IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83796

DONTE JOHNSON,
Petitioner,

v.

STATE OF NEVADA, *et al.*,
Respondent.

Appeal From Clark County District Court
Eighth Judicial District, Clark County
The Honorable Jacqueline M. Bluth, District Judge
(Dist. Ct. No. A-19-789336-W)

APPELLANT'S APPENDIX

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210. Post –Evidentiary Hearing Supplemental Points and Authorities, Exhibit B: Affidavit of Wilfredo Mercado, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154, June 22, 2005	02/13/2019	46	11578–11579
211. Genogram of Johnson Family Tree	02/13/2019	46	11580–11581
212. Motion in Limine Regarding Referring to Victims as "Boys", *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154	02/13/2019	46	11582–11585
213. Declaration of Schaumetta Minor, (Dec. 18, 2018)	02/13/2019	46	11586–11589
214. Declaration of Alzora Jackson (Feb. 11, 2019)	02/13/2019	46	11590–11593
Exhibits in Support of Petitioner's Motion for Leave to Conduct Discovery	12/13/2019	49	12197–12199
1. *Holloway v. Baldonado*, No. A498609, Plaintiff's Opposition to Motion for Summary Judgment, District Court of Clark County, Nevada, filed Aug. 1, 2007	12/13/2019	49	12200–12227
2. Handwritten letter from Charla Severs, dated Sep. 27, 1998	12/13/2019	49	12228–12229

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215. *Holloway v. Baldonado*, No. A498609, Plaintiff's Opposition to Motion for Summary Judgment, District Court of Clark County, Aug. 1, 2007	12/13/2019	47–48	11840–11867
216. *Holloway v. Baldonado*, No. A498609, Opposition to Motion for Summary Judgment Filed by Defendants Stewart Bell, David Roger, and Clark County, District Court of Clark County, filed Jan. 16, 2008	12/13/2019	48–49	11868–12111
217. Letter from Charla Severs, dated Sep. 27, 1998	12/13/2019	49	12112–12113
218. Decision and Order, *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed Apr. 18, 2000	12/13/2019	49	12114–12120
219. State's Motion to Disqualify the Honorable Lee Gates, State *of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed Apr. 4, 2005	12/13/2019	49	12121–12135
220. Affidavit of the Honorable Lee A. Gates, *State of Nevada v. Johnson*, Case No. C153154, District	12/13/2019	49	12136–12138

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221. Motion for a New Trial (Request for Evidentiary Hearing), *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, filed June 23, 2000	12/13/2019	49	12139–12163
222. Juror Questionnaire of John Young, *State of Nevada v. Johnson*, Case No. C153154, District Court of Clark County, dated May 24, 2000	12/13/2019	49	16124–12186
Findings of Fact, Conclusions of Law and Order, *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	10/08/2021	49	12352–12357
Minute Order (denying Petitioner's Post–Conviction Writ of Habeas Corpus, Motion for Discovery and Evidentiary Hearing), *Johnson v. Gittere, et al.*, Case No. A–19–789336–W, Clark County District Court, Nevada	05/15/2019	49	12264–12266
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223. Declaration of Dayvid J. Figler, dated Feb. 10, 2020	02/11/2019	49	12245–12247
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[1] This transcript was not filed with the District Court nor is it under seal.

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Transcript of Jury Trial – Penalty – Day 6 (Volume VI) PM	04/26/2005	17–18	4103–4304
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Transcript of Jury Trial – Penalty – Day 7 (Volume VII–PM)	04/27/2005	18	4382–4477
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Transcript of Jury Trial – Penalty – Day 8 (Volume VIII–C)	04/28/2005	18–19	4478–4543
Transcript of Jury Trial – Penalty – Day 9 (Volume IX)	04/29/2005	19–20	4544–4790
Transcript of Jury Trial – Penalty Phase – Day 1 (Volume I) AM	06/13/2000	8	1780–1908
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Transcript of the Grand Jury, *State v. Johnson*, Case No. 98C153154, Clark County District Court, Nevada	09/01/1998	1–2	001–251
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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2022, I electronically filed the foregoing Appendix 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:

Alexander G. Chen
Chief Deputy District Attorney
Clark County District Attorney's Office

/s/ Celina Moore
Celina Moore
An employee of the Federal
Public Defender's Office

> same gun inches away from Jeff's skull and squeezing the trigger.
>
> The Jury convicted Donte Johnson of the First Degree Murder of 19 year old Matthew Mowen, again, of holding a gun inches from his skull and squeezing the trigger.
>
> They convicted Defendant of the First Degree Murder of Tracey Gorringe. Tracey was the eldest of the victims in the case. He was 20 years old. The jury convicted Donte Johnson of aiming a semi-automatic handgun, inches from his skull, and squeezing the trigger and killing him.
>
> What you will see are the Verdict Forms, actually signed by the foreperson, back in that trial. I show you those because they become very important in this initial phase of the penalty hearing.[663]

3. The jurors when deciding Johnson's guilt did *not* conclude that he was the triggerman. The State argued several alternative theories of first-degree murder: felony murder based on robbery, felony murder based on kidnapping, coconspirator liability, aiding and abetting, and premeditated and deliberate homicide.[664]

4. The jury returned a general verdict form concluding that Johnson was guilty of first-degree murder but not saying under which theory.[665] And it is not even clear that the jurors were unanimous when they decided the theory; the trial court instructed the jurors and the State reiterated that unanimity was not required.[666]

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[663] 4/25/05 TT V-AM at 8–10.

[664] 6/8/2000 TT IV at 196–97, 199, 201–02, 204–05.

[665] Ex. 68.

[666] 6/8/00 TT IV at 201–02; Ex. 67.

5. It is not clear either from looking at the evidence that the jury concluded Johnson was the triggerman. No eyewitness to the murders testified. (The jurors in fact found this as a mitigating factor during the first penalty phase.[667]) Although three witnesses testified that Johnson confessed to shooting at least one of the victims, serious problems exist with their statements.

6. First, there is evidence that Armstrong is an unindicted coconspirator whose testimony, if used alone, could not support Johnson's conviction. *See* Nev. Rev. Stat. § 175.291 (forbidding conviction based only on coconspirator testimony). Newspapers reported Armstrong's involvement several times.[668] Young told detectives two weeks after the homicides that Armstrong was involved.[669] Severs implicated Armstrong the next day.[670] And five days after that Smith told detectives about Armstrong's involvement.[671] Officers then flew to Hawaii to question Armstrong, and he admitted showing Johnson and Young where the victims lived and returning to the house the day Perkins discovered the bodies.[672] And Hart, Armstrong's friend, told the police that he overheard Johnson saying that Armstrong "sent [them] to the hippies."[673] In fact, the State during Young's trial

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[667] Ex. 69.

[668] Ex. 86 at 36–37, 41, 43, 52–54, 57–58, 67–70, 78, 96, 108, 110, 116–19, 124, 126–28, 131, 146, 208, 212.

[669] Ex. 187.

[670] Ex. 50.

[671] Ex. 51.

[672] Ex. 53.

