

Case No. 77002

Supreme Court of Nevada

James Montell Chappell,

Appellant,

vs.

The State of Nevada,

Appellee.

Electronically Filed
Feb 17 2022 04:05 p.m.
Elizabeth A. Brown
District Court Case No. 01-1841
Clerk of Supreme Court

**Request to Take Judicial
Notice of Court Records**

DEATH PENALTY CASE

Appeal from the Eighth Judicial District Court

Rene L. Valladares
Federal Public Defender
David Anthony
Assistant Federal Public Defender
Nevada State Bar No. 7978
David_Anthony@fd.org
Brad D. Levenson
Assistant Federal Public Defender
Nevada State Bar No. 13804C
Brad_Levenson@fd.org
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101
(702) 388-6577

Counsel for Appellant

Pursuant to NRS 47.130(2)(b), James Montell Chappell requests this Court take judicial notice of the publicly filed court records discussed below, which have been filed attached as exhibits to this request. These documents are relevant to the arguments contained in Chappell's petition for rehearing as they demonstrate the practical difficulties that exist when a *pro se* capital petitioner files a postconviction petition while awaiting resentencing.

All four of the documents described below are from the Eighth Judicial District Court case of *Joseph Smith v. State*, another Nevada death penalty case. The following documents are court documents in *Smith*, and are publicly available, as such the documents are from "sources whose accuracy cannot reasonably be questioned," accordingly the facts within them are not subject to reasonable dispute. NRS 47.130(2)(b).

Exhibit 1 is Smith's Motion to Withdraw as Attorney of Record, which is based on Smith's request that his trial counsel, from the Clark County Public Defender, whose office had previously represented him at his first trial and on direct appeal, be relieved and Smith be permitted to represent himself.

Exhibit 2 is Smith's *pro se* Petition for Writ of Habeas Corpus (Post-Conviction), alleging that trial counsel was ineffective at the prior guilt phase trial.

Exhibit 3 is the Reporters Transcript of Proceedings (August 3, 1995) in Smith's case. It is a transcript of a status hearing.

Exhibit 4 is the Reporters Transcript of Proceedings (April 16, 1996). It is the transcript of day one of the jury trial from 1996.

While this Court will generally not take judicial notice of records in another different case, this rule is flexible and this Court will take judicial notice of the record in another case depending on the "closeness" between cases. *See Mack v. Est. of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009). For example, this Court has found a valid reason to take judicial notice of business records maintained at the Secretary of State's office in *Jory v. Bennight*, 91 Nev. 763, 766, 542 P.2d 1400, 1402-03 (1975), and of an attorney general advisory opinion in *Cannon v. Taylor*, 88 Nev. 89, 92, 493 P.2d 1313, 1314-15 (1972). Similarly, here the Court should take judicial notice of the attached exhibits as they provide an example of the difficulties faced by a capital habeas petitioner who filed a postconviction petition while awaiting resentencing.

Chappell is not attempting to improperly expand the record in this matter, but rather to show the likely consequences that would flow from this Court's decision in Chappell's case. As such, these documents have a close relationship and there is a valid reason for this Court to take judicial notice of them.

Chappell therefore respectfully requests that this Court take judicial notice of the documents attached to this request.

Dated this 17th day of February, 2022.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ David Anthony
David Anthony
Assistant Federal Public Defender

/s/ Brad D. Levenson
Brad D. Levenson
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2022, I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

Karen Mishler
Chief Deputy District Attorney
Motions@clarkcountyda.com
Eileen.Davis@clarkcountyda.com

/s/ Sara Jelinek
An Employee of the
Federal Public Defender

INDEX OF EXHIBITS

- Exhibit 1 Motion to Withdraw as Attorney of Record, *State v. Smith*, Eighth Judicial District Court, Clark County, Nevada Case No. C100991X (April 26, 1995)
- Exhibit 2 Petition for Writ of Habeas Corpus (Post-Conviction), *Smith v. Hatcher*, Warden, in the Eighth Judicial District Court, Clark County, Nevada Case No. C100991X (June 25, 1995)
- Exhibit 3 Transcript of Proceedings, *State v. Smith*, Eighth Judicial District Court, Clark County, Nevada Case No. C1000991 (August 3, 1995)
- Exhibit 4 Excerpt of Transcript of Proceedings, Jury Trial Day 1, *State v. Smith*, Eighth Judicial District Court, Clark County, Nevada Case No. C100991 (April 16, 1996)

EXHIBIT 1

EXHIBIT 1

FILED

APR 26 2 08 PM '95

Patricia Bowman

CLERK

MORGAN D. HARRIS
PUBLIC DEFENDER
Nevada Bar #1879
309 So. Third Street
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	CASE NO. C100991X
)	
Plaintiff,)	DEPT. NO. V
)	
vs.)	DATE OF HEARING: 5/16/95
)	TIME OF HEARING: 9:00 A.M.
JOSEPH WELDON SMITH,)	
)	MOTION TO WITHDRAW
Defendant,)	<u>AS ATTORNEY OF RECORD</u>

COMES NOW the Defendant, Joseph Weldon Smith, by and through his attorney, Ralph E. Baker, Deputy Public Defender, and respectfully requests this Honorable Court to allow the Public Defender to withdraw from representation of the Defendant in this case.

This Motion is based upon the papers and documents on file, the attached letter from the Defendant dated March 21, 1995, the Points and Authorities below and those matters adduced by the Court on the Hearing of this matter.

DATED this 24th day of April, 1995.

MORGAN D. HARRIS
PUBLIC DEFENDER

By *Ralph E. Baker*
Ralph E. Baker
Deputy Public Defender
Nevada Bar #3909

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POINTS AND AUTHORITIES

A DEFENDANT HAS AN ABSOLUTE RIGHT TO REPRESENT HIMSELF AND FAILURE TO ALLOW HIM TO REPRESENT HIMSELF REQUIRES REVERSAL OF ANY CONVICTION SO OBTAINED.

