ORIGINAL

MACK MASON, )
Appellant, )
v. ) CASE NO. 37964
THE STATE OF NEVADA, )
Respondent. )

FILED

JAN 02 2002

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

# RESPONDENT'S ANSWERING BRIEF

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


DAVID M. SCHIECK, ESQ.
Law Office of David M. Schieck
Nevada Bar No. 0824
302 East Carson, Ste. #600
Las Vegas, Nevada 89101
(702) 382-1844

Counsel for Appellant

STEWART L. BELL
Clark County District Attorney
Nevada Bar No. 000477
Clark County Court House
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 455-4711

FRANKIE SUE DEL PAPA
Nevada Attorney General
Nevada Bar No. 000192
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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

---

| | | |
|---|---|---|
| MACK MASON, Appellant, | ) | |
| v. | ) | CASE NO. 37964 |
| THE STATE OF NEVADA, Respondent. | ) | |

---

# RESPONDENT'S ANSWERING BRIEF

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


DAVID M. SCHIECK, ESQ.
Law Office of David M. Schieck
Nevada Bar No. 0824
302 East Carson, Ste. #600
Las Vegas, Nevada 89101
(702) 382-1844

Counsel for Appellant

STEWART L. BELL
Clark County District Attorney
Nevada Bar No. 000477
Clark County Court House
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 455-4711

FRANKIE SUE DEL PAPA
Nevada Attorney General
Nevada Bar No. 000192
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases Cited:** **Page Number:**

**Nevada Revised Statutes:**



**Miscellaneous:**

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

---

| | | |
|---|---|---|
| MACK MASON, Appellant, | ) | |
| v. | ) | CASE NO. 37964 |
| THE STATE OF NEVADA, Respondent. | ) | |

---

# RESPONDENT'S ANSWERING BRIEF

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

## STATEMENT OF THE ISSUES

1. Whether the malice instruction given to the jury was vague and ambiguous.
2. Whether the reasonable doubt instruction violated the due process clause of the United States and Nevada Constitutions.
3. Whether the unanimity instruction violated the Defendant's due process rights and relieved the State of its burden of proof.
4. Whether the district court erred when it declined to give a conflicting evidence instruction.
5. Whether there was sufficient evidence to convict the Defendant of first degree murder.
6. Whether the district court erred when it admitted a photograph of the deceased.
7. Whether the district court erred when it allowed the State to introduce penalty hearing evidence in violation of Rule 250.

## STATEMENT OF THE CASE

On September 3, 1999, Mack C. Mason, hereinafter Defendant, was charged by Information with Count I - Burglary While in Possession of a Firearm; Count II - Grand Larceny of a Firearm; Count III - Burglary While in Possession of a Firearm; Count IV - Murder With Use of a Deadly Weapon (Open Murder); Count V - Second Degree Kidnaping With Use of a Deadly Weapon; and Count VI - Possession of a Firearm by Ex-Felon. (Appellant's Appendix (A.A.) at 3-4). On September 28, 1999, the State filed its Notice of Intent to Seek the Death Penalty. (A.A. at 9). The Defendant pleaded not guilty and trial commenced on February 15, 2001. (A.A. at 110).

The jury found the Defendant guilty of Counts I, III, IV, and V. The district court filed its Judgment of Conviction on March 9, 2001. (A.A. at 90). As to Count I, the Defendant was sentenced to a maximum term of one hundred eighty (180) months in the Nevada Department of Corrections (NDC) with a minimum parole eligibility of forty (40) months. (A.A. at 91). As to Count III, the Defendant was sentenced to a maximum term of one hundred eighty (180) months in the NDC with a minimum parole eligibility of forty (40) months. (A.A. at 91). Count III to run concurrently with Count I. (A.A. at 91). As to Count IV, the Defendant was sentenced to life without the possibility of parole plus an equal and consecutive life without the possibility of parole for use of a deadly weapon. (A.A. at 91). Count IV to be served concurrently with Counts I and III. (A.A. at 91). As to Count V, the Defendant was sentenced to a maximum term of one hundred eighty (180) months in the NDC with a minimum parole eligibility of forty (40) months plus an equal and consecutive term of one hundred eighty (180) months with a minimum of forty (40) months for use of a deadly weapon. (A.A. at 91). Count V to be served consecutively to Count IV. (A.A. at 91).

## STATEMENT OF THE FACTS

The Defendant lived with his aunt, Ms. Flora Mason, in March or April of 1999. (A.A. at 128). After March or April of 1999, Ms. Mason took the Defendant's key to her house and the Defendant moved out. (A.A. at 130). At approximately 8:10 a.m. on May 10, 1999, Ms. Mason left for work. (A.A. at 131). Ms. Mason walked to work because it was only a block away. (A.A. at 131). Her normal shift was from 8:30 a.m. to 12:30 p.m. (A.A. at 131).

Johnnie Lee Turner, Ms. Mason's next door neighbor, was sitting in his car listening to the radio and smoking a cigarette on the morning of May 10, 1999. (A.A. at 154). At approximately 8:45 a.m., Mr. Turner saw the Defendant go to the back of Ms. Mason's house. (A.A. at 155, 161). After approximately ten or fifteen minutes, the Defendant appeared from the back of Ms. Mason's house carrying something long wrapped up in a rug or blanket. (A.A. at 156). The Defendant then left the premises.