[673] Ex. 54.

told the jurors that Armstrong was involved:

> You will learn that ultimately Todd Armstrong is perhaps the one who takes these three by the house where these three boys live.
>
> Todd Armstrong, in a white vehicle, gets in the car with the wrongdoers and says, "I will show you where the easy marks live. I will show you where you can get a lot of money by robbing these boys."
>
> And Todd Armstrong, the evidence will show, set this up.[674]

The State even offered Young a plea deal if he testified against Armstrong (Young refused).[675] Finally, there is proof that Armstrong's involvement led him to lie at least once—when he told law enforcement that he did not drive to the victims' house.[676]

7. Second, all three witnesses changed their statements several times, and, most significantly, none of the witnesses accused Johnson of being the triggerman when first interviewed by police. Detectives asked Bryan Johnson directly whether he knew who the triggerman was, and he answered that he did not:

> TT: Did they say if one of them did the shooting that involved four people or did each of them do shooting?
>
> A: I don't know. They . . . I think they both did. I'm not sure.[677]

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[674] Ex. 166 at III-14.

[675] Ex. 86 at 117–19, 126–28, 146; Ex. 166 at III-3–4.

[676] Ex. 53.

[677] Ex. 47.

Hart told detectives initially that he only heard about the homicides through Armstrong—he did not talk to any of the defendants.[678] And Severs initially told police that she knew nothing about the murders, then told police that she did not know which of the defendants shot Biddle, Gorringe, and Mowen.[679] Even after law enforcement arrested Severs and jailed her as a material witness, she insisted that she did not know who shot the three victims.[680] These statements are likely the reason why detectives, after interviewing these witnesses, told the media that they did not know who fired the fatal shots.[681]

8. The statements from Armstrong, Severs, and Bryan Johnson contain several additional discrepancies, undermining their testimony—two years after first speaking with the police—that Johnson was the shooter. The witnesses changed their stories about why they went to the police, what they heard from the defendants, what the defendants took from the house, and their own involvement in the crimes.[682]

9. What's more, with several important details, the witnesses' statements contradicted each other: (1) the people involved in the conversation at the Everman residence after the shootings; (2) what was taken from the victims; (3) who shot the victims; (4) whom the VCR at the Everman residence belonged to; (5) who

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[678] Ex. 46.

[679] Ex. 185; Ex. 50.

[680] Ex. 63.

[681] Ex. 86 at 14, 18.

[682] *See* Claim Three(A)(1).

orchestrated the crimes; (6) whether there was a third participant in the offenses; (7) how the witnesses learned about the crimes; and (8) why and how the witnesses decided to go to the police.

10. The witness statements also conflicted with other evidence. Several of the statements mention that the defendants had taken a VCR from the victims' house. But a VCR is clearly visible in a crime scene photograph from the victims' house on August 14, 1998,[683] and a crime-scene report notes a VCR at the scene that same day.[684] And the timeline in the statements makes little sense. Not only do the statements not give the defendants enough time to commit the offenses, but news reports and other witness statements place people at the home during the day on August 14, 1998.[685] Finally, Severs's statement that she saw the story on the news the next morning cannot possibly be true—the media could not have been aware of the deaths until after the bodies were discovered at 6:00 p.m.

11. Third, there is substantial evidence that the statements were coerced by improper police questioning.[686] Although police failed to record portions of the interviews, coercion can be inferred by the dramatic changes between initial and later interviews, statements from witnesses about their interactions with police, evidence of benefits for testifying and threats of reprisal for failing to testify, and

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[683] Ex. 123.

[684] Ex. 122.

[685] Ex. 86 at 11; Exs. 197–99.

[686] Ex. 175; *see* Claim Three(A)(1).

vulnerabilities of witnesses due to their youth, suspected involvement in the shootings, suspected involvement in other criminal activity, impaired cognition, addiction, and mental illness.[687]

12. Fourth, at least one witness, Severs, was offered significant benefits for her testimony: The State did not prosecute Severs for possessing a stolen vehicle and released her from jail five months before trial—though she first had to cooperate with the state.[688] And there is some suggestion that other witnesses received benefits. The State declined to prosecute Armstrong, despite evidence from several sources that he was involved.[689] Moreover, law enforcement had arrested Hart, Severs, and Bryan Johnson for various crimes in the months before and after the homicides, including driving under the influence, possessing stolen property, and obstructing a police officer; as far as can be discerned, none served jail or prison sentences.[690] Finally, Armstrong had a warrant out for juvenile conduct that the Clark County District Attorney's office cleared in April 1999.[691]

13. Fifth, the State was not even consistent during the various trials about the shooter's identity. During Young's first trial in September 1999, the prosecutor told the jurors that *Young* might have shot Mowen, Gorringe, and Biddle: "You will

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[687] Ex. 175.

[688] 6/7/2000 TT at III-88–91, III-107–09, III-115–22., III-131–32; 1/18/00 PT; 10/14/99 PT.

[689] *See, e.g.*, Exs. 49–51, 53–54, 187.

[690] Ex. 193.

[691] Ex. 170.

learn, after shooting Peter Talamentez one time from close range, it is Donte Johnson *or Terrell Young* who then fires a shot into each one of these boys' head, standing over the bodies and firing a second shot, a third shot and a fourth shot."[692]

14. Sixth, the physical evidence does not support Johnson being the triggerman. During the trial of one of Johnson's codefendants, defense counsel elicited the following testimony from detective Thomas Thowsen:

> Q You're telling me that Donte Johnson pulled the trigger?
>
> A Yes.
>
> Q Okay. Can you tell me why you believe that?
>
> A Based on interviews of other defendants, based on physical evidence at the crime scene.
>
> Q Can you be any more specific?
>
> A We have, I believe, fingerprints. We have, in particular, on a Black and Mild cigarette/cigar pack that Mr. Johnson left at the scene.
>
> We have the victims' blood on his clothing along with his semen.[693]

15. The evidence cited by Thowsen does not show that Johnson was the shooter. The fingerprint was on a small, easily transportable cigar package, and it is impossible to say when, how, or by whom it was brought to the victims' house. At least one of the victims actually knew Johnson and bought drugs from him enclosed in cigar packages.[694]

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[692] Ex. 166 at III-23 (emphasis added).

[693] *Id.* at 60–61.

[694] 6/7/00 TT at III-17.

16. As for the blood on the pants, undersigned counsel has obtained an expert who found that the blood-spatter evidence in this case shows something completely different—that the blood was not deposited on the pants while the wearer was "in the position of an active shooter."[695] Several facts support this conclusion. First, the stains are located on the back of the jeans.[696] Second, the distribution of the stains is "not typical of spatter" from "a gunshot or a blow."[697] Third, the stains had a "crusty" appearance.[698] "Stains that are created by freshly shed blood caused by a gunshot or a blow would not have a 'crusty' appearance. Instead, a 'crusty' appearance would suggest a bloodstain that had undergone physiological changes such as clotting prior to deposition."[699] And, for clotting to occur, time must pass "from initial onset of bleeding until a clot begins to form."[700] Fourth, Criminalist Thomas Wahl also described each of the stains as a "surface stain."[701] "Although this term is not included in any recognized standard terminology, it is suggestive of a transfer stain instead of a stain created by an impact such as a blow or a gunshot."[702] Fifth, the absence of stains on the front of

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[695] Ex. 177.

[696] *Id.*

[697] *Id.*

[698] Ex. 171; Ex. 177.

[699] Ex. 177.

[700] *Id.*

[701] Ex. 171; Ex. 177.

[702] Ex. 177

the pants suggests that "the wearer was not in the position of an active shooter" during "a possible spatter producing event."[703]

17. The blood-spatter evidence also undermines a statement given by Young.[704] Young told detectives that the victims were shot immediately before Young, Johnson, and Smith left the home.[705] But, again, the bloodstains were "crusty," meaning that time had passed between the gunshot and the blood being deposited on the jeans.[706]

b. **Referring to facts not supported by admissible** evidence

18. During the opening statement of the eligibility stage, the State told the jurors that "Johnson pistol whipped [Talamantez] on the head."[707] The autopsy report does not attribute the laceration on Talamantez's head to a "pistol whipping."[708] During the guilt phase, Dr. Bucklin testified that the laceration on Talamantez's head was "caused by blunt force trauma" and "might be consistent with a gun—side of a gun striking the head."[709] But Dr. Bucklin added that "many objects" could have caused the laceration, and he had guessed the blunt object was a

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[703] *Id.*

[704] Exs. 49, 187.