The accused has an absolute right under the Sixth Amendment to the United States Constitution, Faretta v. California, 422 U.S. 806 (1975); Jackson v. Ylst, 921 F.2d 882 (9th Cir. 1990); Lyons v. State, 106 Nev. 438, 796 P.2d 210, 213 (1990), and under Art. 1, sec. 8 of the Nevada Constitution to represent himself. "If an individual in a capital sentencing hearing wishes to proceed pro se, Faretta grants him the right to do so." Silagy v. Peters, 905 F.2d 986, 1007 (7th Cir. 1990), cert denied, 498 U.S. 1110 (1991). The denial of an accused's constitutional right of self-representation is harmful error per se and requires reversal of any conviction so obtained. Arizona v. Fulminate, 499 U.S. 279, 309-10 (1991); Lyons, 106 Nev. 438, 796 P.2d 210 (1990). The right to defend is a personal right and the State may not force a lawyer on the accused.

In the case at bar the Defendant has requested the right to represent himself. The Defendant's request is timely because the trial is scheduled for August 7, 1995. It would be reversible error to deny his request, therefore this Honorable Court must allow the Defendant to represent himself.

DATED this 24th day of April, 1995.

MORGAN D. HARRIS
PUBLIC DEFENDER

By Ralph E. Baker
Ralph E. Baker
Deputy Public Defender
Nevada Bar #3909

March 21, 1995

Rebecca Mounts, Attorney at Law
c/o Clark County Public Defender
309 S. Third Street Room 226
Las Vegas, NV 89155-2610.

Re: Case number C100991X

Dear Mrs. Mounts:

I am in receipt of Mr. Baker's letter of March 14, which acknowledges his receipt of my letter terminating the Public Defender from representing me.

I believe my request meets all the requisite criteria; namely:

- 1) my request is timely,
- 2) my request is not for purpose of delay,
- 3) my request is unequivocal, and
- 4) my request is voluntarily, knowingly and intelligently made.


For these reasons would you please convey to Mr. Baker that my request stands. I ask that he

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY


YOU WILL PLEASE TAKE NOTICE that the Office of the Public Defender has set the foregoing Motion to Withdraw as Attorney of Record for hearing on May 16, 1995 at the hour of 9:00 a.m., in Department V of the Eighth Judicial District Court.

DATED this 24th day of April, 1995.


Ralph E. Baker
Deputy Public Defender
Nevada Bar #3909

RECEIPT OF COPY OF THE foregoing Motion to Withdraw as Attorney of Record, Letter, Points and Authorities, and Notice of Motion is hereby acknowledged this 26th day of April, 1995.

CLARK COUNTY DISTRICT ATTORNEY

By 

224

EXHIBIT 2

EXHIBIT 2

FILED

JUL 25 4 37 PM '95

NDOP NO. 38840
 Post Office Box 208, SDCC
 Indian Springs, Nevada 89070

Loretta Shannon
 CLERK

JOSEPH WELDON SMITH
 Petitioner- In Propria Persona

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
 STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

JOSEPH WELDON SMITH,
 Petitioner,

CASE NO. C100991X
 DEPT NO. II
 DOCKET H

vs.

SHERMAN T. HATCHER,
 WARDEN, S.D.C.C. Respondent.

PETITION FOR WRIT
 OF HABEAS CORPUS
 (POST-CONVICTION)

Date of Hearing: 8.8-95
 Time of Hearing: 0900

INSTRUCTIONS:

(1) This petition must be legible handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of prisons, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of prisons.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in

JS:mth-COPC08030

COB:11111111

JUL 25 1995

RECEIVED

7. Nature of offense involved in conviction being challenged: 3 COUNTS FIRST DEGREE MURDER, ONE COUNT ATTEMPTED MURDER

8. What was your plea? (Check One)

(a) Not Guilty ☒

(b) Guilty ☐

(c) Nolo contendere ☐

9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details: _____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check One)

(a) Jury ☒

(b) Judge without a jury ☐

11. Did you testify at the trial?

Yes ☒ No ☐

12. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

13. If you did appeal, answer the following:

(a) Name of court: NEVADA SUPREME COURT

(b) Case number or citation: 24213

(c) Result: REV. IN PART. REM. FOR NEW PENALTY HEARING

(d) Date of result: 9-28-94

(Attach copy of order or decision, if available.)

1 14. If you did not appeal, explain briefly why you did not:

2 _____
3 _____
4 _____
5 _____
6 _____

7 15. Other than a direct appeal from the judgment of
8 conviction and sentence, have you previously filed any petitions,
9 applications or motions with respect to this judgment in any
10 court, state or federal? Yes _____ No ☒

11 16. If your answer to No. 15 was "yes," give the following
12 information:

13 (a) (1) Name of court: _____

14 (2) Nature of proceeding: _____

15 _____

16 _____

17 (3) Grounds raised: _____

18 _____

19 _____

20 (4) Did you receive an evidentiary hearing on your
21 petition, application or motion? Yes _____ No _____

22 (5) Result: _____

23 (6) Date of result: _____

24 (7) If known, citations of any written opinion or
25 date of orders entered pursuant to such result: _____

26 _____

27 (b) As to any second petition, application or motion,
28 give the same information:

JSW:rh-COPC08034

- 1 (1) Name of court: _____
2 (2) Nature of proceeding: _____
3 (3) Grounds raised: _____
4 (4) Did you receive an evidentiary hearing on your
5 petition, application or motion? Yes _____ No _____
6 (5) Result: _____
7 (6) Date of result: _____
8 (7) If known, citations of any written opinion or
9 date of orders entered pursuant to such result: _____
10 _____

11 (c) As to any third or subsequent additional
12 applications or motions, give the same information as above, list
13 them on separate sheet and attach.