Ms. Mason went back to her home after her shift was completed. (A.A. at 131). She opened her front door and noticed that the sliding glass door in the back of the house was open all the way and was only halfway on its track. (A.A. at 131). Ms. Mason waited a few moments and then toured the house. (A.A. at 132). Ms. Mason saw that the whole house was ransacked. (A.A. at 131).

As she entered her bedroom, Ms. Mason noticed that her bookcase headboard door was open. (A.A. at 132). Ms. Mason prayed that her father's gun was still there. (A.A. at 132). Ms. Mason's father was a police officer. (A.A. at 133). The gun was registered to Ms. Mason's deceased husband. (A.A. at 136). Ms. Mason toured the rest of the house and determined that the following items were missing: 1) her father's pistol; 2) her father's police billy club; and 3) a Mossberg shotgun that a neighbor asked Ms. Mason to keep for her. (A.A. at 133). Ms. Mason also looked in the Defendant's old room, saw that some things had been moved around, and determined that some of the Defendant's clothes were taken out of the closet.

(A.A. at 135). Ms. Mason did not give anyone permission to enter her house. (A.A. at 135). Ms. Mason also noticed that one of the storm windows in her bathroom was dislodged. (A.A. at 138). Ms. Mason called the police and gave a report to the officers. (A.A. at 139).

At approximately 10:30 a.m. on May 10, 1999, the Defendant entered Bargain Pawn and pawned the Mossberg shotgun he stole from Ms. Mason's house. (A.A. at 182). Angela Bramlett, a manager at Bargain Pawn, testified that an employee of Bargain Pawn issued the Defendant a pawn ticket. (A.A. at 180). In order to pawn a firearm at Bargain Pawn, the person attempting to pawn the firearm must present a picture identification. (A.A. at 182). The Defendant presented the Bargain Pawn employee with a picture identification. (A.A. at 183).

Felicia Jackson and the Defendant were involved romantically for approximately two and a half months. (A.A. at 188). Ms. Jackson ended the romantic relationship when she found out that the Defendant was lying to her. (A.A. at 188). Ms. Jackson and the Defendant remained friends and at the end of 1998 or the beginning of 1999 the Defendant sought to re-start their romantic relationship. (A.A. at 189). On more than one occasion, the Defendant told Ms. Jackson that she was not going to live in the same state as him and be involved romantically with someone else. (A.A. at 189).

In May of 1999, Ms. Jackson became involved with Dudley Earl Thomas. (A.A. at 189). On May 10, 1999, Ms. Jackson and Mr. Thomas came into contact twice with the Defendant. (A.A. at 190). The first time, Ms. Jackson and Mr. Thomas saw the Defendant at a little corner store. (A.A. at 191). The Defendant was standing in the doorway of the store and asked to speak with Ms. Jackson. (A.A. at 191). Ms. Jackson refused to speak to the Defendant and left the store. (A.A. at 191).

Ms. Jackson and Mr. Thomas drove down the street and stopped. (A.A. at 191). Ms. Jackson got out of the car to talk to her cousin and Mr. Thomas got out

of the car to talk to friends. (A.A. at 191). Ms. Jackson then re-entered the passenger side of the vehicle and saw the Defendant approaching the car. (A.A. at 191). The Defendant lunged in the car with a knife in his hand. (A.A. at 192). Ms. Jackson scooted over to the driver's side and pushed the door open to get out. (A.A. at 192). Ms. Jackson got out of the car, ran toward Mr. Thomas, screamed Mr. Thomas' name, and ran past him. (A.A. at 192).

The Defendant confronted Mr. Thomas and Mr. Thomas asked the Defendant what was going on. (A.A. at 193). The Defendant told Mr. Thomas that he was just trying to talk to Ms. Jackson. (A.A. at 193). Mr. Thomas told the Defendant that Ms. Jackson did not want to talk to him. (A.A. at 193). The Defendant then started walking toward Ms. Jackson so she took off running. (A.A. at 193). A red Ford Bronco stopped and asked Ms. Jackson if she was alright. (A.A. at 193). Ms. Jackson had a conversation with the people in the red Bronco, eventually got into the truck, and was taken back to Mr. Thomas' apartment. (A.A. at 194).

Approximately an hour and a half after Ms. Jackson was dropped off, she left Mr. Thomas' apartment. (A.A. at 194). While she was walking down the street, she saw the Defendant walking towards her. (A.A. at 194). Cynthia Coleman, who was driving down the street, saw Ms. Jackson waiving at her and pulled over. (A.A. at 194). Ms. Jackson asked Ms. Coleman to give her a ride. (A.A. at 194). Ms. Coleman gave Ms. Jackson a ride back to Mr. Thomas' apartment. (A.A. at 195).

On the evening of May 10, 1999, Ms. Jackson, Mr. Thomas, and Mr. Thomas' friend, Kevin Brown, were at Mr. Thomas' apartment. (A.A. at 195). Mr. Brown was in the living room, Ms. Jackson was in the bedroom writing a letter, and Mr. Thomas was in the bedroom talking on the phone, when Mr. Brown heard a knock at the door. (A.A. at 195). Mr. Brown answered the door and the Defendant asked if Mr. Thomas was home. (A.A. at 410). After Mr. Brown told the Defendant that Mr. Thomas was home, the Defendant pulled out a gun, pushed it against Mr. Brown's abdomen, and told Mr. Brown to leave. (A.A. at 411). Ms.

Jackson looked up and saw the Defendant standing at the bedroom door. (A.A. at 196). Ms. Jackson asked the Defendant what he was doing. The Defendant turned toward Mr. Thomas and asked: "now, man, do you still think it's funny?" (A.A. at 196). Mr. Thomas stated that he didn't think anything was funny if the Defendant was trying to hurt Ms. Jackson. (A.A. at 196).