[705] *Id.* at 24–25.

[706] Ex. 177.

[707] 4/22/05 TT at IV-AM-16.

[708] *See* Ex. 45.

[709] 6/7/00 TT at III-288–89.

gun only "because there's a gunshot wound as well."[710] A different forensic pathologist testified at Sikia Smith's trial that he could not "tell . . . what made [the laceration] or how he got it."[711]

19. In addition, the State told the jurors that Mowen "and his buddies had followed the band Fish [sic] to their concerts and sold pizzas and probably drugs to make money."[712] The State introduced no evidence that Mowen and his friends had sold pizza.

2. Selection stage

a. Referring to facts not supported by admissible evidence

20. During the opening statement at the selection phase, the prosecutor improperly summarized for the jury inadmissible evidence:

> Eventually, in prison, while incarcerated, his criminal conduct still didn't stop. You will hear about his behavior since his incarceration, how he can't comply with the rules and how rules are terribly important when you are a corrections officer at the detention center or at Ely State Prison. It's imperative that the inmates comply with the rules.
>
> You will hear about a phone call he made, threatening to kill a young woman, a civilian.
>
> You will hear about a letter he wrote where he put a hit out on Scale. You hear that name in the trial, Mr. Anderson, named Scale.
>
> You will hear about An [sic] incident where he punched another inmate in the face.[713]
>
> . . .

[710] *Id.* at III-288.

[711] Ex. 56.

[712] 4/25/05 TT V-AM at 13.

[713] 4/28/05 TT at VIII-PM-10–11.

> Nobody is safe from Donte Johnson, if he is out of custody.
>
> Regardless of race, regardless of gender, regardless of socio-economic status, and regardless of whether someone is an inmate at the detention center or an innocent by-stander at the bank, if Donte Johnson is alive, others are in danger.

The State had failed to provide proper notice to the defense that it would rely on this conduct during the penalty phase. Thus, the prosecutor made a statement to the jury about extremely prejudicial conduct that he was unable to actually prove.

B. The State Violated Johnson's Right to Association and a Pretrial Order by Introducing Evidence of Johnson's Gang Affiliation

21. In 2004, the State noted that it intended to call a "gang intelligence officer" during the penalty phase and introduce evidence that Johnson was a member of the "Six Deuce Brims."[714] Johnson objected, and the trial court ruled the evidence inadmissible in the State's case-in-chief.[715]

22. Despite this ruling, the State introduced multiple items showing Johnson's gang ties during the selection stage of the 2005 penalty hearing. The trial court first admitted, without objection, two probation officer's reports from Johnson's time in the juvenile justice system in California.[716] Both reports note Johnson's gang affiliation.[717]

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[714] Ex. 71 at ¶16; Ex. 72 at ¶16.

[715] Ex. 73 at 15; 5/3/04 PT at 18–33.

[716] Exs. 117–18. To the extent counsel failed to properly object to these reports, counsel's performance was deficient.

[717] Ex. 117 at 9–11; Ex. 118 at 10–13.

23. The trial court then admitted, over defense counsel's objection, a packet of disciplinary reports from Clark County Detention Center.[718] These documents also noted Johnson's gang ties.[719]

C. **The State Improperly Emphasized the Ages of the Victims**

24. The prosecutors made repeated references to the youth of the victims, starting from voir dire and continuing throughout the penalty rehearing.[720]

25. Defense counsel attempted before trial to prevent this improper emphasis on the victims' ages. Defense counsel moved for an order preventing the prosecutors from referring to the victims as "kids" or "boys," as they had done repeatedly during the guilt phase.[721] The State did not oppose the motion, and the trial court granted it in May 2004.[722]

26. Despite the trial court's order, the prosecutors several times referred to the victims as "boys" and "kids." For example, during the eligibility-stage closing argument, the prosecutor told the jurors that the defendants "did not take anything with them to prevent the four boys from identifying them."[723] And, the prosecutor continued:

> Todd [sic] Armstrong set this whole thing up. Really? He may have been the one who said what these boys had and

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[718] Ex. 121; 4/29/05 TT at IX-97–98.

[719] Ex. 121 at 43.

[720] 4/22/05 TT IV-PM at 5; 4/25/05 TT V-AM at 5, 9, 15; 4/25/05 TT V-PM at 8; 4/26/05 TT VI-PM at 85, 94, 99, 104; 5/4/05 TT at XII-100, XII-103–04.

[721] Ex. 212.

[722] 5/4/04 PT at 42.

[723] 4/27/05 TT at VII-PM-87.

> it may have been the triggering event. Are we going to blame Todd Armstrong for this? Did he suggest that they go over and execute these kids, ladies and gentlemen?[724]

Defense counsel objected, pointing to the previous ruling, and the prosecutor admitted his mistake.[725]

27. Shortly after the prosecutor acknowledged violating the pretrial order, however, he again referred to the victims as boys: "There is no indication that anybody reasonably can look at the facts in this case that Donte Johnson didn't execute the one-inch-from-the-back-of-each-one-of-these-boys heads, fatal shot."[726] Right after, the prosecutor referred to the victims as "kids": "It's not like this is a Bank of America and when these kids are robbed they can dial 911."[727] And, again: "If you want to find out what the defendant is about as it relates to the four murders, walk that videotape back beyond the four walls of Terra Linda where the young boys or young man is watering his lawn. . . ."[728] Finally, at the end of his closing argument, the prosecutor asked the jury to "[t]hink what went through Donte Johnson's mind, what he was thinking and doing" as he "goes over and systematically executes, bending down to each one of these boys."[729]

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[724] *Id.* at VII-PM-87–88.

[725] *Id.*

[726] *Id.* at VII-PM-89.

[727] *Id.* at VII-PM-89–90.

[728] *Id.* at VII-PM-90–91.

[729] *Id.* at VII-PM-92.

28. After the jury left the courtroom, defense counsel pointed out again the prosecutor's violation of the pretrial order, but the trial court rejected trial counsel's complaint:

> Ms. Jackson: We have an order by this Court and we made it because we felt that it was in order that the victims not be referred to as "boys" or "kids." The Court admonished Counsel because he did it twice, and after the admonishment, it did it two more times, and the record will so reflect.
>
> The Court: You did not object.
>
> Ms. Jackson: I didn't want to keep drawing attention to it. That's why you file motions up front so you don't have to keep doing it in front of the jury. Maybe the Supreme Court may think it's appropriate.
>
> . . .
>
> The Court: If you don't object and give the Court time to rule on it, it's all academic after that. You know you're supposed to object contemporaneously after that.[730]

29. In addition, the State asked witnesses to read portions of the guilt-phase testimony, which contained characterizations of the victims as "boys" and "kids."[731]

30. The State's repeated references to the victims ages and deliberate contravention of the trial court's order was a calculated effort to evoke sympathetic responses from jurors and violated Johnson's right to a fair trial.

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[730] *Id.* at VII-PM-94–95.

[731] 4/25/05 TT at V-PM-83; 4/26/05 TT at VI-AM-89, VI-AM-92, VI-AM-105.

