May 10, 1999, but was staying with his friend, Dudley Thomas, in his apartment on D street (4 APP 408). He first arrived at the apartment in the evening to watch a TV show and eat barbeque (4 APP 409). Felicia was there when he arrived (4 APP 409). While Felicia and Wolf were in the bedroom and Brown was in the front room, MASON came to the door and asked if Wolf was home (4 APP 410). When Brown responded, "Yes", MASON pulled a twelve inch chrome revolver and told him to leave (4 APP 411; 432). Brown ran to the corner of D and Washington and heard a gunshot(4 APP 412). Brown then ran around the corner to a friend's house, and woke up the friend and told him that he thought that Wolf had just been shot (4 APP 413). Brown ran back down an alley toward the apartment and saw MASON holding Felicia by the arm, pulling her up the street (4 APP 413). Felicia appeared to be hysterical and crying (4 APP 415). Brown hesitated, knocked on the window and then went into the apartment and observed Wolf in the bedroom with blood on his head (4 APP 415-17). Brown ran out of the house and told a guy on a motorcycle to call the police and then waited for the police to arrive (4 APP 417).

Brown had stayed at Wolf's apartment many times, both to visit and spend the night over a two to three month period and was familiar that Wolf had a machete that he normally kept under his bed (4 APP 440; 441). Brown was familiar that Wolf's

previous girlfriend was Renay and that he had put her out, but that her clothes were still in the apartment (4 APP 442-43). When Brown was interviewed by the police on the night of the shooting he had told them that MASON was wearing a baseball cap and a short sleeve shirt, while at trial he testified that MASON was not wearing a hat and that he was wearing a dark blue jacket (4 APP 447-50).

General assignment detective Mel Jackson arrived at the D and Washington scene and MASON was developed as a possible suspect (4 APP 460). After talking to Flora Mason and Patrick Braxton, Jackson went to the Vista Motel and commenced surveillance (4 APP 462-64). Surveillance was established at the El Cortez parking garage which was located across the street from the Vista Motel (4 APP 466). MASON and Jackson were first observed walking on Seventh street, holding hands, and entering room 205 at the Vista Motel (4 APP 467; 475). There was nothing that he observed that caused him to believe that Felicia was being held captive by MASON (4 APP 475).

Jackson went to the office of the Vista and several phone calls were made to the room to see if the individuals would come out (4 APP 468). A public address system was also used from the parking area to have them come out of the room (4 APP 4710). MASON came out after the K-9 unit arrived and the dog was allowed to bark on the PA system (4 APP 470).

Crime scene analyst Kelly Neil processed room 205 of the Vista Motel (4 APP 491). He located a wallet under the

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

mattress on the bed with identification in the name of MASON (4 APP 492). There was also a plastic bag with miscellaneous jewelry items (4 APP 492). He also searched room 204 because there was a hole in the wall between the rooms, but did not find any items of evidence (4 APP 493). The hole was jagged and rough in appearance and about two foot across (4 APP 493). An air vent under the vanity in room 205 had a common air duct with the room directly below and a Smith and Wesson .38 special revolver was found in the common duct in the bottom floor room (4 APP 494). There were five live rounds and one expended casing in the revolver (4 APP 504). Due to the damage to the projectile recovered at the autopsy attempts to compare the projectile to test fired rounds from the .38 special recovered were inconclusive (5 APP 537).

A Bargain Pawn receipt was found in the wallet in MASON'S name for a Mossberg shotgun on May 10, 1999 (4 APP 501). There was also a receipt from Marks Brothers Jewelers for the refund of $50 on March 14, 1999 (4 APP 501).

Homicide detectives conducted interviews with both Felicia and MASON after they were arrested (5 APP 551). MASON stated that he had gone to 903 D Street to get his girlfriend (5 APP 555). He left with her, and to his knowledge Wolf was just fine when they left (5 APP 557-58). They had checked into the Vista Motel and had plans to go to Sacramento so he could get a job (5 APP 558-61). MASON had tried to get out of the room because he had warrants and did not want to be arrested (5 APP

561).

Theenda Newson had known MASON for six to eight years and had seen Felicia around for a good five years (5 APP 598; 599). She had been over to Wolf's house a couple of times (5 APP 601). The day before she heard that Wolf had been killed she had seen Felicia walking down Jackson street carrying a black pouch (5 APP 601-602). Felicia stopped and talked to some other people on Jackson and asked if anybody wanted to buy a gun (5 APP 602-603). About two days later she saw Felicia come up to the Town Tavern in a cab, and get out of the cab and go into to the bar (5 APP 604).

Records of the Marks Brothers Jewelers in the Boulevard Mall showed that MASON put a solitaire ring, one-fourth carat, with an enhancer, which is a wedding band on layaway on February 14, 1999 with a $50 deposit (5 APP 609; 616-17). Thirty days later he came back and got his deposit back (5 APP 609). Felicia had put down a $10 layaway on the same day and never came back to pick up her deposit (5 APP 612).

Christopher Jones had known MASON since the mid-1980's and had known Felicia for two and a half years (5 APP 619). In the early part of May, 1999, Felicia came to him tying to sell him a gun (5 APP 620-21). The gun was in a paper bag and Felicia hinted around that she wanted drugs for the gun (5 APP623). The gun looked liked the .38 Smith and Wesson the police had recovered at the Vista Motel (5 APP 624).