The Defendant looked at Mr. Thomas again, stated that he thought Mr. Thomas still thought it was funny, and pointed a gun at Mr. Thomas. (A.A. at 196). The Defendant then shot Mr. Thomas in the head. (A.A. at 197). Mr. Thomas fell to the floor. (A.A. at 197). Ms. Jackson started screaming and the Defendant told Ms. Jackson to get up and get out of the apartment. (A.A. at 197). The Defendant then grabbed Ms. Jackson and shoved her out the door. (A.A. at 197).

After the Defendant and Ms. Jackson went outside, the Defendant saw Mr. Brown and chased him down the street. (A.A. at 198). Ms. Jackson went back inside the apartment to help Mr. Thomas. (A.A. at 198). The Defendant returned to the apartment and asked Ms. Jackson what she was doing,. (A.A. at 198). Ms. Jackson told the Defendant that they needed to get Mr. Thomas some help but the Defendant told her no and shoved her back out the door. (A.A. at 198).

The Defendant and Ms. Jackson exited the apartment and made their way down D street. (A.A. at 199). The Defendant held Ms. Jackson's arm and dragged her down the street. (A.A. at 199). The Defendant led Ms. Jackson to an apartment complex where he was attempting to locate a ride. (A.A. at 199). A man by the name of Wilford gave the Defendant and Ms. Jackson a ride downtown. (A.A. at 200). Once downtown, the Defendant made Ms. Jackson rent a room at the Vista Motel. (A.A. at 202).

At approximately 9:30 p.m. on May 10, 1999, John Etchebarren, a desk clerk at the Vista Motel, rented a room to Ms. Jackson. (A.A. at 332). Ms. Jackson and the Defendant went to the room, Ms. Jackson asked the Defendant why he shot Mr. Thomas, and the Defendant stated that she made him do it and that it was all her

fault. (A.A. at 204). The Defendant and Ms. Jackson stayed in the motel room for a couple hours and then left. (A.A. at 206).

The Defendant wanted to go back to the west side of Las Vegas. (A.A. at 206). Ms. Jackson testified that she got into a cab with the Defendant because the Defendant had a gun. (A.A. at 206). The Defendant told the cab driver to take him and Ms. Jackson to the west side. (A.A. at 207). The cab made two stops and then returned Ms. Jackson and the Defendant back to the motel. (A.A. at 207). Ms. Jackson again asked the Defendant why he shot Mr. Thomas. (A.A. at 207). The Defendant replied that it was her fault and that she made him do it. (A.A. at 207).

Ms. Jackson and the Defendant left the motel room the next morning because the Defendant wanted to buy some clothes. (A.A. at 207). The Defendant bought some clothes and then took Ms. Jackson to a small hamburger restaurant downtown. (A.A. at 208). After they ordered, Ms. Jackson told the Defendant that she was going to go across the street to Payless Shoes to buy some shoes. (A.A. at 209). She made it to the door when the Defendant realized that she was going by herself and went with her. (A.A. at 209). After Ms. Jackson bought some shoes, she and the Defendant went back to the motel room. (A.A. at 209).

Approximately an hour and a half after Ms. Jackson and the Defendant went back to the room, they left again to go to the Greyhound bus station. (A.A. at 210). The Defendant did not want to wait in line so he and Ms. Jackson left. (A.A. at 210). The Defendant stopped at a pay phone and called his cousin, Patrick Braxton, in Sacramento, California. (A.A. at 210). The Defendant asked Mr. Braxton how much tickets cost to go to California. (A.A. at 211). The Defendant told Mr. Braxton that he was leaving Las Vegas, Nevada, because "he had got him a motherfucker." (A.A. at 305). Mr. Braxton took this statement to mean that the Defendant had done something bad to someone. (A.A. at 305). The Defendant told his cousin that he would call him when he got back to the motel room and then the Defendant and Ms. Jackson returned to the room. (A.A. at 211).

The Defendant sent Ms. Jackson down to the motel office to get the telephone line connected in the room. (A.A. at 211). Ms. Jackson left the room and walked in a direction away from the office, the Defendant noticed and walked down to the office. (A.A. at 211). The man in the office was watching the news. (A.A. at 212). He saw the Defendant's picture on the news and the Defendant realized that he was on TV. (A.A. at 212). The Defendant hurried back up to the motel room with Ms. Jackson. (A.A. at 213). Ms. Jackson asked the Defendant why he asked Mr. Thomas what was so funny. (A.A. at 213). The Defendant said that Mr. Thomas tried to run him (the Defendant) over and was smiling when the Defendant was chasing after her. (A.A. at 213).

Melvin Jackson, a detective with the Las Vegas Metropolitan Police Department (LVMPD), was assigned to investigate the death of Mr. Thomas. (A.A. at 460). Detective Jackson went to the crime scene and learned that there was a possible witness. (A.A. at 460). Detective Jackson spoke to Mr. Brown, contacted Ms. Mason, and determined that the Defendant may be located at the Vista Motel. (A.A. at 463). Detective Jackson set up surveillance at the motel and spotted the Defendant and Ms. Jackson. (A.A. at 466). Detective Jackson then went to the motel office and obtained a registration slip which had Ms. Jackson's name on it. (A.A. at 468).