D. The State Improperly Injected Other-Matter Evidence into the Eligibility Stage, in Violation of the Bifurcation Order

31. Johnson moved before the 2005 penalty phase to bifurcate the proceedings, a motion that the district court eventually granted.[732] As a result, the State was restricted during the first stage of the 2005 penalty phase, the eligibility stage, to presenting evidence of the sole aggravator—that Johnson, "in the immediate proceeding, [has] been convicted of more than one offense of murder in the first or second degree," Nev. Rev. Stat. § 200.033(12). *See Hollaway v. State*, 6 P.3d 987, 997 (Nev. 2000), *overruled on other grounds by Lisle v. State*, 351 P.3d 725 (Nev. 2015).

32. To prove the one aggravator, the State needed only to present Johnson's verdict forms from the guilt phase. The State in fact recognized this during closing argument:

> What do you know in this case? I would submit to you that you need look no further than Exhibit No. 247 in this case, the verdict form from the trial in this case in which 12 members of this community like yourselves heard the evidence against Donte Johnson, deliberated and convicted him of four counts of murder in the first degree. That, in and of itself, establishes the existence of an aggravator beyond a reasonable doubt, and that is our only burden in this phase, this first phase of this death penalty proceeding.[733]

33. Almost all of the State's presentation during the eligibility stage went well beyond the verdict forms necessary to find the sole aggravator. For example, it was unnecessary for the State to tell the jurors about Johnson's drug deals or

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[732] Exs. 126–27; 4/19/05 TT at I-AM-7.

[733] 4/27/05 TT at VII-PM-20

present evidence of the crime scene, testimony from Johnson's ex-girlfriend, guns not involved in the homicides, and autopsy reports.[734] In fact, after the prosecution showed the jurors a firearm collected from Johnson's residence, the prosecutor elicited testimony that it was not used in the homicides.[735]

34. The State also told the jurors that it had even more other-matter evidence to introduce during the selection stage. During the opening statement of the eligibility stage, the State told the jurors that it had more evidence to present during the selection stage, so they should "keep [their] options open":

> During the second phase of this hearing, we will have the opportunity to present additional evidence about Donte Johnson's upbringing. That will be in the second phase of the proceedings.
>
> We simply ask you at the conclusion of the first phase to conclude the aggravator of the quadruple homicide outweighs his upbringing, and to keep your options open.[736]

35. The State continued this argument during the closing argument:

> [K]eep in mind that we were limited in this phase of the proceedings to presenting evidence of the aggravator and nothing else. You all told us during jury selection that you would like to know as much as possible about the crime and the defendant before you make this decision you're about to make. We presented to you some evidence of the crime, and we will present in the next phase of the proceeding some evidence about Donte Johnson, that evidence you told us that you wanted to hear.[737]

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[734] *See generally* 4/25/05 TT at V-AM-5–24; 4/25/05 TT at V-PM-7–19, V-PM-21–116; 4/26/05 TT at VI-AM-2–3, VI-AM-27–120; 4/26/05 TT at VI-PM-42–51, VI-PM-57–116; 4/27/05 TT at VII-PM-18–40, VII-PM-79–93.

[735] 4/25/05 TT at V-PM-73.

[736] 4/25/05 TT at V-AM-24.

[737] 4/27/05 TT at VII-PM-20–21.

And, the State added, marking certain items on the verdict forms means only one thing:

> [U]ltimately what happens, if you believe the aggravator, the quadruple murder outweighs the mitigator, when you get to the next phase of this proceeding, the death penalty will be an option for your consideration. That's all that means. It does not mean you automatically impose to [sic] death penalty; it never means that. It simply means you will have four options for punishment as opposed to three.[738]

36. At the very end of the closing argument, the State again told the jurors that they would hear other-matter evidence during the selection stage:

> [A]t this next phase of the proceeding when you eventually select the punishment to impose for all four first-degree murders, we will provide you with the additional information you told us you wanted to know about Donte Johnson. You will hear that no matter what your decision right now in the second phase of this proceeding, and regardless of your decision, there will be a second phase of this proceeding. What I'm suggesting to you is that you should simply keep your options open.[739]

37. During the rebuttal argument, the State attempted to continue implying the existence of additional other-matter evidence: "As Paul Harvey says, the rest of the story deals with the second phase with additional witnesses and additional evidence before you when you consider the final portion of this."[740] Defense counsel objected, and the trial court sustained the objection.[741]

38. By implying the existence of other-matter evidence, the State injected selection-stage material into the eligibility stage, minimized the impact of finding

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[738] *Id.* at VII-PM-23–24.

[739] *Id.* at VII-PM-39.

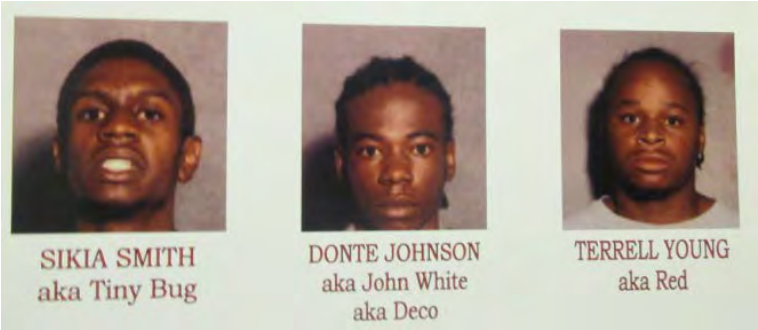
[740] *Id.* at VII-PM-80.

[741] *Id.* at VII-PM-80–81.

death eligibility, and incentivized the jury improperly to "keep their options open," depriving Johnson of a fair sentencing proceeding.

E. The State Displayed Inflammatory Images of the Defendants

39. The State displayed to the jurors inflammatory images of the three defendants, taken immediately after their arrest, which included the defendants' aliases.[742]



40. In addition, the State continually referred to the defendants by those aliases.[743]

F. The State Improperly Disparaged Johnson's Legitimate Mitigation Strategy

41. Throughout the 2005 penalty phase, the State improperly disparaged Johnson's mitigation strategy and evidence.

1. Trivializing the concept of mitigation

42. The prosecution committed misconduct by trivializing the concept of mitigation evidence during the eligibility-stage closing argument:

> We all have obstacles to overcome in our life, we all have crosses to bear. Who among us doesn't have an alcoholic

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[742] 4/25/05 TT at V-PM-68, V-PM-86; Ex. 116.

[743] 4/22/05 TT at IV-AM-12; 4/25/05 TT at V-PM-53, V-PM-68, V-PM-76 V-PM-81, V-PM-94, V-PM-101; 4/29/05 TT at IX-27; 5/4/05 TT at XII-20.

> or a drug addicted family member? Who among us didn't come from an impoverished background or childhood? Who among us hasn't endured physical or emotional abuse as a kid or at least know somebody who has? At some point, we're all adults, and we make choices, so how much weight do you give his difficult upbringing? Is that really worth more consideration than the lives of Jeff Biddle, Tracey Gorringe, Matt Mowen and Peter Talamentez [sic]? How much mitigation does he get for his upbringing? I submit to you, nothing in this man's background, nothing could possibly outweigh the destruction that he caused back in August 1998.[744]

2. Arguing that the jurors should dismiss mitigation evidence not connected to crime

43. The State compounded its trivialization of the mitigation evidence by misstating the law—arguing to the jurors that evidence must be connected to the crime to count as mitigating:

> Donte Johnson is not charged with beating his wife or his girlfriend. He's not charged with any of the attended things that he observed as a child growing up. I ask you to think of the logic of what he saw growing up and how that connects to what you see he has done in this case, and I submit, there is none, but what there is is concrete evidence to suggest that something that runs through his veins and between his ears is different, different from the hundreds and thousands of people that have been brought up in the same or similar circumstances.
>
> . . .
>
> Were you struck by the testimony that Mr. Daskas elicited about the autopsies of four of these individuals—Peter Talamentez [sic], 5'9, 105 pounds, duct taped, face down, hands behind his back, feet tied together. Is there an explanation for the defendant's childhood and upbringing in South Central Los Angeles that explains that? I submit to you, there is not.[745]

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[744] *Id.* at VII-PM-26–27.