Renay Matthews had known MASON for about four years and

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

had met Felicia through him (5 APP 630). She saw them together on a regular basis and to her knowledge continued to be in a relationship and she had observed them hugging and kissing in the couple of months prior to May 10, 1999 (5 APP 631). Felicia was very jealous whenever MASON would talk to Renay (5 APP 632). Wolf had been Renay's boyfriend until about a week prior to May 10th (5 APP 634). When she left him, he would not let her take her clothes with her and she had to call and ask when she needed more clothes (5 APP 637). She knew that Wolf had a machete because she was there when he bought it (5 APP638). Within a day or two of Wolf being shot, she observed Felicia come in a cab to the Town Tavern, go in by herself and then go back to the cab, and she was able to observe that someone was in the cab, that she assumed was MASON (5 APP 643; 645).

Robert James had owned his own janitorial service since 1976 and had known MASON for more than 15 years (5 APP 660-61) MASON worked for him during the period between January, 1999 and May, 1999 and he saw MASON and Felicia together quite often and believed them to be involved in a boyfriend-girlfriend relationship (5 APP 662-63). Somewhere between February and April, 1999 he had rented a U-Haul trailer so they could move their belongings into an apartment (5 APP 664). James had dropped off MASON'S last paycheck toward the end of April, 1999 at MASON'S Aunt Flora's house to MASON (5 APP 665).

MASON testified on his own behalf and related that he had

first met Felicia in 1997 (5 APP 677). The had bank accounts together and had filed tax returns with Felicia and her children listed as dependents, and as far as what she had led him to believe they were still a couple in 1999 (5 APP 677). They had lived together up to April 30, 1999 (5 APP 678).

He also had a key to his Aunt Flora's house and had gone over there at the end of April so that Mr. James could drop off his last pay (5 APP 680). He had a key because he helped her to pay rent on the house (5 APP 680). MASON kept some of his clothes in Flora's house along with several bags of clothing in her storage shed (5 APP 681).

MASON had seen Felicia on May 9th and wanted to talk to her about retrieving some of his belongings that were in storage (5 APP 684-85). She at first told him that she would talk to him later and then later he had tried to talk to her in Wolf's car and she just jumped out of the car and started running (5 APP 685-86). He had chased her to talk to her, but she jumped into a passing car and left the area (5 APP 688). He ran into her later and asked about his belongings and she told him to get with her later (5 APP 689).

On May 10th, MASON first saw Felicia at about 8:00 am at F and Jackson, as MASON was getting ready to go to his Aunt's house (5 APP 682). Felicia accompanied MASON to Flora's house and he unlocked the door, and when he came out the front door later he observed the police up the street and thought they were looking for him on some traffic warrants (5 APP 690).

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

MASON told Felicia and Willie Hardison, whom had given them a ride, to just go around the corner and wait, and when the police left about 30 minutes later, MASON went around the corner. When he left he took a shotgun that he was intending to pawn to pay for his trip to California and then redeem later. He also took two bags of clothing, but did not take the .38 revolver (5 APP 692). He later went to Bargain Pawn and pawned the shotgun. Their plans were to meet up later to arrange to go to California (5 APP 693). Felicia had told him that she was working over at 903 D Street (5 APP 694).

MASON got to 903 D Street at about 8:30 p.m. and asked for Wolf because it was his apartment and Felicia was supposed to be there waiting for him (5 APP 696). MASON and Felicia started to leave, but Felicia indicated that she had forgotten something and went back into the apartment (5 APP 696-97). MASON followed her back into the apartment and heard some hollering and observed Wolf with a machete in his hand (5 APP 698). Wolf was moving into the bedroom and MASON heard a gunshot (5 APP 699). MASON went into the bedroom and observed Felicia in the corner holding a gun and Wolf laying in a box of clothes at the foot of the bed. MASON grabbed Felicia by the arm and told her, let's go (5 APP 700).

They proceeded to the apartment of a friend of MASON'S and got a ride downtown and checked into a motel (5 APP 701-702). Once they got the room, Felicia went and put the phone on and started calling people to find out what had happened (5 APP

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

702). Felicia also took a cab by herself over to the area (5 APP 703). They spent the night in the motel room, and the following day went back over to westside, saw some people and then went back to the room (5 APP 703-704). When they saw the police outside of the room, Felicia started to cry and asked MASON not to say anything to the police (5 APP 705). When it became apparent that they could not get out, Felicia asked MASON to put her under the mattress because maybe the police would not find her (5 APP 706).

Felicia was the one that had placed the gun into the duct work because she had maintained possession of the gun since they had left Wolf's apartment (5 APP 707).

PENALTY HEARING

Felicia Jackson testified that on December 13, 1996 she was visiting her aunt Margaret Jo Duckett on Washington Avenue in Las Vegas and that as she and her daughter left, MASON drove up in his car and was standing and talking with two other men (7 APP 899-900). According to Felicia, MASON fired a shot at her that went through the window of her car, after telling the others that she was a snitch (7 APP 901). She drove off and MASON followed her and fired about five more shots at her (7 APP 902). She saw a police man and ran a stop sign so that he would pull her over (7 APP 903). She told the police a day or two later that she did not want to pursue charges because she was afraid (7 APP 904).