Detective Jackson then called the motel room but no one answered. (A.A. at 213). After no one answered the phone, Detective Jackson called several specialized units to assist him which arrived a short time later. (A.A. at 469). In the motel room, Ms. Jackson peeked through the blinds, saw the police outside of the window, and told the Defendant that the police had arrived. (A.A. at 213). Since no one would answer the phone, the police used a bullhorn to communicate with the Defendant. (A.A. at 214). The police told the Defendant to allow Ms. Jackson to leave but the Defendant refused. (A.A. at 214). Ms. Jackson asked the Defendant to free her but he refused her request also. (A.A. at 215). The Defendant told Ms.

Jackson to get under the mattress so that she would not be hurt. (A.A. at 215). The Defendant then attempted to cut a hole in the wall with a knife in order to get to the room next door. (A.A. at 217). The Defendant was unable to squeeze between the wood in the wall and then decided to give himself up. (A.A. at 217).

Eric Kerns, a police officer with the LVMPD, was assigned to the K9 unit in May of 1999. (A.A. at 344). Officer Kerns and his dog, Matjo, were dispatched to the Vista Motel on May 11, 1999. (A.A. at 346). Detectives at the scene told Officer Kerns that they had been calling the Defendant's motel room and were not getting a response. (A.A. at 346). The officers then announced over the PA system that they were going to send in a dog. (A.A. at 346). Initially, the Defendant did not respond. (A.A. at 346). Officer Kerns had Matjo start barking and the detectives received a call from the Defendant saying that he would surrender if they promised not to send in the dog. (A.A. at 346-347). After the Defendant came out of his motel room, Officer Kerns took him into custody and patted him down for weapons. (A.A. at 347). Matjo was sent into the motel room. (A.A. at 347). Matjo began biting at the bed, Officer Kerns called Matjo out of the room, and then officers went into the room and found Ms. Jackson. (A.A. at 348).

On May 12, 1999, James Charles Vaccaro, a homicide detective for the LVMPD, went to the Clark County Detention Center advised both Ms. Jackson[1] and the Defendant of their *Miranda* rights, and interviewed both of them. (A.A. at 551). The Defendant stated that he understood his rights and told Detective Vaccaro that he was willing to talk to him. (A.A. at 554). The Defendant told Detective Vaccaro that he went to Mr. Thomas' apartment on the night of May 10, 1999, in order to get his girlfriend (Ms. Jackson). (A.A. at 555). The Defendant further stated that he spoke with Ms. Jackson and another man and left without incident. (A.A. at 556). The Defendant also said that he and Ms. Jackson decided

---

[1] Ms. Jackson was under arrest for a petit larceny bench warrant.

to get a motel room downtown. (A.A. at 560). When asked why he attempted to make a hole in the motel room's wall, the Defendant stated that he was trying to get out of the room because he had warrants. (A.A. at 561). The Defendant told Detective Pavarro that Detective Pavarro would not find a gun in Vista Motel room. (A.A. at 580).

On May 12, 1999, Kelly Neil, a crime scene analyst with the LVMPD, and Detective Pavarro went out with Ms. Jackson's permission to the Vista Motel to search the room Ms. Jackson had rented. (A.A. at 491-492). Mr. Neil did not find anything in the room, but searched the connecting air ducts and found a Smith & Wesson .38 special revolver. (A.A. at 494).

James Krylo, a firearms tool mark examiner in the LVMPD forensic lab, tested the .38 caliber revolver recovered from the Vista Motel. (A.A. at 530). Mr. Krylo also tested the bullet recovered from Mr. Thomas' brain to see if it was fired from the .38 caliber revolver. (A.A. at 537). Mr. Krylo's test on the bullet was inconclusive because the bullet was badly damaged. (A.A. at 537). Mr. Krylo was able to state that the bullet recovered from Mr. Thomas' brain was consistent with a .38 special bullet. (A.A. at 538).

Gary Telgenhoff, a forensic pathologist with the Clark County Coroner's Office, conducted the autopsy on Mr. Thomas on May 11, 1999. (A.A. at 386). Mr. Telgenhoff found that a bullet passed through the left side of Mr. Thomas' brain and ended up in the back parietal occipital area of the right side of the brain. (A.A. at 388). Mr. Telgenhoff recovered the projectile and turned it over to David Ruffino, a crime scene analyst employed by the LVMPD. (A.A. at 389). Mr. Telgenhoff determined that Mr. Thomas' cause of death was from a penetrating gunshot wound to the head and concluded that the manner of death in this case was homicide. (A.A. at 396).

## ARGUMENT

## I

## THE DISTRICT COURT DID NOT ERR WHEN IT GAVE THE MALICE INSTRUCTION

The Defendant argues that the malice jury instruction (Instruction 16) is vague, archaic, and does not adequately describe the state of mind necessary to have acted with malice. The Defendant states: "No reasonable juror today would understand that phrase (abandoned or malignant heart) as requiring that the defendant commit the homicidal act with conscious disregard of the likelihood that death would result." See Appellant's Opening Brief at 24, lines 22-26.

Jury Instruction 16 states:

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

(A.A. at 30).

When considering the validity of jury instructions, the court should abide by the "well established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-147, 94 S.Ct. 396, 400 (1973); see, Boyd v. United States, 271 U.S. 104, 107, 46 S.Ct. 442, 443 (1926). Further, while an instruction by itself *may* rise to the level of constitutional error, the United States Supreme Court has stated that "a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." Cupp, 414 U.S. at 147, 94 S.Ct. at 400.

