16. If applicable, please rate your parental style:
( ) Very strict
(✓) Strict
( ) Relaxed
( ) Permissive

17. Please rate the parental style of your parent or guardian growing up:
( ) Very strict
(✓) Strict
( ) Relaxed
( ) Permissive

18. Have you, or someone close to you, had a history of substance abuse (alcohol, drugs)?
Yes ✓ No _____ If so, what are your feelings about that experience: one dead & the other has recovered

19. Have you, or someone close to you, as a child or as an adult, been the victim or witness of acts of domestic violence.? Yes _____ No ✓ If so, what were the circumstances: _____

If so, what are your feelings about this? _____

20. Do you have familiarity with individuals who have used or been addicted to controlled substances?
Yes ✓ No _____

No (21)

Please describe anything you remember about this case that you may have heard from any media source. I think this is the case where the men killed the girl & killed the other girl over a drug deal.

22. Have you already formed any opinion about this case? Yes _____ No _____
If so, please describe that opinion. _____

23. Do you subscribe to any local newspaper, magazines or other periodicals? Yes ✓ No _____
If yes which one(s) from what this brief indicates he was convicted!

24. Do you watch local newscasts, national news broadcasts or TV programs on a regular basis?
Yes — No _____ If so which one(s) 13 - Cnn

25. If you have served in the military please indicate branch of service, when you served, position/rank held, and duties:

Branch	Dates	Position/Rank	Duties
none			

26. Do you belong to any social, governmental, political or religious group or organization? Yes_____ No ✓ If yes, please explain: _____

27. Do you attend religious services? Yes_____ No ✓ If yes, how often?_____

28. Do you have any relatives or close friends who work in the justice system (lawyers, judges, police officers, etc.) Yes ✓ No _____ If yes, please state your relationship to that person(s) and indicate how often you communicate with them including law-related subjects: my son is a retired police officer from the Santa Monica, Calif P.D

29. If you have ever been a juror before, please state for each case the nature of the action and whether or not you reached a verdict: (Please do not state what the verdict was.) To long ago To remember

30. If you have served before, was there anything about that experience that would make it difficult for you to be fair and impartial in this case? Please explain: no

31. In general, what are your opinions and feelings about how the criminal justice system works? Works good. but some times to long of a process.

32. Have you or any family member or close friend ever been arrested and/or charged with a crime? Yes _____ No ✓ If yes, do you feel that person was treated fairly by the judicial system?

33. Do you have any relatives or close friends of a different racial background than your own? Yes ____ No ✓ If so, please describe the relationship. _____

34. When was the last time you hosted someone of a different racial background in your home?

35. The accused is an African American male. Is there anything about that fact that would affect your ability to be fair and impartial in this case? Please explain. No. I feel that I'm open minded + race is not a factor

JChappell CORA009883

36. If the evidence shows that the victims in this case are of a different racial background than the accused, would that affect your ability to be fair and impartial?

No

37. Have you or any family member or close friend ever been the victim of a crime? ___ No ✓ Yes
If yes, do you feel justice was served? Items stolen from my vehicle
I not one has been arrested.

38. How has this experience affected your feelings about the criminal justice system?
They can only do what they can

39. What is your general opinion of:
a. Attorneys Good
b. Public Defenders "
c. Prosecutors "
d. Police officers "
e. Judges "

40. Could you set aside anything you read or heard and/or any preliminary opinions you might have formed and base any decision solely on the evidence presented in court? Yes ✓ No ___

41. Is there anything that you know about yourself or this case that would prevent you from sitting as a fair and impartial juror? Yes_____ No ✓ If yes, explain. _____

ATTITUDES REGARDING THE DEATH PENALTY

The Nevada State Legislature has determined that if a person is convicted of First Degree Murder, then a jury must decide which of four possible punishments provided by law should be imposed. The four possible punishments are:

A. The death penalty,
B. Life imprisonment without the possibility of parole,
C. Life imprisonment with the possibility of parole, after 40 years.
D. Definite term of 100 years with the possibility of parole after 40 years.

The law requires that whenever the District Attorney seeks death as a possible punishment for a charge, prospective jurors must be asked to express their views on both the death penalty and the penalty of life in prison with or without the possibility of parole, and a term of years. Asking about your views at this time is a routine part of the procedure to be followed in all cases in which death is sought as a possible punishment.

42. What are your feelings about the death penalty? Eye for a Eye

43. What are your feelings about the principle of an "eye for an eye, a tooth for a tooth"? If someone takes another life by force they should pay by their life

44. Do you feel that the death penalty is used:
( ) Too often
( ) Not enough
(✓) Appropriately
( ) Used too randomly

45. Have you ever held a different view on the death penalty? If you held a different view, what was it and why did you change your opinion? No

46. Do you belong to any social, political or religious organization or group that advocates the abolition or actively supports the death penalty? If yes, what organizations or groups: No

47. Would you say that you are generally:
a. in favor of the death penalty,
b. generally opposed to it,
(c.) would consider it in certain circumstances,
d. never thought about it.
e. opposed to it under any circumstances.

Please explain: Depending on the crime -

48. Do you hold any strong moral or religious views about the death penalty and its imposition? If so, please explain. No comment

49. Since Mr. Chappell has been convicted of first degree murder, beyond a reasonable doubt, would you say that:

Your beliefs about the death penalty are such that you would automatically vote AGAINST the death penalty regardless of the facts and circumstances of the case.

Yes _____ No ✓

Your beliefs about the death penalty are such that you would automatically vote FOR the death penalty regardless of the facts and circumstances of the case.

Yes _____ No ✓

50. Would you consider all four forms of punishment in a capital case, depending on the evidence presented at the trial and what you learn about the defendant in a penalty hearing? Please explain. Yes, It must be shown that the person caused or killed for the crime 100%

JChappell CORA0098855

51. In reaching a verdict in any penalty phase, you MUST consider the Defendant's background, that is, mitigating circumstances. You must also consider aggravating circumstances. Do you feel you would consider these types of factors and circumstances?

Very much ____ Not at all ____ Somewhat ____ Not Sure ✓

52. Do you understand, if the jury votes for death, you must assume that the sentence will be carried out and the Defendant will be put to death?

Yes ✓ No ____

If no, why not _____

53. Do you understand, if the jury votes for life imprisonment without the possibility of parole, you must assume the sentence will be carried out and the Defendant will spend the rest of his life in prison?

Yes ✓ No ____

If no, why not _____

54. Do you want to serve on this jury? If yes, why? It will only take 3-4 days

If not, why? I own no business + in the only one. I cannot afford to put business off.

Please use the space below to further explain any answers given above or to tell us anything you might think could affect your ability to be a fair and impartial juror.

JChappell CORA009886

I swear or affirm that the responses given are true and accurate to the best of my knowledge and belief.

Signature

3/7/07
Date

ADMONITION

You are instructed not to discuss this questionnaire or any aspect of this case with anyone, including other prospective jurors. You are further instructed not to view, read or listen to any media account of these proceedings.

DOUGLAS HERNDON, District Court Judge

EXHIBIT 242

Terry Cook

FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

MAY 31 | 45 PM '96

Lucie Bowman
CLERK

THE STATE OF NEVADA, :

PLAINTIFF :

VS. : CASE NO. C130899
DEPARTMENT VII

GREGORY D. BOLIN, : DOCKET P

DEFENDANT :

REPORTER'S TRANSCRIPT OF PROCEEDINGS IN RE: MOTIONS

BEFORE THE HONORABLE A. WILLIAM MAUPIN, DISTRICT JUDGE

THURSDAY, MAY 30, 1996

1:30 P. M.

APPEARANCES:

FOR THE PLAINTIFF — MELVYN T. HARMON, ESQUIRE
GARY GUYMON, ESQUIRE
DEPUTIES DISTRICT ATTORNEY

FOR THE DEFENDANT — PATRICIA M. ERICKSON, ESQUIRE

REPORTED BY: CONSTANCE MILLER, CCR NO. 270

INDEX

LAS VEGAS, NEVADA, THURSDAY, MAY 30, 1996, 1:30 P. M.

---oOo---

THE COURT: C130899, STATE OF NEVADA VS. GREGORY D. BOLIN. THE DEFENDANT IS PRESENT. THESE ARE PRE-TRIAL MOTIONS PRIOR TO COMMENCING JURY SELECTION. MR. PHILLIPS IS NOT PRESENT BUT MS. ERICKSON IS ON BEHALF OF THE DEFENDANT. THE STATE OF NEVADA IS REPRESENTED BY MR. GUYMON AND MR. HARMON.

MS. ERICKSON, ARE YOU READY TO PROCEED THIS AFTER-NOON?

MS. ERICKSON: YES, YOUR HONOR.

THE COURT: ON CALENDAR THIS AFTERNOON IS THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S MOTION TO QUASH SUB-POENA DUCES TECUM. IT'S MY UNDERSTAND THAT THIS MOTION IS NOW MOOT.

MS. ERICKSON: YES, YOUR HONOR.

THE COURT: THAT MOTION IS TAKEN OFF CALENDAR. THE MOTION TO SUPPRESS SEROLOGY KIT AND DEFENDANT'S MOTION TO PRECLUDE INTRODUCTION OF CONCLUSIONS REACHED BY TERRY COOK REGARDING FOREIGN PUBIC HAIR, THOSE ARE DEFERRED OTHER THAN TO TAKE EVIDENCE THIS AFTERNOON WITH REGARD TO MR. COOK.

MR. HARMON: YES, YOUR HONOR.

THE COURT: TO ACCOMMODATE MR. COOK SHOULD WE PUT HIM ON THE STAND NOW?

MR. HARMON: PLEASE, YOUR HONOR.

THE COURT: SO WE'LL PROCEED WITH DEFENDANT'S

MOTION TO PRECLUDE CONCLUSIONS REACHED BY TERRY COOK REGARDING FOREIGN PUBIC HAIR AND DEFENDANT'S MOTION TO SUPPRESS SEROLOGY KIT ON THE LIMITED BASIS THAT WE'LL BE TAKING EVIDENCE FROM MR. COOK. ARGUMENT WILL BE DEFERRED UNTIL FURTHER EVIDENCE IS INTRODUCED ON MONDAY PRIOR TO JURY SELECTION. IS THAT CORRECT, COUNSEL?

MS. ERICKSON: YES, YOUR HONOR.

MR. HARMON: YES, JUDGE.

THE COURT: ALL RIGHT. TERRY COOK.

THEREUPON, TERRY LYNN COOK, BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE BE SEATED. STATE YOUR NAME FOR THE RECORD AND SPELL THE LAST NAME, PLEASE.

THE WITNESS: MY NAME IS TERRY LYNN COOK. C-O-O-K.

DIRECT EXAMINATION

BY MR. GUYMON:

Q MR. COOK, WHERE ARE YOU EMPLOYED?

A I'M A CRIMINALIST II WITH LAS VEGAS METROPOLITAN POLICE DEPARTMENT CRIME LABORATORY, LAS VEGAS, NEVADA.

Q AND JUST WHAT IS A CRIMINALIST II?

A WELL, A CRIMINALIST IS AN INDIVIDUAL WITH A SPECIALIZED BACKGROUND OR TRAINING.

THE COURT: MR. GUYMON, YOU CAN FOREGO THESE PRELIMINARIES FOR THE PURPOSE OF THIS HEARING.

Q MR. COOK, HAVE YOU PREVIOUSLY TESTIFIED AS AN

EXPERT IN THE AREA OF SEROLOGY?

A YES, I HAVE.

Q APPROXIMATELY HOW MANY TIMES HERE IN THE EIGHTH JUDICIAL DISTRICT COURT?

A AN ESTIMATE WOULD BE ABOUT 200.

Q AND SPECIFICALLY WITH REGARDS TO YOUR TESTIMONY AS A SEROLOGIST, AS AN EXPERT IN THAT FIELD HAVE YOU GIVEN TESTIMONY REGARDING HAIR COMPARISONS?

A YES, I HAVE.

Q HOW IS IT THAT YOU'RE FAMILIAR WITH THIS PROCESS TITLED HAIR COMPARISONS?

A BECAUSE IT'S A BIG PART OF THE DUTIES OF A SEROLOGIST.

Q WHEN YOU SAY IT'S A BIG PART, WHAT PART DOES IT PLAY WITH THE DUTIES AS A SEROLOGIST?

A WELL, IN THE ORGANIZATION OF MOST FORENSIC LABS THE SEROLOGIST IS RESPONSIBLE FOR PERFORMING THE MICROSCOPIC EXAMINATIONS ON HAIR THAT ARE RECOVERED FROM BEDDING OR ITEMS OF EVIDENCE ON OR NEAR A CRIME SCENE.

Q WHAT TYPE OF TRAINING HAVE YOU RECEIVED SPECIFICALLY AS IT RELATES TO HAIR COMPARISONS THAT PERMITS YOU TO MAKE THOSE TYPE OF COMPARISONS?

A IN 1982 AT THE KANSAS BUREAU OF INVESTIGATION AS WELL AS 1983, WHEN I FIRST ARRIVED AT THE METRO CRIME LAB I WAS GIVEN IN-HOUSE TRAINING. IN 1985 I ATTENDED THE FBI

HAIR AND FIBERS SCHOOL.

Q NOW, YOUR RESUME I BELIEVE ADDRESSES A COURSE THAT YOU ATTENDED THROUGH THE FBI IN JUNE OF 1987. WOULD THAT BE ACCURATE?

A IT MIGHT BE '87. THAT'S CORRECT.

Q LET'S FOCUS FIRST ON THE IN-HOUSE TRAINING YOU RECEIVED AS IT RELATES TO MICROSCOPIC COMPARISONS OR HAIR COMPARISONS. WHAT WAS INCLUDED IN THAT TRAINING?

A THE IN-HOUSE AT THE KANSAS BUREAU OF INVESTIGATION WAS VERY BRIEF. I JUST WATCHED THE MOUNTING OF THE HAIR EXAMINER THERE, WATCHED THE PROCESS. IT WAS MORE IN-DEPTH WHEN I FIRST ARRIVED AT THE METROPOLITAN POLICE DEPARTMENT CRIME LABORATORY, WHERE THE MORE EXPERIENCED EXAMINERS WOULD SIT DOWN AND GO THROUGH THE PROCESSES FOR SIDE BY SIDE COMPARISONS.

Q AND THEN WITH REGARDS TO THE COURSE IN JUNE OF 1987 THROUGH THE FBI, HOW LONG A COURSE WAS THAT?

A TWO WEEKS.

Q CAN YOU TELL THE COURT WHAT INSTRUCTION OR PROCEDURES YOU WERE INSTRUCTED ON THERE AT THE FBI?

A IT WAS A TWO WEEKS COURSE. HALF OF THE COURSE, THE FIRST WEEK, WAS FIBERS, AND THE OTHER, THE SECOND WEEK, WAS A COURSE ON HAIR COMPARISONS.

BASICALLY, THE FBI INSTRUCTORS -- THERE WERE THREE -- THEY WOULD GO THROUGH THE PROCEDURES FOR HAIR COMPARISONS

NOTES AS TO THE LENGTH, COLOR, DIAMETER, THICKNESS, SCALES, CUTICLES, ETC., CAN YOU EXPLAIN TO THE COURT WHY IT IS YOU ONCE DID THAT AND YOU DON'T DO IT TODAY?

A BECAUSE I FOUND IT TO BE SOMEWHAT NOT INTENTIONALLY MISLEADING BUT, AS I DISCUSSED EARLIER, A LOT OF THESE THINGS ARE, OF COURSE, SUBJECTIVE. FOR INSTANCE, THERE'S A VARIETY OF DIFFERENT TYPES OF BROWNS.

THE COURT: HE'S ALREADY EXPLAINED THAT.

MR. GUYMON: I HAVE NO QUESTIONS.

THE COURT: THANK YOU, MR. COOK. YOU MAY STEP DOWN. WE'LL SEE YOU IN A COUPLE WEEKS. I UNDERSTAND MR. COOK IS ON VACATION NEXT WEEK.

MR. HARMON: AS IT TURNS OUT, HE'S NOT GOING TO BE OUT OF THE JURISDICTION. I MISUNDERSTOOD. HE'S INVOLVED IN IN-HOUSE TRAINING, BUT HE WILL BE AVAILABLE AS A WITNESS NEXT WEEK IF WE NEED HIM.

THE COURT: THAT CONCLUDES THIS AFTERNOON'S EFFORT WITH REGARD TO THE MOTION TO SUPPRESS SEROLOGY KIT AND MOTION TO PRECLUDE INTRODUCTION OF CONCLUSIONS REACHED BY TERRY COOK REGARDING FOREIGN PUBIC HAIR.

I'M GOING TO TAKE ABOUT A FIVE MINUTE RECESS.

(BRIEF RECESS.)

THE COURT: STATE'S MOTION TO ADMIT EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS.

MR. GUYMON: JUDGE, IF I COULD I'D LIKE TO GIVE

EXHIBIT 243

File # X192103004 Byrle Ca

9.4

920414-0169
April 22, 1992
sub agy: LVM
sub off: HORN
req off: DIBBLE

~~NUMMO, John (vic/Las Vegas)~~
subjects: MARBLE, Kevin (vic/Las Vegas, NV)
WALKER, Richard (S)
RIKER, David (S)
incident: homicide
exam request: blood grouping

EVIDENCE SUBMITTED

TLC1 One sealed envelope submitted by Holland on 4-14-92 containing:
pkg 3
(item 2) whole blood / MARBLE
ESD 1 yellow/red tube (no purple) hemolyzed ABH
PGM 1 PGM ST 1+1- elution +/-1+

TLC2 One sealed envelope submitted by Horn on 4-14-92 containing:
pkg 1
(item 1) swab with bloodlike substance
ABH "O" PGM 1 PGM ST 1+
(item 2) swab with bloodlike substance
ABH "O" PGM 1 PGM ST 1+
(item 3) swab with bloodlike substance
ABH "O" PGM 1 PGM ST 1+
(item 4) swab with bloodlike substance
weak/dilute ABH "O" PGM 1 PGM ST 1+

(hands of Walker, Richard)

TLC3 One sealed bag submitted by Horn on 4-14-92 containing:
pkg 23
(item 35) right boot (with red laces)
blood on toe and outside of boot
scraped sample ABO "A" +/-/+ ESD 1
PGM 1 PGM ST 1+1-

TLC4 One sealed bag submitted by Horn on 4-14-92 containing:
pkg 24
(item 36) left boot (with red laces)
some blood on outside, 1 drop in crevice
ABO "A" +/-/+ PGM 1 PGM ST 1+1-
ESD —

TLC5 One sealed bag submitted by Dibble on 4-14-92 containing:
pkg 1
(item 1) pair white tennis shoes (Jordache)
swapped and swabbed blood (outside & top) (ABH)
(item 2) Levis with belt (cut)
4 stains (stain #5) stain 1 ABO inc ABO — stain 2 1+
ABO — inc stains 1 & 2 ABO "O" stains 3 & 4 (PGM 1+)
(item 3) striped tank top (cut)
2 stains
PGM ST 2-1+ K (item 4) tie dyed T-shirt (cut)
ABO "B" stains 1 & 2 PGM 2-1 PGM ST 2-1+
blood mass near left shoulder
(item 5) wallet, chain, scabbard
some blood on ca...
(item 6) black underwear

This is to certify that this document is a true and accurate copy of a record in the custody of the Las Vegas Metropolitan Police Department Forensic Laboratory.
[signature] 4/11/02

TLC #6 One sealed bag submitted by Horn on 4-14-92 containing:
pkg 25
(item 37) brown cassette tape case
[illegible] bloodstain crust/flakes

TLC #7 One sealed bag submitted by Horn on 4-14-92 containing:
pkg 27
(item 39) blue toiletry bag and contents
[illegible] bottom of bag

TLC #8 One sealed bag submitted by Horn on 4-14-92 containing:
pkg 30
(item 42) knife with serrated blade and black handle
[illegible] blood [illegible]
(item 43) left glove (tan)
blood absorbed into leather (suede)

TLC #9 One sealed envelope submitted by Horn 4-14-92 containing:
pkg 24
(item 53) $8.00 in U.S. currency
[illegible] all bloody [illegible] (rubbed)

TLC #10 One sealed bag submitted by Horn on 4-14-92 containing:
pkg 10
(item 13) blue jeans and white tennis shoes
blood on left pocket and right ankle [illegible]
[illegible] left side of left shoe only one drop
[illegible]

TLC #11 One sealed bag submitted by McCracken on 4-14-92 containing:
pkg 1
(item 1) black leather jacket (Goose Country)
(item 2) black ninja outfit

TLC #12 One sealed bag [illegible] by [illegible] on 4-14-92 containing:
pkg 7
(item 10) green duffle bag with bloodlike substance
~~[illegible]~~
contents of green duffle bag
clothing, sweaters, towels [illegible]

T[illegible] is to certify that (this document) is [illegible]ue and accurate copy of a business record on file with the Las Vegas Metropolitan Police Department Forensic Laboratory.
[signature] [date]
Signature Date

TLC #13 One sealed envelope submitted by ~~[illegible]~~ GRADY (Bi-Hr PD) on 4-27-92 contain
pkg 1 (item 1) whole blood / WALKER, Richard
ESD 1 PGM 1+ ABO "O" yell/[illegible]
GLO 1 PGM 1

TLC #14 One sealed envelope submitted by ~~[illegible]~~ GRADY (Bi-Hr PD) on 4-27-92 containing:
pkg 2 (item 1) whole blood / RIKER, David
PGM 2-1 PGM 2-1+ ABO "A" yell/[illegible]

TLC #15 One sealed envelope submitted by ~~[illegible]~~ GRADY (Bi-Hr PD) on 4-27-92 containing:
pkg 3 (item 1) whole blood / PHIPPINS, John
ESD 2-1 PGM 2-1 (2+1+) ABO "A" yell/purple
GLO 1

[signature] Errington
[illegible] Serological Chart

TLC #16 One sealed bag submitted by McCracken on 4-14-92 containing:
pkg 5 (item 7) one black handled folding knife with compass
bent slightly, stained blade with [illegible] appears to be
a bloodlike substance — but it isn't
however the handle (TOL+) slightly (insufficient)

This is to certify that this document is a true and accurate copy of a business record on file with the Las Vegas Metropolitan Police Department Forensic Laboratory.

[signature] 4/1/02
Signature Date

Itel	item	description	ABO	EsP	PGM	Glo	PGM ST.	Possible donor(s) of the bloodstain
1	7	MARBLES whole blood	A	1	1	inc	1+1-	[illegible] of population
2	1	swab	O		1		1+	[illegible] Walker
2	2	swab	O		1		1+	
2	3	swab	O		1		1+	
2	4	swab	O		1		1+	
3	35	r. boot	A	1	1	inc	1+1-	marbles blood
4	36	l. boot	A	inc	1	inc	1+1-	marbles [illegible]
5	1	white tennis shoes	A	insufficient	sample			Rikers [illegible] or Marbles
5	2 stain 1	Levis	–		2-1		2-1+	Rikers blood
5	2 stain 2	Levis	–		2-1		2-1+	Rikers blood
5	2 stain 3	Levis	O		1		1+	Walkers blood
5	2 stain 4	Levis	O		1		1+	Walkers blood
5	3 stain 1	tank top	A		2-1		2-1+	Rikers blood
5	3 stain 2	tank top	A		2-1		2-1+	Rikers blood
5	4 stain 1	T-shirt	–		1		1+	Walkers blood
5	4 stain 2	T-shirt	–		1		1+	Walkers blood
5	5	misc.	(no	blood	found)			
5	6	black underwear	(no	blood	found)			
6	37	cassette box	O	–	1	–	1+	Walkers blood
7	39	toiletry bag	(no blood	found)				
8	42	black knife	A	1	[illegible]	–	1+1-	Marbles blood
8	43	left glove	A	1	1	–	1+1-	Marbles blood
9	53	$20 currency	A	–	2-1	–	2-1+	[illegible]
10	13	blue jeans	A	–	1	–	1+1-	MARBLES
		white tennis shoes	insufficient		1		1+	Walkers blood
11	1	[illegible] jacket		(no blood	found)			
	2	[illegible] wallet		(no blood	found)			
12	10	duffle bag	O		1		1+	
	10A	contents of		(no blood	found)			
3	1	WALKER blood of	O	1	1	1	1+	18% Walkers blood
4	1	RIKER, David blood of	A	1	2-1	inc	2-1+	2.4% Rikers blood
[illegible]		[illegible] blood						[illegible] blood
6	7	fishing knife	(TRACES OF BLOOD	INDICATED)				not confirmed as Human blood

This is to certify that this document is a true and accurate copy of a business record on file with the Las Vegas Metropolitan Police Department Forensic Laboratory.

[signature] Walkers

Signature Date

Summary

What a confusing case! Two suspects killed Las Vegan (MARBLE) victims blood possibly on suspects. The suspects, shortly after, got in a car wreck, with injuries, in [illegible] so the blood on their clothes could be their own in addition to the victims. Whats more is [illegible] several days before the Las Vegan [illegible] the victim is from Blythe Ca and the blood on that victim could be on [illegible] Knife

After the types of the [illegible] suspects have blood on them, after analysis the [illegible] forwarded to Richard Good.

All evidence delivered [illegible] on 4-23-92 with the exception of Hon[illegible] from our lab freezer.

At the time the case was started, there was no suspect blood standards [illegible]

Given [illegible] (both) to R Good on [illegible] for comparison (print).

3 types of PGM-ST are being found (2-1+), (1+1-) (1+)

Rec'd blood of Richard Walker, David Riker & [redacted] California victim from Capt GRADY & pilot Ed Venable at 5:00 pm on 4/27/92 at Hughes Air terminal LV, NV. (Cooled in ice chest)

at this point 4-27-92 [illegible] I know three 3 of 4 participants are type A. I will abandon ABO at this point (something not known can be)

The blood of Phippin was somewhat decomposed post mortem (lower [illegible]) [illegible] (blurred bands)

COURT ORDER to not mention Phippin's name in this trial!

		EsD	PGM	PGM-ST	GLO
[redacted]					
MARBLE, Kevin	A	1	1	1+1-	[illegible]
WALKER, Richard	O	1	1	1+	1
Riker, David	A	1	2-1	2-1+	[illegible]

This is to certify that this document is a true and accurate copy of a business record on file with the Las Vegas Metropolitan Police Department Forensic Laboratory.

[signature] [illegible date]
Signature Date

41

EXHIBIT 244

From: Michael O'Callaghan
To: Terry Cook
Date: 1/7/02 11:14AM
Subject: Re: Richard Allan Walker, LVMPD EV# 920414-0169

Terry Cook,

Remember, I inherited the case from probably the best prosecutor this State has ever seen. Unfortunately, I inherited it afte testing was not an option for McCracken's control blood samples. The physical evidence was not lost, onl he opportunity to test it had passed, according to your trial testimony.

Page 2 of the tw page Evidence Impound Report of CSA Debra McKracken under EV# 920414-0169 regarding the crime scene at 301 Boston indicates the following:

Package #5
Item #7 - survival knife with black, 6" blade, compass on top of handle, containing a fishing hook and line, and matches, with apparent blood.

...
Package #7
Items 9A-L - (Apparent blood samples with controls)
... Location Recovered
9J ... Item #7

One fact is clear from the discovery: a control sample was taken from the only knife found at the murder scene.

The Defense could have requested items to be analized like any party to a prosecution. The Defense for two defendants had the same time as the prosecution. Patty Erickson had the same opportunity and information as Mel Harmon and Don Dibble to make a request.

Don Dibble did submit a 2-3 page request to the Crime Lab on April 20, 1992, which says, "Please compare the blood samples recovered to this homicide investigation to the samples of the victim, Mr. Marble." Although the rest of the request goes on the deal specifically with CSA David Horn's Evidence Impound Report, I take this to mean all blood control samples, including those collected by CSA Debra McCracken at the murder scene.

The argument is that the Defense relied upon Dibble's request. If they can rely upon that request, then the defense should also be held accountable for relying upon your report.

Your Report indicated that item #7 of McCracken was tested, but does not indicate that the testing of any of her McKracken's 12 control blood samples were tested.

If the swab was marked into evidence, chances are that you looked at it when you testified and would likely be mentioned. But that is not always the case.

I checked the trial court evidence list and there is no indication of any evidence bag containing any control samples from the murder scene. So the control samples have to be in evidence still, unless released by LVMPD Homicide Detective Tom Thowsen recently for the California murder prosecution in Riverside County, California.

Tom Thowsen,

Is Package #7, Item 9J, still in evidence?
If not, is it in the care, custody & control of the Riverside folks?

>>> Terry Cook Mon 1/7/02 8:25 AM >>>

This is to certify that this document is a true and accurate copy of a business record on file with the Las Vegas Metropolitan Police Department Forensic Laboratory.
Signature 4/11/02 Date

Mike,
The swab wasn't clearly identified as being from that knife or I believe I would have noticed it. I also believe that the facts regarding the knife came out in court and it was cleared up then. The DNA evidence has been clearly compromised after these years and the fault lies at the feet of Metro. This problem exists to this day but there is hope that it will be rectified soon. The swab was lost only to me, not in the vault. I'll research the whereabouts of the swab and see if it still exists

Terry

>>> Michael O'Callaghan 01/04/02 01:27PM >>>
Was the swab listed and clearly identified in the original crime scene report?

Does the suspect swab still exist?
Was the swab the topic of discussion during your testimony during the trial?

If yes to those questions, then why can't we put together an affidavit for you that says that the swab was identified in such&such report, the swab still exists, the swab was a topic of discussion during your testimony, and the defense never asked to have it tested.

What do you think? Ideas?

>>> Terry Cook Thu 12/20/01 8:57 AM >>>
Mike,
I have recieved the transcripts and Pattys affidavit and have read them. I have talked to many attorneys about many cases over the years and forgot most of them. This case, however, sticks in my mind because of some issues that were embarrassing. As the transcripts detail, I was unaware that McCracken swatbed the knife mentioned (states exhibit 50A1) and as a result was unable to blood type the remaining blood on the knife. As I read the impound, it still does not clearly indicate that she (McCracken) removed any blood from the knife. I believe that it is this sample that Patty and I discussed during the trial at a break. I don't recall using the word "lost"...how could I when I didn't know it existed? The context in which she may have been thinking was lost for DNA value as that was a seldom used option during those days...or possibly lost in the evidence vault.which still happens to this day. I recall, to the best of my recollection, that there was a conversation with Patty and that she is an honest person, but may have misunderstood the nature of the missing blood from the knife. I hope that this clears things up and am willing to testify to these recollections.

>>> Michael O'Callaghan 12/18/01 01:05PM >>>
I am sending to you an affidavit from Walker's wife claiming there was "lost" DNA evidence that was not disclosed to her until just before you testified. I parked the paragraph in issue.

I am also sending your trial transcript testimony and some reports to help you review.

Have you any idea what Patty Erickson is taking about?

This is to certify that this document is a true and accurate copy of a business record on file with the Las Vegas Metropolitan Police Department Forensic Laboratory.
Signature Date

EXHIBIT 245

for a few minutes.

(Whereupon a brief recess
was taken)

THE COURT: The State of Nevada versus Victor Jimenez. The record will reflect the presence of the defendant, his attorney, Mr. Harmon for the State, all twelve members of the jury and the alternates.

(Whereupon the following proceedings were
held in the presence of the jury)

THE COURT: Ladies and gentlemen we--Mr. Harmon is going to call another witness at this time. Mr. Harmon.

MR. HARMON: Terry Cook, your Honor.

TERRY COOK

having been called as a witness by the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HARMON:

Q Will you state your name please?

A Terry L. Cook, C-o-o-k.

Q Mr. Cook what is your business or profession?

A I'm a Criminalist 2, with Metropolitan Police Department Laboratory, Las Vegas, Nevada.

Q What is a Criminalist 2?

A A criminalist is one with a specialized background or training that utilizes that background or training in the analysis of evidence. The two denotes three or more year's experience

in that field.

Q Will you describe briefly the extent of your formal training and experience as a criminalist?

A Certainly. I have a bachelor's degree in chemistry awarded from Washburn University in the year 1979. During the academic year of 1979 to 1980 I held the position of assistant instructor temporary, with Kansas State University Department of Chemistry. My duties there were primarily to work on a synthetic fuel project for Phillip's Petroleum Company and to student instruct freshman chemistry labs. The research team with which I was working disbanded after the academic year of 1980.

I was then awarded a position, a temporary position as a toxicologist with the Kansas Department of Health and Environment. My duties there were to analyze body fluids for controlled substances in the events of autopsies. This was a temporary position that expired in November of 1980. I was asked to apply for the Kansas Bureau of Investigation Laboratory located and headquartered out of Topeka, Kansas, and I was given a position as Criminalist 1 there.

It was at the Kansas Bureau Investigation Laboratory that I underwent extensive in-house training in the field of serology. After working as a serologist at the Kansas Bureau Investigation, I then accepted a position as a Criminalist 2 with the Metropolitan Police Department Laboratory in March 6th of 1983.

I've attended the Serological Research Institute school on advanced electrophoresis. I've attended the Serological

Research Institute school on semen analysis. I've attended the FBI Advanced Electrophoresis school. I've attended the FBI Hair and Fiber school. I'm a member of the Midwestern Association of Forensic Science. And I'm also a member of the Electrophoresis Society.

Q Mr. Cook have you qualified as an expert before in courts of law as a criminalist specializing in the field of serology?

A Yes, I have.

Q On about how many occasions and will you please indicate the jurisdictions?

A I've -- on probably sixty occasions in the courts of both Kansas and Nevada; in Nevada every district court excluding sixteen, over the past five years.

Q How long have you been a criminalist with the Las Vegas Metropolitan Police Department?

A Approaching five years.

Q On February the 24th of 1987, did you have occasion to examine a jacket which had been produced by the North Las Vegas Police Department?

A I, I did.

MR. HARMON: Your Honor may I approach the witness?

THE COURT: Yes.

Q (continued by Mr. Harmon) Mr. Cook I'm showing you an evidence bag marked as Proposed Exhibit 48 and also the contents of the bag, which have been previously marked as Proposed Exhibit

48 A, do you recognize the bag and the contents?

A Yes, I do.

Q What is the basis of your identification?

A The bag is recognized because it bears both my signature in the chain of custody and my seal, which bears the initials TLC, my initials, and the date at which I placed this seal on the bag.

The contents are a gray jacket, I recognize because it bears my business card, the date at which I examined this jacket.

Q Now the jacket has been marked, for the record, as Proposed Exhibit 48 A. Did you on, on or about February the 24th, 1987, examine the jacket which is marked Proposed 48 A?

A Yes, I did.

Q What was the purpose of your examination?

A It was a re-analysis to look for the presence of blood specifically on the right shoulder area.

Q Did you find evidence of blood like substance on the right shoulder area?

MR. WEINSTOCK: At this time, your Honor and for the record I have to object, he hasn't been certified as an expert.

THE COURT: Do you wish him to be offered?

MR. HARMON: I offer him at this time, your Honor, as an expert criminalist specializing in the field of serology.

MR. WEINSTOCK: No objection, your Honor.

THE COURT: The Court will accept him as an expert.

MR. HARMON: Thank you.

Did you in fact detect areas of a blood like substance on the right shoulder area of Proposed Exhibit 48 A?

THE WITNESS: Yes, I did sir, after disassembling this cloth flap.

Q (continued by Mr. Harmon) Tell us exactly what you did.

A A serologist their duties are to analyze items of evidence associated with crimes or crime scenes and examine these items for any body fluids. Once the body fluid is detected, to categorize or through certain genetic markers to try to individualize these body stains or body fluids.

When a item, a garment such as this, would come into our laboratory what we would do is look visually for the presence of certain blood and/or semen depending on the crimes and/or hairs. We would do this by obviously visual means and then we would ultimately confirm these through chemical means, that is if we found blood we would through chemical techniques determine whether or not it was human blood and then try to type it in one of the various blood typing systems, we have numerous.

When this item came to me, it was--I looked on the sleeves and the elbow areas specifically for the presence of blood, because I understand that it was a, it was involved or could have been involved in a homicide.

MR. WEINSTOCK: Objection, your Honor, hearsay.

THE COURT: Sustained.

Q (continued by Mr. Harmon) Just explain what you looked for and what your findings were please.

A I looked for the presence of blood on the jacket. With strong lighting I found numerous blood stains on and around this region of the right shoulder area of the arm. I then tried to --

Q What was the nature of the stains you're talking about--

A Blood stains. In fact I tried to, I tried to concentrate these stains and was able to identify it as being blood and in fact human blood, but I was unable to confirm what type, the type of the blood in this case.

Q So you did confirm the presence of human blood on Proposed Exhibit 48?

A Yes, I did in several, several areas in which you can see that are cut out.

Q How many areas did you observe where there was evidence of human blood?

A About four.

Q When you previously testified in April of 1987 did you say six?

A Yes.

Q It was a number of areas?

A That's true, a number of areas were tested.

Q Between four and six?

A That's, that's correct.

Q Were these all on the right sleeve area of the jacket?

A The upper shoulder and the upper sleeve.

EXHIBIT 246

Las Vegas police reveal DNA error put wrong man in prison

BY LAWRENCE MOWER
AND DOUG MCMURDO
LAS VEGAS REVIEW-JOURNAL

Posted: Jul. 7, 2011 | 10:22 a.m.
Updated: Jul. 8, 2011 | 7:28 a.m.

On Jan. 28, 2008, Howard Dupree Grissom walked into High Desert State Prison, just north of Las Vegas, after being convicted of robbery and conspiracy to commit a violent crime.

An employee there, as was required, took a swab of DNA from inside Grissom's mouth, and within a week sent the sample to the Metropolitan Police Department's crime lab.

Had the lab's technicians run the sample against all other DNA evidence in the system, police would have discovered that Grissom also was linked to a 2001 robbery -- and that the mistake had sent the wrong person to prison for that crime.

But they didn't.

Because the lab had a policy to scan Nevada inmate DNA only against evidence in the department's open cases -- a policy changed four weeks ago -- Grissom was never caught.

He would spend more than two years in Nevada's prison system for that 2008 charge, and within three months of being released, he was arrested in California for kidnapping, raping, robbing and trying to stab a woman to death.

Las Vegas police on Thursday revealed, in an unusually candid and thorough explanation that was praised by a national organization, that it had bungled the DNA evidence in that 2001 robbery and caused an innocent man to go to prison for four years.

"We sent an innocent man to prison," Clark County Sheriff Doug Gillespie said. "To say this error is regrettable would be an understatement."

The mistake wasn't the first for the lab, and the department is now reviewing hundreds of cases in which DNA evidence was handled by veteran technician Terry Cook, who has been suspended with pay since May. The department has also tentatively agreed to a settlement with the man wrongfully imprisoned.

But the department did not admit until Thursday night that it had the chance to catch Grissom more than two years ago. Assistant Sheriff Ray Flynn said the practice of scanning the DNA of the state's inmates with all of the evidence in its possession -- not just those in open cases -- was not required by federal authorities.