On January 27, 1999 Felicia was living with Ronald Kie on

Jackson street (7 APP 904). As she was coming into the yard she observed MASON and Kie involved in an argument (7 APP 905). Felicia and her daughter left to catch a bus, and while waiting for the bus she saw smoke coming from the area of Kie's house, so she went back to see what was going on. When she got back to the apartment, Kie told her that MASON had thrown a bottle bomb against the wall (7 APP 906).

Ronald Kie lived in an apartment at C and Jackson on January 27, 1999 and Felicia and her kids were living with him (7 APP 921-22). On said date Kie told MASON to stay away from his house because MASON was always harassing him and following him (7 APP 923). Over defense objection, Kie also testified that a shot had been fired at him by MASON on some previous occasion (7 APP 923). Kie related that on the 27th of January he had been cooking and heard a boom and ran out and saw MASON turning the corner and leaving in his truck and that the back wall of Kie's apartment was on fire (7 APP 925).

Fire investigator Dan Thomas determined that a molotov cocktail had been thrown against the exterior of Kie's building (7 APP 929). The case was never prosecuted (7 APP 931).

Detective Brent Becker was assigned to investigate a shooting that occurred on March 13, 1995 (7 APP 941-42). A verbal dispute had occurred between Larry Thomas and Treneshia Gray, who was living with MASON (7 APP 942). MASON had observed the altercation, walked out side and exchanged words with Thomas and then gone into his room and gotten a gun (7 APP

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

943). Thomas walked up the street and Treneshia came up waving a knife at him and then a car pulled up and MASON pointed a gun out of the car and shot Thomas (7 APP 943). When MASON was interviewed he denied having done the shooting (7 APP 944). Gray told the police that Thomas had a gun (7 APP 946). The case was negotiated to an Alford plea to a gross misdemeanor manslaughter (7 APP 946-47).

In March, 1995 Flora Mason received a telephone call from MASON saying that he had just killed someone and that the police might come looking for him (7 APP 949). MASON had later called her and told her not to worry that there were no witnesses and that nothing was going to happen, and he was very happy and laughing about it (7 APP 949-50).

MASON called Correctional Officer Kenyatta Wooten who had known MASON for almost two years (7 APP 952). MASON was a trustee in the detention center for the entire time that he had known him at the jail (7 APP 951-52). To his knowledge MASON had never had any disciplinary problems at the facility (7 APP 955). Likewise Correctional Officer Richard Williams had no problems with MASON and was aware that he attended voluntary religious programs (7 APP 959-60).

Deanna Mason, the daughter of MASON testified that she was born on March 1, 1948 and had two daughters (7 APP 963). MASON was in prison when she was born and was seven years old when he got out of prison (7 APP 963). After MASON got out of prison he moved to Las Vegas and she would come to see him during

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

summer vacations (7 APP 964). When she was 15 she moved to Las Vegas and lived with him (7 APP 965). She stayed with him for five or six years and he supported her and her child (7 APP 966). MASON while in jail, attended and received a diploma from Crossroads Bible Institute and had a positive influence on her life, even while he was incarcerated (7 APP 968-69).

Renay Matthews also testified at the penalty hearing and related that Wolf had not only hit her with a machete, but had poured alcohol on her and tried to start her on fire (7 APP 976-77). Whenever she would try to leave him, Wolf would pay people to jump on her (7 APP 977). Wolf sold crack cocaine out of his apartment and Kevin Brown's role was to serve as a lookout and answer the door (7 APP 978).

At the conclusion of the penalty hearing the jury returned a verdict of life in prison without the possibility of parole, finding six mitigating circumstances and two aggravating circumstances (1 APP 106).

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

ARGUMENT

I.

THE MALICE INSTRUCTION GIVEN TO THE JURY WAS VAGUE AND AMBIGUOUS AND VIOLATED MASON'S PRESUMPTION OF INNOCENCE

At the settling of jury instructions MASON objected to Instruction number 16 as being vague and archaic and not adequately describing the state of mind necessary to have acted with malice (6 APP 736-37). Instruction 16 stated as follows:

> "Express malice is that deliberate intention to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
>
> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." (1 APP 30)

The quoted instruction in no uncertain terms defines what express malice is without issuing a directive as to when express malice may be found. The distinction is obvious, express malice is merely defined whereas the jury is directed that it may find implied malice "when no considerable provocation appears".

This Court has recently approved the use of "may be implied" instead of "shall be implied" as required by NRS 200.020. See Cordova v. State, 116 Nev.Ad.Op. 78, ___ P.2d ___ (2000). Despite this correction of an improper mandatory presumption language the instruction remains unconstitutionally vague. The terms "abandoned or malignant heart" do not convey anything in modern language. See Victor v. Nebraska, 511 U.S.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

1, 11, 13-14 (1994) (term "moral evidence" not "mainstay or the modern lexicon"); id. at 23 (Kennedy, J., concurring) ("what once might have made sense to jurors has long since become archaic"). The words "abandoned or malignant heart" are devoid of rational content and are merely pejorative, and they allow the jurors to find malice simply on the ground that they believe the defendant is a "bad man."