The Nevada Supreme Court has previously considered the validity of the malice aforethought instruction (Instruction 16). In Guy v. State, 108 Nev. 770, 776-777, 839 P.2d 578, 582-583 (1992), cert. denied, 113 S.Ct.1656 (1993), the court considered whether the malice aforethought instruction, when read in conjunction with the instruction defining express and implied malice, confused the jurors by incorrectly implying that malice was imputable to the defendant simply because he was present at the scene of the crime. The court held that under the law of Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970), the language in the malice aforethought instruction was valid. Guy, 108 Nev. at 777, 839 P.2d at 582-583. Further, in Keys v. State, 104 Nev. 736, 738, 766 P.2d 270, 271 (1988), the court held that "malice aforethought may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner." Citing, Moser v. State, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975). If the jury could have inferred malice aforethought under this definition, they also could have found it under the language of Instruction 16.

In addition, defense counsel fails to mention Instruction 26, defined the felony-murder rule as follows:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of kidnaping or burglary is murder of the first degree when the perpetrator had the specific intent to commit kidnaping or burglary. The specific intent to commit kidnaping or burglary and the commission or attempted commission of such crime must be proved beyond a reasonable doubt. This is called the Felony Murder Rule.

(A.A. at 40).

After reading this instruction, the jury may never have even contemplated the distinction between first and second degree murder. If the jurors found that a murder was committed in the perpetration of a kidnaping or burglary, then under

Instruction 26, they found malice aforethought as well. In fact, in Ford v. State, 99 Nev. 209, 660 P.2d 992 (1983), the court stated that:

> "The felonious intent involved in the underlying felony may be transferred to supply the malice necessary to characterize the death a murder; hence, there is no need to prove or presume the existence of malice aforethought. Therefore, since malice is implied under the felony murder doctrine, the jury need not make an independent finding of malice." Ford, 99 Nev. at 215, 660 P.2d at 995.

See also, Ruland v. State, 102 Nev. 529, 533, 728 P.2d 818, 820-821 (1986). As such, the malice aforethought instruction was not only constitutionally valid, but the finding of malice aforethought may have been simply implied by the jurors under the felony-murder rule.

Instruction 16 merely defines express and implied malice. First, this instruction is taken directly from the language of NRS 200.020. In Witter v. State, 112 Nev. 908, 921 P.2d 886, 893 (1996), the court determined that the malice jury instruction (identical to Instruction 16) accurately informed the jury of the distinction between express malice and implied malice. See also, Guy, 108 Nev. at 777, 839 P.2d at 582-583. In Cutler v. State, 93 Nev. 329, 336, 566 P.2d 809, 813 (1977), the court did not even consider the defendant's argument regarding the validity of the implied malice instruction because the jury found the defendant guilty of first degree murder, thereby conclusively establishing express malice. See also, Doyle v. State, 112 Nev. 879, 921 P.2d 901, 915-916 (1996), citing, Scott v. State, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976) ("The jury returned a verdict of murder in the first degree. They must have found beyond a reasonable doubt that [the defendant] murdered [the victim] deliberately, willfully, and with premeditation. These elements of the crime conclusively established express malice...Thus, implied malice played no part in this case"). Defense counsel makes a further argument regarding the "abandoned or malignant heart" language in the implied malice part of the instruction. (Appellant's Opening Brief at 23). Applying the law of Cutler, the State asserts that the implied malice instruction has no bearing

on this case, because the jury clearly found express malice beyond a reasonable doubt (thus they engaged in no further consideration of the implied malice definition). Further, the cases cited above accepting the express and implied malice instruction, accepted the "abandoned and malignant heart" language as well.

Therefore, the Defendant's argument regarding this language of the instruction and the statute fails.

## II

## THE REASONABLE DOUBT INSTRUCTION DOES NOT VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS

The Defendant argues that the reasonable doubt instruction given to the jury was ambiguous and didn't give any guidance to the jury. The Defendant states: "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." See Appellant's Opening Brief at 31, lines 1-5.

NRS 175.211 states:

> 1. A reasonable doubt is one based on reason. It is not mere doubt, but is such 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 all 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.
> 2. No other definition of reasonable doubt may be given by the court to juries in criminal actions in this state.

In the instant case, the jury was given the following instruction (Instruction 5) on reasonable doubt:

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.
>
> 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 all 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 reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

(A.A. at 19).

This Court has consistently upheld the identical instruction. In Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1999), the defendant complained of the reasonable doubt instruction, which was identical to the instant complaint. The Court held that the instruction was proper because it was as recited in NRS 175.211. The Court went on further to state that it "is not a denial of due process where, as here, the jury was also instructed on the presumption of innocence and the state's burden of proof." Id. at 296, citing Bollinger v. State, 111 Nev. 1110, 1115, 901 P.2d 671, 674 (1995); see also Lord v. State, 107 Nev. 28, 38-40, 806 P.2d 548, 554-556 (1991). Furthermore, the United States Court of Appeals for the Ninth Circuit has held that Nevada's statutory jury instruction on reasonable doubt comports with constitutional standards. Ramirez v. Hatcher, 136 F.3d 1209, 1211 (9th Cir.1998), cert. denied, 525 U.S. 967, 119 S.Ct. 415 (1998).

The instruction as given was taken verbatim from the statute, therefore the instruction was proper. In Cutler v. State, 93 Nev. 329, 336, 566 P.2d 809, 813 (1977), this Court noted that it is appropriate to give a statute as an instruction to the jury in a criminal case. Because the jury was instructed on reasonable doubt as defined by both statute and case law, the Defendant's claim that the reasonable doubt instruction given to the jury was improper and constitutionally infirm lacks merit.