14 (d) Did you appeal to the highest state or federal
15 court having jurisdiction, the result or action taken on any
16 petition, application or motion?:

- 17 (1) First petition, application or motion?
18 Yes _____ No _____
19 Citation or date of decision: _____
20 (2) Second petition, application or motion?
21 Yes _____ No _____
22 Citation or date of decision: _____
23 (3) Third or subsequent petitions, applications or
24 motions? Yes _____ No _____
25 Citation or date of decision: _____

26 (e) If you did not appeal from the adverse action on
27 any petition, application or motion, explain briefly why you did
28 not. (You must relate specific facts in response to this

USMITH-COPC08035

1 question. Your response may be included on paper which is 8½ by
2 11 inches attached to the petition. Your response may not exceed
3 five handwritten or typewritten pages in length.) _____
4 _____
5 _____
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8 17. Has any ground being raised in this petition been
9 previously presented to this or any other court by way of
10 petition for habeas corpus, motion, application or any other
11 post-conviction proceeding? If so, identify:

12 (a) Which of the grounds are the same: NONE
13 _____
14 _____

15 (b) The proceeding in which these grounds were raised:
16 _____
17 _____

18 (c) Briefly explain why you are again raising these
19 grounds. (You must relate specific facts in response to this
20 question. Your response may be included on paper which is 8½ by
21 11 inches attached to the petition. Your response may not exceed
22 five handwritten or typewritten pages in length.) _____
23 _____
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1 18. If any of the grounds listed in Nos. 23(a), (b), (c)
 2 and (d), or listed on any additional pages you have attached,
 3 were not previously presented in any other court, state or
 4 federal, list briefly what grounds were not so presented, and
 5 give your reasons for not presenting them. (You must relate
 6 specific facts in response to this question. Your response may
 7 be included on paper which is 8 1/2 by 11 inches attached to the
 8 petition. Your response may not exceed five handwritten or
 9 typewritten pages in length.)

10 INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.
 11 TRIAL COUNSEL CONTINUED TO REPRESENT DEFENDANT
 12 ON DIRECT APPEAL. COUNSEL HAS NOW WITHDRAWN. PRESENT-
 13 ATION OF THE ISSUE AT THIS TIME IS TIMELY UNDER
 14 NEVADA LAW.

15 19. Are you filing this petition more than 1 year following
 16 the filing of the judgment of conviction or the filing of a
 17 decision on direct appeal? If so, state briefly the reasons for
 18 the delay. (You must relate specific facts in response to this
 19 question. Your response may be included on paper which is 8 1/2 by
 20 11 inches attached to the petition. Your response may not exceed
 21 five handwritten or typewritten pages in length.) NO

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 27 20. Do you have any petition or appeal now pending in any
 28 court, either state or federal, as to the judgment under attack?

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21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

D. EUGENE MARTIN, STEPHEN DAHL, RALPH BAKER

Yes _____ No ✓

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

Supporting FACTS (Tell your story briefly without citing cases or law.): AT TRIAL COUNSEL VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE

(CONTINUED ON PAGES 8A AND 8B)

PARAGRAPH 23 CONTINUED

1 OF COUNSEL, AND FOURTEENTH AMENDMENT RIGHT TO
2 DUE PROCESS OF LAW.

3 DEFENDANT CONTENDS THAT HE DID NOT RECEIVE A
4 FAIR TRIAL BECAUSE THESE TWO CONSTITUTIONAL RIGHTS
5 WERE VIOLATED. COUNSEL'S INEFFECTIVENESS SUBJEC-
6 TED DEFENDANT TO IRREPARABLE PREJUDICE WHICH
7 COULD NOT BE OVERCOME BY ANY SUBSEQUENT ACTIONS
8 BY COUNSEL DURING TRIAL.

9 DURING TRIAL, AS A RESULT OF PROSECUTOR'S IMPRO-
10 PER LINE OF QUESTIONS TO DEFENDANT ON CROSS EXAM-
11 INATION, COUNSEL WAS PLACED IN A POSITION WHERE THEY
12 BECAME WITNESSES FOR THE DEFENDANT. COUNSEL STATED
13 ON THE RECORD THAT IN THE BEST INTEREST OF DEFEND-
14 ANT THEY WERE REQUIRED TO TESTIFY. COUNSEL AC-
15 KNOWLEDGED THAT THIS MANDATE APPLIED TO ALL THREE
16 MEMBERS OF COUNSEL.

17 INEXPLICABLY, COUNSEL FEIGNED A MOTION FOR MISTRIAL
18 AND PERMISSION TO WITHDRAW. COUNSEL KNEW FULL WELL
19 THAT THE ONLY WAY TO INDUCE THE COURT TO GRANT SUCH
20 A MOTION WOULD BE BY ADVISING THE COURT THAT ALL
21 THREE MEMBERS OF COUNSEL DEMANDED TO TESTIFY ON
22 BEHALF OF DEFENDANT.

23 COUNSEL EVEN WENT SO FAR AS TO HAVE DEFENDANT
24 STATE ON THE RECORD THAT HE WAIVED THE ATTORNEY-
25 CLIENT PRIVILEGE, THUS FACILITATING COUNSEL'S MOTION
26 TO WITHDRAW.

27 COUNSEL MADE NO SUCH DEMAND UPON THE COURT.
28 INSTEAD, COUNSEL LITERALLY ABANDONED IN MID-STREAM

PARAG 23 CONTINUED

1 THEIR DUTY TO DEFENDANT, BY "CANDIDLY" ADVISING
2 THE COURT IN ADVANCE THAT NO MATTER WHICH WAY
3 THE COURT RULED, THEY WOULD NOT TESTIFY IN THIS
4 MATTER.