In People v. Phillips, 64 Cal.2d 574, 414 P.2d 353, 363-364 (1966), the California Supreme Court analyzed the element of implied malice, and concluded that an instruction would adequately define implied malice if it made clear that "the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." 414 P.2d at 363: Nevada law is basically consistent with this definition. See Collman v. State, 116 Nev. __, 7 P.3d. 426 (2000):

> "Nevada statutes and this court have apparently never employed the phrase 'depraved heart,' but that phrase and 'abandoned and malignant heart' both refer to the same 'essential concept ... one of extreme recklessness regarding homicidal risk.' Model Penal Code § 210.2 cmt. 1 at 15; see also Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970) (malice as applied to murder includes 'general malignant recklessness of others' lives and safety or disregard of social duty')."

The California Supreme Court disapproved the use of the language referring to an "abandoned or malignant heart" as

superfluous and misleading:

> Such an instruction renders unnecessary and undesirable an instruction in terms of 'abandoned and malignant heart.' The instruction phrased in the latter terms adds nothing to the jury's understanding of implied malice; its obscure metaphor invites confusion and unguided speculation.
>
> The charge in the terms of the 'abandoned and malignant heart' could lead the jury to equate the malignant heart with an evil disposition or a despicable character; the jury, then, in a close case, may convict because it believes the defendant a 'bad man.' We should not turn the focus of the jury's task from close analysis of the facts to loose evaluation of defendant's character. The presence of the metaphysical language in the statute does not compel its incorporation in instructions if to do so would create superfluity and possible confusion.
>
> . . . .
>
> The instruction in terms of 'abandoned and malignant heart' contains a further vice. It may encourage the jury to apply an objective rather than subjective standard in determining whether the defendant acted with conscious disregard of life, thereby entirely obliterating the line which separates murder from involuntary manslaughter.

414 at 363-364 (footnotes omitted). Although the court did not find the use of the language to be error (as it reversed the conviction on other grounds), the passage of time since Phillips has certainly not increased the likelihood that the term "abandoned or malignant heart" conveys anything rational to a juror. No reasonable juror today would understand that phrase as requiring that the defendant commit the homicidal act with conscious disregard of the likelihood that death would result.

Wherefore it is respectfully requested that this Court

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

find that the "abandoned and malignant heart" implied malice instruction denied MASON of due process of law and based thereon reverse his conviction.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

II.

THE REASONABLE DOUBT INSTRUCTION VIOLATED THE DUE PROCESS CLAUSE OF THE UNITED STATES AND NEVADA CONSTITUTION

MASON objected to Instruction number 5 which followed the statutory definition of reasonable doubt, and stated in relevant part:

> "A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation." (1 APP 19)

The specific objection of MASON was as follows:

> "...Specifically the second paragraph of that instruction is defective in that the language, 'as would govern or control a person in the more weighty affairs of life,' is ambiguous and doesn't give any guidance to the jury on how to arrive at what reasonable doubt is.
>
> Further in that same paragraph, 'and are in such a condition that they can say they feel an abiding conviction of the truth of the charge.' Again, it's ambiguous language that, in addition to being archaic, just doesn't have any meaning to the typical juror today. I've spoken with lawyer and layman alike and when you read that language and say, 'Now what does that mean?', nobody can give a definitive answer. Indeed, the Supreme Court has specifically rejected prosecutors and defense attorneys alike from arguing the more weighty affairs of life argument and I think that the fact they've rejected the ability of an attorney to argue what that means gives some credence to the fact that the language should be struck and they should -- there should be a better instruction" (6 APP 737-38).

The Court overruled the objection and gave the instruction

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

quoted above. This instruction is codified in NRS 175.211 and has been upheld by this Court. Holmes v. State, 114 Nev. 1357, 972 P.2d 337 (1998). MASON respectfully submits that the decision in Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328 (1990) indicates that the instruction violates Constitutional principles.

In Cage, supra, the United States Supreme Court found a Louisiana trial court's reasonable doubt instruction constitutionally defective. In making its determination, the Court construed the instruction by considering how reasonable jurors could have understood the charge as a whole. While the Court recognized that the instruction did require a finding of guilt "beyond a reasonable doubt" in accord with In re Winship, 397 U.S. 358 (1970), the Court expressed its belief that the equating of reasonable doubt with "a grave uncertainty" and an "actual substantial doubt" suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard. The Court further opined that, when relating those statements with the reference to "moral certainty," rather than an evidentiary certainty, clearly a reasonable jury could have interpreted the burden of proof required for a finding of guilt to be below that which is required by the Due Process Clause of the United States Constitution.

The reasonable doubt instruction given in the instant case is comparable to the Louisiana instruction rejected by the Supreme Court in Cage. If anything, the instruction challenged

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

here is even more violative of a criminal Defendant's due process rights than the Cage instruction.

The first sentence of the Cage instruction is very similar to the last paragraph of the instruction in the instant case, only the Cage sentence is more fair to the Defendant. Both instruct the jury that, if it has a reasonable doubt as to the Defendant's guilt, the Defendant is entitled to a verdict of not guilty. Both statements are advantageous to a Defendant. But the Cage instruction goes further than the Nevada instruction. The Cage instruction speaks of "doubt as to any fact or element" and of the jury's "duty to give him the benefit of that doubt." The fact that the statement in the Cage instruction is more particular makes it even more benevolent to the Defendant than the Nevada instruction.