## III

## THE UNANIMITY INSTRUCTION DOES NOT VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS

Defendant claims that the district court erred when it provided the jury with Jury Instruction 27. See Appellant's Opening Brief at 32. Jury Instruction 27 provided:

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

(A.A. at 41).

Defendant concedes that the Nevada Supreme Court recently upheld the validity of the instruction in Evans v. State, 113 Nev. 885, 944 P.2d 253 (1997). In Evans, the Supreme Court stated that "whether or not everyone would agree that the mental state that precipitates death in the course of a robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense." Id. 259; citing Schad v. Arizona, 501 U.S. 624, 644-645 (1995).

Furthermore, in Walker v. State, 113 Nev. 853, 944 P.2d 51 (1997), this Court held that a jury need not be unanimous in determining under which theory of criminality the State proved its case. However, Defendant argues that this Court should overrule its holdings in these cases. The State submits this Court's ruling in Evans and Walker is dispositive of this issue, and should be upheld.

## IV

## THE DISTRICT COURT DID NOT ERR WHEN IT DECLINED TO INSTRUCT THE JURY REGARDING CONFLICTING EVIDENCE

The Defendant argues that the district court erred when it declined proposed Jury Instruction B. The Defendant's proposed instruction was based on Crane v. State, 88 Nev. 684, 504 P.2d 12 (1972), and 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 reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to the defendants' guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

Crane, 99 Nev. at 687.

In Bails v. State, 92 Nev. 95, 545 P.2d 1155 (1976), the court recognized its numerous prior decisions holding that it is not error to refuse to give such an instruction if the jury is properly instructed regarding reasonable doubt in cases involving both direct and circumstantial evidence. In the instant case, the Defendant took the stand and provided direct eyewitness testimony thus making this case one of direct and circumstantial evidence. In addition, the Bails court rejected any argument that such an instruction would be required in cases where all of the evidence is circumstantial in nature. Id. at 97

Furthermore, the court in Vincze v. State, 86 Nev. 546, 548, 472 P.2d 936 (1970), stated: "While there is substantial authority to the contrary, we prefer the rule announced in Holland v. United States, 348 U.S. 121 (1954), where the U.S.

Supreme Court said: '[W]here the jury is properly instructed on the standards of reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect...'"

The United States Supreme Court's holding in Holland has been followed by many of the state courts. In State v. Humpherys, 8 P.3d 652, 661 (Idaho 2000), the court stated: "Many of the rulings from our sister states have followed the United States Supreme Court's holding in Holland, that an additional jury instruction is not required in a circumstantial evidence case, when the jury is properly instructed on the reasonable doubt burden of proof." Likewise, the court in United States v. Nelson, 419 F.2d 1237, 1240 (9th Cir. 1969), stated that: "[T]he better rule is that where the jury is properly instructed on the standards of reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect."

"A defendant's requested instruction is not required when it is a misstatement of the law, adequately covered by other jury instructions, or is not supported by the facts." State v. Eastman, 831 P.2d 555, 557 (Idaho 1992). In the instant case, the jury was properly instructed on the standards for reasonable doubt. The Defendant's proposed instruction would have only confused the jury.

In the event it is found that the trial court erred in its refusal to admit Defendant's proposed instructions, such omission was harmless if the ruling would have been the same in the absence of the error. See Witherow v. State, 104 Nev. 721, 723, 765 P.2d 1153,1155 (1988). Pursuant to NRS 178.598(4), this Court has been reluctant to set aside a judgment on the ground of misdirection of the jury unless the error complained of has resulted in a "miscarriage of justice", or has actually prejudiced the defendant's substantial rights. State v. Willberg, 45 Nev. 183, 200 P. 475 (1921)(decision under former similar statute). Further, this Court has stated that when evidence of a defendant's guilt is overwhelming, "the misconduct simply cannot be considered a factor in the outcome of the case." Williams v. State, 103 Nev.106, 111,734 P.2d 700, 703 (1987). Because of the

overwhelming evidence against Defendant the failure to implement a jury instruction constituted harmless error if any.

V

**THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF FIRST DEGREE MURDER**

The Defendant argues "that the properly admissible evidence presented by the State at trial failed to establish the guilt of Mason (Defendant) beyond a reasonable doubt of First Degree Murder." See Appellant's Opening Brief at 37, lines 3-7.

It is well-established that, in reviewing a claim of insufficiency of evidence, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Oriegel-Candido v. State, 114 Nev. 378, 956 P.2d 1378 (1998). Further, a verdict supported by substantial evidence will not be disturbed by a reviewing court. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); DePasquale v. State, 106 Nev. 843, 849, 803 P.2d 218, 221 (1990). Moreover, the weight of the evidence presented at trial should not be re-examined on appeal. It is, "exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony." Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994); Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1972 (1972). Circumstantial evidence alone may sustain a conviction. McNair, 108 Nev. 53.

The evidence at trial proved beyond a reasonable doubt that the Defendant was guilty of First Degree Murder. On the evening of May 10, 1999, the Defendant went to Mr. Thomas' apartment and knocked on the front door. Mr. Brown answered the door and the Defendant asked if Mr. Thomas was home. (A.A. at 410). After Mr. Brown told the Defendant that Mr. Thomas was home, the Defendant pulled out a gun, pushed it against Mr. Brown's abdomen, and told Mr.