5 THIS OVERT ACT BY COUNSEL OPENLY SERVED NOTICE
6 TO THE COURT AND TO THE DEFENDANT THAT THE MOTION
7 WAS NOT GENUINE. NOT ONLY DID COUNSEL'S ACTIONS PRO-
8 VIDE THE COURT WITH A REASON TO DENY THE MOTION, THEY
9 ACTUALLY MADE IT IMPOSSIBLE FOR THE COURT TO GRANT
10 IT.

11 IF COUNSEL HAD EXERCISED THEIR OBLIGATION TO TES-
12 TIFY ON BEHALF OF DEFENDANT, THERE IS A STRONG LIKLI-
13 HOOD THAT THE OUTCOME OF THE TRIAL WOULD HAVE BEEN
14 DIFFERENT.

15 DEFENDANT WAS IRREPARABLY PREJUDICED BY COUNSEL'S
16 FAILURE TO TESTIFY.

17 IF COUNSEL'S FEIGNED MOTION FOR MISTRIAL AND
18 PERMISSION TO WITHDRAW HAD BEEN GENUINE, THE COURT
19 WOULD HAVE BEEN OBLIGATED TO GRANT IT.

20 UNDER SUCH OBLIGATION, IF THE COURT FAILED TO GRANT
21 THE MOTION, MANDAMUS WOULD HAVE BEEN AVAILABLE UNDER
22 S.C.R. 167 AND 185.

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(b) Ground Two: _____

Supporting FACTS (Tell your story briefly without
citing cases or law.): _____

(c) Ground Three: _____

Supporting Facts (Tell your story briefly without
citing cases or law.): _____

(d) Ground Four: _____

JSmith-COPC08040

Supporting FACTS (Tell your story briefly without
citing cases or law.):

WHEREFORE, Petitioner prays that this court grant Petitioner
relief to which he may be entitled in this proceeding.

EXECUTED at Southern Desert Correctional Center, Indian
Springs, Nevada, on the 20th day of JULY, 1995.

Joseph Weldon Smith

NDOP NO. 38840

Post Office Box 208, SDCC
Indian Springs, Nevada 89070

Petitioner- In Propria Persona

VERIFICATION

Under penalty of perjury, the undersigned declares that he
is the petitioner named in the foregoing petition and knows the
contents thereof; that the pleading is true of his own personal
knowledge, except as to those matters stated on information and
belief, and as to such matters he believes it to be true.

Joseph Weldon Smith

NDOP NO. 38840

Post Office Box 208, SDCC
Indian Springs, Nevada 89070

Petitioner- In Propria Persona

SMITH-COPC08042

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, hereby certify pursuant to N.R.C.P.
5(b), that on this 20th day of JULY, 1995, I
mailed a true and correct copy of the foregoing PETITION FOR WRIT
OF HABEAS CORPUS (Post-Conviction) in sealed envelopes, which
first class postage was fully prepaid, addressed to:

Sherman Hatcher, Warden
Southern Desert Correctional Center
U.S. Highway 95 & Cold Creek Road
Post Office Box 208
Indian Springs, Nevada 89070

Frankie Sue Del Papa, Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

Stewart Bell, District Attorney
District Attorneys Office
200 South Third Street
Post Office Box 552212
Las Vegas, Nevada 89155-2212

Joseph Weldon Smith
DECLARANT

EXHIBIT 3

EXHIBIT 3

25 Smith-COPC04923

— FILED IN OPEN COURT —
AUG 8 1995 19

LORETTA BOWMAN, CLERK

By *Chiracandelo* Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * *

STATE OF NEVADA,

Plaintiff,

vs.

JOSEPH WELDON SMITH,

Defendant.

CASE NO. C100991

DEPT. V
DOCKET "H"

Transcript of
Proceedings

BEFORE THE HONORABLE JEFFREY D. SOBEL, DISTRICT COURT JUDGE
AT THE REQUEST OF THE COURT

THURSDAY, AUGUST 3, 1995

APPEARANCES:

FOR THE PLAINTIFF:

MELVYN HARMON, ESQ.
Deputy District Attorney

FOR DEFENDANT SMITH:

RALPH BAKER, ESQ.
Deputy Public Defender

RECORDED BY: SHIRLEE PRAWALSKY, COURT REPORTER

746

CE

Smith-COPC04984

1 LAS VEGAS, NEVADA, THURSDAY, AUGUST 3, 1995

2 THE COURT: State versus Smith on page 10.

3 Mr. Smith, are you still asking for stand-by counsel?

4 THE DEFENDANT: Yes.

5 THE COURT: Mr. Smith, the light went off about an hour after
6 court after we set this down for next week. Stand-by counsel,
7 you're alleging in a petition that you didn't set until next
8 Tuesday, you're now saying gave you ineffective assistance of
9 counsel at your original trial.

10 THE DEFENDANT: That's right.

11 THE COURT: It doesn't occur to you when you file that a week
12 before the trial that that might impact in some way on your trial
13 date?

14 THE DEFENDANT: Yes, I understand that.

15 THE COURT: I don't think you mentioned that on Tuesday, you
16 just sort of let it slide along there?

17 THE DEFENDANT: Well, I didn't--I wasn't given the
18 opportunity to say anything on Tuesday.

19 THE COURT: How far did you go in school? You have several
20 years of college, don't you?

21 THE DEFENDANT: No, I only had one year in college.

22 THE COURT: One year in college? Did you write out the
23 petition for post conviction relief that you submitted on the 25th
24 of July?