The second sentence of the Cage instruction, which is also advantageous to the Defendant, has no analogous counterpart in the Nevada instruction. This sentence informs the jury that a "probability of guilt" does not achieve a standard of "beyond a reasonable doubt," and again directs that the jury "must acquit the accused" if the standard is not reached. This part of the Cage instruction indicates that "beyond a reasonable doubt" means more than merely a preponderance of the evidence.

The third sentence of the Cage instruction, which states that a reasonable doubt is not found upon "mere caprice and conjecture," is indistinguishable from the statement in Nevada instruction that a reasonable doubt is not "merely

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

possibility or speculation."

The fourth sentence of the Cage instruction, which was that a reasonable doubt is that which gives "rise to a grave uncertainty," is interchangeable with the statement in the the Nevada instruction that a reasonable doubt is "such a doubt as would govern or control a person in the more weighty affairs of life." The word "grave" which was troublesome to the Cage court is analogous to the phrase "the more weighty affairs of life."

A number of courts have criticized the definition of the reasonable doubt standard expressed in terms of making important or (weighty decisions) in the jurors' own lives. See State v. Johnson, 774 P.2d 1141 (Utah 1989) and Dunn v. Perlin, 570 F.2d 21 (1st. Cir. 1978). In Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965), the court stated:

> "A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending, in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment."

Similarly, the Supreme Court of Massachusetts in Commonwealth v. Ferreira, 364 N.E.2d 1264, 373 Mass. 116 (1977) in criticizing the instruction on reasonable doubt stated:

> "The degree of uncertainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were the standard mandatory in private affairs the result would be

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

> massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable."

The fifth sentence of the Cage instruction is exactly duplicated in the Nevada instruction. Both say that a reasonable doubt is not "mere possible doubt."

The sixth sentence of the Cage instruction, that a reasonable doubt "is an actual substantial doubt," is almost identical to the statement in the Nevada instruction that "doubt to be reasonable must be actual." Again, the phrase "actual substantial doubt" is what troubled the United States Supreme Court and caused the court to strike down the Cage instruction.

The seventh sentence of the Cage instruction, the most innocuous and meaningless part of the instruction, is uncorrelated in the Nevada instruction.

The final sentence of the Cage instruction, which speaks of a "moral certainly" of a Defendant's guilt, is indistinguishable from the phrase "an abiding conviction of the truth of the charge" found in the Nevada instruction. No practical difference exists between the two phraseologies. Again, "moral certainty" is one of the three phrases which caused the Cage court to find the instruction unconstitutional.

Thus, with the phrases in the Nevada reasonable doubt instruction either the same as, or indistinguishable from, the instruction the court struck down as violative of the Due Process Clause in Cage, the Nevada reasonable doubt

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

instruction is likewise unconstitutional. The Nevada instruction, suggests a higher degree of doubt than is required for acquittal under the reasonable doubt standard, and thus violates the Due Process Clause of both the United States and Nevada constitutions.

Since the jury was not properly instructed, MASON submits that his conviction must be reversed and the case remanded for a new trial.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

III.

THE UNANIMITY INSTRUCTION GIVEN TO THE JURY VIOLATED MASON'S DUE PROCESS RIGHTS AND RELIEVED THE STATE OF ITS BURDEN OF PROOF

Instruction number 27 given to the jury was the subject of contemporaneous objection by MASON and stated:

> "Although you verdict must be unanimous as to the charge, you do not have to agree unanimously on the theory of guilt. Therefore, even if you cannot agree on whether the facts establish premeditated murder or felony murder, as long as all of you agree that the evidence establishes the Defendant's guilt of murder in the first degree, you verdict shall be Murder of the First Degree." (1 APP 41)

MASON respectfully submits that the quoted jury instruction violates a defendant's right to Due Process of Law in not requiring unanimity on each theory of criminality. See, In re Winship, 397 U.S. 358, 90 S.Ct. 1968 (1970); Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491 (1995). MASON is aware of, and refers the Court to it's decision in Evans v. State, 113 Nev. 885, 944 P.2d 253 (1997), however, respectfully urges the Court to reconsider the position.

In the case at bar, the State proceeded on several theories of liability for first degree murder, to wit: premeditation and deliberation, or felony murder in the course of a burglary or felony murder in the course of a kidnapping. Thus there could have been three sets of four jurors that each found that the State had proved something different. Such a scenario greatly lessened the required burden of proof on the State to prove it's case and denied MASON of his due process

rights. It simply does not make sense that the State is constitutionally required to prove every element of it's case beyond a reasonably doubt by an unanimous verdict, and then instruct the jury that it need not be in agreement on the elements of the offense.

It is respectfully urged that the Court reject the instruction at issue and grant MASON a new trial before a constitutionally instructed jury.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

IV.

THE COURT ERRED IN DECLINING TO INSTRUCT THE JURY REGARDING CONFLICTING EVIDENCE

At the settling of jury instructions MASON offered proposed alternative instructions B which was refused by the Court. (6 APP 739-40). Proposed Instruction B, was based on the decision in Crane v. State, 88 Nev. 684, 504 P.2d 12 (1972) wherein the Court approved an instruction that stated:

> "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendants, and the other to their innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendants' innocence, and reject that which points to their guilt.
>
> You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendants' guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt."

Crane, 99 Nev. at 687.