Brown to leave. (A.A. at 411). Ms. Jackson looked up and saw the Defendant standing at the bedroom door. (A.A. at 196). She asked the Defendant what he was doing, Mr. Thomas turned around, and the Defendant asked Mr. Thomas: "now, man, do you still think it's funny." (A.A. at 196). Mr. Thomas stated that he didn't think anything was funny if the Defendant was trying to hurt Ms. Jackson. (A.A. at 196). The Defendant looked at Mr. Thomas again, stated that he thought Mr. Thomas still thought it was funny, and pointed a gun at Mr. Thomas. (A.A. at 196). The Defendant then shot Mr. Thomas in the head. (A.A. at 197). The Defendant then forced Ms. Jackson out of the apartment and held her against her will for the next two days. Mr. Telgenhoff, who conducted Mr. Thomas' autopsy, determined that Mr. Thomas' cause of death was from a penetrating gunshot wound to the head and concluded that the manner of death in this case was homicide. (A.A. at 396).

Based on this evidence, the jury found the Defendant guilty of first degree murder. Although it is not clear whether the jury based its decision on the elements of first degree murder or the felony murder rule, both were satisfied. The State proved that the Defendant committed the murder with malice aforethought by showing that the Defendant acted with premeditation and acted deliberately. The Defendant stole two guns from Ms. Mason's house the morning of the murder. The Defendant pawned the shotgun and kept the .38 Smith & Wesson. (A.A. at 182). The Defendant then considered his options all day long. At approximately 9:00 p.m. on May 10, 1999, the Defendant went to Mr. Thomas' apartment carrying the .38 Smith & Wesson that he stole earlier that morning. (A.A. at 196). Once the Defendant knew that Mr. Thomas was inside, he pulled out the gun and told Mr. Brown to leave. (A.A. at 411). The Defendant then entered the apartment and went into Mr. Thomas' bedroom. (A.A. at 196). The Defendant had a discussion with Mr. Thomas about what Mr. Thomas had done to him earlier. (A.A. at 196). The Defendant asked Mr. Thomas if he still thought it was funny and then shot Mr.

Thomas. (A.A. at 197). This evidence showed that the murder was premeditated and deliberated.

The State also proved the elements required for felony murder. As stated *supra*, Jury Instruction 26, defined the felony-murder rule as follows:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of kidnaping or burglary is murder of the first degree when the perpetrator had the specific intent to commit kidnaping or burglary. The specific intent to commit kidnaping or burglary and the commission or attempted commission of such crime must be proved beyond a reasonable doubt. This is called the Felony Murder Rule.

(A.A. at 40).

The jury convicted the Defendant of both kidnaping and burglary. The Defendant entered Mr. Thomas' apartment with the intent to commit a felony (the kidnaping of Ms. Jackson). In addition, the Defendant forcefully carried Ms. Jackson away from Mr. Thomas' apartment. Ms. Jackson testified that the Defendant detained her against her will for two days. This evidence was sufficient for the jury to convict the Defendant of second degree kidnaping with use of a deadly weapon.

Therefore, the State provided sufficient evidence to convict the Defendant of first degree murder and the Defendant's argument should be denied.

## VI

## THE DISTRICT COURT DID NOT ERR WHEN IT ADMITTED THE PHOTOGRAPH

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." See NRS 48.015. Evidence that is deemed relevant is only inadmissible if its probative value is substantially outweighed by unfair prejudice, if it confuses the issues, or if it amounts to the

needless presentation of cumulative evidence. See NRS 48.025; NRS 48.035. In addition, district courts are vested with considerable discretion in determining the relevance and admissibility of evidence. See Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996).

"With respect to autopsy photographs, this Court recently reiterated its position that even gruesome photographs are admissible if they aid in ascertaining the truth, and that 'despite gruesomeness, photographic evidence has been held admissible when ... utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction.'" Castillo v. State, 114 Nev. 271, 956 P.2d 103, 108 (1998), quoting Browne v. State, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997); see also Theriault v. State, 92 Nev. 185, 193, 547 P.2d 668, 674 (1976); see also Thomas v. State, 114 Nev. 1127, 967 P.2d 1111 (1999). It is within the sound discretion of the trial court to admit or exclude photographs, and absent a showing of abuse of this discretion the decision will not be overturned on appeal. Ybarra v. State, 100 Nev. 167, 172, 679 P.2d 797, 800 (1984).

The district court did not abuse its discretion when it ruled that the autopsy photograph was admissible. The evidence was properly admitted because its probative value was not substantially outweighed by unfair prejudice to the defendant. The autopsy photographs assisted the medical examiner in explaining the cause and circumstances of death. (A.A. at 392). The district court carefully weighed the probative value against the risk of unfair prejudice and determined that the photographs were admissible.

The Defendant's bare claims that the evidence was gruesome and admitted for shock value by a biased court, fails to adequately address the fact that the evidence, albeit prejudicial, had high probative value. The evidence was prejudicial because evidence that is highly probative always "prejudices" the party against whom it is offered since it tends to prove the case against that person. As such, the evidence was properly admitted because it assisted the jury in ascertaining the truth.