1 THE DEFENDANT: Yes, I did.

2 THE COURT: That's your work?

3 THE DEFENDANT: Yes.

4 THE COURT: Why do you think you need stand-by counsel?

5 THE DEFENDANT: I don't think I need stand-by counsel; you
6 suggested that I have stand-by counsel.

7 THE COURT: So, are you saying you don't feel that you need
8 one?

9 THE DEFENDANT: No.

10 THE COURT: So, you feel that you could go through this phase
11 without having a lawyer sitting there, giving you advice?

12 THE DEFENDANT: I'm not sure of that, whether it's necessary.
13 Yes, okay, I'll take that chance.

14 THE COURT: Well, all we're dealing with is life and death
15 here, Mr. Smith. I mean, your life and your death. I don't like
16 the way you've created this situation and I'm not going to make a
17 judgment on the pro per petition for writ of habeas corpus. It
18 will be processed in the usual way. But my impression of it is
19 this is something we litigated fully in trial and it's not
20 probably going to be granted.

21 But you've created an interesting new issue now which is
22 that the stand-by counsel that we appointed, who you said you had
23 no problem with at the time we gave you leave to represent
24 yourself, you file on July the 25th a document that you note for

Smith - COPC04985

15m1h-COPC04986

1 hearing one day into your trial that says he's not competent which
2 puts me in the position of saying I could either have you go
3 through a trial with no stand-by counsel--because I don't think I
4 can force Mr. Baker to sit there with you--or we continue the
5 matter and we get you stand-by counsel who is somebody other than
6 the Public Defender.

7 What input would Mr. Harmon like in this situation, if
8 any?

9 MR. HARMON: Your Honor--

10 THE COURT: Have you seen the petition, by the way?

11 MR. HARMON: Yes, I've seen it. In fact, we'll probably be
12 submitting our response to the Court today.

13 I wasn't here, as I recall, when the Court canvassed Mr.
14 Smith. I think he makes a mistake in proceeding to represent
15 himself.

16 THE COURT: Oh, I think he's making a big mistake.

17 MR. HARMON: And I think he makes a serious error in judgment
18 in not having stand-by counsel.

19 THE COURT: Well, I don't hear that he's really saying that
20 he would do that. He's saying if necessary--and I've now had, of
21 course, because it took me a little while for the penny to drop
22 because I didn't read the petition because it wasn't scheduled
23 yet, the situation that Mr. Smith is putting us into.

24 MR. HARMON: This case, of course, goes back to 1990. I'm

1 very anxious to get it resolved. But when we have the second
2 penalty hearing I'm hopeful that it will be resolved.

3 THE COURT: Forever.

4 MR. HARMON: And it seems to me that there is a problem now.
5 If Mr. Smith is going to make it very clear that he has thought
6 this through and this best judgment is he's able to do this
7 without stand-by counsel, he wants to do it without stand-by
8 counsel, then I think we can proceed next week.

9 THE COURT: But you're not really saying that? You really--
10 you've had one year of college. You need a lawyer to sit there
11 and help you with objections and procedure, don't you?

12 THE DEFENDANT: True.

13 THE COURT: How many of these witnesses are out-of-state?

14 MR. HARMON: There are quite a few out-of-state witnesses,
15 Your Honor. I'd say five or six and we count the victim impact
16 witnesses.

17 THE COURT: Mr. Smith, I recall--but I don't have a
18 transcript of it, or maybe I do. Is there a transcript already of
19 the Faretta canvass?

20 COURT RECORDER: The one that we did Tuesday?

21 THE COURT: No, about two months ago. Would it already be in
22 there?

23 COURT RECORDER: No.

24 THE COURT: You essentially said you wanted to represent
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1 yourself because it was going to be fun; it was going to be a new
2 experience. If you had--

3 THE DEFENDANT: I didn't say that it would be fun, Your
4 Honor.

5 THE COURT: Well, that's what I heard you saying that it was
6 just going to be sort of a new life experience for you. That was
7 basically it, it wasn't that you were unhappy with anybody. But
8 it was going to be an experience. Maybe not as much fun as a
9 roller coaster, but essentially, this was just going to be an
10 experience you wanted to have.

11 If you had somebody outside the Public Defender's office
12 who was going to be stand-by counsel would you prefer--because I
13 agree with Mr. Harmon. Mr. Harmon has probably had well in excess
14 of a hundred murder trials. I haven't had that many trials, but
15 I've represented over 60 people accused of murder.

16 I think you're very foolish--and I think I've told you
17 this before--to represent yourself against experienced counsel in
18 a matter so serious.

19 If we had somebody appointed outside the Public
20 Defender's office which you've, really, sort of made mandatory
21 now, in my opinion, would you want that person to take over the
22 full defense of the penalty phase, or would you like to at least
23 to discuss that with the person who I appoint?

24 THE DEFENDANT: I would like to discuss it with him.

JS Smith - COPC04989

1 THE COURT: Okay. Now, it's my understanding--and I don't
2 know if anybody here can help me including Mr. Baker--but, it's my
3 understanding that July the 1st the--well, you may know better
4 than anybody, Mr. Baker, that the State Federal Public Defender
5 has now got a unit that will take over conflict cases in death
6 penalty matters. Is that correct?

7 MR. BAKER: That's correct, Your Honor. The only thing is I
8 don't believe any of them are qualified for death penalty cases.
9 It's kind of unusual.

10 THE COURT: How are they going to do that?

11 MR. BAKER: I don't know.

12 THE DEFENDANT: Your Honor?

13 THE COURT: Yes, Mr. Smith?

14 THE DEFENDANT: I've spoken with one attorney that has said
15 he would volunteer to be appointed if you would appoint him.