This Court has held that it is not error to refuse to give the circumstantial evidence instruction stating:

> "We have heretofore considered such an instruction in cases involving both direct and circumstantial evidence and have ruled that it is not error to refuse to give the instruction."

Bails v. State, 92 Nev. 95, 97, 545 P.2d 1155 (1976).

In a case that preceded Bails, supra, Vincze v. State, 86

Nev. 546, 472 P.2d 936 (1970) the Court adopted the reasoning of the United States Supreme Court in Holland v. United States, 348 U.S. 121 (1954) that such an instruction was confusing and incorrect if the jury was properly instructed on reasonable doubt. The instruction at issue in Holland is different than that offered by MASON and set forth in Crane above. The Holland instruction is described by the Court as follows:

> "The petitioner assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt."

Holland, 348 U.S. at 139. Clearly the instruction offered by MASON is not the equivalent to that rejected in Holland.

Likewise, the Court in Vincze cited to Compton v. U.S., 305 F.2d 119 (9th Cir. 1962) in support of rejecting the offered instruction, but the instruction was significantly dissimilar. In Compton the instruction dealt with the presumption of innocence and provided:

> "The jury are instructed that when a man's conduct may be consistently, and as reasonably from the evidence, referred to two motives, one criminal and the other innocent, it is your duty to presume that such conduct is actuated by the innocent motive, and not be the criminal."

Compton, 305 U.S. at 120.

It appears that a growing number of states are rejecting the conflicting circumstantial evidence instruction which are the equivalent of Proposed B herein. In State v. Humphreys, 8 P.3d 652 (Id. 2000) the Court examined the issue and reversed existing precedent supporting the instruction, and partially

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

relying upon Holland, supra, stated:

> "We agree with the conclusion of the courts from the growing majority of states that in all criminal cases there should be only one standard of proof, which is beyond a reasonable doubt. Therefore, we hold that once the jury has been properly instructed on the reasonable doubt standard of proof, the defendant is not entitled to an additional instruction on circumstantial evidence even when all the evidence is circumstantial."

Humphreys, 8 P.3d at 656-57.

Proposed Instruction B does not attempt to differentiate a different burden in circumstantial cases. Devitt & Blackmar, Federal Jury Practice and Instruction 11.14 at 310-311 (3rd ed. 1977) contains the following paragraph:

> "So if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonable permitting either of two conclusions - one of innocence, the other of guilt - the jury should of course adopt the conclusion of the innocence."

This instruction has been found to be acceptable but not necessary by federal courts. United States v. Larson, 581 F.2d 664, 669 (7th Cir. 1978). The instruction is most appropriate in cases in which the evidence against the defendant in primarily circumstantial. United States v. Cruz, 603 F.2d 673, 675 (7th Cir. 1979).

Wherefore MASON urges that this Court adopt the "two inferences" instruction contained in Proposed Instruction B and that it was error for the Court to refuse to so instruct the jury in the instant case.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

V.

THERE WAS NOT SUFFICIENT EVIDENCE
TO CONVICT MASON OF FIRST DEGREE MURDER

It is respectfully urged upon this Court that the properly admissible evidence presented by the State at trial failed to establish the guilt of MASON beyond a reasonable doubt of First Degree Murder.

NRS 175.191 provides that:

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in the case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to be acquitted."

This Court in Edwards v. State, 90 Nev. 255, 524 P.2d 388 (1974) stated that:

> "...the test for sufficiency upon appellate review is not whether this court is convinced beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had the right accept."

It is a well recognized rule that where there is substantial evidence in the record to support the verdict it will not be overturned by the appellate court. Nix v. State, 91 Nev. 613, 541 P.2d 1 (1975); Sanders v. State, 90 Nev. 433, 529 P.2d 206 (1979). It is also well accepted that a conviction must be reversed where the evidence is so weak that it constitutes no evidence at all. In re: Corey, 41 Cal.Rptr. 397 (1964); People v. Brown, 92 P.2d 492, 132 Cal.Rptr. 397 (1939). No guilty verdict should be upheld merely because some evidence supporting the conviction was offered. The appellate court must determine if there was evidence sufficient to

justify a rational trier of fact to find "guilt beyond a reasonable doubt." See, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct 2781 (1979); In re: Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct 1068 (1970).

While it is possible for a conviction to be sustained based solely on circumstantial evidence, the circumstances proved must be unequivocal and inconsistent with innocence. Woodall v. State, 97 Nev. 235, 627 P.2d 402 (1981); State v. Weaver, 371 P.2d 1006 (Wash. 1962); State v. Jones, 373 P.2d 116 (Wash. 1961). This Court held in Woodall, supra, that a jury is obligated to afford the defendant the benefit of all reasonable doubt. The standard enunciated in Woodall, was whether a rational trier of fact could reject a plausible explanation consistent with the defendant's innocence. Additionally, it must be determined whether the defendant was inferred to be guilty based upon evidence from which only uncertain inferences may be drawn. Conald v. Sheriff, 94 Nev. 289, 579 P.2d 768 (1968); Oxborrow v. Sheriff, 93 Nev. 321, 565 P.2d 652 (1977); Gilespey v. Sheriff, 89 Nev. 221, 510 P.2d 623 (1976); State v. Luchette, 87 Nev. 343, 486 P.2d 1189 (1979).