## VII

## THE DISTRICT COURT DID NOT ERR WHEN IT ALLOWED THE STATE TO PRESENT EVIDENCE AT THE PENALTY PHASE

On March 1, 2001, the Defendant filed a Motion in Limine to Limit Penalty Hearing Evidence to the Notice of Evidence in Aggravation. (A.A. at 60). The State filed its opposition on March 1, 2001. (A.A. at 83). On March 5, 2001, outside the presence of the jury, the district court heard argument concerning the matter. (A.A. at 874). The Defendant argued that Supreme Court Rule 250(4)(f) applied to character evidence, victim impact evidence, and any evidence to be presented at the penalty hearing. (A.A. at 875). The State argued that the courts have distinguished between evidence of aggravating circumstances, which is usually referred to as evidence in aggravation, and the "any other relevance" portion of Supreme Court Rule 250(4)(f). (A.A. at 876). The district court stated:

> All right. The evidence in aggravation, I think, is clearly that that's going to be used to support the aggravating circumstances to support whether or not the death penalty should be imposed. The other evidence can be admitted once they've proven the aggravating circumstances, then other evidence can be admitted for the jury to consider in making its determination of whether or not it is going to impose something less than the death penalty and determine whether or not they're going to impose life with or without or a certain term.

(A.A. at 881, lines 10-19).

The district court is given broad discretion on questions concerning the admissibility of evidence at a penalty hearing. Witter v. State, 112 Nev. 908, 921 P.2d 886, 895 (1996). NRS 175.552 states in pertinent part:

> 1. . . . [I]n every case in which there is a finding that a defendant is guilty of murder of the first degree, whether or not the death penalty is sought, the court shall conduct a separate penalty hearing. The separate penalty hearing must be conducted as follows:
> (a) If the finding is made by a jury, the separate penalty hearing must be conducted in the trial court before the trial jury, as soon as practicable . . .
> 3. In the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on, whether or not the evidence is ordinarily

> admissible . . . any other matter which the court deems relevant to sentence.

Pursuant to NRS 175.552, any evidence relevant to sentencing is admissible at a penalty hearing. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this Court has held that it will refrain from interfering with the sentence imposed. Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

In Allen v. State, 99 Nev. 485, 488, 665 P.2d 238, 240 (1983), this Court examined the admissibility of evidence at a penalty hearing and held:

> While it is true that the items objected to by appellant are not aggravating circumstances, appellant fails to recognize the import of NRS 175.552 which provides that during a penalty hearing "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." This statute clearly indicates and we so hold that NRS 175.552 is not limited to those nine aggravating circumstances outlined in NRS 200.033. Furthermore, the United States Supreme Court in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), ruled that the relevant factors to be considered by a jury in imposing a penalty for a capital crime are "the character and record of the individual offender and the circumstances of the particular offense."

Supreme Court Rule 250(f) states:

> **Filing of notice of evidence of 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.

On August 11, 2000, the State filed its Notice of Evidence in Support of Aggravating Circumstances. (A.A. at 11). In its Notice, the State listed nine items of evidence or testimony that it tended to present in support of the aggravating circumstances. (A.A. at 11-13). The Defendant was subsequently convicted of first degree murder.

In his brief, the Defendant moves this Court to interpret Supreme Court 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." See Appellant's Opening Brief at 46, lines 19-24. The Defendant further argues that the testimony of Ronald Kie and Flora Mason should not have been allowed at the penalty hearing.

At the penalty hearing, Ronald Kie testified that on January 27, 1999, he told the Defendant to stay away from Mr. Kie's house because the Defendant harassed him and once shot at him. (A.A. at 923). On January 27, 1999, the Defendant attempted to throw a Molotov bomb through Mr. Kie's bedroom window. (A.A. at 923). After Mr. Kie heard an explosion, he looked out the kitchen window and saw the Defendant running from the house. (A.A. at 924).

The State also introduced Flora Mason's testimony during the penalty phase. Ms. Mason testified that in March of 1995, the Defendant told her that he shot and killed someone. (A.A. at 935). The Defendant also called Ms. Mason from jail and bragged about shooting a man in the back. (A.A. at 936). The Defendant made it clear to Ms. Mason that he was happy because there was only one witness to the murder and that witness would not testify. (A.A. at 936).

This evidence was properly admitted by the district court although it was not alleged in the State's Notice of Evidence in Support of Aggravating Circumstances. (A.A. at 11). The evidence the State presented was not aggravating in nature, but, rather, was admitted as any other matter which the court deemed relevant to sentence, whether or not the evidence was ordinarily admissible. NRS 175.552(3).

Pursuant to NRS 200.030(4)(a), a person convicted of murder of the first degree shall be punished by death only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances. The only circumstances by which murder of the first degree may be aggravated are listed in NRS 200.033. In addition to aggravating and mitigating circumstances, evidence may be presented concerning any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible. NRS 175.552(3).

Supreme Court Rule 250(f) requires that the State give notice to the Defendant concerning all evidence in aggravation. The evidence objected to by the Defendant and admitted by the district court was not evidence in aggravation because it did not fit within any subsection in NRS 200.033.

Therefore, the district court did not err when it admitted the evidence at the penalty hearing.

## CONCLUSION

Based on the foregoing Points and Authorities, the State respectfully requests that this Court dismiss Defendant's appeal.

Dated this 31st day of December 2001.

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

By _____
JAMES TUFTELAND
Chief Deputy
Nevada Bar No. 000439

Office of the Clark County District Attorney
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2211
(702) 455-4711

## 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 this 31st day of December 2001.

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

By _____
JAMES TUFTELAND
Chief Deputy
Nevada Bar No. 000439

Office of the Clark County District Attorney
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2211
(702) 455-4711

**CERTIFICATE OF MAILING**

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on December 31, 2001.

David M. Schieck, Esq.
Law Office of David M. Schieck
302 East Carson, Ste. #600
Las Vegas, Nevada 89101

Employee, Clark County
District Attorney's Office

TUFTELANDjRoy Nelson//English