16 THE COURT: Who is that?

17 THE DEFENDANT: That's Mr. Donald York Evans in Reno, Nevada.

18 THE COURT: Never heard of him. Has anybody here? He'd come
19 all the way down here to do it?

20 THE DEFENDANT: Yes, he said he would agree to be appointed
21 if you would do it. And he told me to tell you that?

22 THE COURT: And is he qualified under Rule 250?

23 THE DEFENDANT: Yes, he told me to tell you that.

24 THE COURT: Have you ever heard of this gentleman?

JSmitth-COPC04990

1 MR. HARMON: No, but there are many attorneys I haven't heard
2 of.

3 THE COURT: This is a new york to you?

4 MR. HARMON: Yes.

5 THE COURT: You say Mr. York is his name?

6 THE DEFENDANT: No, York Evans.

7 THE COURT: Oh, York Evans. I see.

8 I guess when I saw you stand up and drop those things in
9 the jury box, Mr. Smith, I wondered where this would end. Because
10 I have never seen a stunt like that in any courtroom anywhere. I
11 don't what you expected me to do when you did it. But you must
12 have been disappointed when I didn't jump over the bench and
13 strangle you for doing that.

14 I mean, I think this is so calculated that you are doing
15 now. I've never seen you do anything that wasn't calculated. And
16 I think this is calculated to do exactly what we're doing which is
17 vacate this hearing. Now, we're only doing this once. And I want
18 to get this over in not only an expeditious fashion, but in a
19 fashion where there is some finality.

20 How do you get in touch with this gentleman in Reno?

21 THE DEFENDANT: I've got his phone number in my legal work
22 and they're holding it right outside of the tank.

23 THE COURT: Okay. And you'll go back to Indian Springs after
24 this?

1 THE DEFENDANT: I suppose so.

2 THE COURT: I'm going to vacate the trial date. I'm going to
3 continue it two weeks. I'm going to ask that you notify Mr. York
4 to be here for possible appointment as counsel and--

5 THE DEFENDANT: Mr. Evans.

6 THE COURT: What?

7 THE DEFENDANT: Mr. Evans.

8 THE COURT: I'm sorry, Mr. Evans. We will take it up at that
9 time.

10 THE CLERK: August 17th, 9:00 a.m.

11 THE DEFENDANT: Thank you.

12 THE COURT: You're welcome.

13 (Conference between Court and clerk, not recorded)

14 THE COURT: Now, there's no hurry on this petition for writ
15 of habeas corpus. And, frankly, not only have I indicated my
16 feelings just briefly about--after briefly reviewing it, about the
17 merits, but at least as to those counts that were reversed, I
18 don't think we even have a judgment of conviction because we don't
19 have the penalty. I mean, so as to those--the reversal wasn't as
20 to all counts, it was only as to two of them, right?

21 MR. HARMON: That's correct, Your Honor.

22 THE COURT: So, it would be premature to even have post
23 conviction relief without a judgment which would include the
24 penalty as to two of them.

SMITH-COPC84992

1 I'm in no hurry to litigate this matter; take all the
2 time you need. Would you like a month to respond to this?

3 MR. HARMON: Yes, Your Honor.

4 THE COURT: Okay. There will be a month to respond to this
5 and by that time maybe there will be a lawyer in place and we can
6 appoint him to represent you on the post conviction relief as
7 well.

8 All right. We'll see you back here in two weeks.

9 THE CLERK: August 17th.

10 (Conference between Court and clerk, not recorded)

11 THE COURT: Yes, let's continue it four weeks for an answer
12 and two weeks beyond that to a Thursday for possible decision or
13 setting of a decision date.

14 THE CLERK: Okay. The State to answer to petition by August
15 31st and matter continued to September 14th, at 9:00 a.m.

16 MR. HARMON: Thank you, Your Honor.

17 THE COURT: Thank you. And the Public Defender will be
18 relieved as stand-by counsel.

19 * * * *

20 ATTEST: I do hereby certify that I have truly and correctly
21 transcribed the sound recordings of the proceedings in
22 the above case.

23 
24 SHIRLEE PRAWALSKY, COURT REPORTER

EXHIBIT 4

EXHIBIT 4

ORIGINAL

FILED IN OPEN COURT
APR 17 1996
LORETTA BOWMAN, CLERK
By *Alonzo* Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA

Plaintiff

vs.

JOSEPH WELDON SMITH

Defendant

CASE NO. C100991

DEPT. NO. V
DOCKET NO. "H"

Transcript of
Proceedings

BEFORE THE HONORABLE JEFFREY D. SOBEL, DISTRICT COURT JUDGE

JURY TRIAL - DAY 1
TUESDAY, APRIL 16, 1996
VOLUME I

APPEARANCES:

FOR THE PLAINTIFF:

MELVYN T. HARMON, ESQ.
Chief Deputy District Attorney

FOR THE DEFENDANT:

DONALD YORK EVANS, ESQ.
PETER R. LaPORTA, ESQ.

COURT REPORTER:

SHIRLEE PRAWALSKY
District Court

TRANSCRIPTION BY:

NORTHWEST TRANSCRIPTS, INC.
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P.O. Box 35257
Las Vegas, Nevada 89133-5257
(702) 658-9626

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

1 LAS VEGAS, NEVADA, TUESDAY, APRIL 16, 1996, 10:00 A.M.

2 (Court is called to order)

3 (Prospective jurors not present)

4 THE COURT: Okay. The jury isn't yet here. We're
5 meeting in session outside the presence of the jury.

6 The petition for writ of habeas corpus is denied.

7 Is there anything else to come before the Court
8 before we pick the jury?

9 MR. HARMON: Not by the State, Your Honor.

10 MR. EVANS: No, Your Honor.

11 THE COURT: All right. Bring in the jury. Thank
12 you.

13 (Pause in the proceeding)

14 (Prospective jurors present)

15 THE COURT: Good morning, ladies and gentlemen. My
16 name is Jeff Sobel. I'm the Judge in this department. This
17 is the time set for a trial of Case Number 100991, State of
18 Nevada versus Joseph Weldon Smith.