[745] *Id.* at VII-PM-83, VII-PM-87; *see also* 4/29/05 TT at IX-225–27; 5/2/05 TT at X-191; 5/3/05 TT at XI-129–31.

3. Reducing Johnson's mitigation evidence to "his upbringing"

44. Starting from the opening statement of the eligibility stage, the prosecutors continually reduced Johnson's mitigation evidence to simply "his childhood" and "his upbringing," then argued that those two factors could not "possibly carry more weight than the aggravator in this case."[746]

G. The State Improperly Impeached Moises Zamora

45. During cross-examination of Johnson's brother in law, Moises Zamora, the State asked Zamora whether he had any misdemeanor convictions.[747] Misdemeanor convictions are not a proper source of impeachment material.

H. The State Engaged in Misconduct during the Closing Arguments

1. Eligibility stage

a. Misstating the jury's guilt-phase findings

46. As it did during the opening statement, the State during the closing argument incorrectly told the penalty-phase jurors that the guilt-phase jurors had determined Johnson was the shooter:

> What are the facts in this case? Repeatedly you've heard, "We make no excuses." Really? What I heard argued just before you is who did what in the underlying murders. It is proven beyond a reasonable doubt that the defendant is guilty of first-degree murder with use of a deadly weapon. The evidence is unequivocal that it is the defendant, Donte Johnson, that fired the fatal rounds into each one of the victims' heads. To argue before you that the evidence is anything else, cite me to the facts.[748]

Defense counsel objected, but the trial court overruled the objection, and the State

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[746] 4/25/05 TT at IV-AM-26; 4/27/05 TT at VII-PM-26–31, VII-PM-37–39.

[747] 4/29/05 TT at IX-189.

[748] 4/27/05 TT at VII-81–82.

continued its improper argument a short while later: "There is no indication that anybody reasonably can look at the facts in this case that Donte Johnson didn't execute the one-inch-from-the-back-of-each-one-of-these-boys heads, fatal shot."[749]

47. As explained more fully above, it is far from "unequivocal" that Johnson was the triggerman.[750]

b. Arguing facts not in evidence

48. During the eligibility-stage closing argument, the State improperly argued the infrequency of quadruple homicides:

> We all watch the news every day and we hear about homicide, unfortunately, in our valley. They're not that uncommon, but double homicides are a bit more unusual than a single homicide, and I would submit to you that based on your common sense and experience, triple homicides are incredible rare, and quadruple homicides are almost unheard of. That is entitled to great weight when you assign weight to the existence of the aggravator in this case. Quadruple homicides are almost unheard of, and he is, Donte Johnson, a convicted quadruple killer.[751]

The State had introduced no evidence of the frequency of triple homicides or quadruple homicides, which are hardly "unheard of." So far this year there have been 46 shootings resulting in three or more deaths and 25 shootings resulting in four or more deaths. *See* Gun Violence Archive, https://www.gunviolencearchive.org/reports/mass-shooting (last visited December 17, 2018).

49. In addition, the prosecutors told the jurors that the defendants did not wear masks, implying that they had intended to kill the victims from the beginning:

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[749] *Id.* at VII-89.

[750] *See* § A(1)(i) above.

[751] 4/27/05 TT at VII-PM-86–87.

> [I]t's not what they took with them; it's what they didn't take with them. They knew Matt Mowen. You're going to rob these folks, put a gun to their face, get in the fucking house, point them out, duct tape them, rob them with gloves and then walk out? No. They had planned the murder all along. They did not take anything with them to prevent the four boys from identifying them. They had planned the whole thing.[752]

The State presented no eyewitness testimony concerning the presence or absence of masks.

50. The prosecutors then told the jurors that Johnson had pistol-whipped Talamantez, a statement that the State failed to support with admissible evidence.[753]

51. Finally, the State in its closing argument repeated an incorrect contention from its opening statements: Mowen and his friends had earned money selling pizza.[754] Defense counsel pointed out that testimony showed Mowen made money selling acid; "[t]here was no evidence at all that pizzas was [sic] sold."[755] The trial judge agreed, noting that he did not "recall pizza."[756] The prosecutor, however, responded that he would "leave it to the collective memory of . . . the jury of what occurred."[757] The State conceded on direct appeal that "the evidence did not support

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[752] 4/27/05 TT at VII-PM-86–87.

[753] *Id.* at VII-PM-91.

[754] *Id.* at VII-PM-85.

[755] *Id.*

[756] *Id.*

[757] *Id.*

its claim that [Mowen] once said that he made money 'selling pizzas and drugs,' instead of just 'drugs.'" *Johnson v. State*, 148 P.3d 767, 776 (Nev. 2006).

c. Inflaming the passions of the jurors

52. The State during the eligibility-stage closing argument improperly asked the jurors to compare Johnson's life against the lives of the victims: "[H]ow much weight to you give his difficult upbringing? Is that really worth more consideration than the lives of Jeff Biddle, Tracey Gorringe, Matt Mowen and Peter Talamentez [sic]?"[758]

53. The State also improperly compared Johnson to others and attempted to coerce the jury into using societal pressure to sentence Johnson to death:

> I would submit to you that if you find that his upbringing outweighs this quadruple homicide, that is disrespectful to members of South Central L.A. who didn't commit a quadruple homicide. Common sense tells us that many, many, many people in a similar upbringing haven't done what Donte Johnson has done. If you were to find that his childhood is entitled to a greater wait [sic] of this quadruple homicide, it's like telling people—
>
> . . . .
>
> Common sense tells you that not every person raised in a similar upbringing has committed a quadruple homicide, so when you assign mitigation in this case, keep that in mind and consider the testimony of his sister and his brother-in-law, because that's all you really need to know.[759]

As the Nevada Supreme Court found on direct appeal, through this statement the State improperly urged the jury to sentence based on public opinion. *Johnson v. State*, 148 P.3d 767, 775 (Nev. 2006) ("How the public may react to the verdict . . .

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[758] *Id.* at VII-PM-26.

[759] *Id.* at VII-PM-28–29.

has no place in the jurors' deliberative process."). This statement further conflicts with Jury Instruction 14: "A verdict may never be influenced by prejudice or public opinion."[760]

54. Finally, the State improperly insulted Johnson: "[W]hat there is is concrete evidence to suggest that something that runs through his veins and between his ears is different, different from the hundreds and thousands of people that have been brought up in the same or similar circumstances."[761] Defense counsel objected, and the trial court sustained the objection, but the State continued:

> The evidence that suggest, as Counsel does mitigation, that what happened and what he saw in his childhood is simply put to rest regarding his own sisters, Eunisha and Johnnisha White. She went through the same things. Why did they not end up doing what Donte Johnson did? Why didn't they execute four people when they did not get what they wanted or wanted to take something from somebody else? The answer is, the defendant is different than his sisters. Counsel said, "unique as DNA." That, we agree on.[762]

2. Selection stage

a. Arguing facts not in evidence

55. The State repeated its argument about masks during the selection-stage closing argument, telling the jurors "[t]hey took with them gloves but no masks."[763] Again, the State introduced no evidence supporting this contention.