"That is one of the things that we have changed because of this," he said.

MISTAKE SENT WRONG PERSON TO PRISON

The case provides a look into the complicated system of when and how DNA is linked to evidence found in crimes.

In November 2001, Grissom was one of two suspects in the robbery of a woman at her southeast valley home.

A masked man in a blue hooded sweat shirt, armed with a baseball bat, burst into her home. The woman had with her two small children, ATM cards and $23 in cash.

The suspect forced her to drive to an ATM to withdraw more money but ran away when the woman's husband spotted them.

Las Vegas police were called and later spotted Grissom, then 15, and his cousin, Dwayne Jackson, then 18, as

they rode bicycles past the woman's house.

Officers followed them to a nearby home and discovered a blue hooded sweat shirt and ski mask inside a car in the driveway.

Both Grissom and Jackson denied involvement in the robbery, and both submitted to DNA tests. Police also were able to recover DNA evidence from the clothing.

But at the department's lab, technician Cook mistakenly placed Jackson's DNA in Grissom's vial -- and Grissom's DNA in Jackson's vial, Flynn said. The swap caused the DNA in Jackson's vial to match that of the clothing.

Jackson was charged with the crime. He maintained his innocence to his attorney in the case, David Chesnoff, the lawyer said Thursday. But faced with the DNA evidence against him and the potential for a life sentence in prison, Jackson took a plea deal. He was released from prison in 2006.

He would not be vindicated for five more years.

SYSTEM DID NOT CHECK ALL OF EVIDENCE

Grissom would be arrested by Las Vegas police in 2007 and plead guilty to robbery and conspiracy to commit a crime, the details of which weren't available Thursday. He received a sentence of two to five years in prison.

Had Grissom been sentenced to prison in another state, the DNA taken from him upon entering that prison probably would have been entered into a federal database known as the Combined DNA Index System, or CODIS, Flynn said.

That database would have matched Grissom's DNA against all DNA in any open or closed case in any state, as required by federal law, Flynn said. It would have realized that Grissom's DNA matched the evidence found on the clothing in the 2001 robbery.

But Grissom was arrested in Nevada and sent to a Nevada prison. A spokesman for the Nevada Department of Corrections said Grissom's DNA was not sent to CODIS at the time, although it now sends all inmate samples to the federal database. The sample was sent to the Metropolitan Police Department's crime lab, as was, and still is, routine, the prisons spokesman said.

Flynn said the department's policy at the time was to match samples from Nevada inmates in open cases in which DNA evidence was taken, such as unsolved murders or rapes. Because they thought the 2001 robbery had been solved, they didn't bother to check Grissom's DNA against the evidence in that case.

In light of the recent mistake at the crime lab, Flynn said it instituted a policy to run prisoner swabs against DNA evidence in all cases, solved or unsolved.

NOT THE FIRST MISTAKE

The technician's mistake was not the first involving DNA evidence at the crime lab. A technician mistakenly labeled a DNA vial in 2001, and the error almost sent an innocent man to prison for life.

Lazaro Sotolusson was an inmate at the North Las Vegas jail when cellmate Joseph Coppola accused him of sexual assault. To investigate the charge, police collected DNA samples from both men.

But at the crime lab, the label on Sotolusson's vial was mistakenly switched with his accuser. When investigators ran the two samples in a computer database, they discovered that his mislabeled DNA matched evidence recovered from two unsolved rapes in the valley.

Prosecutors, unaware of the labeling mistake, charged Sotolusson with the two rapes as well as the sexual assault on Coppola. The charges were later dropped after an expert hired by the man's public defender uncovered the clerical error.

The case prompted a review of every DNA sample in the lab for similar clerical errors, and today the system is automated to prevent such human mistakes, Flynn said.

It did not catch the mistake in Jackson's case, however, because the mistake was not merely a mislabel -- it was

the wrong DNA in the wrong vial.

INNOCENT MAN EXONERATED

Jackson's vindication would not come until after his cousin would be arrested for attacking a woman in an alley behind a Moreno Valley service station in 2007.

Media reports from the Southern California area said Moreno Valley detectives uncovered that the woman had been kidnapped from a nearby apartment, raped in an alley, then robbed and stabbed several times. She suffered nonlife-threatening injuries.

He pleaded not guilty, and a California jury convicted him of attempted manslaughter, according to records. He was sentenced to between 41 years and life in prison.

When he entered the California Department of Corrections and Rehabilitation, an employee took a required sample of his DNA and sent it to CODIS.

Because the system scans evidence in solved and unsolved crimes, authorities in California discovered in October that his DNA matched that of the 2001 robbery in Las Vegas. They notified Las Vegas police.

The department's lab officials, however, discovered that the DNA did not match the name they had on file for the 2001 case -- unbeknownst to them, the vials had been swapped.

A review of the case discovered the mistake. In May, Clark County District Attorney David Roger was asked by police to notify Jackson's attorney . Police said the review of the evidence took months and prevented them from telling Jackson sooner.

Chesnoff on Thursday called his client "a remarkable young man."

"He's not bitter," he added. "He's forward-thinking. He's handling it a lot better than I would."

Chesnoff said Jackson did not want to speak to the media, but that the man was satisfied with the settlement with the department. The amount will be disclosed once the department's Fiscal Affairs Committee approves the settlement, Gillespie said.

Roger said Jackson's record is sealed and his slate wiped clean.

"He can truthfully say he has never been convicted of a crime," Roger said. "From the FBI on down, his wrongful conviction has been erased from every law enforcement database."

NEW PROCESS AND PROCEDURES

The sheriff said the mistake was unacceptable.

"There are no words I could say that will give back the time Mr. Jackson spent incarcerated," Gillespie said.

The department is now reviewing more than 200 cases in which DNA evidence was handled by Cook, who has been with the department since 1983. He stopped handling DNA in 2004, when he transferred to another section at the lab.

Department officials said the department has sent DNA samples from more than 44,000 offenders in Southern Nevada to CODIS since it started using the system in 2000.

Flynn said the department is confident that they haven't made other mistakes.

Linda Krueger, who oversees the department's crime lab, said that in 2001, DNA analysis was only 4 years old and the equipment was primitive.

Krueger said the vials that contained DNA samples were much smaller back then -- about as tall as a penny -- and therefore more difficult to label.

Human hands also had to load the samples in 2001, a process that is automated now.

Las Vegas police said they reported the mistake to a national crime laboratory accrediting agency. On Thursday the Rocky Mountain Innocence Center, a nonprofit that works to correct and prevent the convictions of innocent people in Utah, Nevada and Wyoming, praised the department for its admission.

"Taking active measures to identify these mistakes and free innocent prisoners serves the entire public," Elizabeth Fasse, a staff attorney for the organization, said in a statement. "No one wins when the wrong person is in prison."

Review-Journal reporter Brian Haynes contributed to this report. Contact reporter Lawrence Mower at lmower@reviewjournal.com or 702-383-0440. Contact reporter Doug McMurdo at dmcmurdo@reviewjournal.com or 702-224-5512.

EXHIBIT 247

JAMES MONTELL CHAPPELL,
Appellant/Cross-Respondent,
Appellant,
v.
THE STATE OF NEVADA,
Respondent/Cross-Appellant.
Respondent.

ORIGINAL

Case No. 43493

RESPONDENT'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

Cross-Appeal From A Post-Conviction Order Granting A New Penalty Hearing

Eighth Judicial District Court, Clark County

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05-10884

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant/Cross-Respondent,
Appellant,
v.
THE STATE OF NEVADA,
Respondent/Cross-Appellant.
Respondent.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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RESPONDENT'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

Cross-Appeal From A Post-Conviction Order Granting A New Penalty Hearing Eighth Judicial District Court, Clark County

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that it could not reach the merits of Defendant's petition based on procedural bars because no good cause had been established.
2. Whether the district court erred in determining that Defendant's claims of ineffective assistance of trial counsel warranted no relief as any alleged error was harmless due to the overwhelming evidence of guilt, and
3. Whether the district court abused its discretion in granting Defendant a new penalty hearing.

STATEMENT OF THE CASE

On October 11, 1995, James Montell Chappell, hereinafter Defendant, was charged by Information with Count I- Burglary, Count II- Robbery with Use of a Deadly Weapon, and Count III- Murder (open) with Use of a Deadly Weapon. On

November 8, 1995, the State filed a Notice of Intent of Seek the Death Penalty. On July 30, 1996, Defendant filed a Motion to Strike Allegations of Aggravating Factors. The District Court denied this motion. Thereafter, a jury trial commenced. On October 16, 1996, the jury returned guilty verdicts against Defendant in all three counts. The penalty phase of the trial was held in which the jury sentenced Defendant to death for Count III.

Defendant was sentenced on December 30, 1996 to the following: Count I- a maximum of one hundred twenty (120) months and a minimum of forty-eight (48) months in the Nevada Department of Prisons, Count II- a maximum of one hundred eighty (180) months and a minimum of seventy-two (72) months in the Nevada Department of Prisons with an equal and consecutive sentence for the deadly weapon enhancement to run consecutive to Count I, and Count III- death to run consecutive to Counts I and II. Defendant was given one hundred ninety two (192) days credit for time served. The Judgment of Conviction was filed on December 31, 1996.

On January 17, 1997, Defendant filed a Notice of Appeal with the Nevada Supreme Court. In his appeal, Defendant raised thirteen issues: (1) that the trial court abused its discretion by allowing the State to introduce prior domestic batteries committed by Defendant, (2) that the trial court abused its discretion by allowing the State's witnesses to testify regarding the state of mind of the victim, (3) that the trial court abused its discretion by allowing the State to introduce evidence that Defendant committed shoplifting the day after murdering Panos, (4) that the trial court abused its discretion by allowing the State to characterize Defendant as an unemployed thief, (5) cumulative error, (6) that the State discriminated against Defendant in using pre-emptory challenges to exclude two African American jurors, (7) that there was insufficient evidence to support Defendant's convictions for burglary and robbery, (8) that the trial court erred in refusing to grant Defendant's motion to strike the Notice of Intent to seek the Death Penalty, (9) that the State committed prosecutorial misconduct during closing argument, (10) that the State committed prosecutorial

misconduct during the penalty phase, (11) that Defendant was denied a fair penalty hearing by a State's witness testifying that Defendant deserved the death penalty, (12) that there was insufficient evidence to support the aggravating circumstances of burglary, robbery, and sexual assault, and (13) that the death sentence is disproportionate to the crime committed by Defendant. Defendant's appeal was denied the by the Nevada Supreme Court on December 30, 1998. The Remittitur was filed on October 26, 1999.

On October 19, 1999, Defendant filed a Petition for Writ of Habeas Corpus (Post-conviction). After post-conviction counsel was appointed, Defendant filed a Supplemental Petition for Writ of Habeas Corpus (Post-conviction). Defendant raised over twenty-two issues in his Petition: (1) ineffective assistance of counsel for the failure to call certain witnesses, (2) ineffective assistance of counsel for failure to object to "systematic exclusion of African Americans" from jury service, (3) ineffective assistance of counsel for failure to object to improper jury instructions, (4) ineffective assistance of counsel for failing to move to strike overlapping aggravating circumstances of burglary and robbery, (5) ineffective assistance of counsel for failure to object to prosecutorial misconduct, (6) ineffective assistance of counsel for failure to object to victim impact testimony, (7) ineffective assistance of counsel for failure to object to questioning of Defendant during cross-examination, (8) ineffective assistance of counsel for failure to move to strike the death penalty as unconstitutional and racially biased, (9) ineffective assistance of counsel for failure to object to the prosecutor arguing the absence of mitigating factors, (10) Clark County systematically excludes African Americans form jury service, (11) ineffective assistance of appellate counsel for failing to raise issue of unconstitutional jury instructions, (12) ineffective assistance of appellate counsel for failing to raise issue of overlapping aggravating circumstances, (13) ineffective assistance of appellate counsel for failure to raise issue of victim impact testimony, (14) ineffective assistance of appellate counsel for failing to raise issue of improper cross examination of Defendant, (15) insufficient appellate

review by this Court, (16) improper jury instruction defining premeditation and deliberation, (17) improper jury instruction that jury could not consider sympathy in mitigation, (18) that the trial court erred in failing to instruct the jury regarding non-statutory mitigating circumstances, (19) that the trial court erred in allowing the State to use overlapping aggravating circumstances of burglary and robbery, (20) that the jury instructions failed to apprise the jury of the proper use of character evidence in determining penalty, (21) that the death penalty was imposed against Defendant in a racially biased manner, (22) that the Nevada death penalty statutes are unconstitutional.

The district court heard arguments on Defendant's Petition on July 25, 2002, and determined that many of Defendant's claims in his Petition were waived as they should have been addressed on direct appeal. RT 7-25-02, p. 4-5. The district court, however, granted an evidentiary hearing as to Defendant's claims of ineffective assistance of counsel. Evidentiary hearing was held on September 13, 2002.

The district court did not address every issue individually, but concluded that due to the overwhelming evidence of guilt presented during the trial, none of Defendant's claims of ineffective assistance of counsel during the guilt phase of the trial warranted relief, as any error was harmless. The district court granted Defendant a new penalty hearing based on his counsel's failure to locate and call to testify certain witnesses during the penalty phase. The district court did not reach the merits of Defendant's other claims of ineffective assistance of counsel during the penalty phase, and did not determine the merits of Defendant's remaining claims. Findings of Fact, Conclusions of Law, and Order was filed on June 3, 2004.

The State filed a notice of appeal on the trial court's granting of a new penalty hearing on June 18, 2004. Defendant filed a notice of cross appeal on the trial court's denial of a new trial on June 24, 2003. This Court designated Defendant as Appellant/Cross Respondent and the State as Respondent/Cross Appellant. Defendant filed his opening brief on January 11, 2005.

STATEMENT OF THE FACTS

This Court outlined the facts of the case as follows:

> On the morning of August 31, 1995, James Montell Chappell was mistakenly released from prison in Las Vegas where he had been serving time since June 1995 for domestic battery. Upon his release, Chappell went to the Ballerina Mobile Home Park in Las Vegas where his ex-girlfriend, Deborah Panos, lived with their three children. Chappell entered Panos' trailer by climbing through the window. Panos was home alone, and she and Chappell engaged in sexual intercourse. Sometime later that morning, Chappell repeatedly stabbed Panos with a kitchen knife, killing her. Chappell then left the trailer park in Panos' car and drove to a nearby housing complex.
>
> The State filed an information on October 11, 1995, charging Chappell with one count of burglary, one count of robbery with the use of a deadly weapon, and one count of murder with the use of a deadly weapon. On November 8, 1995, the State filed a notice of intent to seek the death penalty. The notice listed four aggravating circumstances: (1) the murder was committed during the commission of or an attempt to commit any robbery; (2) the murder was committed during the commission of or an attempt to commit any burglary and/or home invasion; (3) the murder was committed during the commission of or an attempt to commit any sexual assault; and (4) the murder involved torture or depravity of mind.
>
> Prior to trial, Chappell offered to stipulate that he (1) entered Panos' trailer home through a window, (2) engaged in sexual intercourse with Panos, (3) caused Panos' death by stabbing her with a kitchen knife, and (4) was jealous of Panos giving and receiving attention from other men. The State accepted the stipulations, and the case proceeded to trial on October 7, 1996.
>
> Chappell took the witness stand on his own behalf and testified that he considered the trailer to be his home and that he had entered through the trailer's window because he had lost his key and did not know that Panos was at home. He testified that Panos greeted him as he entered the trailer and that they had consensual sexual intercourse. Chappell testified that he left with Panos to pick up their children from day care and discovered in the car a love letter addressed to Panos. Chappell, enraged, dragged Panos back into the trailer where he stabbed her to death. Chappell argued that his actions were the result of a jealous rage.
>
> The jury convicted Chappell of all charges. Following a penalty hearing, the jury returned a sentence of death on the murder charge, finding two mitigating circumstances--murder committed while Chappell was under the influence of extreme mental or emotional disturbance and "any other

mitigating circumstances."--and all four alleged aggravating circumstances. The district court sentenced Chappell to a minimum of forty-eight months and a maximum of 120 months for the burglary; a minimum of seventy-two months and a maximum of 180 months for robbery, plus an equal and consecutive sentence for the use of a deadly weapon; and death for the count of murder in the first degree with the use of a deadly weapon. The district court ordered all counts to run consecutively. Chappell timely appealed his conviction and sentence of death.

Chappell v. State, 114 Nev. 1403, 1405-1406, 972 P.2d 838, 839-840 (1999).

ARGUMENT

I

THE ISSUES RAISED BY DEFENDANT THROUGHOUT THIS OPENING BRIEF ARE NOT COGNIZABLE IN THIS APPEAL

It is clear, based on the cover page of Appellant's Opening Brief, that he is appealing the Order issued by the District Court denying him a new trial in his Petition for Writ of Habeas Corpus. Yet, there is no mention throughout the rest of the Opening Brief that references the pleadings filed in the district court, the hearing held before the district court or the fact that most of the claims raised Defendant's petition were denied on the basis of procedural bars and the merits of the issues were never reached. Defendant uses the whole of the brief to address how each issue should be reviewed by this Court, even though the district court never reviewed them. In addition, Defendant is asking this Court to hear the merits of his claims regarding alleged errors in the penalty phase even though Defendant has already been granted a new penalty hearing. Nowhere in Defendant's brief is there any argument as to why the district court erred in upholding the procedural rules as to his claims that were procedurally barred. The State maintains that it would be improper for this Court to review the merits of each of Defendant's issues that were presented in his Petition as they were never considered by the district court.

The only cognizable issues before this Court at this juncture are (1)whether the district court erred in holding that it could not reach the merits of Defendant's petition based on procedural bars because no good cause had been established and (2) whether

the district court erred in determining that Defendant's claims of ineffective assistance of trial counsel warranted no relief as any alleged error was harmless due to the overwhelming evidence of guilt, and (3) whether the district court abused its discretion in granting Defendant a new penalty hearing.

II

THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANT A NEW TRIAL

A. Trial Counsel Was Not Ineffective

Defendant raises several instances of ineffective assistance of trial counsel in his brief. The Supreme Court has clearly established the appropriate test for determining whether a defendant received constitutionally defective assistance of counsel. To demonstrate ineffective assistance of counsel, a convicted defendant must show both that his counsel's performance was deficient, and that the deficient performance prejudiced his defense. Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). The Nevada Supreme Court has adopted this test articulated by the Supreme Court. Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995).

Counsel's performance is deficient where counsel made errors so serious that the adversarial process cannot be relied on as having produced a just result. Strickland, at 686. The proper standard for evaluating an attorney's performance is that of "reasonable effective assistance." Strickland, at 687. This evaluation is to be done in light of all the circumstances surrounding the trial. Id. The Supreme Court has created a strong presumption that defense counsel's actions are reasonably effective:

> Every effort [must be made] to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . .A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id at 689-690. "[S]trategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). The Nevada Supreme Court has held that it is presumed counsel fully discharged his duties, and said presumption can only be overcome by strong and convincing proof to the contrary. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978)

It is not enough for a defendant to show deficient performance on the part of counsel, a defendant must also demonstrate that the deficient performance prejudiced the outcome of his case. Strickland v. Washington, 566 U.S. 668, 686, 104 S.Ct. 2052, 2065 (1984). In meeting the prejudice requirement of an ineffective assistance of counsel claim, a defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 401, 990 P.2d 1263, 1268 (1999) citing Strickland, 566 U.S. 668, 687, 104 S.Ct. 2052, 2066 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. citing Strickland, 466 U.S. at 687-89, 694.

Defendant claims that he received ineffective assistance of counsel during the guilt phase when his attorney: 1) failed to call witnesses during trial, 2) failed to object to the exclusion of African Americans from the jury system, 3) failed to object to improper jury instructions, 4) failed to object to prosecutorial misconduct during closing argument, and 6) failed to object thereby precluding important issues on appeal. Applying this standard of review, the State will address each of the Defendant's claims of ineffective assistance of counsel individually.

1) Failure to Call Witnesses

Defendant asserts that his counsel was ineffective for failing to call witnesses at trial. Specifically, Defendant claims that the witnesses listed in his petition would have demonstrated that Defendant and the victim had a loving, rather than abusive, relationship. Pursuant to Bejarano v. State, 106 Nev. 840, 842, 801 P.2d 1388, 1390 (1990), the Court need not determine whether counsel's actions were ineffective prior

to evaluating whether Defendant has been prejudiced. In this case, Defendant has failed to demonstrate how his counsel's failure to call the enumerated witnesses prejudiced him. In demonstrating that prejudice exists, the defendant must show that the decision in the case would have been different absent the errors. McNelton v. State, 115 Nev. 396, 401, 990 P.2d 1263, 1268 (1999). Here, the defendant cannot demonstrate this.

Defendant claims that if the witnesses listed in his petition had testified, they would have demonstrated that defendant did not commit first-degree murder because their testimony would have demonstrated that he had permission to be in the house and use the victim's belongings. The evidence indicating to the contrary is overwhelming. Further, Defendant himself testified that he committed pre-meditated murder after flying into a jealous rage having seen a letter from another man to the victim. As such, character witnesses would not have changed the outcome of the case. Thus, Defendant's attorney was not ineffective for not calling the witnesses.

2) Failure to Object to Jury Selection

Defendant claims that he received ineffective assistance of counsel because his attorney failed to object to the Clark County jury selection system which systematically excludes African Americans. Defendant's claim is without merit.

Both the Sixth and the Fourteenth Amendments to the United States Constitution guarantee a defendant the right to a jury selected from a representative cross-section of the community. This right requires that the pools from which juries are drawn do not systematically exclude distinctive groups in the community. Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct. 692, 702 (1975). However, there is no requirement that the jury that is selected actually mirror the population at large. Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803 (1990).

The defendant bears the burden of establishing a prima facie violation of the fair cross-section requirement. In order to demonstrate a prima facie violation, the defendant must show 1) that the group alleged to be excluded is a distinctive group in

the community, 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community and 3) that this under representation is due to systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668 (1979). This test has been adopted by this Court. See Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996).

Defendant has failed to meet this test. Defendant claims that African Americans have been excluded from jury selection in Clark County Nevada. Although African Americans are a distinctive group, Defendant has failed to prove the other two prongs required for a prima facie showing that African Americans have been systematically excluded. Defendant's claim that the number of African Americans on the jury was not reasonable and that they were systematically excluded from the jury is belied by the record. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). The record indicates that initially there were a substantial number of African Americans on the entire panel from which the jury in Defendant's case was selected. (Docket No. 29884, ROA 4: 832). Further, several of the African American prospective jurors indicated an unwillingness to serve on the jury due to their beliefs regarding the death penalty. (Id.). Additionally, this Court found that the two African Americans that were excused from the jury based on the State's preemptory challenges were not removed based on race. See Chappell v. State, 114 Nev. at 1411, 972 P.2d 843 (1998) . Thus, the record indicates that the representation of African Americans in the jury pool was fair and that African Americans have not been excluded unfairly.

As Defendant has failed to show that the jury selection process was unconstitutional, he cannot demonstrate that his counsel was ineffective in not objecting to it.

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3) Failure to Object to Jury Instructions

Defendant alleges that he received ineffective assistance of counsel when his attorney failed to object to improper jury instructions. These claims are without merit as the jury instructions were proper.

a) Instructions Regarding Premeditation and Deliberation

Defendant claims that the jury instruction on premeditation denied his due process rights because it does not distinguish between first and second degree murder. Defendant also claims that he received ineffective assistance of trial counsel and appellate counsel when his attorneys did raise this issue before the District Court and Nevada Supreme Court. Defendant asserts that the instructions are improper because they do not clarify the terms deliberation and willful only premeditation. Instructions twenty- one and twenty-two were given to the jury.

Instruction No. 21

> Murder of the First Degree is murder which is (a) perpetrated by any kind of willful, deliberate and premeditated killing and/or (b) committed in the perpetration of burglary or attempted burglary and/or (c) committed in the perpetration of robbery or attempted robbery.

(AA 7:1720)

Instruction No. 22

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or after the time of the killing.
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believed from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

(AA 7:1721). This Court has indicated that the instruction above, the Kazalyn instruction, does not fully define "willful, deliberate, and premeditated", elements of first degree murder. Byford v. State, 116 Nev.___, 994 P.2d 700, 716 (2000). However, this case was tried in October of 1996, prior to the ruling in Byford, and this

Court has indicated that the ruling in Byford is not retroactive. Garner v. State, 116 Nev. 770, 6 P.3d 1013, 1025 (2000).

Further, in Garner, this Court clarified that its holding in Byford did not indicate that giving the Kazalyn instruction constituted error. This Court stated that it did not articulate any constitutional grounds for its decision in Byford. Id. There is sufficient evidence that Defendant committed first degree murder. As such, Defendant's constitutional rights were not violated when the Kazalyn instruction was given. Further Defendant's attorneys were not ineffective in not objecting or raising the issue on appeal.

b) Instruction on Malice

Defendant claims that jury instruction number twenty was improper and that his counsel was ineffective in failing to object to it. Specifically, Defendant contends that the jury instruction gives the improper presumption of implied malice. Jury instruction twenty reads:

> 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 may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

(AA 7:1719). As Defendant admits, this Court has held that this exact instruction accurately informs the jury of the distinction between express and implied malice. Guy v. State, 108 Nev. 770, 777, 839 P.2d 578, 583 (1992). As such, Defendant has not demonstrated that his rights have been violated. Further, Defendant's counsel was not ineffective in not objecting to this instruction.

4. Failure to Object to Alleged Prosecutorial Misconduct

Defendant argues that he received ineffective assistance of counsel when his trial counsel failed to object to numerous episodes of prosecutorial misconduct during the guilt phase of the trial. Defendant has failed to demonstrate that his counsel was ineffective.

In addressing the issue of prosecutorial misconduct, the United States Supreme Court has stated,

> [A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.

United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). Inappropriate prosecutorial comments, standing alone do not warrant reversal of a criminal conviction if the proceedings were otherwise fair. Id. In order to reverse a conviction, the errors must be "of constitutional dimension and so egregious that they denied [the defendant] his fundamental right to a fair jury trial." Williams v. State, 113 Nev. 1008, 1018, 945 P.2d 438, 444 (1997), overruled on other grounds in Byford v. State, 116 Nev. Adv. Op. 23, 994 P.2d 700 (2000).

In order for a defendant to prove prosecutorial misconduct, he must show "that the remarks made by the prosecutor were 'patently prejudicial'." This standard of review is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). The defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby v. State, 109 Nev. 911, 859 P.2d (1993).

Defendant points to several alleged instances of prosecutorial misconduct which his attorney failed to object to. Each of these statements will be reviewed individually below.

a) Improper Quantification of Reasonable Doubt

Defendant asserts that his attorney was ineffective when he failed to object to a statement regarding reasonable doubt. Defendant has failed to show this statement prejudiced him. It is improper for the State to compare reasonable doubt with

decisions to buy a house, choose a spouse, etc. Evans v. State, 28 P.498 (2001). However, this Court has found that this comparison is not prejudicial where a proper written instruction is given. Id. In Lord v. State, 107 Nev. 28, 35, 806 P.2d 548, 552 (1991), the prosecutor for the State suggested that reasonable doubt was fulfilled where 90-95% of the pieces of the puzzle were there. This Court found that the improper quantification of reasonable doubt was not prejudicial to the defendant because the jury received the correct written instruction and because after making improper comments the prosecutor stated the correct statutory definition. Id. See also Randolph v. State, 36 P.3d 424 (2001) (This Court found that the statement "if you have a gut feeling he's guilty, he's guilty" was not prejudicial).

Defendant has failed to show that the statement regarding reasonable doubt was so egregious that Defendant was denied his fundamental rights. In this case, the jury was given instruction number thirty-six (36) which read:

> 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 a 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.

(AA 7:1734). Instruction thirty-five did not contain any improper quantification of reasonable doubt; thus, Defendant was not prejudiced by the prosecutor's statement. As such, it was not improper for his attorney to fail to object.

b) Failure to Preserve Valid Issues for Appeal

Defendant also argues that he received ineffective assistance of counsel because his trial counsel failed to make contemporaneous objections during trial, thereby

precluding appellate review of important issues. Defendant cites to five instances where his attorney did not object. Defendant fails to demonstrate that his attorney was ineffective.

1. Questions Regarding Defendant's Sentence

Next, Defendant suggests that his counsel was ineffective for failing to object when the State questioned him about punishment. The following exchange took place between Defendant and the State during cross-examination at the guilt phase of the trial.

> MR. HARMON: As you sit here this afternoon are you concerned about punishment?
> DEFENDANT: No, sir. Whatever I get I'll accept it.
> MR. HARMON: It doesn't matter to you whether you're convicted of voluntary manslaughter or murder of the second degree or murder of the first degree?
> DEFENDANT: Does it matter? Is that what you said?
>
> MR. HARMON: I'm asking you if it matters which you were convicted of?
> DEFENDANT: No, it doesn't matter, sir. Whatever I'm convicted of I'll accept it.
> MR. HARMON: And you're not concerned if it's murder of the first degree that the punishments be minimized to some extent?
> DEFENDANT: Could you please repeat that, sir.
> MR. HARMON: You said it really doesn't matter to you what you're convicted of, if it's first degree murder you will accept that. Is that what you said basically?
> DEFENDANT: Yes, whatever I'm convicted of I will accept it, sir.
> MR. HARMON: My question therefore was so there isn't some effort here on the witness stand to present yourself in such a way that you will minimize your punishments?
> DEFENDANT: No, sir.
> MR. HARMON: You don't care if you get a death sentence?
> DEFENDANT: Yes, I do care if I get the death sentence.
> MR. HARMON: So you don't want to get a death sentence?
> DEFENDANT: I have three children, sir, and I want to see them and be able to do something with them sometime in my life.
> MR. HARMON: So we have established that is a punishment that you want to avoid; is that true?
> DEFENDANT: Yes, sir, I am pretty sure any man or woman would want to avoid the death penalty?
> MR. HARMON: Are you telling us it doesn't matter beyond that if it's life with the possibility of parole or life without parole? You don't care?

DEFENDANT: I do care, but --
MR. HARMON: What do you mean you do care?
DEFENDANT: Of course I'm going to care, you know.
MR. HARMON: The bottom line is you don't want to get life without parole either, do you, Mr. Chappell?
DEFENDANT: If I get it, I will accept it sir.
MR. HARMON: Is that what you want?
DEFENDANT: No. I have three children and I want to see my three children and be able to do something with em in their life. I never had no father, sir.
MR. HARMON: So you'd certainly prefer a life with parole sentence.
DEFENDANT: I would be honored to have life with.
MR. HARMON: Honored, is that your answer?

DEFENDANT: I would be honored to be able to get out sometime in my life and be able to reconcile with my children.
MR. HARMON: So you do have an interest in how this case turns out?
DEFENDANT: Of course. Yes.

(AA 6:1472-75). The record indicates that the prosecutor was attempting to discredit Defendant's testimony by demonstrating that he had a strong personal interest in the ultimate verdict reached by the jury. The prosecutor was not addressing sentencing in order to dissuade or persuade the jury to come to a verdict, rather he was demonstrating the Defendant's own bias. As such, this line of questioning was not improper. Defendant's attorney was not ineffective in failing to object.

2. Implication Defendant Made Up His Testimony

Defendant claims that his attorney was ineffective for not objecting to the State's cross-examination that allegedly implied Defendant made up his testimony in violation of Defendant's Fifth Amendment rights. Specifically, Defendant claims that the State's cross-examination suggested that he fabricated his testimony after hearing the DNA evidence. Defendant cites to the following testimony:

MR. HARMON: You've had a substantial period of time to think about today, haven't you?
DEFENDANT: Yes, sir.
MR. HARMON: You've known for quite a while, haven't you, that at some point you would take the witness stand and give the jury your version of what occurred?
DEFENDANT: Yes, sir.
MR. HARMON: And once you had made that decision, whenever it was, you've given a lot of attention to what you would tell the jury?

DEFENDANT: I didn't make up anything, sir.

MR. HARMON: I didn't say you made up anything, Mr. Chappell. Have you thought a lot about what you would tell the jury?
DEFENDANT: No.
MR. HARMON: Have you thought a lot about how you would act on the witness stand?
DEFENDANT: No, sir.

(AA 6:1471-72). The statements by the prosecutor were not a comment on Defendant's Fifth Amendment right to be present at trial. The prosecutor only asked Defendant if he had thought a great deal about his testimony. Defendant was the one who brought up the fact that his testimony was not fabricated. The exchange indicates that the prosecutor was only trying to demonstrate Defendant's bias and was not making a statement on Defendant's right to testify. As such, Defendant's attorney was not ineffective in not objecting to this line of questioning.

3. Failure to Strike Motion for Death Penalty Based on Race

Defendant claims that his attorney was ineffective for failing to strike the notice of intent to seek the death penalty based on the racially biased manner in which the death penalty is applied to African Americans. Defendant's claim is a naked allegation. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Defendant has failed to provide any evidence that the death penalty notice was filed against him based on his race alone. Although Defendant provided with his Petition Exhibit One indicating several other cases in which the death penalty was not sought, there has been no evidence that the death penalty was sought in Defendant's case based on his race. As such, Defendant's attorney was not ineffective in not moving to strike the death penalty based on race.

B. African Americans Were Not Systematically Excluded from the Jury

Defendant asserts that his constitutional rights were violated because the Clark County jury selection system systematically excludes African Americans. It should first be noted that this claim is not cognizable in this appeal. The district court denied this claim as it should have been addressed in Defendant's direct appeal and

Defendant provided no good cause to overcome the procedural bar. See NRS 34.810 (1)(b)(2). NRS 34.810(1)(b)(2) states that the Court shall dismiss a petition for habeas corpus if the defendant's conviction was based on a trial and the grounds could have been raised in a direct appeal or a prior petition for writ of habeas corpus unless the court finds both good cause for failure to bring such issues previously and actual prejudice to the defendant. See NRS 34.810(1)(b). Good cause is "an impediment external to the defense which prevented [the petitioner] from complying with the state procedural rules." Crump v. Warden, 113 Nev. 293, 298, 934 P.2d 247, 252 (1997).

Defendant's claim however is without merit. As discussed above, Defendant failed to establish a prima facie showing that the jury selection violates the fair cross-section requirement. The record indicates that a number of African Americans were originally in the jury pool and were dismissed based on their beliefs regarding the death penalty. As such, Defendant's rights have not been violated.

C. The Jury Instructions Were Not Improper

As argued above, this argument is not cognizable as the district court did not determine this issue on the merits as it was barred by NRS 34.810 (1)(b)(2). However, as the State argued above in II(A), these instructions were not improper.

D. The Application of Death Penalty was not Racially Motivated

Defendant asserts that the death penalty was inappropriately applied to him based on his race in violation of his constitutional rights. As argued above, this argument is not cognizable in this appeal as the district court did not address the merits of this claim, but rather found this claim to be barred pursuant to NRS 34.810 (1)(b)(2). This argument however is without merit. A defendant who seeks to assert an Equal Protection clause violation must prove that prosecuting authorities acted with discriminatory purpose in his particular case. McClesky v. Kemp, 481 U.S. 279, 292, 107 S.Ct. 1756, 1767 (1986). Defendant has provided no evidence that would support his inference that Defendant's race played a part in the prosecution's decision to seek the death penalty in his case. Instead, Defendant presents three completely

unrelated cases in which the death penalty was not sought. As Defendant has provided no evidence that the State acted with discriminatory purpose in prosecuting his case, he has failed to demonstrate a violation of the equal protection clause has occurred.

E. The Administration of Capital Punishment in Nevada is Not Arbitrary

Defendant argues that the imposition of the death penalty in Nevada is arbitrary and therefore, unconstitutional. This argument is also not cognizable as the district court did not address the merits of this claim. Both the United States Supreme Court and this Court have repeatedly upheld the constitutionality of the death penalty. Colwell v. State, 112 Nev. 807, 814, 919 P.2d 403, 408 (1996). Defendant's claim that the State of Nevada arbitrarily applies the death penalty is a naked allegation unsubstantiated by fact. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Defendant further adds that Court's holding in McConnell v. State, 102 P.3d 606 (2004) provides support for his argument that the death penalty is unconstitutional. This argument is not cognizable as McConnell was not raised in district court. Moreover, McConnell does not apply to the instant case. First and foremost, this Court has not yet determined that its holding in McConnell is to be applied retroactively. Furthermore, Defendant himself testified as to his pre-meditation and deliberation in committing this murder.

F. Appellate Counsel was not Ineffective

Defendant next argues that his appellate counsel was ineffective for failing to raise various issues in his direct appeal. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 395, 397, 105 S.Ct. 830, 836, 837 (1985); see also, Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test of Strickland v. Washington by demonstrating that: (1) counsel's representation fell below an

objective standard of reasonableness; and (2) but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687, 688 & 694, 104 S.Ct. at 2065 & 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

Further, there is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See, United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. This Court, although not yet affirming the decision of the federal courts, has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). Finally, in order to prove that appellate counsel's alleged error was prejudicial, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

Counsel is not required to assert frivolous claims on appeal. The Defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). However, the Defendant does not have the constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion, the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most, on a few key issues." Jones, 463 U.S. at 751-752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying the good arguments ... in a verbal mound made up of strong and weak contentions." Id. at 753, 3313. The Court has, therefore, held that for "judges to second guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim

suggested by a client would deserve the very goal of vigorous and effective advocacy." Id. at 754, 3314.

Similar to the standards of ineffective assistance regarding trial counsel, appellate counsel has the right and discretion to employ his professional knowledge and tactics in construing a defendant's appeal. Unless the Defendant can demonstrate that counsel did not provide "reasonably effective assistance," appellate counsel's professional conduct will be upheld as effective. See Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Love v. State, 109 Nev. 1138, 865 P.2d 323 (1993). The Defendant has not shown that appellate counsel acted unreasonably. Furthermore, appellate counsel did raise key issues on direct appeal. Obviously, appellate counsel focused on those issues that had the greatest chance of success on appeal and thus any argument of ineffectiveness is without merit.

1. Instructions were Proper

Defendant claims that his appellate counsel was ineffective for not raising claims on direct appeal regarding improper jury instructions. As argued above and will be argued in III below, the jury instructions were not improper. As the jury instructions were proper, Defendant cannot show his appellate counsel was ineffective.

2. Overlapping Aggravators

Defendant asserts that his appellate counsel was ineffective for failing to raise the issue of overlapping aggravating circumstances. As will be argued in Argument III below, such an argument would not have been successful as this Court has already determined that Burglary and Robbery aggravating circumstances can properly be proven and found. As such, Defendant's appellate counsel was not ineffective.

3. Prosecutorial Misconduct

Defendant claims that his appellate counsel was ineffective for failing to raise issues regarding instances of prosecutorial misconduct. As discussed above and will

be addressed below in Argument III, the prosecutor did not commit misconduct. Thus, Defendant's claim is without merit.