19 Is the State ready?

20 MR. HARMON: Yes, Your Honor.

21 THE COURT: Is the defense ready?

22 MR. EVANS: Yes, Your Honor.

23 THE COURT: Thank you. The permanent staff of this
24 courtroom I'd like to introduce you to. You've already met
25 Stony. That's Stonewall Jackson over there on the right.

1 He's the bailiff in this courtroom, and he sees that people
2 get to the right places at the right time, and either in fact
3 or by name he's been the chief training deputy for most of the
4 bailiffs in Clark County for a number of years, which accounts
5 in part for how elderly he is.

6 To my right Ms. Alona -- oh, my God, I'm blanking on
7 the -- Candito, last name. She's the clerk. She marks all
8 the exhibits and we amuse ourselves up here by passing notes
9 throughout the day, which keeps us all awake.

10 To my left is Shirlee Prawalsky, who is the court
11 recorder. There's various means of taking down testimony in a
12 trial. One of the ways is recording it, and that's what
13 Shirlee does in case we need a transcript later. She records
14 it and transcribes it later, and that's the purpose of all
15 these microphones around the courtroom; they go into her
16 recorder.

17 Because you all filled out questionnaires, this
18 being a case where the state is seeking the capital -- is
19 seeking capital punishment, we are going to be able to save
20 several of you the time of sitting through the most boring
21 part of a trial or, in this case, a penalty hearing, which is
22 the selection of the jury.

23 The following individuals by badge number will be
24 excused. Let me read off the whole list first of those who
25 will be excused with our thanks and told to go back to the

I-3
STATE

1 Jury Commissioner. I don't think she'll probably need you on
2 a Tuesday, you'll probably be excused from duty.

3 Listen carefully. We only want these people to
4 leave. Juror Badge Numbers 51, 61, 62, 64, 68, 72, 74, 79,
5 80, 85, 89, 98, 104. Once again, 51, 61, 62, 64, 68, 72, 74,
6 79, 80, 85, 89, 98, and 104.

7 In addition, these people will also be excused, 62
8 -- excuse me. I've already read 62 and 64. 80, 83, 96.
9 That's 80, 83, 96. If your name is on either of those lists,
10 thank you very much for coming down today. You are excused.

11 (Pause in the proceeding)

12 THE COURT: You've already read a synopsis of what
13 this case is about, but I'll ask Mr. Harmon to introduce
14 himself and add anything that he would like to to inform you
15 of the nature of the case and also his list of witnesses.

16 MR. HARMON: Thank you, Your Honor.

17 Good morning, ladies and gentlemen. I will be the
18 prosecutor in the case. My name is Mel Harmon. I'm a Deputy
19 District Attorney with the Clark County District Attorney's
20 Office.

21 This is a criminal case. As you were advised in the
22 jury questionnaire you filled out, a separate jury has
23 convicted the defendant, Mr. Smith, of three counts of murder
24 of the first degree. Your sole function, because we will be
25 conducting what in the legal vernacular we call a penalty

1 hearing in this courtroom, will be to determine the punishment
 2 to be imposed for two of those counts which involve victims
 3 Wendy Cox and Christy Cox.

4 These offenses occurred on October the 5th, 1990, at
 5 a subdivision in Green Valley known as The Fountains. The
 6 specific address was 2205 Versailles Court.

7 The prosecution will call witnesses during its
 8 portion of the evidentiary phase from the following persons.
 9 Lennard Alkirie -- the first name is L-E-N-N-A-R-D, last name
 10 A-L-K-I-R-I-E -- of the Las Vegas Metropolitan Police
 11 Department; Frank Allen, A-L-L-E-N, residing in Orange,
 12 California; Theresa Brown, B-R-O-W-N, Las Vegas; Grozy Rose
 13 Burns, the first name is G-R-O-Z-Y, Las Vegas; Flossie
 14 Christensen -- Flossie is F-L-O-S-S-I-E -- Las Vegas; Jeffrey
 15 Cook, Las Vegas; Lawrence Cook, Burbank, California; Yolanda
 16 Cook from the state of New York; Melanie Cook, Las Vegas;
 17 Kingston Cox, that is K-I-N-G-S-T-O-N, Anchorage, Alaska; Gene
 18 Edwards, Los Angeles Police Department; Giles Sheldon Green of
 19 the Coroner Medical Examiner's Office in Las Vegas; Michael
 20 Hull, H-U-L-L, Henderson Police Department; Glade Lamoreaux,
 21 that is L-A-M-O-R-E-A-U-X, of the Clark County District
 22 Attorney's Office; Eric Lau, L-A-U, Las Vegas; William Leaver,
 23 L-E-A-V-E-R, Las Vegas Metropolitan Police Department; Richard
 24 Little, L-I-T-T-L-E, Henderson Police Department; Adrian
 25 McEachin, M-C-E-A-C-H-I-N, Bronx, New York; Barbara Pickett,

1 Burbank, California; Dennis Sudberry, S-U-D-B-E-R-R-Y, Las
2 Vegas, Nevada; Mike Tuttle, T-U-T-T-L-E, of the San Bernardino
3 County Sheriff's Office, State of California; James White,
4 Henderson Police Department; and John Williams, also of the
5 Henderson Police Department. Thank you.