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[760] Ex. 75 at 14.

[761] 4/27/05 TT at VII-PM-83.

[762] *Id.* at VII-PM-84.

[763] 5/4/05 TT at XII-37.

56. The State next argued, without any supporting evidence, that "criminals who commit single homicides receive life in prison without parole."[764] The Nevada Legislature has provided two sentencing options for capital murder that are less onerous than life in prison without parole: (1) life in prison with the possibility of parole or (2) a term sentence of fifty years, with eligibility for parole after twenty years. *See* Nev. Rev. Stat. § 200.030(4).

57. Finally, the State twice repeated its unsupported statement that Johnson had pistol-whipped Talamantez. First, the State told the jurors that "[w]e know that [Johnson] pistol whips [Talamantez] and he kicks him about the face."[765] Then, the State recounted that Talamantez "was laid face down on the ground, duct taped, hands behind his back, motionless and defenseless when the defendant pistol whipped him, kicked him in the face and then executed him."[766]

b. Inflaming the passions of the jurors

58. During closing argument in the selection phase, the State began by inappropriately personalizing Johnson's actions to the jurors:

> There is one clear and honest mistakable fact in this case. It does not make a difference what age you are, what gender you are, what race you are, whether it's in broad daylight, whether it's at nighttime, whether it's in the privacy and the sanctity of your own home or whether or not it's on the public street, whether or not you're in a bank in broad daylight—none of those matter to the defendant Donte Johnson. He will victimize anybody

[764] *Id.* at XII-107.

[765] *Id.* at XII-38,

[766] *Id.* at XII-102–03.

> under any of those circumstances. That's one unequivocal fact before you.[767]

59. The State also improperly appealed to "justice," arguing that "the just punishment in this case is that Donte Johnson forfeit his life, and that the fair and just punishment in this case is death."[768]

60. The State next implored the jurors to consider the message that their verdict would send the community:

> What message do we send to would-be criminals if we give this man without parole? Do you send this message, if you're going to kill, you may as well eliminate witnesses, you may as well commit additional murders because the punishment is going to be the same? I submit to you that's a dangerous message to send.[769]

61. The State also improperly argued that the death penalty had "no meaning" if it wasn't imposed on Johnson: "If a quadruple killer who laughs about his crimes isn't deserving of the death penalty, then it has no meaning. If a quadruple killer who has previously killed isn't deserving of death, then the death penalty has no meaning."[770]

62. Similarly, the State argued that the jurors would be "giv[ing] Donte Johnson a pass" if they did not sentence him to death:

> If life in prison with no chance of parole is the punishment for the execution of a 17-year-old with this man's criminal background, what is the additional punishment for Matt Mowen? There has to be additional punishment for additional victims, or do we simply ignore that second murder from August 14th? Do we give Donte Johnson a pass? Do we pretend it never happened and

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[767] *Id.* at XII-20–21.

[768] *Id.* at XII-40.

[769] *Id.* at XII-107.

[770] *Id.*

> just give him life without parole? Do we treat Donte Johnson as if he had stopped after executing Peter Talamentez [sic] or is something more required in this case of this defendant? Maybe some of you believe that a double murderer deserves life without parole.
>
> What about victim number three? What about Jeff Biddle? Where is the punishment for that execution? Do we treat Donte Johnson as if he had stopped after killing Peter Talamentez [sic] and Matt Mowen? Do we pretend he never executed Jeff Biddle? Do we imagine that Jeff Biddle wasn't lying there taped up, defenseless and motionless when he was ecuted or is something more required of this defendant? Or do you now give him a pass for both the murder of Matt Mowen and Jeff Biddle, treat him the same as if he had stopped after killing 17-year-old Peter Talamentez [sic]? Maybe some of you believe a triple murderer deserves life in prison without parole.
>
> What about victim number four? What about Tracey Gorringe? How do we punish Donte Johnson for the murder of Tracey Gorringe, or do we pretend that never happened?[771]

63. Finally, the State improperly speculated about Gorringe's thoughts before he was shot:

> What did Tracey Gorringe know and what did Tracey Gorringe hear? Let's think about that. He surely heard the first shot to Peter Talamentez [sic]. He was in the next room in the dining room. Maybe Tracey even heard the grunting noise that Pete made, the one that Donte Johnson laughed about.[772]

64. These arguments were inflammatory appeals to the emotions of the jurors and therefore improper.

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[771] *Id.* at XII-103–06.

[772] *Id.* at XII-105–06.

I. Conclusion

65. Considered either individually or cumulatively, the pervasive prosecutorial misconduct rendered Johnson's penalty hearing fundamentally unfair and was not harmless beyond a reasonable doubt.

66. To the extent that defense counsel failed to properly object to the prosecutors' misconduct and argue that misconduct on appeal, counsel were ineffective. Insofar as the trial court failed to sua sponte correct any error, the court erred.

CLAIM SEVENTEEN: TRIAL COURT ERROR DURING THE 2005 PENALTY PHASE

Johnson's death sentences are invalid under the federal constitutional guarantees of due process, effective assistance of counsel, equal protection, a fair trial, freedom from cruel and unusual punishment, and a reliable sentence because of errors by the trial court. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

A. The Trial Court Committed Error in Allowing Prosecutors to Ask "Stake Out" Questions During Voir Dire Examination of Prospective Jurors.

1. On April 19, 2005, jury selection began in Johnson's third penalty phase hearing. During examination of prospective Juror 001, the State asked "if you were selected the foreperson of this case and you believed under the law and the facts that the death penalty was appropriate[,] could you sign your name as foreperson[?]."[773] Defense counsel promptly objected to this line of questioning.[774] The court overruled the objection and the State again asked the same question.[775] The State would go on to ask the same question to fifteen prospective jurors.

2. The Fourteenth Amendment denies the State the power to deprive any person of life, liberty, or property without due process of law. It further guarantees –along with the Sixth Amendment – a right to an impartial jury. *See Morgan v.*

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[773] 4/19/05 TT I-AM at 25.

[774] *Id.*

[775] *Id.* at 26.

Illinois, 504 U.S. 719 (1992). This right extends to the sentencing phase, where a person facing the death penalty has a right to be sentenced by jurors who do not believe that "death should be imposed ipso facto upon conviction of a capital offense." *Id.* at 735. Thus, the principal of juror impartiality applies equally to the penalty phase. *Id.* at 729.

3. Voir dire plays a critical function in assuring a person that Johnson's Sixth Amendment right to an impartial jury will be honored. *See Rosales-Lopez v. United States*, 451 U.S. 182 (1981).

4. Courts have agreed that case specific questions were permissible, so long as they are not "stake out" questions. *See United States v. Fell*, 372 F. Supp. 2d 766, 770 (D. Vt. 2005). Stake out questions have been defined as those that "ask a juror to speculate or precommit on how that juror might vote based on any particular facts . . . ." *United States v. Johnson*, 366 F. Supp. 2d 822, 833 (N.D. Iowa 2005).

5. Here, the State repeatedly asked prospective jurors an improper "stake out" question. This was a clear attempt to cause prospective jurors to pledge themselves to a future course of action, and "indoctrinate [them] regarding potential issues before the evidence has been presented and [they] have been instructed on the law." *Richmond v. Polk*, 375 F.3d 309, 330 (4th Cir. 2004) (quotations omitted)

6. The court erred in allowing the State to question sixteen prospective jurors by effectively asking them if they could sign the verdict that would put Donte Johnson to death. The question was used to empanel a pro-death jury rather than

the constitutionally guaranteed panel of impartial, indifferent jurors to which Johnson was entitled.