4. Application of Death Penalty Based on Race

This issue was addressed above. As it is without merit, Defendant cannot demonstrate that his appellate counsel was ineffective.

5. Victim Impact Testimony

Defendant claims that his appellate counsel was ineffective in not raising issues on appeal with regard to the testimony of the victim's mother and aunt. As will be argued further in Argument III, this claim is belied by the record as Defendant's counsel did indeed raise this issue on direct appeal. See Chappell, 114 Nev. at 1411, 972 P.2d at 843; Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Moreover, this testimony was not improper. Thus, Defendant's appellate attorney was not ineffective for not raising this issue on appeal.

6. Improper Cross-examination of Defendant

Defendant claims that his appellate counsel was ineffective in not raising an issue with regard to the cross-examination of Defendant. As argued above, this issue is without merit. As such, Defendant cannot demonstrate his appellate attorney was ineffective.

III

THE DISTRICT COURT ERRED IN FINDING THE SOLE ISSUE OF FAILURE TO CALL PENALTY PHASE WITNESSES SUFFICIENT TO GRANT A NEW PENALTY HEARING

The district court granted Defendant a new penalty hearing on the sole assignment of error that Defendant's counsel was ineffective for failing to locate and call certain witnesses to testify during the penalty phase of Defendant's case. The district court did not address the merits of Defendant's other claims. As such, as argued in I above, Defendant's arguments in his opening brief regarding other assignments of error during the penalty phase are not cognizable in this appeal. The State however will address the merits of each issue below.

A. Trial Counsel's Inability to Locate Certain Mitigating Witnesses Did Not Warrant Reversal of Defendant's Sentence

The district court concluded that Defendant's Counsel was ineffective for failing to locate and call the following witnesses to testify: Shirley Sorrell, James Ford, Ivri Marrell, Chris Bardow, David Green, Benjamin Dean, Clara Axam, Barbara Dean, and Earnestine Harvey.

Defendant's trial attorney Howard Brooks testified at the evidentiary hearing that he traveled to Michigan in an attempt to locate these witnesses, and could not find them. (AA 11: 2561-2595). According to Defendant, these witnesses could have testified that Defendant and the victim had a loving relationship. A close examination of the affidavits however reveals that the testimony of these witnesses would not have changed the outcome of defendant's penalty hearing.[1]

1. Shirley Sorrell stated in her affidavit that she knew Defendant and the victim during junior high and high school in Michigan. (AA 11: 2667-2668). She stated that the victim's family was prejudiced toward Defendant and that Defendant and the victim argued a lot. The victim was controlling and had accused defendant of infidelity. Id. Such testimony is not particularly relevant or mitigating in nature such that the penalty might have been different if Shirley Sorrell had testified.

2. James Ford stated in his affidavit that he based the contents of his affidavit on the "collective recollection" between himself, Ivri Marrell, and Benjamin Dean. (AA 11: 2682-2684). Ford stated that the victim and Defendant had a very strained relationship due to the victim's family being prejudiced toward Defendant and the victim being very jealous. Ford stated that though Defendant was not a violent person to his knowledge, if Defendant became addicted to crack while living in Las Vegas, "that may have changed him." James Ford's testimony regarding the true character of

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[1] It should be noted that Defendant's present counsel could not locate either David Green or Earnestine Harvey. AA 11: 2672-2674 (affidavit of Reefer). Additionally, Chris Birdow did not remember much about Chappell and only knew him socially through David Green. AA 11: 2673.

the relationship between the defendant and the victim may have been relevant at trial, but offers little in the way of mitigating evidence.

3. Ivri Marrell stated in his affidavit that he knew the Defendant during high school and for a short time after high school. (AA 11: 2676-2678). Marrell stated that he has no knowledge of anything that happened after Defendant moved to Tucson. Marrell also stated that if Defendant became addicted to crack cocaine, "that may have changed him." Id. Marrell believes he could have rebutted many inaccurate things at trial about defendant and the victims' relationship. However, his testimony would have been only marginally relevant at the penalty phase.

4. Benjamin Dean stated that Defendant confided in him that he felt that the victim was very controlling of him. (AA 11: 2679-2681). Dean believes he could have countered "some of the negative testimony from the trial about James," even though trial counsel had actually contacted and spoken with him. Id.

5. Clara Axam actually testified at the penalty hearing, but was not asked to testify during the trial portion of the case. (AA 11: 2665-2666). The district court judge ruled that "none of the claimed trial errors would have affected the outcome of the trial." (AA 11: 2717). Accordingly, this witness' affidavit does not support the granting of a new penalty hearing.

6. Barbara Dean stated that she knew Defendant while he was in elementary school. (AA 11: 2669-2671). Dean was contacted by the trial counsel and investigator, but her health would have prohibited her from traveling to Las Vegas to testify even if she were called. Id.

While the above witnesses may have had good things to say about Defendant's character, none of them had any knowledge of Defendant's character or his relationship with the victim after Defendant and the victim had moved to Las Vegas. In fact, it is quite clear that all of these individuals had lost all contact with Defendant. Moreover, much of what these witnesses stated in their affidavits focused on how Defendant was treated by the victim and her family.

At the penalty hearing, trial counsel offered the testimony of three witnesses. William Moore, Chappell's juvenile probation officer from Michigan, testified to Chappell's troubled home life, difficulty in school, and activities as a youth. (AA 8: 1983-2002). Clara Axam, the grandmother who raised defendant upon the death of his mother, testified that Chappell was mentally slow and non-violent. (AA 8: 2004-2008). Finally, Sharon Axam, defendant's aunt, testified to the impact of his mother's death when he was two-years old, but that he was non-violent as a child. (AA 8: 2009-2012). In allocution, defendant expressed his love for the victim and his desire to maintain contact with his children. (AA 8: 2012-2013).

Overwhelming evidence was presented in support of the four aggravating circumstances found by the jury. Trial counsel and an investigator traveled to Michigan to locate witnesses, but were only marginally successful. Just because certain childhood acquaintances of defendant are located now, does not mean it was error for trial counsel to not locate them at the time. The proffered affidavits from the new witnesses pertain primarily to the nature of the relationship between the defendant and the victim and none had personal knowledge of the acts of domestic violence introduced by the State. The defendant had already testified at trial to the same facts and details that these witnesses would have testified to at the penalty hearing. (AA 6: 1424-1527). At trial, the defendant testified to the hostility he received from the victim's family (AA 6: 1426-1435), his drug usage (AA 6: 1428, 1438-1439, 1443), and his past domestic violence and threats against the victim (AA 6: 1439-1447). Having additional witnesses testify at the penalty hearing would have been cumulative to the defendant's trial testimony, and in some cases would have directly contradicted the defendant's sworn testimony. It is highly unlikely that had the jury heard their testimony, they would have reached a verdict different than death.

B. Defendant's Remaining Claims Regarding the Penalty Phase of his Trial Warranted no Relief Use of Character Evidence

Defendant argues that the failure to properly apprise the jury of the use of character evidence in a penalty hearing violated his constitutional rights. As argued above, this issue is not properly before the court as the district court determined that it was barred by NRS 34.810 (1)(b)(2). However, even based on its merits this claim deserves no relief. The jury was given instructions seven and eight. They read as follows:

> The jury may impose a sentence of death only if (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances or circumstances found.
>
> The law never requires that a sentence of death be imposed; the jury however, may only consider the option of sentencing the Defendant to death where the State has established beyond a reasonable doubt that an aggravating circumstance or circumstances exist and the mitigating evidence is not sufficient to outweigh the aggravating circumstance.

(AA 9:2139-2140). These two jury instructions made it clear that the jury could not sentence Defendant to death based on character evidence presented during the penalty hearing. Further, the jury found four aggravating factors and found that these factors outweighed the mitigating circumstances. (AA 9:2167-2169). Thus, it is clear that the jury followed the instructions above. As such, the failure to instruct the jury that they could not consider character evidence prior to finding aggravating circumstances could be nothing more than harmless error. Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 826 (1967).

Instruction regarding sympathy

Defendant claims that the jury was improperly instructed that it could not consider sympathy in mitigation of the death penalty. Specifically, Defendant claims that this instruction undermined the jury's ability to consider mitigating evidence. Further

Defendant claims that both his trial and appellate counsel were ineffective in not raising this issue.

In this case, the jury was given instruction number twenty-eight which reads:

> Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.
> A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

(AA 9:2160). Defendant's claim that this instruction restricted the jury's consideration of mitigating factors has previously been rejected by this Court. Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994). This Court has approved the instruction above so long as the jury is instructed to consider the mitigating circumstances placed before it. Id. In the instant case, jury instruction twenty-two listed the mitigating factors for first degree murder. (ROA Vol. 11 p.2153). In addition, instruction number thirty advised the jury:

> The Court has submitted two sets of verdicts to you. One set of verdicts reflects the four possible punishments which may be imposed. The other verdicts are special verdicts. They are to reflect your findings with respect to the presence or absence and weight to be given any aggravating circumstance and any mitigating circumstance.

(AA 9:2162). It is evident from the record that the jury was instructed to consider mitigating circumstances. As such, the antisympathy jury instruction was not improper. See Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994).

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Instruction regarding non-statutory mitigation

Defendant claims that his eighth and fourteenth amendment rights were violated when the District Court did not give a jury instruction delineating the mitigating factors he claimed were present in addition to the statutory mitigating factors. This claim is without merit. In Byford v. State, 994 P.2d 700, 715 (2000), the defendant claimed that the district court had erred in refusing to give the jury an instruction regarding specific mitigating factors. This Court found that the defendant had not properly preserved the issue for appeal. Id. Further, this Court explained that even if the District Court erred in not giving the instruction, it did not violate the eighth and fourteenth amendments pursuant to a Supreme Court decision in Buchanan v. Angelone, 522 U.S. 269, 275, 118 S.Ct. 757, 761 (1998). This Court further explained that the defendant had been given the opportunity to argue the additional mitigating factors during the penalty hearing. Id. As in Byford, Defendant's constitutional rights were not violated when the special jury instruction was not given. Further, instruction number twenty-two indicated that the jury could consider any other mitigating factor. (AA 9:2154).

Overlapping Aggravating Circumstances

Defendant asserts that the State's use of overlapping aggravating circumstances to impose the death penalty was unconstitutional. Furthermore, Defendant claims that his trial counsel was ineffective for failing to move to strike the aggravating circumstances of burglary and robbery and his appellate counsel was ineffective for failing to raise this issue on appeal. It is well settled that the use of burglary and robbery as aggravating factors is not improper. In Bennett v. State, 106 Nev. 135, 142, 787 P.2d 797, 801 (1990), the defendant argued that the State had improperly used burglary and robbery as two separate aggravating factors even though the charges arose out of the same indistinguishable course of conduct. Id. In disagreeing with the defendant, this Court reasoned that because defendant could be prosecuted for both crimes separately and because convictions of both burglary and robbery do

not violate the double jeopardy clause as they are separate and distinct offenses they could be used separately as aggravating factors. Id. See also Wilson v. State, 99 Nev. 362, 376, 664 P.2d 328, 336 (1983) (where the court found that any enumerated felonies that are committed during the course of a murder can be aggravating factors). Thus, it was not improper for the State to use robbery, burglary and sexual assault as aggravating factors, and therefore, neither trial counsel nor appellate counsel was ineffective for not raising this issue.

Defendant further argues in his instant brief that this Court's holding in McConnell v. State, 120 Nev. ___, 102 P.3d 606 (2004) precludes the State's use of the burglary, robbery, and sexual assault aggravating circumstances. It is important to first note that this argument is not cognizable as it was not raised in the district court. However, this claim has no merit. First, this Court has yet to determine whether its holding in McConnell applies retroactively. As this Court stated in it's opinion denying rehearing, the McConnell decision constitutes a new rule that does not apply to convictions which are final. Defendant's conviction has been final since 1999. Even if this Court were to apply McConnell retroactively to the instant appeal, that does not mean that the aggravating circumstances must be stricken. To the contrary, there was overwhelming evidence of premeditation and deliberation in this case. Defendant himself testified that after breaking into the victim's home and having sex with her, he discovered a letter written to the victim by another man. Defendant testified that after discovering this letter in the car, he dragged the victim back into the trailer and stabbed her numerous times.

Claims of Prosecutorial Misconduct

Defendant claims that there were several instances of prosecutorial misconduct during the penalty phase that his counsel was ineffective for not objecting to during the trial and his appellate counsel was ineffective for not raising on direct appeal.

a. This is Not a Rehabilitation Hearing

Defendant first claims that the following statement was inappropriate.

> And this is a penalty hearing. It's a penalty hearing because a violent murder occurred on August 31st of 1995. So it's not appropriate for you to be considering rehabilitation. This isn't a rehabilitation hearing.

(ROA Vol. 11 p.2017). The State submits that this comment was not improper. In Evans v. State, 117 Nev. 1606, 15, 28 P.3d 498, 514 (2001), the defendant argued misconduct occurred when the prosecutor offered his view that the penalty hearing was not a rehabilitation hearing but was for the purpose of retribution and deterrence. Specifically, the prosecutor said, "in my view, based upon this evidence, such a person has forfeited the right to continue to live." Id. This Court determined that there was no error in the prosecutor's remarks and explained:

> A prosecutor in a penalty phase hearing may discuss general theories of penology, such as the merits of punishment, deterrence, and the death penalty. And statements indicative of opinion, belief, or knowledge are unobjectionable when made as a conclusion from the evidence introduced at trial.

Id. Thus, Defendant is incorrect in asserting that the prosecutor committed misconduct when he made the statement above. During closing argument in the penalty phase of the trial, the prosecutor expressed her view that the hearing was not a rehabilitation hearing. The prosecutor was merely commenting on theories of penology with regard to rehabilitation. As such, Defendant's counsel was not ineffective in failing to object, and his appellate counsel was not ineffective for not raising this issue on appeal.

b. Reference to Facts Not in Evidence

Next Defendant claims that the prosecutor improperly introduced facts that were not in evidence at the penalty hearing. The guilt phase and the penalty phase in a capital case are separate proceedings and what is inadmissible in one may be admissible in the other. Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996). The evidentiary rules are less stringent in a penalty phase of the trial. Id. Evidence which may not ordinarily be admissible at trial may be admitted in the penalty phase as long as the evidence does not draw its support from impalpable or highly suspect evidence. Id. In this case, the prosecutor's statements were made as a commentary on the merits

of the death penalty. As such, they were proper. See Evans v. State, 117 Nev. 1609, 28 P.3d 498, 514 (2001). Defendant has failed to demonstrate that his counsel was ineffective in not objecting.

c. Inflammatory Statement During Closing at Penalty Hearing

Defendant claims that his attorney was ineffective for failing to object to the prosecutor's inflammatory statement during closing argument. See Appellant's Opening Brief p. 26. This Court has expressly held that a prosecutor may comment on the loss experienced by the family of a murder victim. Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994). In the instant case, the prosecutor's statement was a comment on the effect Deborah Panos' murder had on her family and was, therefore, proper. Additionally, in Evans v. State, 117 Nev. 1609, 28 P.2d 498, 514 (2001), this Court found that the statement by the prosecutor that Defendant was "an evil magnet" was not improperly inflammatory. Likewise, the statements made by the prosecutor during closing argument at the penalty hearing were not improperly inflammatory. Reference to the fact that the victim died, that her death impacted her children did not unduly prejudice Defendant. Thus, Defendant's attorney was not ineffective in not objecting to the statements.

d. Statement Regarding Sending a Message to the Community

Defendant also claims that his attorney was ineffective for not objecting when the prosecutor encouraged the jury to send a message to the community. In his rebuttal closing argument during the penalty phase, the prosecutor made the following statement:

> My partner also mentioned deterrence. There's nothing illegitimate about deterrence as a factor to be considered. You have it in this case, as the ladies and gentlemen of this jury, within your power to guarantee by the punishment you impose that Mr. Chappell never makes another woman a corpse. You can certainly deter him and you have it within your power to send a message today out into this community, which is we do not tolerate those who have a history of domestic violence, who will let it accelerate and become a murderer and you can tell the other would be James Chappell's what the consequence is when you engage in that type of action.

(AA, 8:2021). A prosecutor may ask a jury to make a statement to the community. Williams v. State, 113 Nev. 1008, 1019, 945 P.2d 438, 444 (1997). In Williams, the prosecutor remarked, "Do not let the system fail them again. When we failed them in the first instance it cost their lives. Should we fail in this instance it will take away the meaning and dignity of their lives." This Court found that this statement was not misconduct and explained that the prosecutor, "may ask the jury, through its verdict, to set a standard or make a statement to the community." Id. at 1020. Similar to the prosecutor in Williams, the prosecutor in this case was asking the jury to make a statement to the community and specifically to the defendant. This comment does not amount to prosecutorial misconduct and Defendant's attorney was not ineffective in not objecting.

e. Argument regarding Victim Impact

Defendant claims that his attorney was ineffective for failing to object to misconduct when the State introduced victim impact testimony during the trial phase. Defendant's claim is without merit. Defendant argues that the prosecutor improperly admitted victim impact testimony during the penalty phase when he referenced the loss of Deborah Ann Panos and her children during his closing argument.

> All evil required was a kitchen knife, Exhibit 68-A-1. Not a large knife, but deadly in its consequences for Deborah Panos. All evil required was a cowering victim. Deborah Ann Panos, 26 years of age, the mother of three little children aged seven, five, and three. Where the promise of her years once written on her brow? Where sleeps that promise now?

(AA 7:1608). This Court has expressly held that a prosecutor may comment on the loss experienced by the family of a murder victim. Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994). In Lay, this Court found that the following statement during the prosecutor's closing argument was not reversible error:

> On the night of June 4th, 1990, society received a great loss and a life was taken from us. Richard Carter's family and friends can no longer have the opportunity to see him.

The statement made by the prosecutor in the instant case is similar to that above. A passing reference to the fact that the victim had three children hardly constitutes victim impact testimony. The State did not commit prosecutorial misconduct in making the statement above. As such, Defendant's attorney was not ineffective in not objecting.

Testimony of Victim's Aunt and Mother

Defendant claims that he received ineffective assistance of counsel when his attorney failed to object to the testimony of the victim's mother, Norma Penfield, and aunt, Carol Monson, during the penalty hearing. Defendant claims that the witnesses improperly requested the jury to give Defendant the death penalty.

The victim's mother made the following statements at the penalty phase of the hearing.

> My only wish now is that justice will punish to the fullest the person who took her life.
> I feel the system has let her down once. I hope to heaven they don't do it again.

(AA 8:1965, 1975). The statements of the victim's mother were not inappropriate. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991). The statements in the instant case are similar to those made by the victims in the case of Witter v. State, 112 Nev. 908, 922, 921 P.2d 886, 896 (1996). The family in Witter asked the jury to show no mercy to the defendant. Id. The family also said that they wanted to do everything in their power to make sure the defendant would not receive mercy. Id. In Witter, this Court ruled that the statements of the victim's family were intended to ask the jury to return the most severe verdict it deemed appropriate not to request a specific sentence. Similarly, the statements made by the victim's mother in this case were asking the jury to return the harshest punishment they could. They were not improper. Id.

During the penalty phase, the aunt of the victim made the following statement. "We only pray now that justice will do what it needs to do and not fail her children again. By that, I mean to give James what he gave Debbie, death." (AA 8:1961). This statement was addressed in Defendant's direct appeal. This Court already concluded that this issue lacked merit. Chappell, 114 Nev. 1411, 972 P.2d 843. In this case, the jury found four aggravating factors. Where aggravating factors have been proven, this error could amount to nothing more than harmless error. See Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827 (1967). Defendant's attorney was not ineffective in not objecting to these statements.

CONCLUSION

For the aforementioned reasons the State respectfully requests theat Cappell's appeal be denied and that the State's appeal be granted.

Dated this 31st day of May, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #000439

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(702) 455-4711

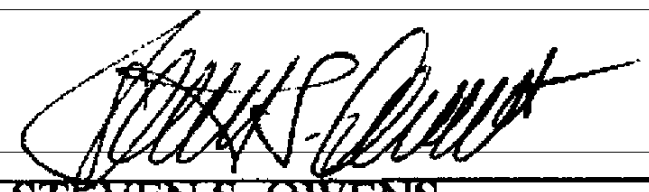
CERTIFICATE OF COMPLIANCE

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 May, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY 

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief On Appeal And Opening Brief On Cross-Appeal to the attorney of record listed below on this 31st day of May, 2005.

David M. Schieck
Clark County Special Public Defender
333 South Third Street, 2nd Floor
Las Vegas, Nevada 89155 - 2316

Employee, Clark County
District Attorney's Office

OWENS/Noreen Nyikos/english

EXHIBIT 248

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE REVIEW OF ISSUES CONCERNING REPRESENTATION OF INDIGENT DEFENDANTS IN CRIMINAL AND JUVENILE DELINQUENCY CASES.

ADKT No. 411

FILED

JAN 04 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER

WHEREAS, the United States and Nevada constitutions provide that every individual charged with a serious crime is entitled to legal representation, even if that individual cannot afford counsel, and competent representation of indigents is vital to our system of justice; and

WHEREAS, on April 26, 2007, the Nevada Supreme Court ordered that the Indigent Defense Commission be created for the purposes of studying the issues and concerns with respect to the selection, appointment, compensation, qualifications, performance standards and caseloads of counsel assigned to represent indigent defendants in criminal and juvenile delinquency cases throughout Nevada and designated the Honorable Michael A. Cherry, Associate Justice, as chair of the Commission; and

WHEREAS, the Commission conducted a statewide survey of indigent defense services in June and July 2007, met numerous times between May 2007 and October 2007, formed subcommittees, and completed a report on the matter; and

WHEREAS, on November 20, 2007, the Commission filed its report with this court making numerous unanimous recommendations to promote the independence of the court-appointed public defense system,

establish performance and caseload standards for public defenders,[1] and ensure the consistency of indigent defense in the rural counties; and

WHEREAS, this court conducted public hearings on December 14, 2007, and December 20, 2007, to consider the Commission's report and hear public comment on the issues concerning the defense of indigents; accordingly,

IT IS HEREBY ORDERED that the following recommendations from the Commission's report are adopted.

Determination of Indigency

WHEREAS, any defendant charged with a public offense who is indigent may request the appointment of counsel by showing that he is without means to employ an attorney and suffers a financial disability;[2] and

WHEREAS, the methods utilized in Nevada's courts and public defender offices to determine who is eligible for defense services at public expense vary widely;

IT IS HEREBY ORDERED that effective immediately, the standard for determining indigency shall be:

> A person will be deemed 'indigent' who is unable, without substantial hardship to himself or his dependents, to obtain competent, qualified legal counsel on his or her own. 'Substantial hardship' is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid,

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[1]The Commission's report included two separate minority reports specifically relating to uniform caseload standards and opposing the imposition of such standards.

[2]NRS 171.188

Disability Insurance, reside in public housing, or earn less than 200 percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial hardship if he or she is currently serving a sentence in a correctional institution or housed in a mental health facility.

Defendants not falling below the presumptive threshold will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of charges being faced, monthly expenses, and local private counsel rates, would result in a substantial hardship were they to seek to retain private counsel.

Independence of the Court-Appointed Public Defense System from the Judiciary

WHEREAS, participation by the trial judge in the appointment of counsel, other than public defenders and special public defenders, and in the approval of expert witness fees and attorney fees creates an appearance of impropriety; and

WHEREAS, the appointment of counsel, approval of fees, and determination of indigency should be performed by an independent board, agency, or committee, or by judges not directly involved in the case;

WHEREAS, the selection of lawyers, other than public defenders and special public defenders, to represent indigent defendants should be made by the administrators of an indigent defense program; and

WHEREAS, the unique circumstances and case management systems existent in the various judicial districts require particularized administrative plans to carry out the recommendations of the Commission contained on page 11 of the Report;

IT IS HEREBY ORDERED that each judicial district shall formulate and submit to the Nevada Supreme Court for approval by May 1,

2008, an administrative plan that excludes the trial judge or justice of the peace hearing the case and provides for: (1) the appointment of trial counsel, appellate counsel in appeals not subject to the provisions of Nevada Rule of Appellate Procedure 3C, and counsel in post-conviction matters; (2) the approval of expert witness fees, investigation fees, and attorney fees; and (3) the determination of a defendant's indigency in the courts within the district; and

IT IS FURTHER ORDERED that each municipal court shall submit any existing administrative plan or formulate and submit to the Nevada Supreme Court for approval by May 1, 2008, an administrative plan that excludes the trial judge or justice of the peace hearing the case and provides for: (1) the appointment of trial counsel and appellate counsel; (2) the approval of expert witness fees, investigation fees, and attorney fees; and (3) the determination of a defendant's indigency in each of their courts.

Performance Standards

WHEREAS, the paramount obligation of criminal defense counsel in indigent defense cases is to provide zealous and quality representation at all stages of criminal proceedings, adhere to ethical norms, and abide by the rules of the court; and

WHEREAS, the performance standards unanimously recommended by the Commission provide guidelines that will promote effective representation by appointed counsel;

IT IS HEREBY ORDERED that the performance standards contained in Exhibit A to this order are to be implemented effective April 1, 2008.

Caseload Standards

WHEREAS, the average caseload for attorneys in the Clark County Public Defender's Office was 364 felony and gross misdemeanor cases in 2006, and the average caseload for attorneys in the Washoe County Public Defender's Office was 327 felony and gross misdemeanors; and

WHEREAS, the National Legal Aid and Defender Association has set the recommended caseload standard for attorneys handling felony cases at 150 per attorney;[3] and

WHEREAS, a majority of the Commission concludes that caseloads in Clark County and Washoe County substantially exceed recommended caseloads and that a caseload standard of no more than 192 felony and gross misdemeanors per attorney should be implemented; and

WHEREAS, by any reasonable standard, there is currently a crisis in the size of the caseloads for public defenders in Clark County[4] and Washoe County; and

WHEREAS, Nevada Rule of Professional Conduct 6.2(a) provides that good cause exists for a lawyer to seek to avoid appointment to represent a person where accepting the appointment is likely to result in violation of the Rules of Professional Conduct or other law; and

WHEREAS, Nevada Rules of Professional Conduct 1.1 and 1.3 require a lawyer to refrain from taking on more cases than he or she can competently and diligently handle; and

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[3]We note that, contrary to the statement in the Commission's report, the American Bar Association has not adopted the NLADA's standards, which have been in existence since 1973 without any material change.

[4]Notwithstanding the excessive caseload for public defenders in Clark County, we note that the Clark County Commission added only a single deputy public defender position in the most recent budget.

WHEREAS, the public defenders in Clark County and Washoe County have deferred advising the county commissioners of their unavailability to accept appointments even if accepting further appointments might compromise the ability of the public defenders to represent their clients; and

WHEREAS, Clark County and Washoe County requested the opportunity to perform and have agreed to fund a weighted caseload study prior to the adoption of any uniform caseload standards; and

WHEREAS, the court believes such a study would benefit the Nevada State Public Defender's Office; and

WHEREAS, the performance of a recognized weighted caseload study requires extensive timekeeping which will impose additional work on the public defenders, further limiting the public defender's ability to represent indigent defendants in criminal and juvenile delinquency cases;[5] and

WHEREAS, the public defenders recognize that the adoption of uniform caseload standards would require a period of gradual implementation; accordingly,

IT IS HEREBY ORDERED that the public defenders in Clark County and Washoe County shall advise the county commissioners of their respective counties when they are unavailable to accept further appointments based on ethical considerations relating to the their ability to comply with the performance standards contained in Exhibit A to this order and to represent their clients in accordance with the Rules of Professional Conduct, and that

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[5]The Nevada State Public Defender's Office already maintains timekeeping records from which a weighted case study can be prepared for that office.

the decision to advise the county commissioners of unavailability shall take into consideration any additional requirements placed on the public defenders' offices in order to prepare a weighted caseload study; and

IT IS FURTHER ORDERED that the Clark County Public Defender and the Washoe County Public defender shall each perform weighted caseload studies for their offices according to a recognized protocol for both criminal and juvenile delinquency cases, taking into consideration the approved performance standards, and submit the results to the Nevada Supreme Court by July 15, 2008; and

IT IS FURTHER ORDERED that the Nevada State Public Defender's Office shall perform a weighted caseload study according to a recognized protocol for both criminal and juvenile delinquency cases, taking into consideration the approved performance standards, and submit the results to the Nevada Supreme Court by July 15, 2008;[6] and

IT IS FURTHER ORDERED that consideration of the implementation of caseload standards will be continued at a hearing to be held at 2:00 p.m. on Friday, September 5, 2008; and

IT IS FURTHER ORDERED that the Administrative Office of the Courts shall develop a method of retrieving uniform statistics regarding the nature and quality of services to indigent defendants including, but not necessarily limited to, demographic data regarding the age, sex, race and ethnicity of each defendant represented; and

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[6]The Commission unanimously recommended that indigent defendants in all counties, except Clark, Elko and Washoe, be represented by the Nevada State Public Defender's Office, which office should be funded entirely by the state general fund. The court has directed supplemental briefing from the Nevada State Public Defender's Office on this issue and will further consider the Commission's recommendation on August 26, 2008.

IT IS FURTHER ORDERED that a permanent statewide commission for the oversight of indigent defense shall be established and appointed by the Nevada Supreme Court with the advice of the Indigent Defense Commission.

Dated this 4th day of January, 2008.

Hardesty, J.

We concur:

Gibbons, J.

Parraguirre, J.

Douglas, J.

MAUPIN, C.J., with whom CHERRY and SAITTA, JJ., agree, dissenting in part:

I agree with the majority with one exception. Based upon my own experience as a practicing lawyer and a former public defender, I believe that any weighted caseload study will confirm the validity of the Commission's recommendations for the implementation of caseload standards. In my view, these standards should be adopted effective July 1, 2008.[7]

_____, C.J.
Maupin

We concur:

_____, J.
Cherry

_____, J.
Saitta

cc: Members of the Indigent Defense Commission
Kathy A. Hardcastle, Chief Judge, Eighth Judicial District
Charles J. Short, Court Executive Officer
Hon. Jerome M. Polaha, Chief Judge
Howard W. Conyers, Washoe District Court Clerk
All District Court Judges
Administrative Office of the Courts

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[7]In this, I suspect that the caseload standards may actually be too rigorous to satisfy the Sixth Amendment to the United States Constitution.

NEVADA INDIGENT DEFENSE
STANDARDS OF PERFORMANCE

CAPITAL CASE REPRESENTATION

Standard 1: The Defense Team and Services of Experts in Capital Cases

(a) The Defense Team

The defense team should:

1. consist of no fewer than two attorneys qualified in accordance with Standard 2, an investigator, and a mitigation specialist; and
2. contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

(b) Expert and Ancillary Services

1. Counsel should:
   (A) secure the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high-quality legal representation at every stage of the proceedings;
   (B) have the right to have such services provided by persons independent of the government; and
   (C) have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.
2. The appointing authority should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

Standard 2: Appointment, Retention, and Removal of Defense Counsel

(a) Qualifications of Defense Counsel

1. The appointing authority should develop and publish qualification standards for defense counsel in capital cases. These standards should be

construed and applied in such a way as to further the overriding goal of providing each client with high-quality legal representation.

2. In formulating qualification standards, the appointing authority should ensure that every attorney representing a capital defendant has:
   (A) obtained a license or permission to practice in the jurisdiction;
   (B) demonstrated a commitment to providing zealous advocacy and high-quality legal representation in the defense of capital cases; and
   (C) satisfied the training requirements set forth in Standard 3.
3. The appointing authority should ensure that the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high-quality legal representation. Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:
   (A) substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases and skill in the management and conduct of complex negotiations and litigation;
   (B) skill in legal research, analysis, and the drafting of litigation documents;
   (C) skill in oral advocacy;
   (D) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
   (E) skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
   (F) skill in the investigation, preparation, and presentation of mitigating evidence; and
   (G) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

(b) Workload

The appointing authority should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with

responsible for the care of small children. The $30 fee paid after five days of jury duty, while more substantial, is still inadequate.

Although many states compensate jurors at a poor rate, those states that have reviewed their jury compensation levels have recommended substantial increases. Leading the increases are New York at $40 a day, and Colorado, Connecticut and Massachusetts at $50 per day.[32] New Mexico pays the minimum wage of $5.15 per hour, making that jury fee schedule one of the highest if jurors serve eight-hour days.[33]

The Commission believes that $40 per day is the minimum amount for jury service and the minimum amount that should be paid to a person sitting on a jury in Nevada.

To reduce the fiscal impact on the counties, payment should not begin until a juror has begun hearing the case or until after a prospective juror has spent two days at the courthouse without being selected, whichever occurs first. Jurors who are selected to serve on a jury should receive $40 per day, as should any prospective juror who must come to the courthouse for more than two days for jury selection.

Because the $9 appearance compensation is inconsequential and the administrative costs to disburse these checks are high, the Commission recommends that appearance compensation be abolished.

This proposal's financial impact on most counties is charted on the following page.

Whatever rate of jury compensation the Legislature sets, it would be wise to periodically review and adjust it. Any new legislation affecting juror compensation ought to include a provision for regularly scheduled legislative review.

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[32] G. Thomas Munsterman, What Should Jurors be Paid?, 16 The Court Manager 2, 12.
[33] Id.

TABLE 1

JURY FEES: Statistics and Projected Impact (1)

County	Trials	Total Jury Fees Paid	Appearance Fees Paid	Fees Paid to Selected Jurors	Projected Fees at $40 (2)	Projected Savings (3)	Projected Costs (4)
Clark	254	$482,695	$385,640	$97,055	$259,136	$223,559	
Washoe	97	$102,339	$49,338	$53,001	$141,512		$39,173
Carson City	9	$7,956	$2,961	$4,995	$13,336		$5,380
Churchill	3	$2,061	$1,710	$351	$937	$1,124	
Douglas	5	$11,307	$8,172	$3,135	$8,370	$2,937	
Elko	19	$34,703	$9,750	$16,293	$43,502		$8,799
Esmeralda	1	$1,022	$695	$327	$873	$149	
Eureka	0						
Humboldt	4	$3,006	$1,233	$1,773	$4,733		$1,727
Lander	0						
Lincoln	1	$993	$603	$390	$1,041		$48
Lyon	6	$11,073	$7,117	$3,955	$10,559	$514	
Mineral	1	$627	$432	$195	$520	$107	
Nye	13	$7,963	$4,453	$3,510	$9,371		$1,408
Pershing	1	$1,787	$1,319	$466	$1,244	$543	
Storey	2	$1,954	$768	$1,039	$2,774		$820
White Pine	10	$7,705	$4,340	$3,364	$8,981		$1,276
TOTALS	426	$677,191	$478,531	$189,849	$506,889	$228,933	$58,631

TOTAL ESTIMATED SAVINGS - $170,302 (5)

(1) All figures from fiscal year 2000-01, provided by court/county clerks

(2) Calculated by multiplying the "Fees Paid to Selected Jurors" by 2.67 to establish the difference between the $15 per day currently paid and the $40 per day fee recommended by the Jury Improvement Commission. The Commission also recommends abolishing appearance fees (currently $9 per day until a summoned citizen is seated on a jury or dismissed and sent home) for two days of the jury selection process. While jurors are paid $30 per day after serving five days, the $15 level was used to demonstrate the most adverse impact the proposed change might have.

(3) The counties that are projected to realize savings in jury fees and the amounts saved if the recommended increase in jury fees to $40 per day and abolition of appearance fees for two days had been in effect.

(4) The counties that are projected to face additional costs in jury fees and the amounts if the recommended increase in jury fees to $40 per day and abolition of appearance fees for two days had been in effect.

(5) Total jury fees paid minus projected jury fees at $40

STATISTICS ARE FOR BROAD COMPARISONS ONLY

The projected figures reflect what the cost and impact on counties would have been had the Commission's recommendations been in place during fiscal year 2000-01. They are calculated at the highest level possible to ensure there is no likelihood of underestimating the impact. Specifically, the projection assumes all jurors in that fiscal year were paid at the $15 per day rate when, in reality, a portion of the jurors were compensated at the $30 per day rate because they served more than five days. All jury fees are reflected, even though jurors' compensation in civil trials is the responsibility of the parties.

The figures in the statistical evaluation are offered for broad comparisons only since there are many variables in the system, such as the number and length of trials, number of alternate jurors, last minute settlements that result in summoned citizens being sent home, number of jurors summoned and whether the trials are civil or criminal.[34] The greatest variable involves the number of jury trials held in rural judicial districts. Although the number of trials in Clark and Washoe counties remained relatively constant, the number of trials (and consequently the number of citizens summoned to jury duty) can and do increase or decrease dramatically from year to year.

Despite these variables and the projection of fiscal impact at the highest rate, it is clear that adopting the Commission's recommendations would have a minor negative impact on about half the counties and cause a fiscal savings in the other half. While it would have cost Washoe County a few thousand dollars had the recommended jury fee reforms had been enacted, Clark County would have saved nearly a quarter of a million dollars.[35]

[34] Civil Trials have eight jurors plus alternates, if any, while criminal trials have 12 jurors plus alternates, if any.
[35] See Table 3: Jury and Mileage Fees: Projected Impact.

TABLE 2

MILEAGE FEES: Statistics and Projected Impact

County	Mileage Fees Paid (1)	% of Jurors From Beyond 65 Miles (2)	% and Costs For 65-mile Jurors (3)	Projected Mileage Fees (4)	Projected Savings (5)	Projected Costs (6)
Clark	$181,710	3.4%	7% or $12,500	$22,812	$158,898	
Washoe (7)	$24,458	-0-	-0-	-0-	$24,458	
Carson City (8)	-0-	-0-	-0-	-0-	-0-	
Churchill (7)	$352	-0-	-0-	-0-	$352	
Douglas (7)	$3,127	-0-	-0-	-0-	$3,127	
Elko	$8,432	9%	62% or $4,835	$8,823		$391
Esmeralda	$180	39%	47% or $84	$153	$27	
Eureka (9)	-0-	-0-	-0-	-0-	-0-	
Humboldt	$520	2.5%	25% or $130	$237	$283	
Lander (9)	-0-	-0-	-0-	-0-	-0-	
Lincoln	$689	14%	58% or $402	$733		$44
Lyon	$3,018	2.5%	8% or $241	$440	$2,578	
Mineral (7)	$198	-0-	-0-	-0-	$198	
Nye	$1,426	10%	91% or $1,297	$2,367		$941
Pershing	$509	19.5%	83% or $422	$770		$261
Storey	$577	3%	2% or $11	$21	$556	
White Pine	$369	7%	20% or $74	$135	$234	
TOTALS	$225,565	11% (10)	40%(10) or $19,996	$36,491	$190,711	$1,637

TOTAL ESTIMATED SAVINGS - $189,074

(1) The actual mileage fees paid in fiscal year 2000-01.
(2) Estimated percentage of those persons called to jury duty who must travel more than 65 miles one way.
(3) Estimates by county officials of the percentages of mileage fees and corresponding dollar amounts paid to citizens who traveled more than 65 miles one way in response to jury summons.
(4) Estimates of the amounts that would have been paid had the Commission recommendations been in place limiting mileage fees to citizens who must travel more than 65 miles one way in response to jury summons; raising the rate to 36.5 cents per mile rather than the current statutory rate of 20 cents per mile.
(5) The estimated amount it would have saved had the recommendations been in place. This does not include the administrative savings from not having to create and process mileage checks or vouchers for citizens traveling less than 65 miles one way.
(6) The estimated amount it would have cost had the recommendations been in place. This does not reflect the administrative savings from not having to create and process mileage checks or vouchers for citizens traveling less than 65 miles one way.
(7) No jurors summoned from beyond 65 miles.
(8) Carson City pays no mileage fees to citizens summoned to jury duty.
(9) No jury trials were held in the county during fiscal year 2000-01.
(10) Average among counties that summon jurors from beyond 65 miles.
(11) Total fees paid in fiscal year 2000-01 minus projected fees.