The evidence presented at trial was conflicting and there was no eyewitness to the actual shooting except Felicia and MASON and their testimony was inconclusive at best. Felicia was shown to have consistently lied about her relationship with MASON and the events leading up to the death of Wolf. It is not inconsequential that the jury acquitted MASON of having

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

stolen the .38 revolver that was the alleged weapon used to shoot Wolf. If the jury did not believe that MASON had taken the revolver, it is a fair assumption that the jury believed that Felicia had taken the gun at some previous time. This was corroborated by the testimony of Theena and Christopher Jones that Felicia had been observed just shortly before the incident trying to sell a gun that looked just like the .38 revolver found in the vent under room 205 at the Vista Motel.

The trial evidence corroborated MASON'S testimony of what transpired. Both Kevin Brown and Renay Matthews knew that Wolf kept a machete in his bedroom. MASON would not have known of the machete had he not seen Wolf trying to use it on Felicia when she shot him.

Similarly the actions of Felicia at the Vista Motel establish that she was trying to avoid detection by hiding under the bed. If as she claimed, she had nothing and had been kidnapped, would not her just reaction have been to yell for help rather than hiding quietly until the police dog located her?

Based on all of the evidence presented by the parties it is respectfully urged that there was insufficient evidence to convict MASON of first degree murder and that his conviction must therefore be set aside.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

VI.

IT WAS IMPROPER TO ADMIT THE PHOTOGRAPH OF THE DECEASED LAYING ON A GURNEY AT THE MORGUE WITH A BLOODY FACE WHEN IDENTITY WAS NOT AN ISSUE

During the testimony of Felicia Jackson, during re-direct examination the prosecution over defense objection showed a photograph of the deceased laying on a gurney at the morgue with blood in his fact. (3 APP 294).

Felicia had finished lengthy direct examination on the previous day and had finished an equally lengthy cross-examination on the sequence of events. Not once did MASON question the identity of Dudley Thomas. Then on re-direct at the very end of the questioning, the prosecutor shows the gruesome photograph to Felicia and asks "Who is that?" (3 APP 294) There was absolutely no probative value to the photograph and it was a tactic to force a witness to become emotional and prejudice the jury against the Defendant.

At the next break MASON put his objection on the record. His position was that the photographs were more prejudicial than probative especially when considered that he had stipulated to the identity of Dudley Thomas and as cause and manner of death and identity were not issues in the case.

Photographs that depict the victims in such a manner as to be gruesome, gory and inflammatory serve no evidentiary purpose. Because this was a capital prosecution, exacting standards must be met to assure that the trial is fair. Johnson v. Mississippi, 486 U.S. 578, 584 (1988); Gardner v.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

Florida, 430 U.S. 349, 363-64 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (White, Jr., concurring). At a capital trial, the constitution mandates the avoidance of inflammatory appeals to the passions and prejudices of juries. The United States Supreme Court has repeatedly held that "Because of the qualitative difference [between death and any other form of punishment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Gardner v. Florida, 430 U.S. 349, 363-64 (1977); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Beck v. Alabama, 447 U.S. 625, 637-38 (1980).

It is well established that where the prejudicial effect of photographs outweighs their probative value, they should not be admitted. Caylor v. State, 353 So.2d 9 (Ala.Cr.App. 1977). See also, Commonwealth v. Scaramuzzino, 317 A.2d 225, 226 (Pa. 1974) ("photograph of a wound of the back of the ear with the hair pulled away" too prejudicial); State v. Clawson, 270 S.E.2d 659, 671 (W.Va. 1980) (citing cases); accord, McCullough v. State, 341 S.E.2d 706 (Ga. 1986); People v. Coleman, 451 N.E.2d 973, 977 (Ill.App.Ct. 1983); Browne v. State, 302 S.E.2d 347 (Ga. 1983); Commonwealth v. Richmond, 358 N.E.2d 999, 1001 (Mass. 1976); State v. Childers, 536 P.2d 1349, 1354 (Kan. 1975); People v. Burns, 241 P.2d 308, 318 (Cal.App. 1952).

The Nevada Supreme Court has held, under NRS 48.035(1), that the relevance of victim photographs may be "substantially

outweighed by the danger of unfair prejudice". Where the proffered photographs are "gruesome or unduly prejudicial", they should be excluded. Clem v. State, 104 Nev. 351, 356, 760 P.2d 103 (1988); Dearman v. State, 93 Nev. 364, 369, 566 P.2d 407 (1977).

This Court has held that color photographs of a victim used by a doctor to explain the cause of death to a jury are properly admissible because they aid in the ascertainment of the truth. Allen v. State, 91 Nev. 78, 530 P.2d 1195 (1975). Under such circumstances the probative value of the photographs outweighs any prejudicial impact they might have on the jury. The photographs were entered only for shock value and under such circumstances the prejudicial effect of the photographs outweighed any possible probative value. This evidence deprived MASON of a fundamentally fair trial and due process of law and his conviction should be set aside.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

VII.

THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE PENALTY HEARING EVIDENCE IN VIOLATION OF RULE 250

On February 27, 2001 MASON was convicted of First Degree Murder with Use of a Deadly Weapon, two counts of Burglary with Use of a Deadly Weapon and Second Degree kidnapping with Use of a Deadly Weapon. The State had filed on September 28, 1999 a Notice of Intent to Seek Death Penalty (1 APP 9-10) setting forth two aggravating circumstances:

1. The murder was committed while the person was engaged with another in the commission of or an attempt to commit any Burglary and the defendant killed the person murdered [NRS 200.033(4)(a)] and

2. The murder was committed by a person who had previously been convicted of a felony involving the use or threat of violence to the person of another [NRS 200.033(2)].

Thereafter on August 11, 2000 the State served on counsel for MASON a Notice of Evidence in Support of Aggravating Circumstances (1 APP 11-13). In said Notice the State listed nine (9) items of evidence or testimony that it intended to present "in support of aggravating circumstance and/or character evidence at a penalty hearing". Items 1 through 8 all pertained to the murder of Dudley Thomas on May 10, 1999. Item 9 was documents and supporting evidence showing that the Defendant had been convicted in 1969 in the State of Texas of robbery, a felony involving the use of force or violence.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

MASON received no additional Notice of Evidence in Aggravation, and after MASON was convicted of First Degree Murder and before the penalty hearing, MASON filed a Motion in Limine to limit the State's evidence at the penalty hearing to those items designated in their Notice of Aggravation (1 APP 60-82). The Court heard argument on MASON'S motion and denied same prior to the commencement of the penalty hearing (7 APP 874-86).

Supreme Court Rule 250(4)(f) states as follows:

> "(f) **Filing of notice of evidence in aggravation.** The state must file with the district court a notice of evidence in aggravation no later than 15 days before trial is to commence. The notice must summarize the evidence which the state intends to introduce at the penalty phase of trial, if a first-degree murder conviction is returned, and identify the witnesses, documents, or other means by which the evidence will be introduced. Absent a showing of good cause, the district court shall not admit evidence not summarized in the notice. If the court determines that good cause has been shown to admit evidence not previously summarized in the notice, it must permit the defense to have a reasonable continuance to prepare to meet the evidence."

Most recently the Nevada Supreme Court considered the interpretation and failure to comply with the Notice requirements of Rule 250. In State v. District Court, 116 Nev. Ad. Op. 103 (2000) the En Banc Court upheld an order of the Second District Court denying Motions to file untimely notices of intent to seek the death penalty. In State v. District Court, the prosecution was untimely in filing the Notice of Intent within 30 days of the filing of the Information under Supreme Court Rule 250(4)(c) and (d). SCR 250 (4)(d) allows a

late filing upon a showing of "good cause", the same language used in 250(4)(f) to excuse the filing of the Notice of evidence of aggravation. The Court found that "the workload of the prosecutor and the complexity of the case did not constitute good cause" and that "mere oversight on the part of the prosecutor does not constitute good cause."

The State argued that MASON had knowledge of other bad acts or character evidence that it intended to introduce and that MASON would suffer no prejudice. The Nevada Supreme Court in State v. District Court addressed the prejudice issue and expressly found:

> "However, nothing in the rule suggests that lack of prejudice to the defendant can supplant the express requirement of a showing of good cause before the district court may grant a motion to file a late notice of intent to seek death."

Just as with (4)(d) there is nothing in (4)(f) that supplants the express requirement of a showing of good cause to vary from the required Notice of Evidence in Aggravation required by SCR 250.

The danger of allowing the State to proceed with presenting bad character evidence against the defendant without notice to the defense was well illustrated during the testimony of Ronald Kie, who over defense objection was allowed to testify that MASON had followed and harassed him and that the police had been called to no avail and that MASON had fired a bullet at him (7 APP 923). This was testimony that was not contained in any notice provided by the State and not part of

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

any discovery provided by the State. The situation was thus not significantly different than faced in Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991) wherein the State at the last minute came up with additional character evidence against the defendant at a penalty hearing in a capital case. In Emmons, this Court found that

> "Consistent with the constitutional requirements of due process, defendant should be notified of any and all evidence to be presented during the penalty hearing."

Emmons, 197 Nev. at 62.

Likewise the State had obtained information from Flora Mason concerning alleged conversations with MASON about his bragging and being happy about getting away with a killing during 1995, yet had never revealed same to the defense or gave notice until the penalty hearing was set to commence (7 APP 939). It is just these type of abuses that Rule 250 attempted to prevent, and would do so if the requirements of the Rule were to be enforced by the District Courts.

It is respectfully requested that this Court interpret Rule 250(4)(f) to require that all evidence be listed in the Notice of Aggravation that the State intends to introduce at a penalty hearing. Such was not done in this case and Mason is entitled to a new penalty hearing.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

CONCLUSION

Based on the authorities herein contained and in the pleadings heretofore filed with the Court, it is respectfully requested that the Court reverse the conviction and sentence of MACK MASON and remand the matter to District Court for a new trial.

Dated this 28 day of November, 2001.

RESPECTFULLY SUBMITTED:

DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson, Ste. 600
Las Vegas NV 89101
702-382-1844
Attorney for MASON

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: NOV. 28, 2001

BY _____
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
The Law Office of David M. Schieck
302 East Carson, Suite 600
Las Vegas, Nevada 89101
702-382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 28 day of November, 2001, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

District Attorney's Office
200 S. Third Street
Las Vegas NV 89101

Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701

KATHLEEN FITZGERALD, an employee
of David M. Schieck

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844