7. Insofar as these questions caused a biased juror to sit, the error was structural. In the alternative, this error was not harmless beyond a reasonable doubt. Johnson is entitled to relief.

B. The Trial Court Violated Johnson's Due Process Rights by Permitting the State to Introduce Irrelevant, Trivial, and Unproven Prior Bad Acts

8. Under Nevada law, the State may present "other-matter" evidence during the selection stage of a penalty hearing, but only if the probative value of the evidence outweighs its prejudicial nature. The trial court improperly allowed the State to present irrelevant and unproven prior bad acts. Individually and cumulatively, the erroneous admission of this evidence "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994).

1. The trial court should not have admitted Johnson's juvenile misconduct during the selection stage

9. On March 17, 2004, the State noted its intent to use Johnson's juvenile records in the penalty rehearing.[776] Defense counsel objected, and the trial court initially agreed with defense counsel, concluding the records were more prejudicial than probative.[777]

10. The trial court shortly changed course, however:

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[776] Ex. 71 at 4–5; *see* Ex. 72.

[777] Ex. 73 at 9; 4/28/04 PT at 17.

> Let's go back to the juvenile records. The Court has said we do get juvenile records. Normally it's not in an adult's case, but the trier of fact and the sentencing judge routinely look at the juvenile records of defendant when they're doing sentencing.
>
> It's not something that I'm particularly fond of because I think a person changes for the most part from when they're a juvenile, and they haven't fully developed as a juvenile. That's why we have a law to keep their records sealed automatically until the age of 24.
>
> However, I have to follow the law. The Supreme Court says you can use them. So I'm going to reverse my decision on that. It can come in.[778]

11. The State proceeded to introduce evidence of Johnson's juvenile offenses and misconduct during the selection stage of Johnson's 2005 penalty phase. The State started its opening statement by telling the jurors that, "[t]o understand Donte Johnson, you have to go back to 1992, when he was 14 years old" because that was "when his criminal conduct began."[779] Specifically, the State said, Johnson committed an armed robbery at the age of 14, was placed in a "camp," then returned home, "defied his grandparents," and violated probation.[780] The next year, the State continued, a 15-year-old Johnson possessed a handgun at school and later took a vehicle without the owner's consent.[781] When he was 16 years old, the State concluded, Johnson was convicted of bank robbery and was sent to a juvenile facility.[782]

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[778] 5/3/2004 TT at 13.

[779] 4/28/05 TT at 4.

[780] *Id.*

[781] *Id.*

[782] *Id.* at 4–6.

12. The State then introduced testimony from an officer who had investigated the bank robbery in Los Angeles, a bank teller who had been working during that robbery, and a parole officer who testified about Johnson's conviction and placement in the California Youth Authority.[783]

13. The State also introduced two reports from probation officers that documented juvenile misconduct unrelated to Johnson's adult charges.[784] The first report noted that Johnson "will not attend school," is "difficult" and "uncooperative" at home, and was involved with a gang.[785] The second report noted that Johnson drank alcohol occasionally, smoked marijuana approximately four times each week, was not attending school, did not work, was involved in a gang, and was "difficult and uncooperative at home."[786] That same report stated that Johnson and his codefendants "were joking and playing around" during juvenile proceedings.[787]

14. During closing argument in the selection phase, the State relied heavily on the evidence of Johnson's juvenile misconduct, insisting to the jury that Johnson's teenage acts "tell you volumes about who this gentlemen is."[788] And the State again noted that Johnson and his codefendants "were joking and playing around" during juvenile proceedings and repeated a statement Johnson's

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[783] *Id.* at 38–64; 4/29/05 TT at 30–46.

[784] 4/29/05 TT at 32–35; *see* Ex. 117.

[785] Ex. 117 at 9–10.

[786] Ex. 118 at 7–13.

[787] *Id.* at 12.

[788] 5/4/05 TT at 20–27.

grandmother had made when Johnson was 16 years old.[789] The State ended its rebuttal argument by imploring the jurors not to "forget about the bank robbery at age 16."[790]

15. In addition to being substantially more prejudicial than probative, admitting this evidence violated Johnson's rights under *Roper v. Simmons*, 543 U.S. 551 (2005).[791]

2. The trial court should not have admitted evidence of an incident involving inmate Oscar Irias

16. On April 6, 2004, the State informed Johnson and the trial court that it intended to present evidence of an incident at Clark County Detention Center involving inmate Oscar Irias, who allegedly was thrown over a second-floor railing after going to the higher tier for cleaning supplies.[792] Defense counsel objected, arguing that the evidence lacked any probative value to offset its prejudicial nature because Johnson was not actually involved in the incident.[793] Defense counsel pointed out that a different inmate pleaded guilty to the offense, Reginald Johnson, and the State dropped the charges against Donte Johnson.[794] In addition, the victim received a favorable plea deal for participating in the prosecution of Donte Johnson

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[789] *Id.* at 25–27.

[790] *Id.* at 103.

[791] *See* Claim Twenty.

[792] Ex. 72 at ¶15.

[793] Ex. 73 at 12–13.

[794] *Id.* at 13.

and Reginald Johnson, and evidence developed by Reginald Johnson's attorney showed that the correctional officers who supposedly witnessed the event could not actually have seen anything.[795]

17. The trial court held an evidentiary hearing to consider whether to admit the evidence.[796] At the evidentiary hearing, Johnson presented testimony from several people that correctional officers had lied about the incident with Irias.[797] Jose Vigoa first testified that, contrary to a correctional officer's statement, he did not see the incident with Irias, only the aftermath.[798] Next, Toby Bishop testified that Irias would not have needed to go to the second floor to get cleaning supplies, as the correctional officers had reported, because the supplies were located on the first floor.[799] And, Bishop continued, he saw Reginald Johnson throw Irias over the railing while Donte Johnson was on the first floor talking to another inmate.[800] The guards did not see the altercation, Bishop added, and did not come out until "[w]ay after the fact."[801] George Ashton Cotton similarly testified that "all the guards had their back turned" during the incident with Irias and that cleaning

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[795] *Id.*

[796] 5/17/04 PT.

[797] *Id.* at 53–100.

[798] *Id.* at 55–56.

[799] *Id.* at 60–61.

[800] *Id.* at 62–63.

[801] *Id.* at 64–66.

supplies were available on the first floor.[802] Termaine Anthony Lytle agreed that the guards "all had their backs towards 5C," the module Irias was in, because they were looking at the unit on the other side.[803] Robert James Day added that Reginald Johnson had thrown Irias, "the child molester," over the railing, but none of the correctional officers were watching.[804] Finally, Reginald Johnson testified that he, acting alone, assaulted Irias.[805]

18. Despite this evidence, the trial court allowed the State to argue to the jurors that Johnson had participated in the offense against Irias.[806] In overruling Johnson's objection, the court relied in part on a hearsay statement from Irias.[807]

19. During the selection stage of the penalty rehearing, the State relied heavily on the incident with Irias. First, during the opening statement, the State argued that this incident proved that Johnson could not safely be housed in prison:

> Eventually, in prison, while incarcerated, his criminal conduct still didn't stop. You will hear about his behavior since his incarceration, how he can't comply with the rules and how rules are terribly important when you are a corrections officer at the detention center or at Ely State Prison. It's imperative that the inmates comply with the rules.
>
> . . .
>
> Regardless of race, regardless of gender, regardless of socio-economic status, and regardless of whether

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[802] *Id.* at 71–74.