TABLE 3

JURY AND MILEAGE FEES: Projected Impact (1)

COMBINED TOTALS

County	Total Fees Paid (2)	Projected Fees (3)	Projected Savings (4)	Projected Costs (5)
Clark	$664,405	$281,948	$382,457	
Washoe	$126,797	$141,512		$14,715
Carson City	$7,956	$13,336		$5,380
Churchill	$2,413	$937	$1,476	
Douglas	$14,434	$8,370	$6,064	
Elko	$43,135	$52,325		$9,190
Esmeralda	$1,202	$1,026	$176	
Eureka (6)	-0-	-0-		
Humboldt	$3,526	$4,970		$1,444
Lander (6)	-0-	-0-		
Lincoln	$1,682	$1,774		$92
Lyon	$14,091	$10,999	$3,092	
Mineral	$825	$520	$305	
Nye	$9,389	$11,738		$2,349
Pershing	$2,296	$2,014	$282	
Storey	$2,531	$2,795		$264
White Pine	$8,074	$9,116		$1,042
TOTALS	$902,756	$543,380	$393,852 (7 counties)	$34,476 (8 counties)

TOTAL ESTIMATED SAVINGS - $359,376 (7)

(1) Figures from fiscal year 2000-01 or projections based on those figures. Combines jury fees and mileage fees reflected individually in Tables 1 and 2.
(2) Combined Jury and Mileage Fees paid during fiscal year 2000-01 (See: Tables 1 and 2).
(3) Projected Jury and Mileage Fees combined, had Commission recommendations been in place to increase jury fees to $40 per day while eliminating appearance fees for two days and eliminating mileage fees for citizens traveling less than 65 miles while increasing the mileage rate to 36.5 cents per mile from the statutory rate of 20 cents per mile.
(4) Projected total savings to the indicated counties that would have resulted had Commission recommendations been in place.
(5) Projected costs to the indicated counties that would have resulted had Commission recommendations been in place.
(6) No trials were held in the county during fiscal year 2000-01.
(7) Total fees paid in fiscal year 2000-01 minus projected fees.

MILEAGE FEES

Currently, jurors receive mileage compensation at a rate of 20 cents per mile.[36]

Since jury service is a duty of citizenship which necessarily imposes a burden upon citizens, the Commission recommends that those summoned should not be compensated for mileage unless long distance travel is involved. The Commission recommends mileage compensation when a citizen summoned must travel more than 65 miles one way. This kind of extended travel is often necessary in rural counties where the population is spread out over a vast area.

Provision for mileage compensation also ought to be made, without regard to the distance involved, when the individuals summoned and selected are disadvantaged persons for whom the financial burden of transportation would constitute an undue hardship.

The Commission also believes that when mileage is paid, the rate should be the same as is paid to state employees: 36.5 cents per mile in 2002. This proposed mileage fee increase would likely be more than offset by the elimination of mileage fees for travel of less than 65 miles one way.

[36] NRS 6.150(3). Carson City does not pay mileage expenses to jurors.

Juror Compensation

RECOMMENDATIONS

1. NRS 6.150(1) should be amended to abolish the $9 per day appearance fee for those summoned but not selected.

2. NRS 6.150(2) should be amended to establish a rate of $40 per day for each sworn juror for every day of service and for any prospective juror after the second day of jury selection.

3. NRS 6.150(3) should be amended to abolish mileage fees except for travel over 65 miles one way.

4. NRS 6.150(3) should be amended to pay jurors at the state employee compensation rate (currently 36.5 cents per mile).

5. Employers are encouraged to continue paying their employees while they are serving on jury duty.

6. Unions are encouraged to bargain for wage compensation for their members during the time they are serving as jurors.

FREQUENCY OF JURY SERVICE

The length of time which passes between completion of jury service and eligibility to again be summoned can vary widely because of the varying need for jurors in the districts and the law of the State of Nevada. No legal limit is stated in Nevada law for again summoning jurors selected by jury commissioners, but there is a one-year limit on county commissioners again summoning jurors, unless there are not enough suitable jurors available to serve.[37] In the Second and Eighth Judicial Districts, jury commissioners summon jurors, while this is done by the county commissioners in districts with smaller populations.

NRS 6.070, enacted in 1885 and amended in 1919[38], restricts the county commissioners from summoning jurors more than once in the space of a year, unless there are not enough other suitable jurors available; then and only then may a citizen be summoned more than once in a single year.[39] In contrast, NRS 6.045, which was enacted in 1963, provides for a jury commissioner to select jurors in counties with over one hundred thousand people.[40] NRS 6.090(3) provides that where a jury commissioner is selecting potential jurors, the district judge may direct the selection of more jurors when the district judge deems it necessary[41], but is silent as to the length of time that must pass before a person who has served is again eligible for jury service.

Actual re-summons periods within Nevada's judicial districts vary depending on population size and the number of jury cases tried. In sparsely populated counties, citizens are usually summoned for specific trials and may be immediately summoned again if they are not seated as jurors.[42] The Second and Eighth Judicial Districts currently do not re-summon citizens for one and two years, respectively.

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[37] "The board of commissioners shall not select the name of any person whose name was selected the previous year ...." NRS 6.070.
[38] NRS 6.045, 6.070. Id.
[39] NRS 6.070.
[40] NRS 6.045.
[41] NRS 6.090(3).
[42] NRS 6.070 states that one may not be selected for service if they were selected the previous year, "unless there be not enough other suitable jurors in the country to do the required jury duty."

Jury service can cause significant personal and financial hardships for jurors.[43] In those rural jurisdictions where jury cases are tried frequently yet the population of those qualified to serve is small, the hardships associated with service are suffered more frequently. To minimize these hardships, the Commission believes that citizens should not be summoned to perform jury service more frequently than once every two years unless there are absolutely no other persons available to summons. Additionally, state courts should honor a juror's service on a federal jury by treating those persons in the same way that it exempts persons who have served on a state jury.

To the extent possible, the Commission also recommends that jury panels be reduced to the minimum number necessary for the selection of a jury. While this can be difficult to predict, doing so wherever possible would reduce the number of potential jurors summoned and assist in reducing the frequency of summonses.

One-Day/One-Trial

A common trend throughout the country is the one-day/one-trial system whereby citizens summoned to court serve for one day or, if seated as a juror or still eligible to be seated, serve only for the duration of one trial.[44] While every district in Nevada professes to use this system, the Commission was informed this is not always true in the Eighth Judicial District.

One-day/one-trial systems have a number of advantages. Among these are decreased hardships for jurors because of the shortened terms of service, and the ability to permit a far greater number of citizens from a broader cross-section of the jurisdiction's population to participate in the jury process.[45] A significant disadvantage is that because more citizens are cycled through the jury selection process, more administrative expense is engendered.[46]

It is important in that process that the minimum number of prospective jurors be summoned to address a court's requirements and that the courts strive for complete utilization of those summoned. Different jurisdictions and organizations have different

[43] What Should Jurors be Paid?, supra note 35.
[44] See Jury Trial Innovations, supra note 20.
[45] G. Thomas Munsertman, Jury System Management 72 (1996).
[46] Id. at 71.

definitions of jury utilization. The Commission defines juror utilization as a juror participating in the voir dire process, even if that is simply sitting in a courtroom with other prospective jurors during the selection process. The Commission strongly believes that a prospective juror's time should be respected.

The Commission believes the one-day/one-trial system should remain the practice to the extent it is possible. Concurrently, Nevada District Courts should establish a stated goal that all citizens summoned should have the opportunity to participate in voir dire and the judicial process.

Frequency of Jury Service

RECOMMENDATIONS

1. **Nevada citizens ideally should not be summoned for jury duty more frequently than once every two years.**

2. **Citizens who have served on a federal jury within the preceding 12 months should be excused from jury duty in state court for the same period they would have been had they served on a state court jury.**

3. **Jury panels should be comprised of the minimum number of citizens necessary for the selection of a jury.**

4. **The one-day/one-trial system of jury management should be the practice in every district to the extent it is possible.**

5. **NRS 6.045 should be amended to harmonize with NRS 6.070 so that districts which utilize a jury commissioner are subject to the same one year restriction on re-summonsing jurors as exists in other districts.**

CITIZENS WHO ARE SUMMONED FOR JURY DUTY, BUT DO NOT RESPOND

Jury service is a task that citizens are both obligated and privileged to perform. If a jury is to be truly representative of the population, a jury of peers, persons of all economic backgrounds and professions must serve. Nevada law permits the release of jurors for undue hardship when truly difficult circumstances exist. Ordinary inconvenience because of missed work should not be a factor when considering whether to release potential jurors for undue hardship. Jury commissioners are inundated with requests from citizens who have been summoned asking to be excused from jury duty. Problems are described ranging from scheduled vacations, or the desire not to miss a day of work to great hardships such as being the sole caregiver for an ill dependent or having a young child and no available childcare.

Jurors should be instructed during the pre-voir dire presentation that only extreme hardship issues, not typical employment concerns, will be considered by the court. This might prevent the avalanche of courtroom requests for release from jury based upon work excuses. Judges should be consistent among themselves about the standards that should be applied in determining who should receive hardship releases.

Unfortunately, in addition to those who appear but attempt to avoid selection by complaining about the personal inconvenience of jury duty, many others ignore the summons for jury duty altogether. The rate of non-response is particularly high in the Second Judicial District and appears to be on the rise.[47] Potential jurors who fail to appear, assuming they can avoid selection by failing to appear, should be promptly informed that their behavior is in violation of Nevada law. A fair and consistent method should be in place to deal with those who fail to appear in response to the jury summons to ensure that all citizens are treated equally.

[47] Washoe County Jury Commissioner's Office. The Jury Commissioner found that up to 21.83% of people summoned in 2000 did not respond, which is over double the amount of non-respondents reported for 1995.

Unforeseen circumstances, such as a misplaced summons or a miscalendared appearance date, will occur and should be addressed non-punitively in any procedure. The first instance of non-appearance may require nothing more than a postcard with an instruction to call and reschedule the appearance date. However, courts should deal appropriately with those summoned who fail to appear on more than one occasion. Failure to appear is contempt of court and punishable by a fine of up to $500.[48]

The Commission advocates a measure of justice for those citizens who routinely fail to respond when summoned. Citizens who willfully fail to appear could be fined or assigned jury duty for a date certain, or both. Community service might also be considered as a way to educate miscreants about the importance of responding to a summons which is an order to appear. In the Second Judicial District, some who failed to appear pursuant to a summons have been required sit in court for the duration of a jury trial. This punishment is not routine in the Second Judicial District, but reflects the response chosen by a few of the judges in that district. Such a punishment is a commendable response to a failure to appear, as it communicates to the public the importance of the jury's role in our judicial system. It is the responsibility of the court or the chief judge to see that penalties for failing to appear are uniformly and consistently imposed. The Commission suggests that any fines imposed for failing to appear be used to pay for improvements to juror amenities.

A contempt proceeding for failure to respond to a summons begins with an order for the wayward citizen to appear in court for a show cause hearing. The order to appear and show cause must be signed by the judge and accompanied by an affidavit from the jury commissioner or clerk and a notice stating the time and place set for the contempt hearing. The citizen must be served with these documents by the method deemed most efficient for each district, the civil division of the Sheriff's Office, or by certified mail. The Commission recommends consistent application of this process.

The rate of non-appearances to jury summonses can be decreased through public education. Programs designed to teach the importance of jury duty should be introduced to children beginning in elementary school. Other techniques, such as a court-sponsored "Juror Appreciation Day" and radio and television public service announcements, can be used to target adults.[49] New York has effectively used a publicity

[48] NRS 6.040.

[49] See generally Jury Trial Innovations, supra note 20, at 25-28.

campaign including interviews and profiles of "celebrity jurors," including Barbara Walters and then-New York City Mayor Rudy Giuliani. Such campaigns demonstrate that even the famous and influential do their part for the jury system and do not always "get out of it."[50]

Citizens Who Are Summoned for Jury Duty, But Do Not Respond

RECOMMENDATIONS

1. **The courts should vigorously confront the problem of citizens failing to respond to jury summons. The first approach should be to educate them on the necessity of jury duty through a postcard re-notification.**

2. **Citizens who habitually fail to respond should be subjected to contempt proceedings and if held in contempt of court, a measure of justice should be imposed.**

3. **A computerized jury management system, discussed in the** Use of Technology **section, would assist in identifying non-respondents and automatically sending follow-up notices.**

4. **Fines imposed for failing to appear in response to a jury summons should be used to pay for improvements to juror amenities.** (See following section)

[50] See Continuing Jury Reform in New York State, supra note 12, at 31.

FACILITIES FOR JURORS

Often the only contact citizens have with the judicial system is as jurors. Jury duty can be an intimidating, daunting, tedious and boring experience. Jury facilities contribute to the impressions that a citizen forms of the judicial system and the trial process. Furthermore, adequate facilities are a fundamental requirement to lessen the stress and discomfort and set the tone for a positive and rewarding experience. Those summoned and those who are selected for jury service should be as comfortable as possible while they perform their vital public service.

Jurors should have no unexpected or inappropriate contact with attorneys, litigants, parties and witnesses. Facilities to accommodate jurors – **jury assembly rooms, juror lounges, deliberation rooms and restrooms** – should be located near one another to eliminate unwanted interactions between jurors by unauthorized persons. It is preferable to have separate assembly rooms and lounges, although limitations in existing courthouses may make this unfeasible.

When jurors arrive for their first day of service, the check-in counter or a sign indicating the location of check-in should be immediately visible to jurors. Clear signage should also be available to indicate the location of the jury assembly room or the location where jurors should be seated to await juror orientation and assignment to a courtroom.

JURY ASSEMBLY ROOM

Those summoned should be made as comfortable as possible while they await assignment or re-assignment to a courtroom. An area for viewing television should be available, with a screen visible to a large audience. A separate room or area should be available with current reading materials for those who prefer to read. Donations of books are accepted in many districts, and jurors should be allowed to keep the books they may have started to read. Courts have noted that jurors will often bring the book back and donate additional books of their own. Signs explaining the book policy should be posted. Games and puzzles are ideal items for the assembly room. A work area is also helpful for jurors who may use laptops or need the space to do any work they have brought with them.[51] Beverages should be readily available. Vending machines, a coffee maker and a microwave oven are also desirable amenities.

[51] See generally Jury Trial Innovations, supra note 20, at 48-49.

JUROR LOUNGE

A separate, smaller lounge adjacent to the assembly room is useful for jurors who are already assigned to a case. The lounge provides an area away from participants in the trials for jurors to congregate during breaks and lunchtime. This area should be furnished with comfortable seating, reading materials and tables for games and puzzles. Beverages and vending machines should be readily available.

Telephones in a location with some privacy should be available so that jurors may address personal matters that might arise during jury service.

DELIBERATION ROOMS

It is imperative to provide jurors with the appropriate space for making the important decisions required of them. Private and secure rooms are needed when it is time for jurors to deliberate and reach a verdict. The jury deliberation rooms should be specifically assigned for this function, and should be large enough so jurors do not feel crowded. They should be adequately ventilated, have beverages available and a small refrigerator to accommodate jurors with special dietary requirements. A dry-erase board mounted on the wall with writing implements should be provided. Restrooms should also be located in or near the deliberation rooms. For security and privacy reasons, the deliberation rooms should not have windows.

RURAL FACILITIES

Many of Nevada's rural courthouses, constructed in the late 1800s and early 1900s, are woefully inadequate for the demands of today's trials.[52] Separate jury assembly rooms and juror lounges are necessary to prevent improper contact between jurors and parties, witnesses and attorneys. But in most of these rural courts, those "rooms" or "lounges" often consist of the hallway outside the courtroom. There simply is inadequate space in these older buildings to adequately segregate the jurors during a trial. In these aging courthouses, restroom facilities are usually very small, few in number and likely to be shared by jurors and the public, trial participants and court employees. An inability to keep the trial participants separated from the jury increases the possibility of improper contact and the chances for a mistrial.

[52] See Ronald M. James, Temples of Justice: County Courthouses of Nevada (1994).

Inadequate jury deliberation rooms are also a problem. During a recent jury trial in Pioche, the county commission chambers were designated as the deliberation room. When the jury arrived, they found the chambers occupied by a justice of the peace holding traffic court. The jury had to wait until traffic court was concluded to begin their deliberations.

Security issues also abound in these older facilities. For example, at the White Pine County Courthouse, court sessions frequently involve maximum-security inmates from Ely State Prison. Inadequate facilities to house and safely route prisoners to the courtroom means law enforcement officers toting shotguns or rifles must guard them in semi-public areas. Some rural courthouses lack any prisoner holding facilities or even metal detectors. Security for jurors and litigants must be a priority to provide basic safety for everyone and ensure the fair and orderly administration of justice.

In much of rural Nevada, the complexity and stress of juror work is compounded by poor facilities and other conditions jurors are forced to endure. Yet cases to be resolved by juries in rural Nevada are as important as cases heard in the urban areas of Nevada. Rural juries deserve safe, comfortable and friendly environments to perform their difficult tasks. The issue of inadequate court facilities in rural Nevada is of paramount importance and should be studied and addressed in a statewide effort to provide adequate facilities for all jurors in the state.

Facilities for Jurors

RECOMMENDATIONS

1. **Adequate facilities for those called to jury duty must become a priority for Nevada's courts and counties.**

2. **When the opportunity arises to construct a new courthouse, it must be planned with adequate facilities for jurors as a priority. Older courthouses should be remodeled to provide adequate facilities for jurors.**
3. **Accommodations should be made in every county courthouse to separate prospective jurors and jurors from participants in the trials, even if it requires relocation of existing staff or implementation of construction projects.**

4. **Security in all courthouses and particularly in rural courthouses must become a priority. It is unconscionable to summon citizens to jury duty and not provide safe and secure environments in which they will serve.**

BAILIFFS – THE COURT'S LINK TO THE JURY

A court bailiff's function is generally threefold: maintain a safe and secure courtroom, provide liaison services between jurors and the court, and aid in ensuring the courthouse itself is secure. Individuals reporting for jury service encounter a variety of new experiences, some of which tend to be intimidating and confusing. Citizens look to the bailiffs for direction and support.

While most jurors find their interaction with the bailiffs a positive experience, anecdotal information brought before the Commission indicated that problems exist in some districts. There have been reports of negative attitudes and demeanor on the part of some bailiffs in districts where the sheriff assigns officers to the courtroom duty. The problems appear to be directly related to an administrative structure that does not include the judicial system directly in the hiring, training, supervision and assignment of bailiffs.

The bailiff is typically the first court representative a juror encounters and the primary avenue of communication between the judge and the jury. A juror's first impression of the judicial system and the jury experience is formed, in great part, through that initial contact with the bailiff. A negative courtroom experience with a bailiff can affect the trust and confidence a juror has in the court system as a whole and that impression can affect others the juror communicates with after the trial's conclusion.

It is clear from the testimony received by the Commission that the vast majority of Nevada's bailiffs are exceptional professionals who treat the public with great respect and courtesy. Where this is not the case, the root causes of the problem appear to be a lack of formalized training and, in some situations, a court's inability to exercise adequate supervisory authority over the bailiffs.

Nevada's Peace Officer's Standards and Training (POST) Committee establishes minimum training standards for peace officers, including bailiffs.[53] While this training provides an excellent foundation for new peace officers, the training is not bailiff-specific. Most bailiff training occurs "in-house," without a statewide standardization of procedures and protocols.

This lack of standardization is exacerbated in the Second Judicial District where bailiffs are employed by and provided by the sheriff and are rotated on a biannual basis. The rotation has even occurred mid-trial. Jurors who look to bailiffs for direction can suddenly find themselves dealing with a bailiff with whom they have no rapport and who has little or no knowledge of courtroom procedures. Also, any benefits of on-the-job training are lost as experienced bailiffs return to the sheriff's department for further assignment. Similar situations occur in many rural jurisdictions, where trials and court hearings are less frequent and law enforcement officers are provided as bailiffs only when needed.

The Commission believes bailiffs should be court employees. Judicial supervision of bailiffs has been difficult to enforce in the Second Judicial District, because bailiffs are not court employees. At the same time, there must be a structure within each district that utilizes a bailiff's time to the fullest.

In the Eighth Judicial District, where bailiffs are court employees and members of a judge's individual staff, there is a history of supervisory lapses and underutilization of bailiffs. When daily court activities have concluded, some judges release their bailiffs from any meaningful responsibilities. Some bailiffs conduct their own personal affairs and some simply leave the courthouse. Morale problems occur when some bailiffs are reassigned to other duties in the courthouse, while others are not.

Some judges utilize their bailiffs for nontraditional duties, such as clerical work. A few judges in Clark County permit their bailiffs to be utilized by court administrators for general courthouse security. The Commission believes that this should be the preferred utilization of a bailiff's time when court is not in session. With a new, larger courthouse under construction in Clark County, it is imperative that all bailiffs be available to secure the courthouse for the protection of the jurors and general public.

[53] NRS 289.470 (defining judicial bailiffs as category II peace officers).

BAILIFFS – The Court's Link to the Jury

RECOMMENDATIONS

1. Standardized bailiff training should be implemented throughout the District Courts in Nevada to enhance the jury duty experience by ensuring citizens are treated with the respect and courtesy they are due. Ideally this training would be part of the requirements set forth in POST standards. If this is not possible, then a state-wide standardized "in-house" training program should be developed and implemented throughout the district courts. Training should include specific requirements and protocols for interacting with jurors and emphasize the importance of jurors to our legal system. Bailiffs should be required to complete annual training after the completion of the initial training.

2. No peace officer should be permitted to work as a bailiff in the court system without the successful completion of formalized bailiff training.

3. A bailiff manual – outlining procedures, protocols, and responsibilities – should be developed by the Administrative Office of the Courts for use by each district court in the training and utilization of bailiffs.

4. To ensure qualified bailiffs, District Court administrators, with the concurrence of the District Court judges, should hire, train, assign and discipline all judicial bailiffs. Bailiffs not performing duties directed by the judges to whom they are assigned should be assigned to court administration for appropriate training or reassignment.

5. Standardized hiring procedures should be adopted. Minimum qualifications should be set by the judiciary to ensure the quality of new bailiffs. Preference should be given to applicants who have POST certification since this would provide the most experienced individuals.

6. To attract the most qualified bailiffs and to ensure the continued professionalism and high morale of bailiffs, a salary comparable to the salaries of other state and local law enforcement officers should be paid.

Suggested Training for Bailiffs

1. Interaction with a Jury
    a. Acceptable conversations with a jury
    b. Movement of a jury
    c. Responsibilities During Jury Deliberations
2. Security/Media
    a. Handling of defendants who are in custody
    b. Courtroom security
    c. Interaction with the news media
    d. Extra measures in high profile/high security trials
3. Protection of Evidence
4. Courtroom Demeanor
    a. Professional conduct during trial
    b. Demeanor towards the defendant
    c. Limiting inappropriate contact with defendants in custody
    d. Keeping the public in the appropriate areas
5. Courthouse Safety
    a. Securing of weapons
    b. Judicial protection and threat management
    c. Gang threats
    d. Judicial protection

Suggested Minimum Qualifications for Bailiffs

1. All bailiffs should be minimally qualified as Category I or II peace officers (certification per NR 289.550)
2. Bailiffs assigned to a jury duty should have basic jury training
3. Bailiffs should be qualified to carry a weapon
4. Bailiffs must pass pre-employment drug testing
5. Bailiffs must be capable of performing minimum physical requirements, those expected of law enforcement officers

JUROR PROTECTION

National studies have indicated that jurors have varying degrees of concern for their safety and privacy. Predominately, those concerns arise with juries hearing criminal cases, although similar issues may arise during the course of high profile civil litigation.[54]

These legitimate juror concerns must be balanced against the principle that trials are open and public proceedings – a hallmark of our judicial system since colonial times. The use of anonymous juries invites suspicion that jurors have been specially selected for certain cases, thereby detracting from the appearance of fairness that is essential to public confidence in the system. The United States Supreme Court stated that there is a "community therapeutic value" served by open trials when offenders are called to account for their criminal conduct by a jury of their peers, fairly and openly selected.[55] Any procedure that implies secrecy can frustrate this broad public interest.

The Commission therefore reaffirms the importance of an open process of jury selection and rejects the concept of blanket anonymity for jurors. Nevertheless, judges must not be denied the ability to adequately safeguard jurors in extraordinary cases. Jurors should not be expected to forfeit all rights of privacy by virtue of performing their civic duty.

The Commission believes that judges should have discretion to empanel anonymous juries *only in extraordinary cases* when there is substantial reason to believe that jurors require protection. For example, in the first trial of Siaosi Vanisi on charges he brutally murdered a University of Nevada-Reno police officer, jurors were addressed only by numbers in open court. The trial judge believed that this system would help the jurors feel more at ease in light of the shocking nature of the case and the publicity that surrounded it. The jurors were thankful for the privacy and security that the numbers provided.

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[54] See, e.g., Mark Curriden, The Death of the Peremptory Challenge, 80 A.B.A. J. 62, 65 (1994) (discussing a poll in the Atlanta Constitution finding that two-thirds of prospective jurors thought that questions during voir dire were too personal); Jan M. Spaeth, Swearing With Crossed Fingers, 37 Ariz. Att'y 38 (Jan. 2001) (describing various studies of juror candor when answering voir dire questions).

[55] Richmond Newspapers v. Virginia, 448 U.S. 555, 570 (1980).

Judges are encouraged to continue the common practice of instructing jurors to notify the bailiff or the Court immediately if they receive any improper contacts or intimidation during the trial or acts of retaliation thereafter. Jurors should be provided with cards listing phone numbers of appropriate court personnel to notify in the event of inappropriate contact. Judges should instruct jurors that they may speak, or decline to speak, about the case to third parties after the jury is released from service. In the extraordinary case where there is a demonstrated need to protect a jury, the trial judge may permit identification of jurors in open court only by badge number and may order withholding information that would permit the location of a juror outside the courtroom, such as address, phone number, and employer information.

In cases where juror questionnaires are employed by order of the court, the judge should decide any questions of distribution or redaction when faced with an extraordinary case. The Second Judicial District Court issues an order to counsel with every jury list, restricting dissemination of private juror information listed on questionnaires. The questionnaires are made available to counsel for the parties and their litigation teams, but not directly to criminal defendants, or to third parties. Violation of the order subjects the violator to contempt sanctions.

The Commission believes that these safeguards should maintain the hallmark of open, public trials, while providing protection in those extraordinary cases where there is a genuine risk to jurors' safety.

Juror Protection

RECOMMENDATIONS

1. Nevada's courts must recognize the well-established principle that trials should be open and public and that using anonymous juries invites suspicion and detracts from the appearance of fairness that is essential to public confidence in the jury system.

2. Judges should have the discretion to empanel anonymous juries only in extraordinary cases to preserve the safety of the jurors and their families.

3. Anonymous juries should not be empanelled unless there is a reasonable showing of evidence that the safety of jurors is at risk. The mere fact that a trial may involve a notorious defendant or garner high publicity should not be grounds to empanel an anonymous jury.

4. Judges should have the discretion in extraordinary cases to prevent the identities of jurors or potential jurors from becoming public or being provided to individuals who may use the information improperly.

5. Judicial training should be required to ensure judges apply the appropriate standards when considering whether to empanel anonymous juries or limit access to juror information.

EMPOWERING THE JURY

MINI-OPENING STATEMENTS and JURY TUTORIALS

Members of the Commission have observed that often a jury panel will include individuals who actively try to avoid being selected. Generally, all jury panel members experience some confusion as to why they have been summoned and how the jury will be selected. Unfortunately, the negativity of one or two vocal panel members can infect the attitude of others on the panel, reducing the number of potential jurors expressing a willingness to serve.

Between the confusion inherent in the way jury selection generally proceeds in Nevada and the reluctance of some panel members to cooperate in the process, the entire jury selection phase of a case can be chaotic and difficult. Often, once a panel understands something about the factual nature of the controversy, enthusiasm for participation grows. In cases which are particularly technical or complicated by contested scientific issues, a panel's understanding of the factual controversy may alleviate its confusion and frustration and resulting negativity towards jury service.

To address the confusion that jury panels experience at the commencement of jury selection, the Commission recommends that the trial courts adopt two innovative practices designed to improve the jury panel's early understanding of the case and the issues the selected jurors will decide. The goal is to eliminate jury panelists' confusion and reluctance to serve by providing enough pertinent information and guidance at the very outset of the jury selection phase of the case. If jury panel members understand the nature of the controversy and if they are given a few basic tools to aid their understanding of the issues in the case, their comfort level with the process and their interest in the case and in serving on it will be enhanced.

The first proposal is to permit counsel to make a "mini-opening statement" before any questioning of the panel commences.[56] Mini-opening statements should be employed in every jury trial to briefly introduce prospective jurors to the nature of the case (whether it is civil or criminal), the claims and disputed factual issues involved, as

[56] See Jury Trial Innovations, supra note 20, at 154-55.

well as the major theories of the plaintiff (or state) and the defense. The judge should discuss the mini-opening statements with counsel prior to the trial and clarify the limitations of brevity and non-argumentative provision of information. A time limit for each party would be helpful to prevent abuses, varying according to the complexity of each case.[57] Mini-opening statements by counsel are expected to produce more meaningful juror responses in voir dire, and reduce the number of jurors seeking to be excused from the case.[58]

The second proposal is to utilize "jury tutorials." This device is meant to provide information to juries at the beginning of trials involving particularly technical or complicated issues.[59] A jury tutorial is educational in nature and is likely not necessary in all cases. For example, a tutorial may consist of a glossary of technical terms and definitions, or a video presentation depicting a geographical location. A tutorial may be appropriate in cases in which the likelihood of confusion on the part of the jury is enhanced by the predicted length of the proceedings, coupled with anticipated disputes concerning highly technical or scientific evidence which is complicated or difficult to comprehend.

During the pretrial hearing in civil cases prior to the motion to confirm trial, or calendar call in criminal cases, counsel for the parties should discuss with the judge the likely length of trial and whether complicated or highly technical evidence will be presented. The judge should consider the use of a tutorial at the request of one or both of the parties. The judge has discretion to approve a tutorial, even over the objection of one or all of the parties. However, a clear record of the request and reasons for granting it should be made part of the pretrial record. Prior to calling the jury, the court and counsel will have determined the content of the tutorial and the manner of presentation.

The tutorial would commonly precede the presentation of evidence, although in some circumstances it might precede jury selection. The judge would be expected to instruct the jury or the panel at the time the tutorial is presented, and again when the jury is given instructions at the close of the evidence, that the tutorial is not evidence in the case, just as juries are instructed that arguments of counsel are not evidence.

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[57] See Jurors: The Power of 12: Report of the Arizona Supreme Court Comm. on Effective Use of Jurors Recommendations 18 (Nov. 1994), available at http://www.supreme.state.az.us/nav2/jury.htm.
[58] See Jury Innovation Pilot Study: Los Angeles Superior Court Innovation Comm. 2 (Nov. 1999).
[59] See Jury Trial Innovations, supra note 20, at 105-06.

In appropriate cases, with the concurrence of counsel and consent of the judge, the tutorial may be presented immediately preceding the technical evidence.

Mini-opening statements and tutorials, properly utilized, will reduce juror frustration and confusion. A jury that understands from the beginning of the case what the case involves, and what the jury is being asked to decide, will have much less difficulty following the evidence as it is presented. In technical or complicated cases, a jury which understands terminology or which has some appreciation for the physical attributes of a disputed location (be it an intersection or the layout of a construction site) should be better able to understand the evidence as it is presented. A comfortable, alert and informed jury should produce a carefully considered and reliable decision.

Mini-Opening Statements and Jury Tutorials

RECOMMENDATIONS

1. **Mini-opening statements should be presented before voir dire begins in every jury trial.**

2. **Jury tutorials should be utilized in appropriate jury trials, particularly those involving technical or complicated issues.**

INSTRUCTING JURORS ON RELEVANT LAW AT THE BEGINNING OF TRIAL

A common complaint from former jurors was that they did not know at the outset of a trial what rules, laws and standards they would be asked to apply in deliberation. During public hearings, former jurors said that they had no way of knowing what evidence was important and should be the focus of their attention and what evidence was incidental. A former juror complained that he noted certain testimony only to learn when jury instructions were presented at the end of the trial that the evidence had

been superfluous. He said that had he been told at the outset of the trial what was required to prove the elements of the crime charged, he could have carefully focused on the critical witnesses and evidence. He likened it to playing a game and not knowing the rules until the end.

Based on his statements and similar complaints from other former jurors, attorneys and judges, the Commission believes that jurors should be given instructions on the law relevant to the case prior to opening statements in a trial. The instructions should include definitions of legal and technical terms and the burdens of proof. To render just and reliable verdicts, jurors must not only hear all the evidence, but know the applicable legal standards.

Instructing on relevant law at the beginning of trial would give jurors the context of what must be proven so they can better understand the evidence as it is presented. Legal issues change with the ebb and flow of testimony at a trial and the instructions provided at the beginning of a trial will not be sufficient at the end. At the end of a trial, the jury instructions provided at the beginning would be replaced with a revised series of instructions that addresses all the legal issues and evidence that arose during the trial. Some instructions likely would be similar or identical to the early instructions, but others would be new and case-specific.

Standard "stock" instructions should be given in addition to "special" instructions drafted and agreed to by the parties and reviewed by the court prior to jury selection. Caution is appropriate in determining which "special" instructions should be given at the beginning of a case because the applicability of those instructions is frequently dependent upon the evidence presented at trial.

It is not always necessary to provide the preliminary instructions in writing, but if individual trial notebooks are provided to jurors (See Jury Notebooks section in this report) the early instructions should be included in the notebooks. As with the trial notebooks, if individual instructions are provided in writing, they should be returned and maintained by the Court at the conclusion of each day's proceedings.

Instructing Jurors on Relevant Law At the Beginning of Trial

RECOMMENDATIONS

1. Instructions on relevant law should be provided to jurors before opening statements in trials.

2. In addition to instructions on trial procedure, the following instructions should be given in every case:
    a. Explanation of what constitutes evidence and definitions of direct and circumstantial evidence
    b. The role of expert witnesses

3. In criminal cases, instruction should include:
    a. Definition of reasonable doubt
    b. Any statutory definitions relevant to the trial
    c. Presumption of innocence
    d. Any other "stock" instructions relevant to the trial.

4. In civil cases, instruction should include:
    a. Definition of preponderance of evidence or other applicable burden of proof
    b. Use of testimony from deposition
    c. Any statutory definitions relevant to the trial
    d. Any other "stock" instructions relevant to the trial.

5. Instructions that are given prior to the opening statements should be revised if necessary and also given at the conclusion of the evidence as part of the current instruction process.

JURY NOTEBOOKS

The jury notebook is a device not commonly employed by the Nevada trial courts. It is an innovation which the Commission believes will aid the jury in understanding, following and processing complex information and exhibits during trial. It may not be economically feasible in every case to provide every juror with a three-ring binder containing exhibits, photographs, admitted documentary evidence and legal instructions. It is, however, essential that, in every case, every juror be provided with suitable materials with which to take notes if the juror so wishes.

Detailed notebooks should be prepared and distributed to each juror in appropriate cases where the judge, in the exercise of sound discretion, deems the use of a notebook warranted by virtue of the case's anticipated length, complexity and technical difficulty.

Nationally and in Nevada as well, the practice of providing jurors in complex cases with notebooks has proliferated in the last decade. Juror comprehension studies by the American Bar Association during the 1980s revealed that "complex cases present inherently difficult problems to the lay juror and challenge the ability of modern juries to fulfill their traditional role in complex litigation."[60] Many scholars and jurists agree that, "to expect six or twelve individuals sitting on a jury to absorb weeks or months of testimony on an unfamiliar subject, retrieve it from memory, analyze it, and somehow reach the correct decision is to adopt a method of decision-making fraught with unreliability."[61]

The notebook is one tool that can help jurors navigate through the confusion of complex or technical litigation.

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[60] Keith Broyles, Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases, 64 Geo. Wash. L. Rev. 714, 723 (1996) (recognizing that tools such as notetaking and following along with written materials are essential to the classroom learning process and should be incorporated into the jury trial).

[61] Robert M. Parker, Streamlining Complex Cases, 10 Rev. Litig. 547, 550 (1991); accord Broyles, supra note 68, at 732 (jurors generally lack the same fact finding tools that are at the disposal of the court in a complex case, a problem which supports the argument that jurors are less competent fact finders than judges).

Having notebooks and the ability to take notes may enhance a juror's memory and recall in a complex case, aiding the fact-finding function.[62]

> [T]he notebook is a tool for enabling jurors to better understand the case and the trial process. By giving jurors this information at the beginning of the trial and collecting it in one source, which they can refer back to as necessary, courts may help jurors to feel less intimidated by their solemn surroundings, the expertise of the judge and lawyers, and their inexperience as jurors. Even low-tech juror notebooks would give jurors greater familiarity with their task, which should in turn lead to greater juror confidence, and perhaps even assertiveness.[63]

The judge exercises discretion as to what would be included in the jurors' notebook and so its contents will vary with each case. Desirable content includes a listing of the parties, lawyers and witnesses, photographs (often photographs of the witnesses), relevant documents, a glossary of technical terms, the jury instructions, a seating chart for the courtroom that identifies the trial participants, definitions of legal terms that are likely to be used in the case and a trial schedule (particularly if the judge and lawyers already know of prior commitments that will shape the trial schedule).

Additionally,

> The contents of the jury notebook could change during trial depending on the rulings of the court or the progression of the case. It is a simple matter to call changes to the jury's attention and even to exchange pages. If jurors had notebooks, counsel could ask them during trial to refer to an instruction or definition on a certain page or could direct a witness' attention to similar instructions. Focusing the jury's attention

[62] Broyles, supra note 64, at 732-33; see also Ariz. R. Crim. P. 18.6 & comment to 1995 amendment (noting that, "[I]n trials of unusual duration or involving complex issues, juror notebooks are a significant aid to juror comprehension and recall of evidence. At a minimum, notebooks should contain: (1) a copy of the preliminary jury instructions, (2) jurors' notes, (3) witnesses' names, photographs and/or biographies, (4) copies of key documents and an index of all exhibits, (5) a glossary of technical terms, and (6) a copy of the court's final instructions").