6 THE COURT: Thank you.

7 Will the defense introduce themselves.

8 MR. EVANS: Thank you, Your Honor.

9 Good morning, ladies and gentlemen. My name is Don
10 Evans, and I'm representing Mr. Joseph Weldon Smith. This is
11 Mr. Smith. I am in private practice, and I've been appointed
12 to represent Mr. Smith; and I'll be assisted by Mr. Peter
13 LaPorta, the Chief Deputy of the Las Vegas office of the State
14 of Nevada Public Defenders Office.

15 MR. LAPORTA: Good morning.

16 MR. EVANS: We intend to introduce evidence in
17 mitigation of Mr. Smith's penalty, and we will be asking you
18 to spare his life in this case. Thank you.

19 THE COURT: Thank you.

20 MR. EVANS: Oh... We will also call Jimmie Smith, Mr.
21 Smith's mother; Terrell [phonetic] Smith, Mr. Smith's brother;
22 Barbara Krause; and Pat Vattthauer.

23 THE COURT: Thank you.

24 Folks, the attorneys and I are not interested in
25 prying into your private life. The questions on the

1 questionnaire that dealt extensively with your background were
2 asked as they could have been asked in court, but we --
3 instead, we tried to save time and do it in writing to try to
4 get seated on the panel that actually determines the penalty
5 in this case twelve people who are intelligent and open
6 minded.

7 The questioning process will continue this morning.
8 Hopefully, we'll be through with it before lunch; perhaps not,
9 maybe it'll be sometime this afternoon. But the process is
10 known as voir dire, and it's conducted under oath, and Ms.
11 Candito will administer that oath to you now.

12 (Prospective jurors sworn)

13 THE COURT: Most people really don't want to sit on
14 a jury, and for those of you -- we live in a gambling town,
15 the odds are for those of you who don't want to be here it's
16 about three quarters of you are going to be excused by the
17 time this process is through. We're going to need twelve,
18 plus two alternates, to hear this matter.

19 Don't worry, when I'm asking you questions or
20 counsel are asking questions, whether a completely truthful
21 answer might seem to be embarrassing. If you were to conceal
22 something and that were going to become -- and that came to
23 light later, even years down the road, it could contaminate
24 the verdict. So be as honest as you can.

25 I'm going to conduct a general voir dire of all of

1 you seated in the audience, and these questions very few
2 people are going to answer yes to. Only if you have a yes or
3 affirmative to these questions, raise your hand, wait 'til I
4 call on you, and then give me your badge number and your name
5 so I can find you on the list, and I'll come back to you.
6 But, as I said, most of these questions you'll have a no
7 answer, and just don't raise your hand, and we'll go on to the
8 next question.

9 Are any of you acquainted with the defendant or
10 either of his attorneys?

11 No affirmative response.

12 Is there any of you acquainted with Mr. Harmon?

13 No -- first row, what's your badge number and name,
14 sir?

15 PROSPECTIVE JUROR DOCKERY: 49. Jan Dockery.

16 THE COURT: Anybody else?

17 Mr. Dockery, where do you think you know Mr. Harmon
18 from?

19 PROSPECTIVE JUROR DOCKERY: He was the prosecutor of
20 a friend of mine -- the questionnaire asked for close friend
21 -- an acquaintance of mine possibly twenty years ago in a
22 murder case.

23 THE COURT: A long time ago. Is there anything
24 about that that would cause you to be unfair to either side?

25 PROSPECTIVE JUROR DOCKERY: Not at all.

1 THE COURT: Okay. Thank you.

2 Are any of you acquainted with any of the witnesses
3 whose names were read to you by Mr. Harmon?

4 The very last row. Yes, sir.

5 PROSPECTIVE JUROR BECCUE: Mr. Leaver, William
6 Leaver.

7 THE COURT: What's your badge number, sir?

8 PROSPECTIVE JUROR BECCUE: 95.

9 THE COURT: Who do you think you know?

10 PROSPECTIVE JUROR BECCUE: I know Mr. Leaver, Bill
11 Leaver.

12 THE COURT: Oh. Okay. I thought that was your
13 name. What's your name?

14 PROSPECTIVE JUROR BECCUE: Kent Beccue.

15 THE COURT: And where do you know Mr. Leaver from?

16 PROSPECTIVE JUROR BECCUE: He lives up the street a
17 few houses.

18 THE COURT: You talk --

19 PROSPECTIVE JUROR BECCUE: I met him and his wife
20 one day walking around the block, and we just got to talking.
21 That's how I know him. And know he worked --

22 THE COURT: What is he, a handwriting expert?

23 MR. HARMON: Yes.

24 PROSPECTIVE JUROR BECCUE: Pardon me?

25 THE COURT: He's a handwriting expert. Did you talk

1 cases with him when you seen him?

2 PROSPECTIVE JUROR BECCUE: No. No.

3 THE COURT: Anything about this acquaintanceship
4 that you think would influence you for or against any of the
5 parties here today?

6 PROSPECTIVE JUROR BECCUE: No.

7 THE COURT: Okay. Thank you very much.

8 All of you filled out questionnaires. Is there
9 anyone who didn't tell the truth on those questionnaires?

10 No affirmative responses.

11 We've had trials in here involving murder where the
12 trial, including a penalty hearing, has gone as much as five
13 or six weeks. Jury duty is a civic responsibility, and it's
14 not one that is always pleasant, either by virtue of the
15 content of what you're listening to or the sacrifices that you
16 have to make in order to come down here and put aside your
17 business and sit here.

18 People, some of them, in these longer jury trials
19 lose thousands of dollars. They disrupt their plans. If it's
20 around Christmas, some people have to change or modify or
21 cancel, even, their plans relative to Christmas or
22 Thanksgiving or whatever. What I'm saying is that jury duty
23 is a burden. And I'm saying this by way of preface to a
24 question having to do with the burden that would be on you if
25 you had to sit in this case.

I-10

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MAR 3 2011
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MAR 3 2011
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CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM
THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.

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