[63] Nancy S. Marder, Juries and Technology: Equipping Jurors for the Twenty First Century, 66 Brook. L. Rev. 1279 (2001); accord Jury Trial Innovations, supra note 20, at 110 (noting that juror notebooks assist jurors to organize, understand and recall large amounts of information during lengthy and complex trials).

on such rules over a long period of time reinforces the probability that those rules will be followed during deliberation.[64]

In 1998, the American Bar Association adopted the Civil Trial Practice Standards "to standardize and promote the use of innovative trial techniques to enhance juror comprehension."[65] One standard adopted by the ABA outlines the rules for use of juror notebooks. The standard dictates:

1. Use & Contents.
   In cases of appropriate complexity, the court should distribute, or permit the parties to distribute, to each juror identical notebooks, which may include copies of:
   A. The courts preliminary instructions
   B. Selected exhibits that have been ruled admissible (or excerpts thereof)
   C. Stipulations of the parties
   D. Other material not subject to genuine dispute, which may include:
      a. Photographs of parties, witnesses, or exhibits
      b. Curricula vitae of experts
      c. Lists or seating charts identifying attorneys and their respective clients
      d. A short statement of the parties' claims and defenses
      e. Lists or indices of admitted exhibits
      f. Glossaries
      g. Chronologies or timelines
      h. The court's final instructions.

The notebooks should include paper for the jurors' use in taking notes.

[64] Parker, supra note 65, at 550.
[65] A.B.A. Civil Trial Prac. Standards, SG007 ALI-ABA 409, 418-20 (1998).

2. Procedure.
    A. The court should require counsel to confer on the contents of the notebooks before trial begins.
    B. If counsel cannot agree, each party should be afforded the opportunity to submit its proposal and to comment upon any proposal submitted by another party.
    C. Use at Trial.
        a. At the time of distribution, the court should instruct the jurors concerning the purpose and use of the notebooks.
        b. During the course of trial, the court may permit the parties to supplement the materials contained in the notebooks with additional documents as they become relevant and after they have been ruled admissible or otherwise approved by the judge for inclusion.
        c. The court should require the jurors to sign their notebooks and should collect them at the end of each trial day until the jury retires to deliberate. The notebooks should be available to the jurors during deliberations.[66]

The comment section of the Standard further suggests that::

> [I]f notebooks are to be provided, they should be distributed at or near the outset of trial for convenience of reference throughout the proceedings. Alternatively, the court may determine that distribution should follow the introduction of some or all of the exhibits or salient testimony. In either event, the court may permit the parties to supplement the notebooks with additional materials that the court rules admissible or includable (e.g. instructions) later in the trial. Materials that have not been specifically approved by the judge may not be included in jury notebooks. The court may suggest, or in appropriate cases, direct the parties to prepare notebooks for jurors. This should ordinarily be resolved prior to trial.[67]

[66] Id.
[67] Id at 421.

Other states have also adopted similar protocols. For example, Arizona's Rules of Civil Procedure allow the court to authorize documents and exhibits to be included in notebooks for use by the jurors during trial to aid them in performing their duties.[68] Jurors may also access their notebooks during recesses, discussions, and deliberations.[69]

Courts are only now beginning to recognize the numerous advantages engendered by the use of jury notebooks. Nevada should join this movement.

Jury Notebooks

RECOMMENDATIONS

1. **Nevada should adopt the ABA Civil Trial Practice Standard for Jury Notebooks and encourage their use for all trials regardless of length or complexity.**

2. **Jury Notebooks should be distributed to the jurors immediately prior to the commencement of the trial and that counsel should be allowed to update the Jury Notebooks with new and additional material throughout the course of the trial.**

3. **Jury Notebooks and any supplementation thereto should be distributed to the Jurors through the Bailiff.**

[68] Ariz. R. Civ. P. 47(g).
[69] Ariz. R. Civ. P. 39(d). See also Mo. R. Crim. P. 27.08.; N.H. Sup. Ct. R. 64-A.

CLUSTERING SCIENTIFIC AND TECHNICAL EVIDENCE and PERMITTING MINI-CLOSING ARGUMENTS FOLLOWING THE PRESENTATIONS

Jurors often face the difficult challenge of determining the importance and credibility of expert testimony when technical or scientific evidence is presented at trial. Testimony is presented to assist jurors in understanding specific concepts and issues. Jurors generally have limited knowledge of such matters, but expert testimony can be difficult to comprehend because of its intricate detail.

The traditional adversarial format exacerbates the situation because the plaintiff's case is presented in its entirety before the defense even has an opportunity to call its witnesses. As a result, it can be days or even weeks between the testimony from the plaintiff's expert and the defense's expert witness taking the stand to contradict the testimony. It may be difficult for jurors to recall the plaintiff's expert testimony in detail by the time the defense witness testifies. It also can be difficult for jurors to give appropriate weight to the testimony of one expert without hearing the opposing view within a helpfully short timeframe.

The Commission believes that if jurors cannot easily understand scientific, technical or medical evidence that often is at the heart of a case, they cannot render an informed verdict and justice will not be served.

The district courts should have the discretion at trial to consolidate the technical and scientific presentations of both plaintiff and defense expert witnesses. Testimony from plaintiff's experts should be followed immediately by testimony from the defense's experts on the same issue. This should assist the jury in better understanding complex issues. When evidence is presented in this manner, jurors are not required to learn new concepts or comprehend new ideas for a second time.

Additionally, the district courts should permit mini-closing arguments, immediately following the presentation of this evidence to the jury. Such arguments should be limited to the technical or scientific issues addressed by the expert testimony and should only inform jurors of the relevance and importance of the evidence. Once these arguments are completed, the trial should resume in its normal format. Clustering the presentation of scientific, technical or medical testimony should help the jury better understand the contested issues the competing evidence is designed to illuminate.

Clustering complicated evidence should be considered in both complex civil and criminal cases. While clustering expert testimony in criminal cases may be more difficult, or even impossible, because of the presumption of innocence and a defendant's right to reserve his presentation of evidence until the state rests, the Commission believes that clustering of evidence could be very beneficial in appropriate criminal cases.

Scientific and technical evidence need not be clustered if the trial is expected to be of such short duration that the time gap between the plaintiff and defense expert testimony is very brief. Nor does the testimony need to be clustered if it does not represent the heart of the dispute, such as when the scientific or technical aspects of the case are not primarily in dispute.

Judges should make determinations about these matters not based upon the desires of the trial attorneys, but rather on a determination of what would best assist jurors understand the evidence and issues.

Clustering Technical Evidence

RECOMMENDATIONS

1. **Judges should have the discretion at trial to consolidate scientific, technical or medical expert testimony from plaintiff and defense experts at one point in a trial to assist jurors in understanding the issues.**

2. Clustering expert testimony and evidence should be considered in both civil and criminal cases, although recognizing that a defendant's constitutional rights may restrict its use in criminal cases.

3. Immediately following the presentation of clustered expert testimony, attorneys should be permitted to make mini-closing arguments on the issues addressed by the expert testimony before the normal trial format is resumed.

JURORS ASKING QUESTIONS

NOTE: This was the only section that resulted in a minority report being filed. The minority report follows the Commission's recommendations]

"Many courts have permitted the practice for years without fanfare or objection from counsel."[70] In a November 1999 study by the Los Angeles Superior Court, it was observed that for over 15 years some courts have allowed jurors to ask questions.[71] Among the advantages of this procedure are alerting attorneys to areas of confusion, helping jurors clarify and retain information, and increasing juror satisfaction with service. Asking questions during the trial also provides an opportunity for lawyers to timely respond.

In the Los Angeles Superior Court study, 92 percent of the responding jurors were very positive about being allowed to ask questions; 4 percent felt the procedure was awkward and they had mixed feelings; 1 percent had negative responses and the remaining 3 percent of jurors were neutral.[72]

This Commission received comments from numerous attorneys at the Commission's public hearings in Las Vegas and Reno. Many of those attorneys expressed concern that jurors would disrupt proceedings by (1) asking too many questions, (2) asking

[70] Jury Innovation Pilot Study, supra note 62, 14 (Nov. 1999).
[71] Id.
[72] Id.; Jurors: The Power of 12, supra note 61, at 18.

questions the lawyers tactically want to avoid or, (3) becoming advocates for one party or the other. A few judges indicated they are not in favor of the process because they fear the questions would impede trial progress or that the process would be too cumbersome.

Allowing jurors to ask questions, however, does not seem to produce the negative effects that opponents often fear.[73] Studies of various trial courts nationwide conclude that jurors generally do not ask inappropriate questions.[74] The studies also found that jurors do not become angry or embarrassed if their questions are not asked, nor do they tend to advocate for one side or the other.[75]

The risk of inappropriate questions is further avoided by requiring that questions be directed at factual issues already raised by counsel. Critics in Nevada also expressed concern about improper juror questions, but under the directives of Flores v. State,[76] such questions should not be allowed. If jurors cannot communicate their concerns through questions, attorneys run the risk that the issues will be resolved without clarification helpful to the jury. The availability of questions alerts the trial attorneys to confusion on the part of jurors and permits the attorneys to devise a strategy to respond. The history of juror questions in Nevada and Arizona has demonstrated that the proposed concerns and fears of counsel have not materialized.

In the national studies, attorneys who participated in trials with juror questions reported that the questions did not interfere with their trial strategies or cause them to lose command of the case.[77] Attorneys also felt that juror questions did not prejudice their clients, and a review of jury verdicts and other data suggests that indeed no prejudice occurred.[78]

Proponents of the system who have experienced juror questions first hand in trials said the process enhanced the trials and sometimes alerted lawyers to jurors' concerns or the issues they deemed important.

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[73] Larry Heuer & Steven, Increasing Juror Participation in Trials Through Note Taking and Question Asking, 79 Judicature 256, 258 (1996) [hereinafter Juror Participation].
[74] Id. at 260.
[75] Id.
[76] 114 Nev. 910, 912-13, 965 P.2d 901, 902-03 (1998).
[77] Juror Participation, supra note 77, at 261; Larry Heuer & Steven Penrod, Juror Note Taking and Question Asking: a Field Experiment, 18 Law & Hum. Behav. 121, 147 (1994) [hereinafter Field Experiment].
[78] Juror Participation, supra note 77, at 261.

As Arizona civil attorney Philip H. Grant wrote in a 1999 article:

> Three years after Arizona jurors began asking questions, the lawyers practicing in the state have found the process to be worthwhile and rewarding. The jurors expressed their pleasure with the personal involvement and the minor practical difficulties engendered have been far outweighed with the satisfaction of those called to serve. I do not believe that any of us would speak in favor of reversing our progress and going back to the 'good ole days' of keeping the jurors out of the lawyers' business. The sky has not fallen.[79]

Commission member Don Campbell, a veteran trial attorney, explained how he had been an opponent of juror questions and was apprehensive at learning a recent trial would be held before a judge who routinely let jurors ask questions. Mr. Campbell, however, said the experience changed his mind and has made him an advocate of juror questions.

Following a criminal trial in summer 2002 in Las Vegas, during which jurors were allowed to ask questions, the defense attorney wrote to the Commission to endorse the process. The attorney stated in part:

> I found this procedure to have some very positive effects on the course of the trial. First, the jury seemed to pay close attention to each witness and their answers since they would have an opportunity to add their own questions. Second, any issues missed by the attorneys and, honestly areas the lawyers might be afraid to ask, can be inquired into by the jurors, so they are not left hanging or wondering about any particular issue. Third, with their involvement raised to this level, there is likely to be fewer circumstances for read-backs of testimony. Lastly, the jurors tend to ask good questions that will help attorneys understand how the jury is feeling about the importance of some of the issues.
> I believe that juror's questions often get to the heart of the truth.

The Commission made a presentation to the State Bar of Nevada at the State Bar Convention in June 2002. At the request of a district judge who opposes jurors asking questions, an informal poll was conducted of all the attorneys in attendance

[79] Philip H. Grant, An Irreverent View of Participatory Juries, Voir Dire vol. 6 at 10 (Spring 1999).

about their preference on the issue of jurors asking questions. Nevada attorneys in attendance overwhelmingly supported the use of juror questions.

District judges in Nevada who allow jurors to ask questions said they believe this procedure lets jurors become more involved in the trial. Research demonstrates that jurors pay greater attention to the evidence as it is presented, and are more likely to remember it if they are allowed to ask questions.[80] Some juries ask more questions than others, but the average number of juror questions is only about five per trial.[81] However, even jurors who ask few or no questions are very happy to have the opportunity to do so.[82]

Jurors who asked questions did not attach any extra significance to the questions they posed.[83] Jurors reported feeling more informed and better able to reach a responsible verdict when questions were asked.[84] Furthermore, allowing juries to ask questions can speed the deliberation process without introducing significant delays at trial.[85]

Procedurally, the Commission suggests that during opening comments the court advise the jurors that they will be given the opportunity to submit written questions of any witness called to testify in the case. The jurors should further be instructed that they are not encouraged to ask many questions because that is the primary responsibility of counsel.[86] The jurors should also be informed that they may ask questions only after both lawyers have finished questioning a witness. Finally, the jurors should be advised that all questions from jurors must be factual in nature and designed to clarify information already presented. Jurors must not place undue weight on the responses to their questions.

If any juror has a question, it should be written and given to the bailiff, who will give it to the judge. The judge and the attorneys should discuss the question at the

[80] Juror Participation, supra note 77, at 261.
[81] Id. at 259.
[82] Id. at 260; Jury Innovation Pilot Study, supra note 62, at 14.
[83] Id.
[84] Field Experiment, supra note 81, at 142, 147-48.
[85] See With Respect to the Jury: A Proposal for Jury Reform: Report of the Colorado Supreme Court Comm. on the Effective and Efficient Use of Juries 38 (Feb. 1997) available at http://www.courts.state.co.us/supct/committees/juryref/juryref.htm.
[86] For a sample jury instruction, see Juror Participation, supra note 77, at 258.

bench or outside the presence of the jury to determine if there is any objection. The court reporter/recorder should report any objection and the judge should rule upon it outside the presence of the jury, applying the same legal standards as if an attorney asked the question. Arizona has successfully used a similar procedure since 1993.[87]

Jurors can better perform their duty in rendering a just and accurate verdict if they are permitted to ask questions. A juror does not need to know the rules of evidence to ask a question. The judge determines the admissibility of the evidence the question seeks outside the presence of the jury. With procedural safeguards in place, the Commission believes that allowing jurors to ask questions will greatly improve juror comprehension and involvement, without disrupting the proceedings or prejudicing either party.

Jurors Asking Questions

RECOMMENDATIONS

1. The Nevada Supreme Court should amend the District Court Rules to require that all district judges allow jurors to ask questions of witnesses in all civil and criminal trials in accordance with the guidelines specified by the Nevada Supreme Court in the case of Flores v. State, 114 Nev. 910, 965 P.2d 901 (1998).

2. The Nevada Supreme Court should create proposed District Court Rule 26 to read as follows:

The court shall instruct jurors of their right to ask questions of all witnesses in criminal and civil cases as follows:

A. All questions must be factual in nature and designed to clarify information already presented
B. All questions asked must be submitted in writing
C. The court will determine the admissibility of the questions outside the presence of the jury

[87] Jurors: The Power of 12, supra note 61, at 18.

D. Counsel will have the opportunity to object to each question outside the presence of the jury
E. The court will instruct the jury that only questions that are admissible in evidence will be permissible
F. Counsel will be permitted to ask follow-up questions
G. Jurors will be admonished to not place any undue weight on the answers to their questions
H. There shall be no questions by jurors of a criminal defendant during the penalty phase following a murder conviction

MINORITY REPORT

OPPOSITION
to
JURORS ASKING QUESTIONS

[NOTE: The Jury Improvement Commission adopted rules allowing a minority report if 4 of the 15 commissioners dissented on an issue. This is the only issue that resulted in a minority report.]

Jurors should not question witnesses during trials.

The United States uses an adversary system in its trials. Attorneys are the combatants, advocates for the parties. Judges decide issues of law and enforce the rules of the cases. Jurors weigh the facts and evidence and determine who wins.

All counsel involved in a trial must be licensed by the State Bar, after attending at least three years of law school and passing a rigorous bar examination. That education includes courses on evidence, civil and criminal procedure and Constitutional law. All the training is necessary to properly prepare to act as counsel and question witnesses during a trial.

By the People

Because trials impact litigants' property or freedom – and sometimes involve questions of life and death – the adversary system was tailored to enhance the search for truth. When both sides of a dispute are given equal access to the facts of the case and an equal opportunity to make presentations to a jury, justice results.

Judges are not supposed to take sides and neither are jurors. Potential jurors are questioned before trial and selected for their impartiality. Those who are biased are not selected.

Permitting jurors to ask questions undermines the fundamental protections that have been in place in our system for decades. It encourages jurors to express opinions, which may indicate early in a case that one party is favored over the other by the juror. The questions may disclose that jurors have begun deciding the case, before both sides in the case have had the opportunity to present evidence. It also permits jurors to communicate with the attorneys – through their questions – and let one side know what evidence it is missing.

There are countries that do not use an adversary system in their courts. Many use inquisitorial systems, where the prosecution accuses a person, conducts a full investigation, and the person must prove his or her innocence. Our Founding Fathers declined to impose such a system in the United States, believing that the State was the more powerful party in criminal courts, and therefore should be forced to prove guilt.

The Commission does not recommend moving away from the adversary system, but the authors of this minority report believe that by allowing jurors to ask questions the result would be the same.

During public hearings, many attorneys argued vociferously against allowing jurors to ask questions, citing many of the concerns in this minority report. One attorney told the Commission he came to the public hearing to support the concept, but changed his mind after hearing the arguments of fellow lawyers.

In the same way that we do not let the hometown fans make the calls in baseball, basketball or football games – with an obviously biased perspective – we should not let the jurors become advocates in our courtrooms. That is the job of the lawyers. Allowing jurors to ask questions during trials would permit them to become advocates.

Justice

Our judicial system ensures that all litigants get their day in court, with a level playing field to present their strongest cases. Citizens must be confident the decisions at the end were fairly obtained.

Trials are far more complicated than baseball, basketball or football games. No jury could have the training and experience of the attorneys to know which questions are allowed, and which were not. Attorneys ask questions – or don't ask questions – for informational, legal or tactical purposes the jurors could not know. Evidence is presented in a particular fashion to tell a story and educate the jurors about the relevant facts and issues. Jurors should not assume that role, and allowing them to ask questions would be to let them do just that.

About half the states permit some questions to be presented by jurors. In the past four years courts that have considered permitting jurors to question witnesses have tended to preclude or restrict such questioning. Nevada is one of the only States that wants to expand the practice.

Jury questions have the potential to present litigants with additional opportunities to fight on appeal. This is likely to make cases more expensive and time-consuming. During a recent case in Massachusetts jurors asked nearly one hundred questions. Clearly that case would have been completed more quickly without those questions. Ohio recently decided not to permit questions. Texas has decided not to permit questions in criminal cases.

Of course, not every case in which jurors ask questions will be longer, more expensive or present additional appeal opportunities. Attorneys who have won cases in which jurors have asked questions obviously like the idea. There are attorneys who believe the questioning by jurors helped their cases. These generally are private attorneys who get to pick their cases, passing on those that are the weakest. That luxury is not available to attorneys who are appointed to represent people who cannot pay their own attorney. Our system is not intended to, and should not, penalize the indigent.

Trials are searches for the truth, within the rules. A confession from a suspect who was beaten is not admissible, and has not been for many years in the United States. Evidence obtained as the result of unauthorized searches is also not admissible at a trial.

The Bill of Rights grants more protections to litigants in criminal courts than any other single group of people - the right to remain silent in the face of accusations, the right to speedy and public trial, the right to appear and defend, the right to the assistance of counsel, the right to be free from unreasonable search and seizure, the right to due process of law, the right to equal protection, and the right to be free from cruel and unusual punishments upon conviction. It was precisely because George Washington, Benjamin Franklin, Thomas Jefferson, James Madison and the others involved in drafting our Constitution and Bill of Rights had lived under a regime in which these rights were not given to the citizens that they made sure the rights were written into our Constitution and Bill of Rights.

It is the attorneys' job to ask the questions of the witnesses to educate the jury.

Even if jurors would enjoy trials more, and they might, if given the chance to participate, that is not sufficient reason to risk weakening the rights that have made this Nation a two-century-old testament to Democracy.

Other Issues

PROPOSED

JURORS' BILL OF RIGHTS

By the People

Nevada jurors are regularly asked to temporarily leave their safe, secure and routine lives and make the toughest decisions any individuals could be asked to make. In murder cases they are often asked not only if the defendant is guilty or innocent, but whether that person should live or be executed for the crime. A juror's decision often determines whether a criminal defendant walks free or spends years behind bars. In civil cases, a juror's decision involves thousands or millions of dollars in money or property, altering for good or bad the lives of the litigants and their families or companies.

These are no small matters and the state and the courts realize that citizens who serve on juries are summoned involuntarily and serve for marginal compensation and at a personal sacrifice. Our system of justice simply would not exist without jurors, yet jurors often believe their time is not respected and their sacrifice is not appreciated fully. The primary complaint of former jurors who testified to the Jury Improvement Commission or completed the Commission's questionnaire was that much of their time was wasted as they waited to be sent for jury selection or, once selected, for trials to begin each day.

The Commission knows that more sacrifices and more involvement by citizens will be sought as the courts get busier and busier.

The Commission also believes that those called to jury duty have certain rights that should be respected. Therefore, the Commission recommends that a Jurors' Bill of Rights be adopted by the Nevada Supreme Court to recognize the rights that those involved in the court system – whether as administrators, attorneys, judges or court staff – are expected to honor.

On the following pages is the recommended ...

Jurors' Bill of Rights

Jurors' Bill of Rights

1. A juror's time is precious. Delays in jury selection and the progress of the trial should be avoided whenever possible and when delays are unavoidable, they should be minimized.

2. Jurors have a right to be treated with courtesy and respect due officers of the court, to be free from harassment and to be informed of their right to individually choose whether to discuss a verdict with trial counsel or the media.

3. Jurors have the right to receive sincere attention to their physical comfort and convenience as well as the ability to receive safe passage to and from the courthouse.

4. Jurors should be reasonably compensated for their service.

5. Jurors should have the opportunity to reasonably provide information about their previously scheduled commitments after the court issues the summons for jury duty, but before the panel is expected to report, and the courts should make every effort to accommodate the jurors' and prospective jurors' needs.

6. Jurors have the right to be randomly selected from the broadest possible compiled list of qualified citizens. No one should be excluded from jury service on the basis of race, sex, religion, physical disability, profession or country of origin.

7. Jurors have the right to be instructed on the law in plain and understandable language.

8. Jurors have the right to a venue to express their concerns, air complaints and make recommendations regarding their experience and treatment as jurors. For this purpose, judges are encouraged either to meet with the jury after the trial has been concluded, if circumstances permit, or to correspond with jurors and survey them regarding their satisfaction with the process and their suggestions for improvement.

9. Jurors have the right to ask questions of witnesses in trials pursuant to limitations of the law.

10. Jurors have the right to take notes in both civil and criminal trials.

RURAL ISSUES

While most of the issues considered by the Commission address concerns common to all courts and jury systems across Nevada, regardless of locale, the implementation of some recommendations will necessarily be affected by the trial venue.

Nevada's nine judicial districts are widely diverse. Two districts, the Second and the Eighth, encompass large urban populations. Both, however, include sparsely populated rural communities. The First, because it includes Carson City, receives a disproportionately larger share of public interest lawsuits against or on behalf of the state. In the Seventh Judicial District, the judges hear a great deal of prisoner litigation because the maximum security prison is situated in White Pine County. Douglas County, seat of the Ninth Judicial District, despite great population increases in the Minden-Gardnerville area, tries relatively few jury trials. When a jury trial goes forward, however, some members of the panel must travel substantial distances to attend.

Many of Nevada's rural counties have, since their beginnings, been dependent upon the mining industry to sustain their economies. The recent decline of the mining industry in these rural counties has resulted in the loss of population in several districts. This, in turn, means a loss of ancillary business and a concomitant, substantial loss in tax base and revenue. Rural economies have been devastated, with local governments struggling to provide even basic governmental services. Humboldt, Lander, Lincoln, Mineral, Nye, Pershing and White Pine counties (and this is not meant to be an exclusive list) have experienced significant declines in their local economies over the past several years.

These economic woes affect funding for the rural courts, in addition to all other aspects of government. Providing basic services for jurors, and the court system itself, presents a significant challenge for many rural communities. Instituting jury improvements is a greater challenge in these communities because of the financial constraints, geographical distances involved and relatively small pool from which jury panels are summoned.

In investigating the unique problems of the rural counties, the Commission informally surveyed the rural judges and court staffs. The Commission also received testimony during public hearings from representatives of rural counties, who explained the adverse impact that statewide implementation of jury reforms could have on their

communities and court systems. The Commission acknowledges and shares these concerns and believes that any recommendations that are implemented on a statewide basis must be tailored to address the special needs of the rural communities to minimize any potential adverse effects on those areas and to advance the cause of justice in all communities in this state.

Some of Nevada's sparsely populated counties face their own special concerns with regard to jury reform. For example, for many citizens in the rural counties, the time between jury service may be shorter than one year. NRS 6.070[88] provides for a statutorily recommended one-year period between times served on a jury. The statute does provide an exception permitting the summonsing of persons who have already served once in the past year if not enough suitable jurors are otherwise available. This frequent call to jury service could be reduced through the elimination of automatic occupational exemptions and constant effort to keep the list of citizens qualified for jury duty as up to date and broad as possible.[89]

Rural Issues

RECOMMENDATIONS

In large part, rural issues revolve around a lack of funding. Rural economies suffer as each mine closes, and populations decline. Critical needs for courts must be identified, and a statewide strategy must be developed to address and fund these needs. The State Judicial Council and the newly formed Commission on Rural Courts should aggressively explore these issues and report their findings and proposals.

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[88] NRS 6.070 (stating that a juror selected the prior year may not be selected again "unless there be not enough other suitable jurors").

[89] The resourcefulness of the dedicated public servants of the rural counties is exemplified by DeAnn Siri, Esmeralda County Clerk-Treasurer. An interview with Ms. Siri revealed the following: There are 558 registered voters in the county of 970 residents. To develop a jury pool, Ms. Siri uses the registered voter list, various utility lists, local telephone books and any other sources at her disposal. In addition, if she knows of anyone who is eligible and not on the jury pool list, she will add the name.

ASPIRATIONAL GOALS

The Commission has made many recommendations that can be implemented in the next few years to considerably improve the jury system in the State of Nevada. However, a few other ideas the Commission explored in its study have real merit or may warrant further study, but do not seem feasible to implement at this time. These recommendations are made as long term goals that should be kept in mind for the future.

Day Care

Several judicial systems provide day care services for the children of citizens summoned for jury duty. This permits many people to serve when they could not otherwise. The advantage is not only that a person can participate in the jury process, but it broadens the spectrum of those participating in the jury process. Lack of day care can restrict those prospective jurors who are young and of limited economic means.

In 1996, the California Blue Ribbon Commission on Jury System Improvement recommended that a special child care program be put in place to meet the needs of citizens called to jury duty. In doing this, the Commission observed that: "In some counties, 60% of the hardship excuses involve lack of child care. The Commission believes that reasonable child care options must be made available to jurors."[90]

In early 2002, the Ninth Judicial Circuit Court of Florida announced that it had opened a day care facility for children of jurors. The facility is run by a licensed, non-profit organization and provides its services on-site. "The Judges want jury service to be available to all members of the community," stated Judge Antoinette Plogstedt, who chairs the Jury Innovations Committee. "Now parents (with young children) can exercise their right to serve on a jury."

The Commission well understands that the cost of establishing day care for the children of citizens participating in the jury system is substantial and would require the

[90] Final Report: California Blue Ribbon Commission on Jury System Improvement 26 (1996).

acquisition of necessary space in or near Nevada's courthouses. Given the tight financial budgets in the counties and the state at this time, it is extremely doubtful that this service to assist jurors can be implemented in the near future. But we do hope that this proposal will be kept in mind and its implementation considered when funding becomes feasible.

Understandable Jury Instructions

Jury instructions should be in clear, plain, understandable language. A key component of our jury system is the written jury instructions given by the district judge to the jurors at the conclusion of the trial. Virtually every jury study has not only emphasized the importance of the instructions, but has recommended that additional efforts be made to recast them in ordinary English that is understandable to the laymen.

Nevada has made several attempts to revise the standard jury instructions to make them more understandable, and at the present time two committees are rewriting the criminal jury instructions to accomplish this goal.[91] After these efforts are completed, the Nevada Supreme Court should assess what additional work is necessary to make all civil and criminal jury instructions clear and understandable to the layman and take the necessary action to accomplish this goal.

Public Education

Once the majority of the recommendations are implemented, the Commission recommends that a broad based educational program be initiated throughout Nevada to emphasize the improvements in the system. The educational program, through the media and other avenues, should emphasize specifically that everyone is now participating, that the system is more juror-friendly and that every step has been taken to make sure that a juror's time is not wasted. The media campaign should also state that it is now easier to fulfill a citizen's duty to perform jury duty and the importance of jury service to our democratic system.

[91] The Criminal Jury Instruction Revision Committee in the Eighth Judicial District Court is chaired by District Judge Sally L. Loehrer, and Justice Myron E. Leavitt is the Supreme Court's representative on this committee. The Second Judicial District Court is also revising its criminal jury instructions in an effort headed by District Judge James W. Hardesty. Both reports are expected to be made public in the near future.

The Commission has mentioned the educational campaign launched by the New York judiciary in 1996 and that it would be a good example to follow in structuring such a future effort in Nevada. New York instituted a statewide juror appreciation week every November primarily to thank jurors.[92] Pittsburgh, Pennsylvania, and Duluth, Minnesota, also made major efforts to improve citizen education about jury service. These included a Jury Appreciation Month or Week, distributing bumper stickers, free bus passes to jurors, and other creative programs to both inform citizens and show appreciation to jurors.[93]

Mandatory Employer Compensation

In several states, employers are required by law to compensate their employees who are summoned to jury duty.[94]

While requiring employers in Nevada to provide limited compensation to employees called to jury duty is a revolutionary concept, it is something that should be considered by the Legislature at some point. We commend those employers who continue to pay their employees who serve on juries and hope that all employers would adopt the practice in the future. In this way, employers can help ensure that juries are comprised of competent and committed individuals. It can also be argued that this is in the employer's interest since lawsuits and litigation have become an inevitable part of business ownership.

Should this concept ever be adopted, the Commission does not endorse requiring full compensation for an employee whose absence already is likely to have an adverse fiscal impact on the employer. The Commission does not believe it would be an undue burden on an employer with 10 or more employees to provide compensation at the statutory level of $40 per day for the first three days an employee serves on jury duty – a total of $120. That would allow the employers to support their employees, fulfill an element of civic responsibility and ease the burden on the court system. The

[92] Continuing Jury Reform in New York State, supra note 12.
[93] Jury Trial Innovations, supra note 20, at 26-27.
[94] District of Columbia; Employers (with 10+ employees) pay regular salary for 5 days, Colorado; Employers pay statutory $50 per day jury fee for 3 days, Connecticut; Employers pay statutory $50 jury fee for 5 days, Massachusetts; Employers pay statutory $50 jury fee for 3 days,
New York; Employers (with 10+ employees) pay statutory $40 jury fee for 3 days

court system would pay the jury fees for the remainder of the time a citizen serves on a jury, and pay jury fees from the beginning for jurors who are unemployed or whose employers would not be required to contribute.

Voir Dire Process

Several jury study reports have commented on the voir dire process, the procedure where the judge and attorneys ask the prospective jurors questions to determine if they are qualified to serve. The Commission has refrained from making an in-depth review of this process because we do not perceive it to be a part of Nevada jury trials where major problems are occurring, and it would have been a major additional analysis that could have detracted from the Commission's remaining inquiries.

Voir dire is done to answer two fundamental questions - can the prospective juror physically and mentally serve as a juror, and does he or she have any prejudices or life experiences which would make that person unable to serve as a fair and impartial juror? Nevada's district judges have held the inquiry to those matters, and the Commission does not see long and protracted voir dire in Nevada as exists in several other states.

But because the voir dire process is vital to the jury process and our justice system, a complete review of it may be warranted in the future. This would be particularly so if the Nevada district judges began permitting long and protracted voir dire examination by attorneys. At the present time, we do not believe the voir dire process in Nevada is in need of any major revision.

CONCLUSION

The Jury Improvement Commission believes the reforms and innovations advocated in this report can significantly improve the experiences of citizens who serve on our juries and positively impact the verdicts that result.

These recommendations, if adopted, would allow the courts to better serve justice. Jurors, drawn from a large and diverse pool, would be better informed, more actively involved in the trial process and more attentive.

The Commission took into consideration the effects its recommendations might have on judges, lawyers, court staffs and county governments that fund the courts. There is no doubt that implementing the recommendations would entail additional effort and time by courtroom professionals and, in some cases, a commitment of more resources by governments.

But the mission of the Commission was to recommend reforms in the jury system that would expand the ways jurors are selected, improve the way they are treated and enhance the ability of jurors to understand the evidence and follow the proceedings. The citizens of the State of Nevada deserve no less.

The Jury Improvement Commission urges the Nevada Supreme Court, the local courts and the Nevada Legislature to enact these recommendations for the benefit of our citizens and justice in Nevada.

COMMENDATIONS

Clark County Jury Management System

The Nevada Supreme Court Jury Improvement Commission commends the Eighth Judicial District Court for its use of technology to improve the jury management system in Clark County – one of the nation's fastest growing areas and home to two-thirds of Nevada's population. By committing the resources for a sophisticated jury management system, Clark County not only improves efficiency in the courts, but also eases the burden on citizens called to jury duty.

Over 230,000 residents are summoned each year for jury duty and calls to the Jury Commissioner at the Eighth Judicial District Court can exceed 1,500 per day. There simply is no way court employees can handle the great volume of calls without keeping citizens waiting for long periods of time. This is neither fair to the citizens nor efficient for the court.

By implementing a state-of-the-art computerized system with integrated voice response, those with questions about jury service or who simply want to confirm or reschedule their jury duty can obtain responses quickly and efficiently. The Eighth Judicial District Court has shown what can be accomplished to best serve the citizens and the courts.

Washoe County Jury Trial Innovations

The Nevada Supreme Court Jury Improvement Commission commends the Second Judicial District Court for taking steps to respect and maximize a juror's time by implementing a meaningful overflow trial system that works because of the dedication and cooperation of the District Court judges.

The Second Judicial District Court initiated a "no bump" trial policy that allows virtually every case to be resolved through settlement or trial by the designated trial date. If a judge has two cases ready to proceed to trial on a particular date, another judge in the district, who has no trials proceeding, voluntarily takes the second trial. The Commission believes such dedication in a large judicial district is worthy of recognition.

Rural County District Courts

District Courts in Nevada's rural counties have few resources to initiate innovative jury reform. The limitations of court facilities often constructed a century ago make jury management alone a difficult task, yet testimony to the Jury Improvement Commission indicated the courts routinely go out of their way to accommodate citizens called to jury duty. Some judges go so far as to utilize their personal chambers to sequester jurors away from attorneys and defendants. Courts also regularly make special accommodations for jurors who have to travel long distances in sometimes difficult weather conditions to perform their civic duty. The Jury Improvement Commission commends the rural county District Courts for their dedication and sacrifice.

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SUPREME COURT OF NEVADA
FIAT JUSTITIA
FIAT JUSTITIA

EXHIBIT 237

DA file / Harmon

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * * *

FILED

Aug 13 11 20 AM '87

CLERK

THE STATE OF NEVADA

Plaintiff,

vs.

VICTOR MAXIMILLIAN JIMENEZ
aka VICTOR DINO JIMENEZ

Defendant.

Case No. C77949 & C77955
Department No. I
Docket No. "J"

BEFORE THE HONORABLE J. CHARLES THOMPSON, DISTRICT JUDGE

RECORDER'S TRANSCRIPT RE:
JURY TRIAL

THURSDAY, APRIL 30, 1987

APPEARANCES:

For the Plaintiff: MELVYN T. HARMON, ESQ.
(Deputy District Attorney)

For the Defendant: RICHARD L. PIPKINS, ESQ.

DAVID L. PHILLIPS, ESQ.

Recorded by: JANICE R. LISTON
Special Reporter Transcriber

themselves as Frank and Lydia Jimenez, did they relate to you that they were extremely afraid to come to the courthouse because of threats against them?

A No they did not.

Q Did they .... did they tell you that they had been threatened ...

A No.

Q With bodily harm at any time?

A No.

Q Do you know if they have been the victims of any violence in the last day or two

A No I don't.

Q Do you know reason why they are not present?

A No.

Q In court?

MR. PIPKINS: Pass the witness, your Honor.

MR. HARMON: I have no further questions.

THE COURT: Thank you for being a witness.

TERRY COOK

having been called as a witness by the Plaintiff, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. HARMON:

Q Will you state your name please?

A Terry L. Cook

Q Spell your last name.

A C-O-O-K

Q Mr. Cook, what is your business or profession?

A I'm a Criminalist II assigned to the serology unit with Las Vegas Metropolitan Police Department laboratory, Las Vegas, Nevada.

Q What exactly is a Criminalist II?

A A criminalist is a general term applying to someone with a specialized background or training -- uh -- that analysis evidence. Uh -- two denotes three or more experience doing this. My area of expertise, specifically, is that of serology and that's the identification of body fluids.

Q Uh -- will you explain to us briefly the nature and extent of your formal training and experience in your field of expertise?

A Yes sir. I have a bachelors degree in chemistry, awarded from Washburn University in the year 1979. During the academic year of 1979 to 1980, I held the position of assistant instructor, temporary, with the chemistry department at Kent State University. My duties there were to instruct in the freshman chemistry laboratories, and to work on the synthetic fuel chemistry project. The team with which I was working disbanded after the academic year of 1980, and I was -- uh -- given a temporary position as a toxicologist with the Department of Health and Environment located out of Topeka, Kansas. This was a temporary position approximately nine months in length. In January, 1981, I was asked to apply for a Criminalist position

at the Kansas Bureau of Investigation laboratory and I was awarded that position. It was at the Kansas Bureau of Investigation in which I went uh -- a year of intensive training in the field of serology specifically. I worked as a serologist for Kansas for approximately two years. I came to the Metropolitan Police Department March 6th of 1983 and have worked as a serologist since that time. I have additionally attended the F.B.I. Advanced Electrophoresis School -- uh -- biochemical methods class. This was two weeks in length and it was -- uh -- in June of 1985. I have additionally attended the Advanced Electrophoresis School at the Serological Research Institute located in Emeryville, California, and that was in uh March of 1986.

Q Mr. Cook in connection with your duties, have you had occasion from time to time to qualify as an expert in courts of law?

A Yes I do sir.

Q Uh -- is this as -- uh -- a criminalist with a specialty in the field of serology?

A Uh -- often sir.

Q Can you tell us about how many times you have qualified in that fashion and in what jurisdiction?

A In the Justice and District courts in both Kansas and Nevada... in excess of sixty times I would imagine, including this court on numerous occasions.

Q Over how many years, sir?

A Over six

Q In, in January and February, 1987, were you assigned as a Criminalist II --uh-- to the Criminalistics Bureau of the Las Vegas Metropolitan Police Department?

A I was.

Q Uh -- during that period of time, did you have submitted from the North Las Vegas Police Department, specifically by Detective Scroggin, a number of articles of clothing?

A Yes sir.

Q Uh -- will you tell us what articles of clothing were submitted by Detective Scroggin?

A Initially, they consisted of a -- uh -- blue and white shirt, uh -- a pair of ... two pairs of brown trousers, and a dark colored jacket.

Q Did you conduct any sort of examination upon those articles?

A Uh -- yes sir I did a visual examination for obvious blood stains.

Q As a result of uh -- the examinations you conducted, did you generate two separate reports?

A Yes I did sir.

Q Is -- uh -- one dated January the 28th, 1987 and the other February the 24th, 1987.

A That's correct.

MR. HARMON: May I have the court's indulgence?

EXHIBIT 238

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

--oOo--

THE STATE OF NEVADA, Plaintiff,	Case No. C92278
-vs-	Dept. No. III
STEVEN ALTONIO PARKER aka STEVE ALTONIO PARKER, Defendant.	Docket:

FILED

FEB 8 1991

CLERK

DEPUTY

REPORTER'S TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE JOSEPH PAVLIKOWSKI, DISTRICT JUDGE

Friday, February 8, 1991
9:30 A.M.

Volume V
Pages 922 - 1049, inclusive

APPEARANCES:

For the State: Melvyn T. Harmon, Esq.
Deputy District Attorney

For the Defendant: Mace Yampolsky, Esq.
Michael Cherry, Esq.

Reported by: DANETTE ANTONACCI-BOPP, CSR #222
LISA BRENSKE, CSR #186

DANETTE ANTONACCI-BOPP, CSR #222 (702) 455-4672

MR. HARMON: Terry Cook.

TERRY COOK,

called as a witness by the State, having been first duly sworn, was examined and testified as follows:

THE COURT: Give us your full name, spell your last name, your business address and your occupation.

THE WITNESS: Terry L. Cook, C-o-o-k. I'm a Criminalist 2 with the Metropolitan Police Department laboratory in Las Vegas, Nevada. The address is 6765 West Charleston.

THE COURT: What are your duties?

THE WITNESS: My duties are essentially to analyze serological evidence for the presence of body fluids and then characterize them by blood types.

THE COURT: What type of evidence is that?

THE WITNESS: Predominantly sexual assault kits, bloody clothing, bedding and any other items with suspected bloods or body fluids deposited.

THE COURT: Have you had any special training, Terry?

THE WITNESS: Yes, I have.

THE COURT: What type of training?

THE WITNESS: I hold a bachelors degree in

chemistry awarded from Washburn University during the year of 1979.

During the academic year of 1989 to 1980 I held the position of assistant instructor temporary with the Kansas State University chemistry department.

My duties there were to help instruct freshman chemistry labs and work on a synthetic fuel project.

I was then employed as a toxicologist temporary position in 1980 with the Kansas Department of Health and Environment. My duties were to analyze blood and urine samples for the presence of poisons and controlled substances.

I was then asked to apply at the Kansas Bureau Investigation Crime Laboratory in Topeka, Kansas where I underwent extensive training in the area of blood grouping and narcotics analysis.

I then accepted a position with Metro police in March of 1983. While employed at Metro I attended the F.B.I. advanced school and biological -- it's called the biochemical methods of blood stain analysis.

I attended the F.B.I. hair and fiber school. These were located in Quantico, Virginia. I additionally attended Serological Research Institute on semen analysis.

I'm also a member of the Midwestern Association of Forensic Sciences.

THE COURT: Have you testified in the courts of Nevada previously?

THE WITNESS: Yes, I have.

THE COURT: Approximately how many times?

THE WITNESS: Approximately a hundred.

THE COURT: Mr. Harmon.

MR. YAMPOLSKY: No objection to his qualifications as an expert.

THE COURT: Thank you, Mr. Yampolsky.

DIRECT EXAMINATION

BY MR. HARMON:

Q Mr. Cook, as I proceed always keep in mind that the court reporter has to take everything down so please don't speak too rapidly.

You are a criminalist with the Las Vegas Metropolitan Police Department?

A I am.

Q Directing your attention to this particular case have you conducted a number of examinations involving the analysis of objects for the presence of blood?

A Yes.

Q Have you also examined a sexual assault kit?

A Yes.

Q Have you examined various hair samples?

EXHIBIT 239

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,	Case No. C107751
Plaintiff,	
vs.	DEPT. NO. 11
DAVID ROBERT RIKER,	
Defendant.	DOCKET NO. "S"

* *

BEFORE THE HONORABLE ADDELIAR D. GUY, III, DISTRICT JUDGE,
and
THE HONORABLE RICHARD WAGNER, DISTRICT JUDGE,
and
THE HONORABLE JAMES A. STONE, DISTRICT JUDGE

FEBRUARY 23, 1994

RECORDER'S TRANSCRIPT RE:
PENALTY PHASE - THREE-JUDGE PANEL
(DAY 2, VOLUME II)

APPEARANCES:

For the State: MICHAEL N. O'CALLAGHAN, ESQ.
Deputy District Attorney
200 S. Third St.
Las Vegas, NV 89155

For the Defendant: STEPHEN J. DAHL, ESQ.
MARK S. BLASKEY, ESQ.
Deputies Public Defender
300 S. Fourth St., #1404
Las Vegas, NV 89101

EXHIBIT FOUR(B)

JUDGE GUY: Here we go.

TERRY L. COOK, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Thank you. You may be seated.

THE WITNESS: Thank you, ma'am.

DIRECT EXAMINATION

BY MR. O'CALLAGHAN:

Q Please state your name.

A Terry L. Cook, C-O-O-K.

Q Are you employed?

A Yes, I am.

Q By whom?

A Metropolitan Police Department, Crime Laboratory, Las Vegas, Nevada.

Q In what capacity?

A I'm a criminalist II.

Q And how long have you been employed with the Las Vegas Metropolitan Police Department as a criminalist?

A Eleven years.

Q And what have your duties and responsibilities been as a criminalist II?

A Almost exclusively that of a serologist.

Q Which is?

A A serologist is an individual with a specialized background or training that utilizes that background and training in the analysis of body fluids such as blood, semen,

and saliva, hairs and fibers.

Q Have you testified as an expert in that area before?

A Yes, I have.

Q And in courts in this jurisdiction?

A Yes, I have.

Q What courts?

A Every district court in the 8th judicial district, about 150 times including this one on probably eight to ten.

Q Okay. And what's your training and background in the area of serology?

A I hold a Bachelor's Degree in chemistry awarded from Washburn University in the year 1979. During the academic year of 1979 to 1980, I held the position of assistant instructor, temporary, with the Kansas State University Chemistry Department located in Manhattan, Kansas. My duties were to help instruct freshmen chemistry labs as well as work on a synthetic fuel project funded by Phillips Petroleum Company.

The research team with which I was working disbanded after that academic year to go to Clemson. I then took a position as a toxicologist with the Kansas Department of Health and Environment. My duties there as a toxicologist essentially were to screen body fluids for the presence of poisons. This was a temporary position allotted by the governor, and after nine months the funding was ceased.

I was then asked to apply at the Kansas Bureau of

Investigation Crime Laboratory located and headquartered in Topeka, Kansas. It was at the Kansas Bureau of Investigation that I underwent two years of extensive in-house training in the field of serology.

I then accepted a position as a criminalist II with the Metro Police here in Las Vegas. While at Metro Police I was able to attend the FBI Biological Methods of Advanced Blood Stain Analysis as well as the FBI Hair and Fiber School. I also attended -- these were in Quantico, Virginia, the FBI Laboratory Facility.

I was then able to attend the Serological Research Institute School on Advanced Electrophoresis as well as the Serological Research Institute on semen analysis. These are both in Emeryville, California which is the Bay Area.

I've also attended annual meetings at the Midwestern Association of Forensic Science which I'm a member. I'm also a member of the Electrophoresis Society.

Q Did you do a serology analysis with regard to Case No. or Event No. 920414-0169 with the Las Vegas Metropolitan Police Department?

A Yes, I did.

Q You did two of them. Is that correct?

A Excuse me?

Q Two reports?

A Yes.

EXHIBIT 240

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. RICHARD ALLEN WALKER, Defendant.	Case No. C107751 Dept. No. XI Docket "S"

BEFORE THE HONORABLE ADDELIAR D. GUY, III, DISTRICT JUDGE

JUNE 16, 1994

RECORDER'S TRANSCRIPT RE:
JURY TRIAL
(DAY 13, VOLUME XIII)

APPEARANCES:

For the State: MICHAEL N. O'CALLAGHAN, ESQ.
JAY SIEGEL, ESQ.
Deputies District Attorney
200 S. Third St.
Las Vegas, NV 89155

For the Defendant: PATRICIA M. ERICKSON, ESQ.
501 S. Sixth St.
Las Vegas, NV 89101

ALAN JOSEPH BUTTELL, ESQ.
2635 S. Highland Dr.
Las Vegas, NV 89109

Recorded by: PAT LOFFT
Reporter/Transcriber
Clark County Courthouse
200 S. Third St., Dept. 11
Las Vegas, NV 89101

THURSDAY, JUNE 16, 1994; 10:30 A.M.

(Jury in)

THE COURT: Continuation of jury case No. 107751, State of Nevada v. Richard Allan Walker. Let the record reflect the presence of Defendant with counsel, District Attorney, other officers of the Court.

Will the Clerk please call roll call of the jury?

(Clerk calls roll call of jury, all present)

THE COURT: Will counsel stipulate the presence of the jury?

MR. O'CALLAGHAN: Yes, your Honor.

MS. ERICKSON: Yes, your Honor.

THE COURT: Good morning, jury.

Mr. Siegel?

MR. SIEGEL: Terry Cook.

THE BAILIFF: Terry Cook.

TERRY L. COOK, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Thank you. You may be seated.

THE WITNESS: Thank you, ma'am.

DIRECT EXAMINATION

BY MR. SIEGEL:

Q Would you please state your name and spell it for the record?

A My name is Terry L. Cook, C-O-O-K.

Q Mr. Cook, what's your occupation?

A I'm a Criminalist II with the Metro Crime Lab, Las Vegas, Nevada.

Q And how long have you been with the Metro Crime Lab?

A Eleven years.

Q And how long have you been a criminalist?

A Thirteen years.

Q And are you also a serologist?

A Yes, I am.

Q Could you tell us your educational background, please, and an emphasis in criminology and serology?

A Certainly. First of all, a criminalist is an individual with a specialized background or training that utilizes that training in the analysis of evidence.

Specifically, my training is in the area of serology. And serology is the identification of body fluids--mostly blood, semen and saliva--in connection with crimes of violence, and located at crime scenes.

I hold a Bachelor's Degree from Washburn University awarded in 1979 in chemistry. During the academic year of 1979 to 1980 I held the position of assistant instructor, temporary, with the Kansas State University Chemistry Department located in Manhattan, Kansas.

My duties there were to help instruct freshman chemistry laboratories as well as to work on a synthetic fuel project that

was funded by Hills Petroleum Company. The research team with which I was working went to Clemson University after that academic year.

I then accepted a position as a toxicologist with the Kansas Department of Health and Environment. As a toxicologist, my duties were to extract, chemically extract, body fluids of deceased individuals. In many cases it was urine and blood, and in some cases it was the fluid behind your eye called vitreous humor. And I would extract these body fluids for the presence of poisons. This was a temporary job that was allotted by the governor for about nine months.

Then I was asked to apply at the Kansas Bureau of Investigation Crime Laboratory which is headquartered and located in Topeka, Kansas. It was at the Kansas Bureau of Investigation that I underwent two years of intensive in-house training in the area of serology.

In March of 1983, I accepted a position at Metro Crime Lab as a serologist, and I've been working predominantly as a serologist to this day. In fact, I'm responsible for the analysis of the majority of the murder cases in the last eleven years.

While at the forensic lab I also attended the FBI school of advanced biological methods of bloodstain analysis as well as the FBI hair and fiber school. This is located in Quantico, Virginia, about 40 miles south of Washington, D.C.

I also attended the Serological Research Institute School on Advanced Electrophoresis and the Serological Research Institute School on Semen Analysis. And this school was located in the San Francisco Bay area, Emeryville, California.

I also attend annual meetings and seminars through the Midwestern Association of Forensic Science in which we kind of update techniques.

And I'm currently a member of the Electrophoresis Society.

Q Have you ever testified as an expert in the field of serology?

A Yes, I have.

Q Ever in this state?

A Yes, I have.

Q How many times?

A Conservatively, about 175 times.

MR. SIEGEL: Your Honor, I would offer Mr. Cook as an expert in serology.

THE COURT: Any objection?

MS. ERICKSON: No, your Honor.

THE COURT: So ordered.

BY MR. SIEGEL:

Q What exactly is serology in regard to blood analysis?

A Serology, as I mentioned earlier, was the identification of body fluids as they appear on items of evidence associated with crime scenes. And this is based on -- first of

all, we have to identify the body fluid, locate its whereabouts, or even if it does exist.

Secondly, we have to confirm that it's human.

And thirdly, based on our blood types, we try to separate these body fluids based on your blood types, and you have several. The one we're most probably familiar with is our ABO blood system. We're all either A, B, AB or O. And most of us are pretty familiar with that.

Actually a serologist is interested in about eight or nine of your blood groups or blood types, when in fact you really have about 20.

So as a serologist, as a forensic serologist, what I would do is I would identify a body fluid and then based on certain techniques, I would type these. Be the ABO or what we call PGM subtype, which is another blood type or esterase D to hydrogenase, which is another type. And these are things I'm interested in.

Then what I would do is I would type the fluids found on the items of evidence and relate them back to blood standards presented to me as being known victims and/or known suspects.

Q And in this case, were you in fact given blood samples from three knowns--that would be a Kevin Marble, a David Riker and a Richard Walker?

A Yes.

Q And were these for the event numbers, Metro event No.

920414-0169 and X192103004 out of Blythe?

A That's correct.

Q And in fact you were personally handed some samples from some officers who arrived from Blythe?

A That is correct.

Q Okay. And how many jurisdictions did you receive samples or items from in this particular case?

A Three.

Q And is that usual for you?

A It's highly unusual.

Q And does this stick out in your mind because of that?

A It sticks out as being one of the more confusing cases in my history.

Q Okay. And that is in regards to serology...

A Well...

Q ...and criminalistics?

A That's correct.

Q Now, you received these samples from the three knowns. Let's talk first about Kevin Marble. You received something from the evidence vault? (pause) From where did you get that, and how were you able to identify it?

A It came to me from the evidence courier during the morning evidence drop. It came to me on April 23rd, 1992. I signed out for this. It was a sealed manila envelope that was originally booked by Marjorie Holland which did contain a tube of

EXHIBIT 241

JChappell CORA00987

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,	)	CASE NO. C 131341
	)	
Plaintiff,	)	DEPT. NO. III
	)	
vs.	)	
	)	
JAMES CHAPPELL,	)	
	)	
Defendant.	)	
	)	

How well presented

JURY QUESTIONNAIRE

10106310 050009 Jerry Taylor

JUROR NUMBER BADGE NO. PRINT NAME

5-5-41

DATE OF BIRTH

Dear Prospective Juror:

You have been placed under oath. Please answer all questions truthfully and completely as though the questions were being asked of you in open court. You may be asked additional questions in open court during the jury selection process. Some of the questions asked in court may be similar to the questions included in the questionnaire. Every effort will be made to keep duplication of questions to a minimum.

All questions asked, either by way of this questionnaire or by way of oral examination, are intended to facilitate the selection of a fair and impartial jury to hear this case. The answers provided in response to the written questions will be made available to counsel for both the State and the defense. During regular questioning by the court and the attorneys you will be given an opportunity to explain or expand upon any answers, if necessary.

To assist the Court and counsel in evaluating any knowledge you may have concerning this case, please read the brief synopsis of this case provided with this questionnaire. The State has the burden of proving these allegations beyond a reasonable doubt. After you have completed filling out the questionnaire, please leave it with a jury assistant.

If you wish to make further comments regarding any of your answers, please do so on the last page of this questionnaire. If you need additional pages, please ask a jury assistant and they will be provided to you. As you answer the questions that follow, please keep in mind that every person is fully entitled to his or her own opinions and feelings, and that there is no right or wrong answers, only complete and incomplete answers. Complete answers are far more helpful than incomplete answers because they make long and tiresome questioning unnecessary, therefore, shortening the time it takes to select a jury.

Your answers will be used solely in the selection of a jury and for no other purpose.

DOUGLAS HERNDON
District Court Judge

OATH

You are instructed to affirm below that the responses you are giving are true and accurate to the best of your knowledge and belief.

Signature

3/7/07
Date

JChappe11 CORA00987

SYNOPSIS

James Chappell was convicted in October, 1996 of the murder of Deborah Panos. The two had known each other, and had an on again-off again relationship, for ten (10) years. He was also convicted of Robbery and Burglary in the incident.

This hearing is only to determine the appropriate punishment for the murder conviction.

The incident occurred on September 1, 1995 at the Ballerina Mobile Home Park near Lamb and Bonanza Road.

This case is expected to last approximately one week.

Are you physically available to serve as a juror on this trial?

Yes ✓ No ____

If no, please explain:

JChappell CORA009880

1. Your full name: JERRY McALLISTER TAYLOR
2. Your age: 65
3. Your place of birth: Huntington Park, California
4. How long have you lived in the Las Vegas Metropolitan area? 6 year
5. Your marital status (married, divorced, single, separated): ✓
6. Children:

Age	Sex	Education	Occupation
42	M.	12	X-Police officer
41	F	12	Fire Fighter
38	F	12 + 4 Coll.	Business Owner - Massage Th
32	F	12	Nail Stylist

7. Without listing an address, please describe the economic and ethnic makeup of your neighborhood. Middle Class & upper Income of 100,000. + up

8. What is the highest grade you have completed? 12
9. Did you attend College or University? NO If so, please list which college, what degree(s) did you receive and your major: In house system

10. Have you received any other special training or schooling? Yes ✓ No _____
If so, explain: General Motors Institute in Michigan

11. What is the education level of your spouse or person you are living with and their current occupation? Again, please list any advanced degrees and areas of study. 12

12. If you have taken courses or had training in any of the behavioral sciences (e.g. psychology, sociology, counseling or similar areas), please identify such courses/training by title and subject matter: None

13. If you have taken courses or had training in any of the legal fields, (i.e. law, administration of justice, corrections, law enforcement), please identify such courses/training by title and subject matter: None

14. If you have taken courses or had training in any of the medical sciences, and in particular the medical specialty of psychiatry, please identify such courses/training by subject matter or title: None

15. What are your hobbies, recreational activities and things you like to do in your free time? Boating

↳ 41 M. 12 4 Home Electronics

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

JAMES MONTELL CHAPPELL, Appellant, v. WILLIAM GITTERE, et al., Respondents.	No. 77002 District Court Case No. (Death Penalty Case)

APPELLANT'S APPENDIX

Volume 24 of 31

Appeal From
Eighth Judicial District Court, Clark County
The Honorable Valerie Adair, District Judge

RENE L. VALLADARES
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BRAD D. LEVENSON
Assistant Federal Public Defender
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Las Vegas, Nevada 89101
(702) 388-6577
Attorneys for Appellant

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of May, 2019. Electronic Service of the foregoing Appellant's Appendix shall be made in accordance with the Master Service List as follows:

Steve S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Sara Jelinek
An Employee of the
Federal Public Defender
District of Nevada

DISCUSSION AND CONCLUSIONS

There are four possible stages in the process leading to the selection of jurors for venires in the Eighth Judicial District Court, which may contribute to the observed disparity. These four sources are:

- The source list
- The sampling process
- Procedures for dealing with non-response to summonses
- Standards for excusing

The source list

The American Bar Association's Standards Relating to Juror Use and Management states that "The jury source list should be representative and should be as inclusive of the adult population in the jurisdiction as is feasible." At least some of the disparity ascertained in this study might result from the use of a single source list provided by the Nevada Department of Motor Vehicles, rather than using multiple sources.

As a single source, the list does appear to be reasonably inclusive. Population projections for Clark County for 1992 indicate a population of 677,665 for residents 18 years of age or older[11]. Figures provided by the Nevada DMV show that as of July, 1992 there were a total of 616,406 licensees and ID card holders over the age of seventeen in Clark County[12]. Thus, the DMV list includes 90.1 percent of the adult population of the county.

A list which excludes 10 percent of the jury eligible population may, however, contribute to the under-representation of racial minorities on jury venires in Clark County. A list which is not fully inclusive could be skewed against racial minorities because of economic and other factors which might affect obtaining driver's licenses or DMV ID cards. However, the DMV does not keep records on the race of licensees and ID cardholder, so it is not possible to determine whether the source list is as representative of the adult population as is feasible.

---

[11]See Nevada Population Information, prepared by the State Demographer's Office, Nevada Small Business Development Center, Bureau of Business and Economic research, College of Business Administration, University of Nevada, Reno. This estimates Clark County's 1992 population to be 897,570. 1990 Census data estimates 24.5 percent to be under 18 years of age. Thus, Clark County's projected 1992 population of individuals 18 years of age or older is approximately 677,665.

[12]See report provided by State of Nevada Department of Motor Vehicles, run date 7/27/92.

Nevertheless, augmenting the single source list with other lists is a method used in a number of other states to improve inclusiveness in this initial stage of the jury selection process. Augmenting the present list with just one other source, a list of registered voters, would increase inclusiveness by several percentage points, and use of one or more other lists, such as city directories, welfare recipients, naturalized citizens, or utility customers to name just a few could ensure that the master jury pool is as inclusive as possible.

The sampling process

Random sampling is an important part of the jury selection process at two stages. First, the names of those chosen to be summoned each week should be selected randomly. The Court Administrator states that this selection process is done by staff at Clark County's Computer Information Systems Department, and that the process has been challenged three times and found sound each time. But until specific information is available about the actual selection procedures used by Clark County it is not possible to say with any degree of certainty that selection at this stage is random.

Procedures for dealing with non-response to summonses

According to information provided by the Court Administrator, it appears that failure to follow up on non-responses to summonses might be a major factor contributing to under-representation of racial minorities on jury venires in the Eighth Judicial District.

Only about 1,600 (33.3%) of the 3,000 summonses mailed out each week generate responses. About 25% are returned as undeliverable, while the remainder, about 20%, fail to generate responses for reasons that have not been determined.

Because the court does not attempt to ascertain correct addresses for summonses which are undeliverable (mostly as a result of expired forwarding addresses), and does not resummon those who don't respond, nearly one-half of the total available jury pool is effectively eliminated from consideration at this rather early stage of the selection process[13].

---

[13]Assessing the possible effect of anticipated discrimination upon the willingness of minority individuals to attempt to participate in the jury selection system is beyond the scope of this study. It is certainly conceivable that many minorities, particularly low-income minorities, may fail to retain a jury summons from fear of any contact with the justice system or from a belief that members of minority groups would be excluded as a matter of course from participating in a system which is perceived as disproportionately involving members of their own communities as defendants.

Standards for excusing potential jurors

The Court Administrator's stated policy is to excuse potential jurors using conservative criteria, telling most of those who present excuses based on hardship, inconvenience, or biases of various sorts to report for jury duty and leaving it to the judge to decide whether or not to excuse them. Records are kept but not compiled concerning the number excused for various reasons. But if it is actually the case that only about 600 (37.5%) of the 1,600 who respond to their summonses qualify and are not excused, then this is potentially a stage of the selection process at which the observed under-representation of racial minorities on venires may arise[14].

Conclusion

The study shows that racial minorities are under-represented on jury venires for Eighth Judicial District courts. The disparity is statistically significant, and with respect to African-Americans there is less than 3 chances in 1,000 that the observed disparity occurred by chance rather than as a result of other factors. With respect to other minorities, there is approximately 1 chance in 100 that it occurred by chance alone.

The limitations of this study preclude conclusive identification of the causes of the observed disparities. The procedures followed in three areas deserve further study. First, a single source list is used to generate names of adults in Clark County. This list, provided by the Nevada DMV, includes about 90 percent of the adult population. Second, about one-quarter of those summoned do not receive the summons because it is returned to the Jury Commissioner's office as undeliverable, and no attempt is made to ascertain correct addresses for those individuals. In addition, nearly one-quarter of the summonses are not returned, for unknown reasons, and those individuals are not re-summoned. Finally, among those who do respond to the summons, over 60 percent are either disqualified from jury duty or are temporarily or permanently excused from serving by the Jury Commissioner's office. The net effect of these procedures is that out of every 100 adult members of Clark County's population, only about 18 ever reach the stage of being assigned to a jury venire, while 82 do not.

The precise cause of the disparity between the percentage of racial minorities in the adult population and the number observed in jury venires, and the particular stage of the selection process at which the disparity arises cannot be precisely identified due to the financial limitations on the scope of this study and further observations and analysis will be required to determine whether the observed disparity violates the state or federal constitution. Based upon measures adopted in other states, it

---

[14]To the extent that members of the minority groups may comprise a less affluent segment of the community, a policy of allowing excusals based upon a claim of financial hardship, dependence upon commission work, or child-care difficulties may create a disparate impact.

is possible that the disparity could be reduced if some or all of the following measures were implemented:

* Use of multiple source lists to ensure that the jury pool is as inclusive and as representative as possible.

* Implementation of measures to ascertain correct, deliverable addresses for those individuals whose summonses are returned as undeliverable.

* Re-summoning of those who don't respond to their initial summons.

* Limitation of informal disqualification and excusal of potential jurors, and requiring documentation of the impact of such excusals upon minority representation.

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY COURTHOUSE
200 SOUTH THIRD STREET
LAS VEGAS, NEVADA 89155-0001

COURT ADMINISTRATION

(702) 455-4277
FACSIMILE (702) 366-9124

November 12, 1993

Michael Pescetta, Executive Director
Nevada Appellate and Post Conviction Project
330 South Third Street, Suite 701
Las Vegas, Nevada 89101

Re: Jury Composition Study

Dear Mike:

The Jury Services Commissioner and I appreciate the opportunity to preview the jury composition study. The review raised concerns with the study's conclusions, as well as with the methodology utilized to reach the conclusions. Our concerns with the data collected and utilized to identify potential sources of disparity in composition are noted as follows:

* The baseline information from the preliminary 1990 U.S. Census for Clark County is representative of the racial composition of the general population. In contrast, the racial composition of the jury venires observed at the Clark County Courthouse would represent only those individuals 18 years or older who are citizens of this country. Do you know if the statistical data from the 1990 census identified only those U.S. citizens ages 18 or older? We are having difficulty independently correlating the percentages on page 9 with the 1990 Clark County census data.

* Further confusion is created by the data's presentation (again referring to Page 9). The section titled "Assessment of Disparity Between Composition of Venires and Composition of the Adult Population" implies the population chart on that page totaling 741,459 represents only the adult population for Clark County in 1990. However, on page 17 it indicates the projected adult population for Clark County residents ages 18 and over is 677,663 in 1992. The two population references indicate that the adult population in Clark County decreased by approximately 10 percent from 1990 to 1992. We could not locate population data for Clark County which supports the adult population trends inferred.

- The baseline information represents census data which is self-reported. The study recorded population based on visual observation. Discussion with urban planners indicates this distinction in reporting of a population's racial composition will create natural disparity between the two data sets.

The essence of our concern with the study methodology drives at the heart of the findings of disparity and the attempt to identify at what stage the selection process may be occurring. Did the study make an "apples to apples" comparison of 1990 census for Clark County residents ages 18 and older who also are U.S. citizens to jurors who have the same characteristics? If it did, this reduces the potential that the study's methodology ~~skewed~~ the statistical presentation of racial disparity.

With respect to juror selection procedures used in the Eighth Judicial District as defined by the Jury Composition Preliminary Study, several procedures require clarification:

- Page 15, paragraph 2, the statement, "If a person doesn't show up for jury duty after being assigned a badge (and thus a department), the process for following up varies," is not accurate. Jurors assigned badge numbers are rarely assigned departments at the time of their badge number assignment.

- Page 18, paragraph 1, the statement, "The Court Administrator states that this selection process is done by staff at Clark County Computer Information Systems Department, and that the process has been challenged three times and found sound each time. But until specific information is available about the actual selection process procedures used by Clark County, it is not possible to say with any degree of certainty that selection at this stage is random," is misleading to the reader. The author(s) fails to indicate that during discussion of this issue, we provided the name of Mr. Bill Cadvallader, the Information Systems Analyst assigned to the Juror Service Program. We specifically referred the study's author to Mr. Cadvallader for any information regarding the random selection methodology used by the juror system software in identifying jurors. Mr. Cadvallader indicates he is not aware of any attempt by this study's author(s) to obtain this information.

- Page 18, paragraph 2, the statement, "Potential jurors should also be randomly assigned to panels for specific trials. ~~Apparently~~ this is done by assigning badge numbers to individuals as they call the Jury Commissioner's office in response to summons. These badge numbers are grouped sequentially to form panels which are then assigned to the

various departments. But, if it is the case that badge numbers are assigned sequentially as calls are received, then the randomness of the assignment process is called into question," causes some concern.

The first concern with the statement is the inference of the word "apparently." One would expect that questioning the randomness of the juror selection process would be based on fact rather than conjecture. This is particularly true where a little more research could have accurately defined the process. The second concern involves the description of the assignment process. The description, as written, is not accurate.

* Page 18, the bottom paragraph states, "While we cannot say for certain that this is the major cause of under representation of racial minorities on jury venires in the county, that conclusion appears to be warranted. If minorities are more transient and tend to move more often than others, then they are less likely to receive a summons sent to them."

The first sentence attempts to reach the conclusion that undeliverable mail is the major cause for the alleged under representation of minorities on jury venires. Even assuming the study demonstrates minorities are under represented on jury venires, the conclusion that undeliverable mail is the cause has no empirical basis and is conjecture. In analyzing the second sentence which claims that minorities are more transient, if this is accurate, no matter what juror source list we use, minorities will be under represented. You would have, in effect, structural under representation of minorities for juror venires. Similar to structural unemployment for the work place, this would mean some level of under representation for minorities will exist regardless of efforts to eliminate such under representation.

* Page 19, second paragraph, the statement, "Records are not kept (or at least compiled) concerning the number excused for various reasons, so it is not possible here to determine whether inordinate numbers of excuses are being given," is inaccurate. Records are retained indicating the reason for excusal. Jury personnel previously interviewed by the author(s) do not recall any request for such data.

* Due to our concerns with the methodology utilized by the study, Clark County Internal Audit received a copy of the draft. Although several of their concerns mirror those detailed herein, attached is that review of the study.

With respect to the juror selection procedures used in the Eighth Judicial District Court, we are instituting two new elements which should improve the efficiency and effectiveness of the summons process. In January of 1993 we established a formal, automatic letter follow-up system for jurors postponing and not scheduling after the postponement date lapsed. Also, we are working with Clark County Information Systems to incorporate zip plus four mailing codes on the summons envelope. Other jurisdictions have reported as much as a 10 percent increase in summons deliveries and responses due to this approach. We expect the zip+4 approach to be operational within 6 months.

Sincerely,

Charles J. Short
Acting Court Administrator

CJS:ns

cc: Chief Judge Nancy Becker
Shirley Blake

INTERNAL AUDIT DEPARTMENT

JEREMIAH P. CARROLL II, C.P.A.

TO: Chuck Short, Acting District Court Administrator

FROM: Jeremiah P. Carroll, Director of Internal Audit

SUBJECT: Jury Composition Study

DATE: October 12, 1993

You have asked us to review the report on the jury composition study prepared for the Nevada Appellate and Postconviction Project. We question whether the findings support the conclusions reached in the report. We are not saying that disparity is or is not occurring, however, we are saying that this report doesn't prove that the jury selection process is invalid nor does it prove that disparities arise as a result of procedures followed by the Eighth Judicial District Courts.

This report was read by three audit personnel with the following credentials:

(1) Director, Certified Public Accountant (CPA), with thirteen years of auditing and research experience,

(2) Auditor, CPA, MBA, with fifteen years of auditing and research experience, and

(3) Auditor, CPA, MBA, with twenty years of auditing and research experience.

Each of these individuals have voiced concerns in various areas of the report. The following is a listing of the areas we question either individually or collectively:

- The Executive Summary of Findings makes a positive declaration that the "study revealed a significant disparity." However, in the explanatory paragraphs following the terms: "probably arises," "probably is less," "probably occurs," and "might result" are used. These are not conclusive statements that disparity exists or is, in fact, caused by the condition observed.

- The physical observation of prospective jurors is not, in our opinion, conclusive evidence of determining minority background. Therefore, the entire projection of sample observations to the population throughout the report is statistically insupportable because observations alone do not conclusively identify racial categories in all cases.

- Additionally, the number of observations (six) is insufficient to determine with any degree of certainty that the sample is representative of the population. Most analysts would require more than forty days of observations to obtain a 95% reliance level of confidence rather than use six days of observation. Therefore, most statistics shown in the assessment of disparity section of the report are questionable; as well as any conclusions reached.

- Part of the report is an inference that the jury selection should be representative of the general population when in fact the jury selection should be representative of the total population qualified for selection (i.e., electors who have sufficient knowledge of the English language and who have not been convicted of a felony). The report author does not investigate this provision and its effect on minority representation. The report does state, however, the qualifications for jury service.

- The report states that until information is available about the actual selection procedures used by Clark County it is not possible to say with any degree of certainty that selection at this stage is random. The report author does not state that he was denied this information. Even so, unavailability of information doesn't mean that procedures to assure random selection don't exist.

- The report states assigning people to panels is done by assigning badge numbers to people as they phone in. The report then states "the randomness of the assignment process is called into question." This is not true as far as any racial disparity is concerned. What you have done is shown a preference for people who call in early, regardless of race.

- The report states that records are not kept concerning the number of jurors excused for various reasons. The report author then states that this may result in "under-representation of minorities," without giving any justification except to imply that there may be "inordinate numbers of excuses being given." This is not evidence to show that jurors are not properly excused.

- The report author then states that minorities who respond to a summons "might be more likely to mention financial hardships" or other excuses. He states this in support of the contention that minorities may be under-represented in jury venires. There is no evidence that shows that minorities are more likely to request to be excused or that Jury Commissioner's Office "readily" accepts such requests from minorities.

- In the conclusions to the report, the report writer again makes references to areas of disparity using the following terms: "might result," "does not appear," "may," and "might serve as barriers." These are not conclusive statements that disparity is caused by jury selection procedures, if in fact the disparity exists.

I have one question on the study procedures. Certain additional procedures could have been performed to mitigate the confusion in the "study." We questioned why statistical studies were not performed on the areas the report author found in fault. A study could have been done on returned mail in an attempt to determine minority status of the prospective juror. Additionally, jurors excused from court could have been surveyed. Was the report author prohibited from doing this?

While we believe that this report doesn't prove that disparities arise as a result of procedures followed by the Eighth Judicial District Courts, the courts can work to enhance reaching all eligible prospective jurors and non-responsive potential jurors. Other alternatives are available to enhance the process and should be utilized if feasible.

If you have any questions regarding these comments, please call me at extension 3269.

NEVADA APPELLATE AND POSTCONVICTION PROJECT

330 South Third Street, Suite 701
Las Vegas, Nevada 89101
702-384-5010
Fax 702-384-5844

A NON-PROFIT CORPORATION

September 8, 1993

Honorable Nancy Becker
Chief Judge
Eighth Judicial District Court
200 South Third Street
Las Vegas, Nevada 89155

CONFIDENTIAL

Re: Jury Composition Study

Dear Chief Judge Becker

On Friday, I spoke to Mr. Short, the Acting Court Administrator, about the preliminary study of jury composition in Clark County which the Project has commissioned. I provided Mr. Short with a copy of the preliminary report for him to review, so that any factual errors which the report may contain could be corrected before it is distributed to anyone else. Mr. Short indicated that he is suggesting significant changes in the report and we will carefully review his suggestions before the document is made public.

I appreciate the amount of time and effort Mr. Short is devoting to this issue. I believe that the more non-controversial factual issues we can identify, the more cost-effective any steps to improve the system will ultimately be, whether those measures are taken by the Court Administrator or as a result of litigation in particular cases. I would like to acknowledge Ms. Peterson's and Mr. Short's cooperation, and the Court's support of them, in facilitating our inquiry into this issue. This attitude is by no means universal among courts or administrators.

I do want to correct one misunderstanding which Mr. Short related to me. Early last year, when the Project had just begun operation, I discussed a number of issues with Ms. Peterson; and at that time I indicated the likelihood that the Project would be conducting

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some kind of inquiry into the jury selection process. Ms. Peterson, as always, graciously offered her cooperation. In October, 1992, Dr. DeWitt began the observations which form the basis of the study, and personnel in the Court Administrator's office asked him what he was doing. I know that he identified himself as conducting a study for the Project, because Ms. Peterson called me to confirm that he was working with me. I confirmed that he was conducting a study for the jury selection procedures and I thanked Ms. Peterson for her willingness to discuss that issue with Dr. DeWitt. I am quite certain that I never suggested that the jury study was being conducted for the Supreme Court.

I am aware that Dr. DeWitt is also conducting a study of the Alternative Dispute Resolution system for the Supreme Court, and he sometimes divides his time in Clark County between the Supreme Court's study and the jury study; and I suppose some confusion may have arisen from his dual role. I have always made it clear, however, that the jury composition study was commissioned by the Project to identify possible constitutional issues in the jury selection system. I believe that giving the report to Mr. Short for his review before it is made public is an indication that the Project is approaching this sensitive issue in a straightforward and responsible manner.

Please excuse the length of this letter, but I believe that it is necessary to be as clear as possible with all concerned parties when the Project is dealing with these difficult issues.

Yours truly,

Michael Pescetta
Executive Director

MP/ef

cc: Mr. Charles Short

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NEVADA APPELLATE AND POSTCONVICTION PROJECT

330 South Third Street, Suite 701
Las Vegas, Nevada 89101
702-384-6010
Fax 702-384-6944

A NON-PROFIT CORPORATION

August 25, 1993

Hand Delivered

Mr. Charles J. Short
Acting Court Administrator
Eighth Judicial District Court
200 South Third Street
Las Vegas, Nevada 89155

Re: Jury Composition Study

Dear Mr. Short:

I want to express my thanks to you and your office for the cooperation you extended to us in connection with our preliminary study of the jury composition situation in Clark County. The help your office provided was important to completing the preliminary study in an economical and expeditious manner.

I enclose a copy of the preliminary report. I would like to give you an opportunity to review it and correct any factual inaccuracies you may detect in it before it is released to attorneys who may be contemplating raising jury composition issues, or to the public. I expect that the report will be distributed in the first week of September. If you have any corrections to suggest, I would appreciate it if you would let me know by August 31.

Again, many thanks for your assistance.

Yours truly,

Michael Pescetta
Executive Director

MP/ef

enclosure: as noted

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REPORT OF FINDINGS

JURY COMPREHENSION PRELIMINARY STUDY
8TH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

Prepared for:
Nevada Appellate and Postconviction Project

Prepared by:
John E. Dellitt, Ph.D.

AUGUST, 1993

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INTRODUCTION

Research Objective

In August, 1992 Litigation Technologies, Inc. was commissioned by the Nevada Appellate and Postconviction Project to conduct a preliminary jury composition study in the Eighth Judicial District, Clark County, Nevada. The Nevada Appellate and Postconviction Project had received information suggesting that there is a probable basis for a composition challenge as a result of under-representation of racial minorities on jury venires. This preliminary study was designed to collect data to determine whether it is likely that racial minorities are under-represented, and to try to identify the stages in the jury selection process where the under-representation, if any, might be occurring.

Methodology

The study was comprised of two parts. The first part involved investigating how the jury selection system works in the Eighth Judicial District. This entailed obtaining applicable statutes and regulations concerning the process, and interviewing officials to obtain answers to specific questions about the jury selection system. In the second part of the study, we collected data to help identify potential sources of disparity in composition at various levels of the selection process.

EXECUTIVE SUMMARY OF FINDINGS

The study revealed a significant disparity between the proportion of members of racial minorities in the adult population and the proportion ultimately assigned to jury venires. Specifically, Blacks and other racial minorities, including Hispanics, are under-represented on jury venires for Eighth Judicial District courts. Observation of potential jurors in September, 1992 and May and July, 1993 indicated that African-Americans were under-represented by over one-third (36.8 percent) while other racial minorities were under-represented by 28.3 percent. The likelihood that these findings are a result of chance alone rather than other factors is less than 1 in 1,000 for African-Americans and less than 1 in 100 for other minorities.

An analysis of the selection procedures employed in the Eighth Judicial District indicates that the disparity in representation of racial minorities probably arises from procedures at three distinct phases of the selection process. First, the jury pool is comprised of names obtained from just one source - a Nevada Department of Motor Vehicles list of licensees and ID cardholders. This list includes only about 90 percent of the jury eligible population, which probably is less inclusive and less representative than is feasible.

[redacted], the disparity probably occurs, in large part, at the summoning stage of the selection process. About one-quarter of the summonses mailed out are returned as undeliverable, while more than twenty percent fail to generate any response from the individuals summoned. The Jury Commissioner's office does not make any attempt to ascertain correct addresses for summonses which are undeliverable, and does not re-summon those who fail to respond for other reasons.

The third stage of the selection process in which practices might result in disparity is in the granting of excuses from jury duty by the Jury Commissioner's office. Although the stated policy of the Court Administer is to employ very conservative criteria when considering requests for excusal, about 67 percent of those who do respond to a summons are either disqualified from jury duty or are excused, temporarily or permanently, from serving. These individuals never reach the stage of being assigned to a venire.

APPLICABLE STATUTES AND RULES

NEVADA REVISED STATUTES

QUALIFICATIONS AND EXEMPTIONS OF JURORS

6.010 Persons qualified to act as jurors.

Every qualified elector of the state, whether registered or not, who has sufficient knowledge of the English language, and who has not been convicted of treason, felony, or other infamous crime, and who is not rendered incapable by reason of physical or mental infirmity, is a qualified juror of the county in which he resides.

6.020 Exemptions from service.

1. Upon satisfactory proof, made by affidavit or otherwise, the following named persons, and no others except as provided in subsection 2, are exempt from service as grand or trial jurors:

(a) Any federal or state officer.
(b) Any judge or justice of the peace or attorney at law.
(c) Any county clerk, recorder, assessor, sheriff, deputy sheriff, constable or police officer.
(d) Any locomotive engineer, locomotive fireman, conductor, brakeman, switchman or engine foreman.
(e) Any officer or correctional officer employed by the department of prisons.
(f) Any employee of the legislature or the legislative counsel bureau while the legislature is in session.
(g) Any physician, optometrist or dentist who is licensed to practice in this state.

2. All persons of the age of 65 years or over are exempt from serving as grand or trial jurors. Whenever it appears to the satisfaction of the court, by affidavit or otherwise, that a juror is over the age of 65 years, the court shall order the juror excused from all service as a grand or trial juror, if the juror so desires.

§.030 Grounds for excusing jurors.

1. The court may at any time temporarily excuse any juror on account of:

(a) Sickness or physical disability.
(b) Serious illness or death of a member of his immediate family.
(c) Undue hardship or extreme inconvenience.
(d) Public necessity.

A person temporarily excused shall appear for jury service as the court may direct.

2. The court shall permanently excuse any person from service as a juror if he is incapable, by reason of a permanent physical or mental disability, of rendering satisfactory service as a juror. The court may require the prospective juror to submit a physician's certificate concerning the nature and extent of the disability and the certifying physician may be required to testify concerning the disability when the court so directs.

§.040 Penalty for failing to attend and serve as a juror.

Any person summoned as provided in this chapter to serve as a juror, who fails to attend and serve as a juror, shall, unless excused by the court, be ordered by the court to appear and show cause for his failure to attend and serve as a juror. If he fails to show cause, he is in contempt and shall be fined not more than $500.

SELECTION OF TRIAL JURORS BY JURY COMMISSIONER

§.043 Designation by rule of district court; administrative duties; selection of trial jurors.

1. The district court may by rule of court designate the clerk of the court, one of his deputies or another person as a jury commissioner, and may assign to the jury commissioner such administrative duties in connection with trial juries and jurors as the court finds desirable for efficient administration.

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3. If a jury commissioner is so selected, he shall from time to time estimate the number of trial jurors which will be required for attendance on the district court and shall select that number from the qualified electors of the county not exempt by law from jury duty, whether registered as voters or not. The jurors may be selected by computer whenever procedures to assure random selection from computerized lists are established by the jury commissioner. He shall keep a record of the name, occupation and address of each person selected.

PART VI. JURY COMMISSIONER

Rule 6.01 Designation of Jury Commissioner.

Pursuant to the provisions of NRS 6.045, the court must designate a jury commissioner. The jury commissioner is directly responsible to the district court through the district court administrator.

Rule 6.10 Jury Sources.

In locating qualified jurors within Clark County as required by NRS 6.045, the jury commissioner must utilize the list of licensed drivers as provided by the State of Nevada Department of Motor Vehicles and Public Safety and such other lists as may be authorized by the chief judge.

Rule 6.30 Notice to Court Administrator of Prospective Juror's Failure to Appear.

If any prospective juror summoned fails to appear, the jury commissioner must immediately notify the court administrator of that person's failure to appear and the department to which they were assigned.

Rule 6.32 Trial Juror's Period of Service.

Each person lawfully summoned as a trial juror must serve for a period established by the court.

Rule 6.40 Duty of Jury Commissioner on Appearance of Prospective Jurors.

When prospective jurors appear before the jury commissioner pursuant to summons, he must assign such number of prospective jurors to each department of the court as the jury commissioner and the court administrator deem necessary.

Rule 6.42 Reassignment of Prospective Jurors.

Prospective jurors, assigned for service in a department of the court, whose services subsequently are not required must return to the jury commissioner for possible further assignment on that day.

Rule 6.44 Completion of Trial Juror's Duties.

When a trial juror has completed his jury duties in the department to which he was assigned, the district judge must direct him to return to the jury commissioner.

Rule 6.50 Court Administrator May Excuse Jurors.

A person summoned for jury service may be excused by the court administrator because of major continuing health problems, full-time student status, child care problems or severe economic hardship.

Rule 6.70 Limitation, Construction of Part VI.

Part VI must be limited to trial juries and jurors, and must be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice.

OBSERVATION OF JURY VENIRES

In order to determine the percentage of minorities in venires for trials in Eighth Judicial District courts, prospective jurors were observed and counted on a total of six occasions: three in September, 1992; one in May, 1993; and two in July 1993. On these six occasions a total of 1,137 prospective jurors were observed in the juror orientation room at the Clark County Courthouse[1].

On five occasions, the counts were conducted as individuals lined up at the front desk in the juror orientation room to receive their paychecks and badges. On one occasion, they were observed as they waited in a separate room. For the most part, jurors were called up to the desk in groups of thirty, and lined up in single file. This facilitated the counting procedure considerably.

The objective of the observation was to count the total number of prospective jurors, and the number of females, males, African-Americans, whites, and "other" racial minorities (including Asian, Latino, Native American, etc.) Because the methodology involved observing jurors and making an on-the-spot determination about whether to categorize each individual as White, African-American, or Other we include no separate classification for people of Hispanic origin, which generally indicates a Spanish-speaking person of Latin American origin, of any race. The results of the observations are summarized below:

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	OBSERVATION DATE							
Juror Type	2-14-22	2-21-22	2-28-22	5-24-22	7-12-22	7-19-22	Total	%
White	170	182	174	77	170	221	994	87.4
African-Amer.	11	17	9		10	16	68	6.0
"Other"	12	13	7		13	18	75	6.6
TOTAL	193	212	190		193	255	1,137	100.0

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To summarize, the racial composition of the jury venires observed at Clark County Courthouse was as follows:

Race	Number	Percent
White	994	87.4
African-American	68	6.0
Other	75	6.6
Total	1,137	100.0

ASSESSMENT OF DISPARITY BETWEEN COMPOSITION OF VENIRES AND COMPOSITION OF THE ADULT POPULATION

In order to determine whether there is any significant disparity between the percentage of racial minorities in the general population and the jury venires, we first had to collect census data about the racial composition of the general population.

Preliminary 1990 census data for Clark County[2] indicate that the racial composition is as follows:

Race	Number	Percent
White	602,658	81.3
African-Amer.	70,738	9.5
Other	68,063	9.2
Total	741,459	100.0

In the past the U.S. Bureau of the Census has acknowledged that the census undercounts the population and has released estimates of the undercount for each state. Estimates of the undercounts for the 1990 census have not been released yet, but in 1980 the Nevada undercount was estimated to be 3.46 percent, which was the second highest among the 50 states. [redacted]

believe that racial minorities are more likely to be undercounted, it is probably fair to assume that the percentage of racial minorities in Clark County's population is actually higher than reported above. As a result, the disparities discussed below are probably marginally smaller than they would be if the census were accurate.

A comparison of the racial composition of Clark County's population with the racial composition of the jury venires observed at the Clark County Courthouse yields the following table:

Race	Observed at Courthouse	General Population
White	87.4	81.3
African-Amer.	6.0	9.5
Other	6.6	9.2
Total	100.0	100.0

Absolute disparity

When assessing whether a particular cognizable group is under-represented in the venire, there are two commonly accepted ways to proceed. In the first, and less useful approach, one looks at the disparity between the group's proportion in the general population and its proportion in the venire. This is known as the "absolute disparity." For example, if a racial minority constitutes 10 percent of the population and just 5 percent of the venire, then the absolute disparity for that group is 5 percent - the difference between the two percentages.

In this study, the absolute disparity between the population and the venire for African-American and other racial minorities can easily be calculated by computing the difference between the two percentages, as summarized in the following table:

Race	Jury Venire	-	General Population	=	Absolute Disparity
White	87.4%		81.3%		+ 6.1%
African-Amer.	6.0%		9.5%		- 3.5%
Other	6.6%		9.2%		- 2.6%

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Thus, in terms of absolute disparity, whites are over-represented by 6.1 percent, while African-Americans are under-represented by 3.5 percent and other races are under-represented by 2.6 percent.

Comparative disparity

However, the absolute disparity does not reveal anything about the magnitude of the disparity in relationship to the group's relative proportion of the population. In order to do that, one must use a quantitative index which expresses absolute disparity as a percentage of the cognizable group's relative size in the general population. This is accomplished by means of the comparative disparity index, or CDI[3]. If, for example, the absolute disparity between representation in the population and representation in the venire is 5 percent for a particular racial minority, as in the example above, the comparative disparity is arrived at by computing the absolute disparity, then dividing the absolute value of that difference by the group's percentage of the population, and multiplying that result by 100 in order to express the result as a percentage (.05 ÷ .10 x 100 = 50%.)

In this study, the comparative disparity between representation in the population and representation on venires is calculated as follows:

Race	Absolute Disparity		Percent of Population		Comparative Disparity
White	6.1%	÷	81.3%	x 100 =	+ 7.5%
African-Amer.	3.5%	÷	9.5%	x 100 =	- 36.8%
Other	2.6%	÷	9.2%	x 100 =	- 28.3%

In other words, according to the comparative disparity index, African-Americans are substantially under-represented by more than one-third (36.8%), and other minorities are under-represented by over one-quarter (28.3%). There were 36.8 percent fewer African-Americans on the observed venires than one would expect based on the proportion of African-Americans in the population. Likewise, there were 28.3 percent fewer Asians, Latinos, Native Americans, and other racial minorities (in aggregate) than one would expect.

One consequence of this is a greatly reduced chance that an African-American or a member of one of the other racial minorities will be on a venue sent to a particular courtroom for a jury trial, and thus a greatly reduced chance that an African-American or a member of another racial minority will be selected to serve on a jury for a criminal or civil case in the Eighth Judicial District.

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Statistical Significance Test

The statistical significance test is a means of determining the probability that the disparity has occurred by chance alone. If the probability is very low, chance is rejected as the source of the disparity, and it may be concluded that some other factor or factors, such as systematic bias or discrimination in the selection process, produces the disparity.

Using a statistical significance test described in several authoritative sources[4], we are able to calculate probabilities that under-representation of African-Americans and other racial minorities (or over-representation of whites) discussed above did not occur by chance alone. The results of the test are summarized in the following table:

Race	Number of Standard Deviations	Probability of Chance
White	5.27	p<.0001
African-American	4.02	p<.001
Other	3.03	p<.01

The table indicates that for African-Americans the likelihood that the disparity occurred due to chance rather than other factors is less than 1 in 1,000. For other minorities the likelihood that it occurred due to chance alone is less than 1 in 100. In other words, the disparities are highly significant, statistically. Several Supreme Court opinions[5] have cited the statistical significance standard as a measure of the significance of disparities, and in Castaneda v. Partida[6] the Court set out a statistical significance cutoff of "two or three standard deviations" as one method of distinguishing unconstitutional from allowable disparities. By that standard, the level of under-representation observed in the sample indicates an unconstitutional disparity for African-Americans and other racial minorities.

Hispanics

Our observation of potential jurors did not entail a count of Hispanics as a separate category. Some of the individuals classified as Other were clearly Hispanic, just as some were clearly Asian. But such distinctions, based only on a quick observation of physical characteristics, were in several cases difficult to make, and we felt that it might be misleading or inaccurate to record or report such distinctions.

It is likely, however, that most if not all of the Hispanics in the groups observed were actually classified as Other in our count. Thus, we can reasonably suggest that the number of Hispanics was probably some fraction of the total number of individuals classified as Other (5.4 percent were classified as Other.) Census data indicate that 11.2 percent of the population of Clark County is Hispanic', and thus it is unlikely that Hispanics are in fact substantially under-represented on jury venires. At the least, there is an explicit indication that further study of the potential under-representation of Hispanics is warranted.

SELECTION PROCEDURES USED IN EIGHTH JUDICIAL DISTRICT COURT

In order to learn how the selection process works, a face-to-face interview was held with the Eighth Judicial District Court's Court Administrator and the Jury Commissioner on September 28, 1992. The purpose of the interview was to learn about the process by which the general population is reduced to petit jury venires. In addition to learning about the various steps in the process, we wanted to learn who performs each step, and what criteria are used in the qualification and excusal processes. Salient information gathered in that interview is presented in the following section:

According to the Court Administrator and the Jury Commissioner[3] potential jurors for trials in the Eighth Judicial District Court are drawn from only one source - a registration list provided by the Nevada Department of Motor Vehicles. The list, containing over 600,000 names, includes information about motor vehicle licensees and DMV ID card holders 18 years of age or older who are residents of Clark County. The list is on a computer tape which the DMV furnishes to Clark County's Computer Information Systems Department. The Information Systems Department unloads the data from the tape into the county's mainframe computer. The list is updated every six months by means of a new tape from the DMV.

In the past, the jury pool was composed of names from voter registration lists as well as the DMV list. However, studies showed that 97 percent of the registered voters were also on the DMV list, so in 1983 a decision was made to use only the DMV list.

Each week the county provides the Jury Commissioner's office with a list of about 3,000 names randomly selected, from all zip code areas in the county. (Note that as of January 1, 1993, the Jury Commissioner's office began selecting 2,500 names per week, rather than 3,000.) The Court Administrator feels that the process is more objective if the county pulls the names and the Jury Commissioner's office isn't involved. The county uses a comprehensive jury selection software program, which has been in use since about 1983. This selection process has been challenged three times and found valid each time, according to the Court Administrator. However, specific information about how the computer randomizes and selects names would have to be obtained from the Clark County Computer Information Systems Department personnel who run the program in order to evaluate whether procedures being used are appropriate.

Summonses are then sent to those 3,000 individuals. About 25 percent are returned because of bad addresses (mostly expired forwarding addresses), while just under one quarter who are summoned do not respond, and about 1,600 respond by telephone as instructed. The court has no enforcement staff and does not send out a second summons to people who don't respond to the first one. Also, they do not make an attempt to ascertain addresses of people whose summonses are returned as undeliverable.

The 1,600 or so individuals who call the Jury Commissioner's office in response to the summonses are asked several questions to determine eligibility, and to provide information to the judge and attorneys for use in voir dire. In addition to data affecting eligibility, data is collected about the person's occupation, education, spouse's occupation, and prior jury service. If eligible, individuals are then randomly assigned a "badge number" and told to report for jury duty on a specific date. They are also instructed to call before coming in, so they won't have to come in if the case settles. If a person doesn't show up for jury duty after being assigned a badge number (and thus [redacted] department), the process for following up varies. [redacted] the judge will ask the Jury Commissioner's office to call the person and tell them to come in, and sometimes the judge will simply tell them to send out an order to show cause for not appearing. [redacted] of the 1,600 who respond to the summons actually qualify and report for jury duty.

Jurors are paid $9.00 for reporting to the courthouse if they are not selected for jury duty. If they survive voir dire and are selected to serve on a jury, they are paid $15.00 for each of the first [redacted] days, and $30.00 for every day thereafter. They are also paid mileage. The court uses a "one day/one trial" system, in which people who come to court but are not selected for a trial, as well as those who are selected to serve, are exempted from further jury duty for a period of at least three years. This system eases the burden on people, so that they aren't called back on multiple occasions if they are not selected, or if they serve on a jury.

A staff of 3 full-time and 2 or 3 part-time people handles the telephone calls that come in response to the summonses. This staff is responsible for determining eligibility. To be eligible, a person must be a citizen of the United States, a resident of Clark County, not a convicted felon (unless rights have been restored), and be able to [redacted] and understand English. By statute, those over 65 who request excuses, and those with permanent disabilities are exempted. [redacted] are given to full-time students, people claiming medical excuses, people whose income is based strictly on commission, and people in positions exempted by law.

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Those not exempted or ascertained to be ineligible are told to report for jury duty and to let the judge deal with their excuses, if any, in the courtroom. The Jury Commissioner's office tries to maintain a personal touch, by speaking with each potential juror individually on the telephone. The staff is instructed to be very careful not to excuse jurors except for the reasons stated above. The policy is to let the judges decide on all other requests for exemption.

When jurors arrive at the courthouse they are directed to a room where they are given a badge, a handbook about the jury system, and their check for thefirst day's service. They are also shown an orientation film and given an opportunity to ask questions, after which they are assigned to petit jury venires for various departments, based on groupings of badge numbers.

The procedures used by the Eighth District Court have been reviewed over a period of several years by a consultant, Dr. Thomas Munsterman, who is associated with the National Center for State Courts. He last visited in mid-1992. The Court Administrator has set a goal of reaching all the standards set by the National Center for State Courts, but recognizes that the Eighth Judicial District has not yet reached that goal with respect to some of the standards.

DISCUSSION AND CONCLUSIONS

There are four potential sources of disparity in the process leading to the selection of jurors for venires in the Eighth Judicial District Court. These four sources are:

* The source list
* The sampling process
* Procedures for dealing with non-response to summonses
* Standards for excusing

The source list

The American Bar Association's Standards Relating to Juror Use and Management states that "The jury source list should be representative and should be as inclusive of the adult population in the jurisdiction as is feasible." At least some of the disparity ascertained in this study might result from the use of a single source list provided by the Nevada Department of Motor Vehicles, rather than using multiple sources.

As a single source, the list does appear to be reasonably inclusive. Population projections for Clark County for 1992 indicate a population of 677,000 residents 18 years of age or older[9]. Figures provided by the Nevada DMV show that as of July, 1992 there were a total of 616,406 licensees and ID card holders over the age of seventeen in Clark County[10]. Thus, the DMV list includes 90.1 percent of the adult population of the county.

But a list which excludes 10 percent of the jury eligible population may very well contribute to the under-representation of racial minorities on jury venires in Clark County. A list which is not fully inclusive could easily be skewed against racial minorities because of economic and other factors which might serve as barriers to obtaining driver's licenses or DMV ID cards. However, the DMV does not keep records on the race of licensees and ID cardholders, so it is not possible to say with any degree of certainty whether the source list is as representative of the adult population as is feasible.

Nevertheless, augmenting the single source list with other lists is a method used in a number of other states to improve inclusiveness in this initial stage of the jury selection process. Augmenting the present list with just one other source, a list of registered voters, would increase inclusiveness by several percentage points, and use of one or more other lists, such as city directories, welfare recipients, naturalized citizens, or utility customers to name just a few could ensure that the master jury pool is as inclusive as possible.

The sampling process

Random sampling is an important part of the jury selection process at two stages. First, the [redacted] to be summoned each week should be selected randomly. The Court Administrator states that this selection process is done by staff at Clark County's Computer Information Systems Department, and that the process has been challenged three times and found sound each time. But until specific information is available about the actual selection procedures used by Clark County it is not possible to say with any degree of certainty that selection at this stage is random.

Potential jurors should also be randomly assigned to panels for specific trials. Apparently this is done by assigning badge numbers to individuals as they report to the jury commissioner's office in response to summonses. These badge numbers are grouped sequentially to form panels [redacted]. But if it is the case that badge numbers are assigned sequentially as calls are received, then the [redacted] of the [redacted] is called into question.

Further study is needed to determine whether the selection process conducted by Clark County is actually random, but clearly some of the disparity we have found might be attributable to procedures used at this stage of the selection process.

Procedures for dealing with non-response to summonses

According to information provided by the Court Administrator, it appears that failure to follow up on non-responses to summonses might be a major factor contributing to under-representation of racial minorities on jury venires in the Eighth Judicial District.

Only about 1,600 (53.3%) of the 3,000 summonses mailed out each week generate responses. About 25% are returned as undeliverable, while the remainder, about 22%, fail to generate responses for reasons that have not been determined.

Because the court does not make any attempt to ascertain correct addresses for summonses which are undeliverable (mostly as a result of expired forwarding addresses), and does not resummon those who don't respond, nearly one-half of the total available jury pool is effectively eliminated from consideration at this rather early stage of the selection process. While we cannot say for certain that this is the major cause of under-representation of racial minorities on jury venires in the county, that conclusion appears to be warranted. If minorities are more transient and tend to move more often than others, then they are less likely to receive a summons sent to them. If they are less likely to respond to a

summons for any of a variety of reasons, from lack of understanding of the judicial process to anticipation of exclusion from the system, then they are more likely to be under-represented in the pool of potential jurors.

Standards for excusing potential jurors

The Court Administrator's stated policy is to excuse potential jurors using conservative criteria, telling most of those who present excuses based on hardship, inconvenience, or biases of various sorts to report for jury duty and let the judge decide whether or not to excuse them. [redacted] are not kept (or at least not compiled) concerning the number excused for various reasons, so it is not possible here to determine whether inordinate numbers of excuses are being given. Likewise, figures were not available concerning the numbers deemed ineligible for various reasons. But if it is actually the case that [redacted] about 600 (37.5%) of the 1,600 who respond to their summons qualify and are not excused, then this is potentially another stage of the selection process that might account for the under-representation of racial minorities on venires.

If, for example, minorities who respond to a summons are more likely than others to present excuses which are readily accepted by staff in the Jury Commissioner's office, then minorities are going to be under-represented on jury venires. Racial minorities and low income people might be more likely to mention financial hardship and be granted excuses by the Jury Commissioner's staff. Also, the practice of [redacted] to people who say they derive their entire income from commissions might tend to exclude racial minorities and others who have higher rates of unemployment or who are less likely to be employed in traditional wage earning jobs.

Conclusions

The study shows that racial minorities are under-represented on jury venires for Eighth Judicial District Courts. The disparity is statistically significant, and with respect to African-Americans there is less than 1 chance in 1,000 that the observed disparity occurred by chance rather than as a result of other factors. With respect to other minorities, there is less than 1 chance in 100 that it occurred by chance alone.

An analysis of the selection process indicates that disparities arise as a result of procedures followed in three distinct areas. First, a single source list is used to generate names of adults in Clark County. This list, provided by the Nevada DMV, only includes about 90 percent of the adult population. Second, about one-quarter of those summoned do not receive the summons because it is

returned to the Jury Commissioner's office as undeliverable, and no attempt is made to ascertain correct addresses for those individuals. In addition, nearly one-quarter of the summonses are not returned, for a variety of reasons, and those individuals are not re-summoned. Finally, among those who do respond to the summons, over 60 percent are either disqualified from jury duty or are temporarily or permanently excused from serving by the Jury Commissioner's office.

The net effect of these procedures is that out of every 100 adult members of Clark County's population, only about 18 ever reach the stage of being assigned to a jury venire, while 82 do not. The disparity between the percentage of racial minorities in the adult population and the number represented in jury venires is directly attributable to one or more of the factors discussed above, and the disparity could be reduced or eliminated if some or all of the following measures were implemented:

* Use of multiple source lists to ensure that the jury pool is as inclusive and as representative as possible.

* Implementation of measures to ascertain correct, deliverable addresses for those individuals whose summonses are returned as undeliverable.

* Re-summoning of those who don't respond to their initial summons.

* Strict adherence to statutes and rules governing disqualification and excusal of potential jurors.

NOTES

1. Observations were conducted by John S. DeWitt, Ph.D., President of Litigation Technologies, Inc. He was accompanied on two occasions by Mia B. Sanderson, a partner in the firm. On two other occasions, he was accompanied by Nancy Downey, M.A., of Downey Research Associates, a Las Vegas research and consulting firm.

2. See Nevada Population Information, prepared by the State Demographer's Office; Nevada Small Business Development Center, Bureau of Business and Economic Research; College of Business Administration, University of Nevada, Reno.

3. See Kairys, Kadane and Lehoczsky, Jury Representativeness: A Mandate for Multiple Source Lists. 65 Cal. L. Rev. 776 (1977).

   Also see Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases. 80 Harv. L. Rev. 338 (1966).

4. National Jury Project, Jurywork: Systematic Techniques, Release #8, (1989); D. Baldno & J. Cole, Statistical Proof of Discrimination (Shepard's McGraw-Hill 1980); Finkelstein, Note 3.

5. Castaneda v. Partida, 430 U.S. at 496 n.17; Alexander v. Louisiana, 405 U.S. at 630 n.9; Whitus v. Georgia, 385 U.S. at 552 n.2.

6. Castaneda v. Partida, Note 5.

7. United States Department of Commerce, U.S. Census, 1990.

8. The Court Administrator is Anna Peterson. The Jury Commissioner is Shirley Blake.

9. See Nevada Population Information cited in Note 2. This estimates Clark County's 1992 population to be 897,570. Preliminary 1990 Census data estimates 24.5 percent to be under 18 years of age. Thus, approximately 677,665 are 18 years of age or older.

10. See report provided by State of Nevada Dept. of Motor Vehicles, run date 7/27/92.

EXHIBIT 236

"Justice by the people"

REPORT of the SUPREME COURT of NEVADA

Jury Improvement Commission

October 2002

"The right of trial by Jury shall be secured to all and remain inviolate forever . . ."

— Nevada Constitution

Report of the Supreme Court of Nevada

JURY IMPROVEMENT COMMISSION

October 2002

Supreme Court of Nevada

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Cliff Young, Vice Chief Justice
Robert E. Rose, Justice
Miriam Shearing, Justice
Deborah A. Agosti, Justice
Myron E. Leavitt, Justice
Nancy A. Becker, Justice

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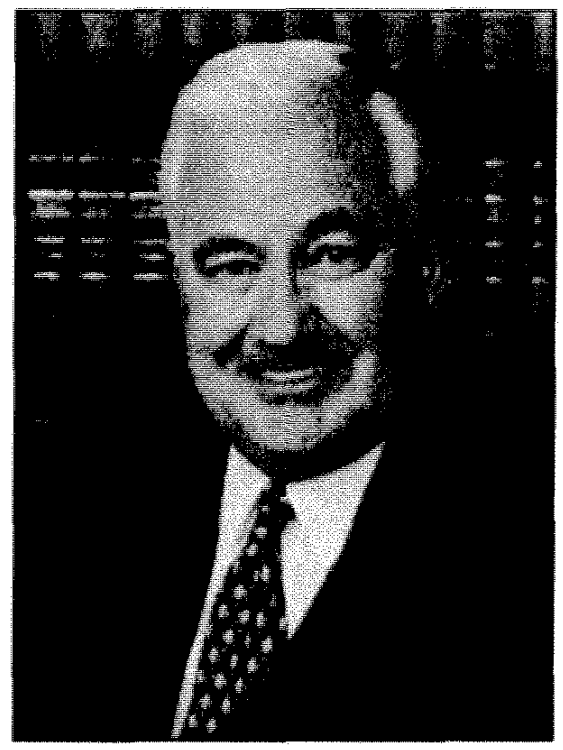
A Message from the Justice Bob Rose

There is nothing more basic, more fundamental in our justice system than the right to have our disputes decided by a jury of our peers. The jury system is essential to our system of government. It is a bulwark of our democracy and a cornerstone of our freedoms.

Concern about the future of the nation's jury systems prompted the National Center for State Courts to organize the 2001 Jury Summit in New York City, co-sponsored by the New York State judiciary. The purpose was to bring together representatives of state judiciaries to examine every aspect of the states' jury systems and explore possible ways to update and reform the system that has served democracy so well. I attended the 2001 Jury Summit as part of Nevada's delegation that included Second Judicial District Court Judge Janet J. Berry and Clark County Assistant District Court Administrator Rick Loop.



The wealth of information obtained at the Summit prompted me to recommend that the time was ripe for a study of the Nevada jury system. The other justices agreed and established the **Jury Improvement Commission** in mid-2001. Justice Deborah A. Agosti was named as co-chair and by September 2001, thirteen additional Commission members were appointed.

No aspect of the justice system has more of an impact on the average citizen than jury duty. Because of that, the Jury Improvement Commission has become one of the most important commissions ever established by the Nevada Supreme Court.

CO-CHAIRS

Justice Deborah A. Agosti

Jury duty is an obligation of citizenship and a unique experience. Private persons are asked to take time from their personal and professional endeavors, sit and listen for hours and days, deliberate with people they barely know and make decisions that will deeply affect others. At no other time is a citizen asked to participate in government in such a personal, detailed and important way. As a juror, a citizen is literally required to pass binding and lasting judgment upon the conduct of one or more within our society. This is an awesome responsibility, indeed.

There is no question that a strong and reliable jury system is an essential component of this country's judicial branch of government and crucial to the public's trust and confidence in the courts. During my tenure as a trial judge, I have seen that jurors form lasting conclusions about the judicial branch as a whole. Jurors judge our judicial system based upon their perceptions of its fairness, efficiency and understandability. Every recommendation within this report is meant in one way or another to strengthen our jury system and inspire the public's trust and confidence in the system we so cherish.

I believe strongly in the process of trial by jury. I also believe Nevada's jury system is sound, effective and reliable. Nevertheless, it is worthwhile to review any system from time to time in order to identify weaknesses and effectively plan improvements. It has been my privilege to work with the dedicated members of the Commission in the systematic review of our practices relating to the treatment of jurors and the conduct of jury trials. I particularly acknowledge Justice Bob Rose for his conceptualization of the commission and for his leadership in its progress. I hope that our efforts will contribute to improving the overall quality of this venerable and indispensable institution: **The Trial by Jury.**

INTRODUCTION

Nothing is more fundamental to our justice system than the right to have our disputes decided by a jury of our peers. Trial by jury is a bulwark of our democracy, a cornerstone of our freedom, and is guaranteed by the Bill of Rights.[1] The Nevada Constitution states:

> "The right of trial by jury
> shall be secured to all
> and remain inviolate forever."[2]

The jury system is a fundamental right that links the citizens to the justice system and gives them ultimate authority over the outcome of trials. Jurors pass judgment not only on criminal defendants and civil litigants, but on the jury system itself. Those involved in the jury system know that jurors are not shy about expressing their concerns when they feel the need.

There has been criticism over the past few decades that the jury system is either too slow and cumbersome for our modern society or that jury verdicts are influenced more by the quality of the lawyers or showmanship than the facts and law. In response to these and other criticisms of the modern judicial system, the National Center for State Courts' Civil Justice Reform Initiative in 2000 explored the erosion of the public's opinion about the courts. The initiative hoped to identify key factors contributing to the deteriorating perceptions and to develop strategies and actions to restore public trust and confidence.

In his book, *In the Hands of the People*, United States District Court Judge William Dwyer readily acknowledges the threats to the jury system in the first chapter entitled *The Endangered Jury.* Judge Dwyer opines that the troubles "arise not from the jury but from the way we manage adversarial justice."[3] He warns that the "looming danger is that we will lose [the jury system] if we move too slowly or incompetently to improve the system that surrounds it."[4]

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[1] U.S. Const. amend. XI.
[2] Nev. Const. art. 1, § 3.
[3] William L. Dwyer, In the Hands of the People 5 (2002).
[4] Id.

By the People

State judiciaries have begun to examine their jury systems and devise improvements. In 1993, the Arizona judiciary became the first to establish a commission, followed by a number of other states, including New York, Florida and Colorado.

Concerns about the future of the nation's jury systems prompted the National Center for State Courts to organize the 2001 Jury Summit in New York City, co-sponsored by the New York State judiciary. The Summit's purpose was to examine the current state of the jury system and explore potential improvements and reforms. Nevada's delegates to the 2001 Jury Summit were Nevada Supreme Court Justice Bob Rose, Second Judicial District Court Judge Janet J. Berry, and Eighth Judicial District Assistant District Court Administrator Rick Loop. The information obtained at the Summit prompted Justice Rose to recommend that a study be conducted of the Nevada jury system. The Nevada Supreme Court agreed and established the Jury Improvement Commission, which Justice Rose and Justice Deborah A. Agosti co-chair.

The Nevada Supreme Court's Jury Improvement Commission was so named because the Court believed the Nevada jury system is basically a sound and productive system that is not in need of an extensive overhaul. The Court agreed there could be room for improvement in a system that has not seen much change over the last century. The Commission's mandate was to study the jury system in Nevada and recommend changes to improve efficiency, make the process more user friendly for citizens and lawyers and ensure that verdicts are fair and reliable.

The Jury Improvement Commission is an independent commission of the Supreme Court of Nevada.

Its findings, conclusions and recommendations are those of the members and do not necessarily reflect the opinion of the Supreme Court of Nevada, its justices or staff.

The Commission examined the way cases are processed by the courts and how citizens are called to jury duty and treated when they report. The Commission tried to determine whether jurors have access to all the information and evidence needed to make the best possible decisions. The goal was to recommend ways to improve the quality of justice in Nevada jury trials while making jury duty as trouble-free as possible for citizens who serve. To emphasize this, the Commission calls its study Justice by the People.

The Commission held public hearings in Las Vegas, Reno, and Carson City and listened to judges, attorneys, court administrators, former jurors and the general public. Also, questionnaires were distributed to hundreds of former jurors surveying their opinions of the jury experience. Two of the nation's leading experts in the field, G. Thomas Munsterman and Michael Dann of the National Center for State Courts, met with the Commission to help guide the process. Mr. Munsterman, Director of the Center for Jury Studies at the National Center for State Courts, and Mr. Dann, a former Arizona Superior Court judge who headed that state's first jury study, contributed their knowledge and helped ensure that the Commission's product is complete and meaningful. The Commission also reviewed the reports generated by other states that had examined their jury system practices, as well as leading texts in the field, such as the resource book *Jury Trial Innovations* by Mr. Munsterman.

The Commission believes it has obtained an accurate picture of the way the jury system functions in Nevada and the concerns of all involved.

The Commission realized that to be effective, the jury system must balance the needs of the trial judges, the attorneys, and the court system against the burden on citizens called to jury duty. The Commission could not make recommendations to improve one aspect without rightfully considering the other. The focus of the jury system must always be on achieving just resolutions in legal disputes. To best achieve justice, the legal system must strive to provide all the necessary information to jurors in an intelligible way, while preserving the rights of those who rely on the courts for dispute resolution. With the aim of achieving this end, many of the Commission's recommendations involve the way evidence is presented to jurors.

Other recommendations focus on the way citizens are summoned to jury duty and treated while they perform this vital public service. It is necessary for citizens to understand that jury duty is not just a responsibility, but a right as well. Nevadans should be willing to serve and proud of their service, and Nevada's courts must work to treat jurors with the respect they are due. If citizens and the courts embrace their roles, our jury system, the hallmark of our democracy, will not only survive, but flourish.

Summary of Recommendations

Case Processing With Efficiency

The first series of recommendations focuses on the management of cases prior to trial, which prepares the cases for trial or facilitates the settlement process that resolves the vast majority of both civil and criminal cases. Settlements and plea bargains reduce the number of disputes that are tried and the corresponding need to summon citizens to jury duty. The Commission strongly believes that the courts should not infringe on the lives of citizens by summoning them to jury duty unnecessarily, nor encumber public funds that could be used for other governmental needs. The Commission was particularly interested in ways of promoting settlement well prior to the day prospective jurors are scheduled to report for jury duty.

The Commission also believes that effective case management by the courts simplifies and facilitates earlier decisions on the legal issues in the cases that go to jury trial, thus reducing the length of cases and the time citizens must spend in jury service.

These recommendations are as follows:

1. **Early Mandatory Case Conferences in Civil Cases** – Within 10 days after the answer to the complaint is filed, the judge should notify all counsel to appear for an early case conference to be held within the next sixty days. The judge, rather than a commissioner, should conduct the conference.

2. **Formalized Settlement Conferences in Civil Cases** – Meaningful settlement conferences should be conducted by a judge or mediator in all cases except those few where the district court judge determines such efforts would be futile.

3. **Meaningful Pretrial Conferences in All Cases** – While pretrial conferences are already required in civil cases, they often are not conducted in any effective way. The Commission believes meaningful pre-trial conferences are extremely helpful in both civil and criminal cases.

4. **Workloads of District Court Judges Should be Equalized** – The actual workloads of all district court judges should be equal regardless of what type of cases they handle. Judges should perform their routine work at the courthouse during working hours, demonstrating their commitment to the job they were elected to perform and instilling public confidence in the justice system. Judges' availability at the courthouse also promotes effective case management, insuring a workforce to address case processing issues, such as settlement conferences.

5. **Adopt a "No Bump" Jury Trial Policy** – Every case ought to be resolved by the trial date or go to trial at the designated time. To accomplish this, it is necessary to have all judges present in the courthouse, and a meaningful overflow system in place, enforced by a strong chief judge.

6. **The Jury Should Not Be Kept Waiting** – Delay was the most frequent complaint made by former jurors to the Commission. Jury trials should be a court's top priority. Judges should be sensitive to the impact of delay on jurors. Trials should start at the designated time. Judges should require that all pre-trial matters be submitted and decided prior to the time jurors are required to appear and, whenever possible, address legal issues affecting the case after the jurors have been dismissed for the day.

Selecting Citizens For Nevada Juries

The following recommendations involve the statutes and court rules that establish who is eligible for jury service and how prospective jurors are selected, treated and compensated. The responsibility of jury duty should belong to all citizens. Basic fairness and diversity issues demand that prospective jurors be called from all segments of the community. To that end, the Commission believes that the jury pool should include as many citizens from as many walks of life as is possible. No one should be automatically exempt from jury duty, except legislators and their staffs while they are in session. Jury duty requires a certain amount of commitment and sacrifice. Once seated, jurors should be reasonably compensated for their service. Those who serve should not be summoned anew to jury duty for a reasonable period of time. The Commission makes the following recommendations:

7. **Attempt to Use Three or More Source Lists in Selecting Prospective Jurors** – The prevailing current practice is to use Department of Motor Vehicles and registered voters' lists. The Commission believes adding utility users' names should broaden the pool of prospective jurors and consequently reduce the frequency with which citizens are recalled to jury duty.

8. **Eliminate All Statutory Exemptions From Jury Duty** – All jury exemptions listed in NRS 6.020(1) should be eliminated, except for legislators and their staffs while they are in session. There should be no occupations or classes of individuals excused from performing the same public service the average citizen is required to perform.

9. **Increase Juror Pay** – While jurors should be adequately compensated for their service, it is the Commission's view that jury duty is a public service that requires a certain amount of sacrifice. Current jury compensation ($9 appearance fee for responding but not being selected, $15 per day for the first five days of service, and $30 per day for every day of jury service thereafter) is inadequate. The Commission believes the $9 appearance fee is so little as to be inconsequential; many prospective jurors are surprised to receive any such compensation. The Commission recommends that the appearance fee be eliminated for the first two days a citizen appears pursuant to a jury summons, but is not selected. Jurors who are selected to serve on a jury should receive $40 per day, as should any prospective juror who must come to the courthouse for more than two days for jury selection. Eliminating the appearance fee would help offset the added expenses of the increased jury fees.

10. **Eliminate Mileage Allowances for Travel of Less than 65 Miles One Way** – Most jurors travel relatively short distances for jury duty yet receive compensation for each mile traveled. This often results in wasteful expenditure of administrative resources to issue mileage allowance checks for very small amounts. The Commission believes normal travel to the courthouse should be an uncompensated part of jury duty. When a citizen must travel more than 65 miles in one direction, however, compensation should be provided. Mileage allowance in such cases should be increased to the state rate of 36.5 cents per mile.

11. **Adopt a One-Day/One-Trial Policy** – All District Courts should adopt a one-day/one-trial policy in which jurors conclude their obligations in one day unless selected to serve on a jury or involved in ongoing jury selection.

12. **Excuse Jurors from being Called Again for a Period of Time** – Those who have served on a jury should be excused for a reasonable period of time before again being summoned. The Commission believes the period should be at least a year, but understands that it can vary from county to county depending on the local needs and the size of the available jury pool. Wherever possible, those who have served on federal juries should be excused from further jury duty in state courts for the same amount of time as is afforded those who served on a state jury.

Empowering The Jury

Perhaps the most innovative and revolutionary recommendations involve the methods of presenting evidence to jurors. The Commission believes that jurors should have the best information in an intelligible form to aid them in reaching a just verdict. Jurors are generally unfamiliar with the intricacies of the law and trial procedures. Former jurors complained at public hearings that they were not aware of what was expected of them until they received the instructions on the law just before final arguments. They complained the trials were sometimes confusing and nearly all advocated allowing jurors to ask questions of witnesses to clarify issues. The Commission understands that attorneys would lose a small measure of control over trial strategy and may be required to alter the way they present evidence as a result of some recommendations. The Commission nevertheless concludes that problems for counsel like the infusion of some uncertainty in trial strategy as a result of jurors; questions to witnesses is warranted. On balance, it is more important for jurors to have the opportunity, through more active participation in the trial, to fully understand all the evidence as it is presented. The Commission makes the following recommendations:

13. Juror Notebooks – In every case, jurors should be provided with paper and pencils to take notes. In appropriate cases, jurors should be provided with individual notebooks to hold copies of instructions and exhibits, their personal notes and photos of witnesses.

14. Instructions on the Law at the Beginning of Trial – Jurors should be instructed on the critical law in the case before the trial begins, and be provided with copies of those instructions, so they can focus appropriately on the testimony and evidence.

15. Permit Jurors to Ask Questions in All Cases – Jurors should be permitted to ask clarifying questions of each witness at the conclusion of a witness's testimony. The juror's written question is submitted to the judge, who, after consulting with counsel, rules on the evidence the question is designed to elicit.

16. Mini-Opening Statements – Before beginning jury selection, attorneys should make brief statements to inform prospective jurors generally as to the nature of the case. The prospective jurors may become interested in the case from the outset, minimizing the number who seek to be excused from jury service.

17. **Clustering Evidence on Complex Issues** – The District Court should have the discretion to cluster presentations of all technical, medical or scientific evidence at one time during trial, whether it comes from the plaintiff/prosecution, or defense. Hearing all the evidence on complex issues at one point in the trial should help jurors intelligently weigh the technical evidence. Attorneys should also be permitted to make mini-closing arguments solely on the technical issues immediately after the evidence has been presented.

18. **Increased Bailiff Training and Court Control** – Bailiffs are the communication link between juries and the courts. They assist and protect the jurors. Bailiff are critical to the proper functioning of a jury trial so they need to be properly trained. The district court should also have sufficient authority over their job performance.

19. **Protection of Jurors** – A hallmark of our justice system is that all jury trials are open and public, and the identities of the jurors are known. On rare and extraordinary occasions, however, when there may be a substantial threat to the safety of the jurors, the identities of the jurors should not be publicly disclosed. The decision to protect jurors' identities should always be handled in a manner which preserves a defendant's right to a fair trial.

Issues Considered And Rejected

The following issues were fully considered by the Commission, and addressed in the public hearings. The Commission believes that enacting these proposals would not further justice in the jury system.

Reduction of Peremptory Challenges From 8 to 4 in Capital Cases, and From 4 to 2 in All Other Cases – This was considered as a way to enhance the diversity of juries and to shorten the time it takes to select juries. The Commission believes that the present system has worked well and has produced sufficiently diverse juries.

Permit Jurors to Discuss Testimony and Evidence Mid-Trial, Before Deliberations – While this proposal was explored to determine if it would help jurors better understand evidence, the Commission concluded that it could cause more new problems than it might remedy. A large majority of the former jurors who testified were opposed to the idea.

Recommendations

CASE PROCESSING WITH EFFICIENCY

Minimizing Delays Through Pretrial Procedures

Pretrial planning is essential to ensure that trials are orderly and fairly presented. Ideally, a jury trial should begin and proceed to verdict with only normal interruptions. Ideally, judges presiding over a jury trial should devote six or seven hours a day in court to the trial. The ideal is often not attainable because of evidentiary issues, scheduling or other problems with witnesses or jurors, or emergencies in other cases. This seems to be the norm in most districts.

In the Eighth Judicial District, however, a jury trial is subject to additional interruptions and significant delays. Current practices in that district as well as its enormous volume of cases contribute to the problem. For example, since most civil motions are orally argued, a judge's law and motion calendar usually consumes valuable time that would otherwise be spent trying the jury case.

Additionally, the current system for assigning cases has resulted in an inequitable workload between the judges who specialize in civil and those who hear only criminal cases, with the judges who handle only civil cases bearing far heavier caseloads. One civil judge has resorted to beginning trials at 8:30 a.m. and ending at 1:30 p.m. each day, and doing the remainder of his work thereafter.

Another judge told the Commission that he handled routine court matters throughout the morning and then went to a temporary courtroom rented by Clark County in an adjoining building to preside over construction defect jury trials in the afternoon. One attorney told the Commission during a public hearing that he was involved in a jury trial being tried every other week. The trial would be conducted for a week and then the district court judge would use the next week to catch up before resuming the trial the following week.

These sorts of schedules place an unfair burden on the citizens serving as jurors and hamper their abilities to remember the evidence. An Eighth Judicial District Court judge complained: "Conducting jury trials in this district is like a M.A.S.H. unit operation."

The citizens of Nevada deserve better than a M.A.S.H. approach to jury trials. Jury trials should be a judge's most important business. Once a jury is empanelled, trials should be conducted six or seven hours a day, every day, until concluded.

Although the Eighth Judicial District's caseload is very high and the Commission agrees that additional judges are needed, there are a number of innovations the district could implement to process jury trials more efficiently and less expensively.

The Commission urges adoption of the following recommendations designed to eliminate the problems and delays that have become routine in some Nevada courts.

Judicial Workloads

Judicial workloads should be equally divided among all district court judges. In districts where some judges hear only civil cases and others hear only criminal cases, an inequity may exist. Judges in the Eighth Judicial District with civil calendars have heavy and time-consuming caseloads, while judges with criminal calendars have lighter workloads.[5]

Each judge should be required to be at the courthouse during working hours unless ill, on vacation or away on court related projects or for continuing education.

The chief judges in the Second and Eighth Judicial Districts have authority to assign overflow trials to judges who have no trials scheduled. This authority should be exercised more fully to eliminate needless continuances and help equalize workloads.

A system should be devised whereby a judge who is not in trial hears the law and motion calendar for a judge presiding over a jury trial. A visiting judge or a senior judge also could do this. Reassigning a judge's law and motion calendar would free valuable time for jury trials. Alternatively, district courts may want to consider the eliminating oral arguments on motions and instead require attorneys to submit motions on the briefs. The courts could then promptly decide motions. The Commission notes that the Second Judicial District successfully decides motions by submission. Another option for the Eighth Judicial District would be to move to a four-day jury trial work-week, reserving law and motion calendars and non-jury trials for the fifth day.

[5] The Nevada statewide trial court caseload for the 2000-01 fiscal year included 11,782 criminal cases and 23,123 civil cases. Nevada Supreme Court, Annual Report of the Nevada Judiciary, Fiscal Year 2000-01, tb. 1.

"No Bump" Policy

To ensure that litigants will proceed to trial on their scheduled day, the Commission recommends all district courts adopt a "no bump" policy. This policy would promote resolution of both civil and criminal cases by requiring trials to start on the designated date. The Commission urges that all courts give priority to jury trials over all other matters. The Commission proposes the following case management policy:

1. Death penalty cases take priority over all other settings;
2. Civil trials or trials which are the most time-intensive or complicated should remain in the docketed department;
3. In the event of a case overflow situation, the "in custody" criminal trials or least time-consuming or complex cases should be reassigned to another department;

The procedure for re-assigning cases should be as follows: A judge's administrative assistant should first try to find a department that is willing to accept transfer of an overflow case. The assistant should provide the overflow department with the case caption, attorneys, charges (or causes of action) and the projected number of days for trial. If no department is available by noon on the Thursday preceding trial, the assistant should contact the Chief Judge for reassignment of the case. The Chief Judge should review the cases and make assignments or calendar adjustments as necessary. In the event a case settles, the judge who requested transfer of an overflow case should take back the overflow case. Judges may set trials on a trailing calendar. Counsel should be prepared to commence trial on any day during the week the trial was originally scheduled. Counsel should presume their trial will be heard in one of the district's departments. Counsel will be notified of their department assignment by the Friday preceding trial. Counsel should not be permitted to exercise a peremptory challenge against the department assigned to hear an overflow case.

A "no-bump" policy has been in effect in the Second Judicial District Court for the past three years. During that time, only two trials have been "bumped" as a result of judicial unavailability. The "no bump" policy forces the parties to prepare for trial and schedule expert witnesses with certainty. The policy has resulted in significant settlement of civil cases and entry of pleas in criminal cases.

Judicial Case Management

Testimony received by the Commission has illustrated that direct judicial involvement in the management of civil cases significantly helps litigation move swiftly through the court process and substantially aids in the settlement of cases.

In the Second and Eighth Judicial Districts, a civil case is initially placed under the supervision of the Discovery Commissioner and a schedule is set for discovery and pretrial motions. In the Second Judicial District, judges have implemented a system that directly involves the judge at an early stage in each civil case filed. Approximately 90 days after a civil case is filed, the judge and attorneys hold an early case conference to consider that case's specific requirements. On most occasions, this results in a recommendation for a settlement conference before another judge, as well as the setting of firm dates for the completion of discovery.

Several Second Judicial District court judges have indicated that their personal involvement in every civil case at an early stage in the litigation process expedited the case and increased the possibility of early settlement.

The Commission believes this is a valuable procedure and recommends the following Early Mandatory Case Conference policy be adopted to expedite settlement or other appropriate disposition of the case:

1. A Pretrial Scheduling Order shall be issued no later than 10 days after the filing of the Answer to the Complaint or motion filed under Nevada Rule of Civil Procedure 12. Counsel for the parties shall set a mandatory pretrial conference with the court to be held within 60 days of the filing of the Pretrial Scheduling Order.
2. Counsel and parties must be prepared to discuss the following:
    a. Status of NRAP 16.1 settlement discussions and an assessment of possible court assistance
    b. Alternative dispute resolution techniques appropriate to the case
    c. Simplification of issues
    d. The nature and timing of all discovery
    e. Any special case management procedures appropriate to the case

f. Trial setting
g. Other matters that may aid in the prompt disposition of the action

3. Trial or lead counsel for all parties and the parties (if the party is an entity, an authorized representative) must attend the conference
4. A representative with negotiating and settlement authority of any insurer insuring any risk pertaining to the case must attend
5. Upon request and/or stipulation of counsel, and at the discretion of the court, a party or parties may appear telephonically.

Meaningful Pretrial Conferences

District courts should embrace all forms of pretrial dispute resolution. The Commission recommends the use of pretrial conferences with the district judge's full involvement to decide issues prior to trial and streamline the case as much as possible for jury presentation. One attorney contrasted the practices of two district court judges in his district – one conducts a pretrial conference and decides all possible issues prior to trial while the other conducts no pretrial conferences. The attorney said that the two different judicial approaches produce two distinctly different results. When one or more formal pretrial conferences are held with the judge actively participating, many legal issues are decided before trial and delays are reduced. When no pretrial conference is held, all of the legal issues that arise are necessarily determined during trial, wasting valuable court time, causing jurors and witnesses to sit and wait, impacting witness's schedules and unnecessarily increasing the trial costs.

The Commission believes district court judges should actively engage in pretrial case management.

Formalized Settlement Conferences

The expeditious settlement of cases in litigation achieves many desired results. The parties agreement to a settlement, eliminates the stress, uncertainty, and cost of litigation. The settled case is removed from the court's case inventory, freeing up judicial resources for the remaining civil and criminal cases.

When courts institute a civil settlement program, the results are impressive.

Nevada's Federal District Court instituted a mandatory settlement program for a defined type of civil case, calling it Early Neutral Evaluation.[6] U.S. Magistrates, who would not try the case, conduct the early neutral evaluation. This program has achieved an 82% settlement rate.[7] Nevada's state district judges hold many settlement conferences, most of which result in settlement. The Commission commends those district judges who conduct settlement conferences in cases that are not on their own calendar.

The Nevada Supreme Court's mandatory civil settlement program is in its fourth year and consistently settles more than half of the civil cases appealed.[8] This result is achieved even though there is a declared winner and loser before the case is appealed. The Commission is convinced that most litigated civil cases could be settled by an effectively conducted settlement conference. The incorporation of such conferences into a meaningful case management system would result in a significant reduction of civil cases requiring a jury trial.

The Commission recommends that all judicial districts establish meaningful pretrial settlement conferences for cases where the parties or the district judge believe there is a reasonable opportunity for settlement. The ultimate time saving benefits from a well run, organized settlement program ought to outweigh any initial increased burden on the court. It should reduce judges' civil calendars, with fewer civil cases going to trial.

The Commission recommends that all district court judges be provided with mediation/settlement training at the National Judicial College. To maintain the integrity of the litigation process, the judge assigned to conduct the trial should be different from the judge conducting the settlement conference. Such a policy would enhance the litigants' confidence, in the event the case is not settled, that the trial judge is untainted by the candor necessarily expressed at the settlement conference. The actual and perceived integrity of the judicial branch hinges upon the judges' collective dedication to swift, efficient, reliable justice. Innovation in the pretrial case management arena will only enhance the quality of justice in Nevada.

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[6] Early Neutral Evaluation in the District of Nevada: An Evaluation of the District of Nevada's ENE Program (Aug. 2000).

[7] Id. at 6.

[8] NRAP 16. Since the beginning of the program in March 1997, 55% of the cases appealed have been settled. (1463 cases of the 2909 cases appealed have been settled since March 1997). Information provided by the Nevada Supreme Court Clerk of Court, May 2002.

Minimizing Delays Through Pretrial Procedures

RECOMMENDATIONS

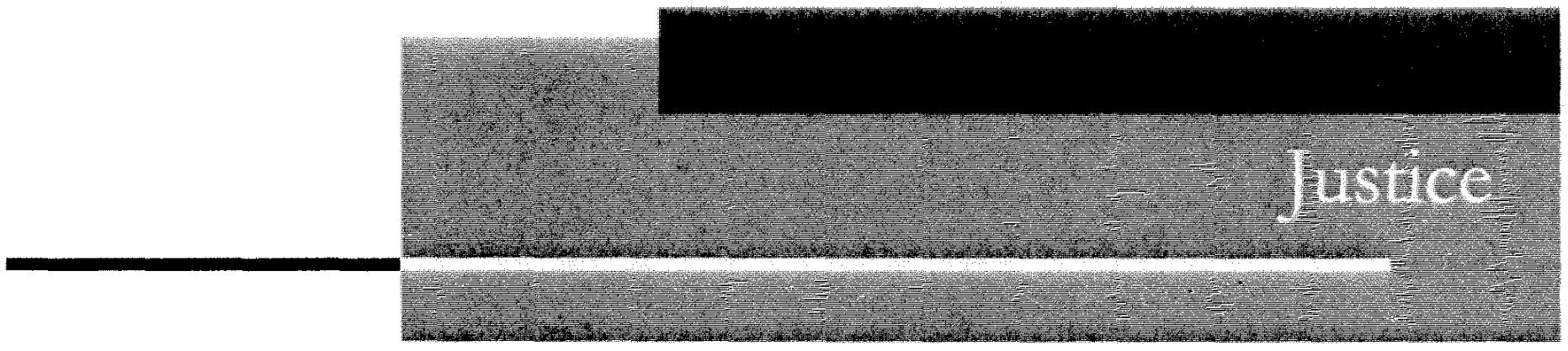
1. The jury should not be kept waiting. Delay was the most frequent complaint made by the former jurors to the Commission. Jury trials should be a court's top priority. Judges should be sensitive to the impact of delays on jurors. Trial should start at the designated time. Judges should require that all pretrial matters be submitted and decided prior to the time jurors are required to appear, and whenever possible, address legal issues affecting the case after the jurors have been dismissed for the day.

2. Early Mandatory Case Conferences—Within 10 days after the answer to a complaint is filed, the judge should notify all counsel to appear for an early case conference to be held within the next 60 days. The judge, rather than a commissioner, should conduct the conference.

3. Formalized settlement conferences should be held in civil cases. Meaningful settlement conferences should be conducted by judges or mediators in all cases except those few where the district court judge determines such efforts would be futile.

4. Meaningful pretrial conferences should be held in all cases. While pretrial conferences are already required in civil cases, they often are not conducted in any effective way. The Commission believes meaningful pretrial conferences are extremely helpful in both civil and criminal cases.

5. Workloads of District Court judges should be equalized. The actual workloads of all District Court judges should be equal regardless of what type of cases they handle. Judges should perform their routine work at the courthouse during working hours, demonstrating their commitment to the job they were elected to perform and instilling public confidence in the justice system. Judges' availability at the courthouse also promotes effective case management, ensuring a workforce to address case processing issues, such as settlement conferences.



6. **A "No Bump" jury trial policy should be adopted. Every case ought to be resolved by the trial date or go to trial at the designated time. To accomplish this, it is necessary to have all judges present in the court-house, and a meaningful overflow system in place, enforced by a strong chief judge.**

Using Technology In Jury Management

Most Nevadans have limited contact with the justice system. When they do, it is usually because they are summoned to jury duty. Nevada has experienced phenomenal growth in recent decades, and is ranked as the fastest growing state in the union. Since 1986, Nevada's population has increased 108 percent. Between 1996 and 2000, nearly 400,000 people migrated to the state.[9] This population boom, which is expected to continue for at least the next decade, has placed a substantial burden on Nevada courts to meet ever-increasing demands for jury trials. The ability to efficiently process the panels summoned for jury duty has become essential.

Throughout the country, the addition of new or improved jury management technology is the top reform implemented in state and federal courts.[10]

There are two principal elements that must be addressed when automating the jury management process. The first is a comprehensive jury management system that can manage the needs of both the courts and the citizens summoned. An effective system must encompass all aspects of jury management from issuing summonses for jury duty to facilitating final payment of jury compensation. Additionally, an automated jury management process must be capable of tracking and providing the timely and accurate analysis of jury utilization.

The second element involves the way prospective jurors and jurors access and

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[9] Nevada State Demographer's Office, Nevada County Population Estimates July 1, 1986 to July 1, 2000 (2000), available at http://www.nsbdc.org/demographer/pubs/images/2000_estimates.pdf.
[10] Robert G. Boatright, Improving Citizen Response to Jury Summons: A Report with Recommendations 43 (American Judicature Society) (1998).

interact with the jury management system. Because of the great disparity in population in Nevada's counties, the jury management needs of those courts vary considerably. The rural counties all together summon only a few thousand citizens to jury duty each year. Traditional phone systems are typically adequate to handle the needs of these jurors and courts. In contrast, the Eighth Judicial District Court summons as many as 230,000 residents each year. The number of telephone calls to the Eighth Judicial District Court's jury commission from those summoned can exceed 1,500 per day. A traditional telephone bank cannot meet the needs of Clark County without a substantial expenditure of personnel, equipment and facilities resources.

To handle the telephone volume expeditiously and efficiently, the Eighth Judicial District Court recently installed a computerized call management system. The system combines integrated voice response and automatic call distribution capabilities, thus allowing the jury commission to handle double the number of calls while saving 20 percent in full-time personnel costs. Although the impact would not be as significant in smaller counties, computerized call management systems would prove to be a benefit wherever they are installed.

The Commission believes that automated jury service systems are essential to meeting the ever-increasing demand for juries throughout Nevada and continuing the high level of support provided to those called to jury duty. Automation has the potential to improve customer service, reduce manpower costs and provide the district courts with a superior management tool.

The Commission recommends that computerized jury and call management systems meet the following criteria:

JURY MANAGEMENT SYSTEMS – An effective jury management system must provide end-to-end capabilities. Non-computerized jury management systems tend to be labor-intensive and are often unable to keep pace with growth and the administrative needs of the district courts and the statistical requirements from the Administrative Office of the Courts of the Supreme Court of Nevada.

A jury management system should:

1. Randomly select a pool of prospective jurors from the source database
2. Automate summons processing

3. Expedite the juror check-in process
4. Randomly select associated voir dire panel members
5. Permit and facilitate maximum flexibility in constituting and reconstituting panels
6. Generate all essential documents (i.e., summons, payment vouchers or checks, failure to appear letters, and attendance verification documentation, audit-compliant payroll reports)
7. Create trial records and juror utilization reports
8. Provide statistical ad hoc reports in support of internal and external requirements
9. Improve the courts' ability to manage juror utilization
10. Provide easy access and use for both jurors and staff

INTEGRATED VOICE RESPONSE – As part of a jury management system, a computerized phone system enhances the customer service provided to prospective jurors while reducing the manpower associated with jury departments. A computerized system ought to assist jury services personnel with the pre-screening of prospective jurors and compilation of qualification data. It also should permit juror rescheduling without staff input.

The Commission considers the following capabilities to be the minimum requirements for an automated call system:

1. Be fully compatible with the selected jury management system or software
2. Permit automatic scheduling, confirmation and response to frequently asked questions
3. Utilize "screen pop" technology (a new technology that permits data retention when transferring calls from the automated system to an operator)
4. Be sufficiently expandable to handle projected growth

Other states have reaped many benefits from installing automated jury management systems. For example, New York's automated system handles calls from jurors who need to determine when they are scheduled to appear, and permits them to

reschedule jury service for a more convenient time. It is estimated that it saves $270,000 annually in juror fees alone.[11] Additionally, New York has implemented a juror hotline that helps the courts respond quickly to problems ranging from inadequate air conditioning in deliberation rooms to threatening contact from litigants.[12]

In light of the benefits realized from the automated systems in New York State and Clark County, the Commission recommends that Nevada implement such systems statewide and update existing systems to best serve the citizens when they are called to jury duty.

Using Technology in Jury Management

RECOMMENDATIONS

1. **Automated jury management systems, like those implemented in New York State and Clark County, Nevada, should be utilized statewide in Nevada to improve the abilities of counties to summon and process citizens for jury duty. Such interactive systems permit citizens to communicate more efficiently with the counties and the courts.**

2. **Existing technology systems should be updated when necessary to best serve citizens called to jury duty.**

3. **In rural counties where fiscal constraints prevent full service technology systems from being feasible, the counties should begin implementing technology with available funding and seek additional funding outside the county structure to finance the needed technology.**

[11] Continuing Jury Reform in New York State 19 (Jan. 2001), available at http://www.courts.state.ny.us/jury/reform.pdf.
[12] Id. at 25-27.

SELECTING CITIZENS FOR NEVADA JURIES

Who is Summoned to Jury Duty And What Source Lists Are Used

> The American system of trial by jury is unique. No other nation relies so heavily on ordinary citizens to make its most important decisions about law, business practices, and personal liberty – even death. Ideally, Americans take their participation seriously lest they someday stand before their peers seeking justice.[13]

Trial by jury is the right of every person in the United States. This is guaranteed by the United States Constitution and the Nevada Constitution, which both state, "the right of trial by Jury shall be secured to all and remain inviolate forever."[14] Jury service not only provides the chance to participate directly in the trial process, but it may be one of the most important acts undertaken by American citizens. It is every citizen's right, privilege, and responsibility.

The Commission recommends guidelines for Nevada courts relating to who is summoned for jury duty. It is not the Commission's intent to reinvent what has been accomplished in jury management prior to the Commission's study. In keeping with this objective, the Commission's recommendations parallel the standards already set forth by the American Bar Association regarding jury management. The ABA recommends that jury service not be denied or limited by discrimination on the basis of any cognizable group, including identification by race, economic background, occupation, or religion.[15] The ABA also recommends drawing jurors from regularly maintained lists of residents that are representative of the adult population.[16]

The Commission's goal is to ensure that all eligible persons have the opportu-

[13] Stephen J. Adler, The Jury: Trial and Error in the American Courtroom, (1994) (quoting from hard-cover jacket).
[14] U.S. Const. amend. XI; Nev. Const. art. 1, §3.
[15] Standards Relating to Juror Use and Management, 1993 A.B.A. Judicial Admin. Div. Comm. on Jury Standards 3.
[16] Id. at 10.

nity to serve as jurors and that jury pools represent a broad spectrum of the eligible populace. Reaching 80% of the qualified population is a reasonable goal.[17]

The best source lists must be readily available, practical to obtain and, most importantly, represent a fair cross section of the adult population in each county.[18] The Commission recommends that master lists comprised of three sources and no less than two sources be maintained.

There are many list sources to consider when compiling master lists. Examples include lists of newly naturalized citizens, real estate tax rolls, utility companies' customer lists, welfare rolls, lists of individuals with children enrolled in public schools and lists of persons issued hunting and fishing licenses.[19] Many of these lists have been collectively used with success in rural counties. For example, Seventh Judicial District Judge Dan Papez of Ely has reached an agreement with the local power company to obtain a list of its customers for the jury pool. This customer list is kept confidential by the court.

Selecting source lists and combining them presents a myriad of potential problems, such as availability, duplication, bias and cost. Male gender bias is a factor when considering hunting and fishing licenses, real estate tax rolls and many utility lists. Names on real estate tax rolls and utility lists may be second home owners, landlords or individuals who do not reside in that judicial district.

The two optimum source lists are Voter Registration and Department of Motor Vehicles records. Exclusive use of Voter Registration records, however, will prevent the counties from reaching many potential jurors. Non-white and younger members of the population and those in lower economic classes register to vote at substantially lower rates than other groups.[20] The DMV records seem to offer the best representation of persons eligible to serve. Some jurisdictions, like Clark County, use DMV records exclusively.

[17] Id. at 12. The ABA states that a list covering 80% of the adult population in a jurisdiction is a reasonable goal. However, many jurisdictions combine source list and are 90% inclusive.
[18] See Taylor v. Louisiana, 419 U.S. 522 (1975). Relying on a House and Senate Committee Report, the Court stated that "the requirements of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice." Id. at 530, relying on S. Rep. No. 891, at 9 (1967).
[19] Jury Trial Innovations 35-36 (G. Thomas Munsterman et al. eds., 1997).
[20] In 2000, 52.3% of the Nevada voting age population was registered to vote. U.S. Bureau of Census, U.S. Dep't of Commerce, Statistical Abstract of the U.S. tb. 402 (2001).

Who is Summoned to Jury Duty And What Source Lists are Used

RECOMMENDATIONS

1. **Three source lists should be utilized by every county or, at a minimum, counties combine Voter Registration and DMV records into single master lists of potential jurors.**

2. **Other lists noted in this section should be used to supplement the Voter Registration/DMV lists, but should not be the primary sources to reach potential jurors.**

3. **In rural counties with limited numbers of individuals in the jury pools, as many lists as possible should be used to ensure that all eligible citizens are available for jury duty.**

Exemptions From Jury Service

What gives you the right to sit there and judge someone else? The Constitution does. When you're called to serve, exercise that right.[21]

In states such as New York, innovative advertising campaigns such as this one, taken from the side of a city bus in New York City, coupled with the elimination of automatic occupational exemptions has created a resurgence in the responsiveness to jury summons and increased the desire of jurors to serve. The elimination of automatic occupational exemptions for jury service has placed such notables as Rudolph Giuliani, Dan Rather, Ed Bradley, Marisa Tomei and Dr. Ruth Westheimer in the jury box. Allie Sherman, former coach of the New York Giants, said, "Jury duty should become part

[21] Continuing Jury Reform in New York State, supra note 12.

of everyone's game plan."[22] The elimination of automatic exemptions gives everyone the opportunity to fulfill their constitutional right, "to sit there and judge someone else."[23]

Twenty-five states and the District of Columbia have no automatic occupational exemptions[24] and three states have only a single exemption.[25] Eliminating exemptions based on profession is supported by every state or national study committee that has ever studied the jury system.[26]

New York has been extremely progressive in its elimination of automatic occupational exemptions. Chief Judge Judith Kaye of the Court of Appeals of the State of New York initiated the jury reform program, which in 1995 abolished all exemptions from jury duty. This has increased the jury pool enormously and also created a more diverse and more inclusive jury pool. Chief Judge Kaye herself was called to jury duty in August 1999.[27] Kaye's service and the service of other notables reflect the spirit that jurors be selected from a diverse and truly random pool. As our legal system is founded on trial by jury, the Commission believes that increasing the pool of available jurors is a critical first step in jury reform.

In an effort to broaden the jury pool in our own courts, the Commission believes that the automatic exemptions from jury service based on occupation should be eliminated. Currently NRS 6.020(1) allows exemptions for doctors, lawyers, dentists, judges, employees of the legislature, county clerks, recorders, assessors, police officers, prison officials and railroad workers.[28] Many of these exemptions are antiquated and make little sense.

Strong policy reasons exist for this proposed change. Broad citizen participation in jury service should be encouraged. Civil litigants and those accused of crimes are entitled to have their case decided by juries. Blanket exemptions exclude well-

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[22] VIP's Pay Tribute to Jury Service, New York State Jury Pool News 2 (Winter 1998).
[23] Continuing Jury Reform in New York State, supra note 20 at 31.
[24] Bureau of Justice Statistics, U.S. Dep't of Justice, State Court Organization tb. 40, 269.
[25] Id. (Georgia provides exemptions for people who are permanently mentally or physically disabled while Maryland and Pennsylvania provide exemptions for active military service only).
[26] Jury Trial Innovations 35-36 (G. Thomas Munsterman et al. eds., 1997).
[27] Paula Span, Giuliani Has His Day in Court, as a Juror, Washington Post, September 1, 1999, at C2.
[28] NRS 6.020 (Exemptions from jury service).

informed citizens from juries and prevent broad citizen participation on juries. Without these exemptions, the perception of bias, prejudice, or favoritism in the system is eliminated.

Eliminating exemptions ought not cause unnecessary hardships for those previously exempted or for those who depend upon them. Physicians, for example, may not have the ability to appear upon the date named in the summons without first rescheduling patients who rely upon them for their health. The Commission envisions each district offering flexible scheduling for those citizens whose call to jury duty will necessarily impose upon their professional obligations.

Eliminating exemptions would also have other beneficial effects, such as giving those who work within the justice system, such as lawyers and judges, an inside view and consequential increased sensitivity to jurors' perceptions and needs. The Commission recommends that the qualifications and exemptions of jurors be limited to persons over the age of 70, persons over the age of 65 who live 65 miles or more from the court, and legislators and their staffs while the Legislature is in session. The Commission notes that attempts to eliminate occupational exemptions have failed in the past. In light of the success experienced by other states, the Commission urges the Legislature to eliminate the existing occupational exemptions.

Problems caused by automatic occupational exemptions are particularly acute in rural Nevada. In sparsely populated counties, many citizens find themselves on jury panels year after year, and occasionally more than once during the same year. Other citizens, however, never serve because they are employed in occupations that are statutorily exempt. For example, the elimination of exemptions for correctional officers – as many states have done – would increase the jury pool by approximately 300 citizens in White Pine County, where the Ely State Prison is located. Because of White Pine County's otherwise small juror pool, the availability of the additional 300 citizens would be significant. Moreover, while an argument might exist to exempt that occupation from criminal cases, no argument exists to justify the automatic exemption from civil cases. The judge, during the jury selection process, would be in the best position to respond to any suggestion that a particular correctional officer's absence from his or her duties at a given time would create an unwarranted security risk for the prison.

The Commission heard testimony from some rural county representatives that if certain occupations are not exempted, such as doctors who are in short supply in the

rural areas, significant problems for the communities affected could result. If the lone doctor were summoned to jury duty, there would be no one to respond to a medical emergency.

The Commission recognizes these concerns. Judges in rural counties, however, are able to effectively address these very legitimate concerns using courtesy exemptions and temporary exemptions as provided by NRS 6.030.[29] This procedure provides judges with great flexibility to evaluate a request to be excused from jury duty. Exemptions should be based on undue hardship rather than inconvenience. Deferred service of short duration should be the preferred alternative to outright and permanent release from jury service.

Each district should continue to use the categories of discretionary exemptions that they currently employ. For instance, in Washoe County, the judges have discretion to exempt students, nursing mothers and parents who home-school children.

Eliminating automatic exemptions means that more first time jurors will serve. Obviously, new faces and occupations in jury rooms mean a broader cross section of jurors who are more representative of the community. Larger jury pools reduce the frequency and duration of service by all and spread the benefits and burdens of jury service more fairly.

Exemptions from Jury Service

RECOMMENDATIONS

1. **NRS 6.020(1) should be amended by the 2003 legislative session to eliminate all automatic occupational exemptions from jury service except for legislators and their staffs while the Legislature is in session.**

2. **The county clerk or jury commissioner should be flexible and accommodating in scheduling jurors. Elimination of automatic occupational exemptions is not meant to impose an undue burden on people, but to broaden the pool of potential jurors.**

[29] NRS 6.030 (Grounds for excusing a juror).

JUROR COMPENSATION

Since 1993, citizens in Nevada have been paid $9 per day for appearing in response to a jury summons.[30] If selected, a juror is paid $15 for the first five days of service and $30 per day thereafter.[31] If a citizen is seated as a juror on the first day, he or she receives $15, rather than $9.

Some businesses continue to pay their employees' salaries during jury service either voluntarily or pursuant to a collective bargaining agreement. The Commission applauds those employers and encourages others to do the same. Unfortunately, many summoned for jury duty lose all or most of their wages while they serve. While this responsibility of citizenship necessarily involves sacrifice and inconvenience, a reasonable level of compensation is necessary to soften the financial impact of service.

One man testified that when he served during a lengthy trial he used his vacation and sick leave days to maintain his income level, but still had to serve several days with his only compensation being the jury fees. He emphasized that despite the hardship, he would do it again if he were summoned. While this commendable dedication is common among former jurors, the Commission believes that such sacrifices should be minimized.

The Commission recognizes that the present jury fee structure and level of compensation is not adequate, especially for jury service that lasts more than two or three days. On the other hand, the Commission is mindful that county governments pay the jury fees in criminal cases, and a large increase could adversely impact their budgets.

The Commission believes the $9 appearance fee provides neither meaningful compensation nor even minimal motivation to appear. The jury commissioners and clerks who were resources for this report stated that many prospective jurors are surprised to receive any compensation at all for their initial appearances.

The $15 fee paid the first five days of service is also insignificant and insufficient to either address the impact of lost wages or to pay child care expenses for parents

[30] NRS 6.150(1).
[31] NRS 6.150(2).