[803] *Id.* at 78–79.

[804] *Id.* at 86–87.

[805] *Id.* at 90–95.

[806] *Id.* at 117–18.

[807] *Id.* at 111–15.

> someone is an inmate at the detention center or an innocent by-stander at the bank, if Donte Johnson is alive, others are in danger.[808]

20. The State reiterated during closing argument that Donte Johnson should be put to death in part because of the incident with Irias.[809]

3. The trial court improperly admitted evidence of trivial misconduct

21. During the selection stage of the 2005 penalty phase, the State introduced exhibits outlining trivial misconduct Johnson committed as a minor and young adult.

22. The trial court first admitted, without objection, two probation officer's reports from Johnson's time in the juvenile justice system in California.[810] The reports included the following trivial misconduct: (1) when he was fourteen years old, Johnson pestered female students at his middle school "by asking silly questions"; (2) Johnson was not attending middle school regularly; (3) Johnson as a teenager was uncooperative at home; (4) Johnson drank alcohol and smoked marijuana when he was fifteen years old; and (5) Johnson—again as a teenager—on one occasion was "joking and playing around" in court.[811]

23. The trial court then admitted, over defense counsel's objection, a packet of disciplinary reports from Clark County Detention Center.[812] The packet,

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[808] 4/28/05 TT VIII-PM at 10–11.

[809] 5/4/05 TT at XII-30–34.

[810] Exs. 117–18.

[811] Ex. 117 at 3, 9–11; Ex. 118 at 7, 9, 12–13; 4/29/05 TT at IX-32–35.

[812] Ex. 121; 4/29/05 TT at IX-97–98.

included repetitive reports, along with the following trivial misconduct: (1) quitting voluntary GED classes; (2) possessing "a newspaper that did not belong to him"; (3) passing notes, called "cadillacs," to other inmates; (4) making "excessive noise" with other inmates on the Fourth of July and New Year's Day; (5) "screaming and singing" through the vents; (6) going in other inmates' cells; (7) wearing clothes that were the wrong size and inside out; (8) covering his light at night; (9) "talking while in line up"; and (10) responding to a correctional officer "in a gang banging and disrespectful manner."[813] Johnson was in his early- to mid-twenties when these incidents occurred.

24. This misconduct was irrelevant to the jury's decision whether to sentence Johnson to death, and the trial court erred by allowing it. To the extent that defense counsel failed to properly object, defense counsel were ineffective.

C. The Trial Court Should Have Declared a Mistrial when a Victim's Brother Fainted in front of the Jury

25. Nick Gorringe—brother of Tracy Gorringe—groaned, passed out onto the floor, and then, while crying, was aided out of the courtroom.[814] David Mowen—Matthew Mowen's Father—assisted Gorringe out of the courtroom.[815] This incident happened in front of the jury, ensuring that Johnson's sentence was imposed under influence of passion, prejudice, and other arbitrary factors, in violation of Johnson's rights to due process and to be free from cruel and unusual punishment.

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[813] Ex. 121 at 6, 12, 17–19, 34, 36–40, 45, 52–53, 59.

[814] 4/27/05 TT VII-PM at 31–37.

[815] *Id.* at 35.

26. Given the makeup of the courtroom—Johnson's African-American family on one side and the victims' predominantly Caucasian families on the other side—it was clear to the jury that Gorringe was a family member of one the victims. For the jury to see a family member be so overwhelmed that they essentially faint rendered Johnson's trial fundamentally unfair.

27. During the three penalty phases in this case, the State's theory and evidence remained roughly the same: the same exhibits were presented; much of the same testimony. Yet, only in the 2005 penalty phase, did an incident such as this one happen.

28. Only a mistrial could have remedied this exposure to the jury. The court erred in failing to grant a mistrial. Insofar as counsel failed to properly object, counsel were ineffective.

29. In addition, this is structural error, thus Johnson is entitled to a new penalty phase. Alternatively, this error was not harmless beyond a reasonable doubt.

D. The Trial Court Allowed the State to Improperly Cross-Examine Defense Witnesses

1. Dr. Kinsora

30. During cross-examination, the State asked Dr. Kinsora whether Johnson "fits the characteristics of an antisocial personality disorder."[816] Defense

[816] 5/3/05 TT at XI-101–02.

counsel objected, pointing out that the question was beyond the scope of direct.[817] The question also was inappropriate because Dr. Kinsora did not test Johnson for personality disorders.[818] But the trial court erroneously overruled defense counsel's objection.[819]

31. In addition, the trial court improperly allowed the State to impeach Dr. Kinsora with extrinsic evidence—a social-history report by a mitigation specialist.[820] After multiple overruled objections, and after the State read substantial portions of the report into the record, the trial court finally realized that the impeachment was improper.[821]

2. Reginald Johnson

32. During the State's cross-examination of defense witness Reginald Johnson, the State attempted improperly to impeach the witness with old felonies:

> Q Mr. Johnson, I want to go back to begin my cross-examination by discussing your criminal record.
>
> Would it be a fair statement to say that you have admitted to the criminal activities that you ultimately were charged with in courts?
>
> A Yeah; it's true.
>
> Q You've pled guilty to all those offenses?
>
> A That's true.

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[817] *Id.*

[818] *Id.* at XI-102–03, IX-104.

[819] *Id.* at XI-103.

[820] *Id.* at XI-112–29.

[821] *Id.* at XI-129–31.

Q And you have a 1992 conviction out of the State of Tennessee for aggravated robbery?

A That's true.

Q Nineteen ninety-three, State of Tennessee—[822]

33. Defense counsel objected.[823] The trial court at first sustained the objection, but then allowed the State to continue impeaching Reginald Johnson with the outdated offenses because he was later adjudicated as a habitual offender:

Q So, that would have been 1993, aggravated robbery as well out of the state of Tennessee?

A That's correct.[824]

34. The State then attempted to impeach Reginald Johnson with the sentences he was serving:

Q At the time that you were sentenced on the robbery charges, do you recall what the sentence was?

A No. A lot.

Q A lot?

A Over a hundred.[825]

35. Defense counsel again objected, but the trial court in an unrecorded bench conference apparently overruled the objection, because the improper questioning continued, this time with the addition of conduct that Reginald Johnson had not yet been convicted of:

Q Prior to you being sentenced ultimately in this case, the Oscar Irias incident, you had been

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[822] 5/2/05 TT at X-65.

[823] *Id.* at X-65–66.

[824] *Id.* at X-66–67.

[825] *Id.* at X-67.

sentenced to a minimum of 64 years in the Nevada State Prison; is that about right?

A If that's what you say. I know it was a lot. I'm not sure how much it was.

. . .

Q At the time that you entered your pleas to the Oscar Irias incident, you had been sentenced to 64 years, correct?

A Correct.

Q In addition, you were waiting to be sentenced in another court for another felony matter, correct?

A Assault.

Q And in addition, the State of California was seeking your extradition for multiple counts of robbery, correct?

A That's correct.[826]

36. Old crimes, charges, and sentences were not proper impeachment material, and the trial court erred by allowing this evidence, depriving Johnson of a fair trial.

E. The Trial Court Admitted Unnecessary and Gruesome Photographs

37. During the penalty rehearing, the State moved to admit various gruesome photographs.[827] Defense counsel objected to their introduction as prejudicial, inflammatory, and duplicative of other photographs, but the trial court overruled defense counsel's objections and admitted the photographs.[828] The trial court erred in admitting the photographs.

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[826] *Id.* at X-67–70.

[827] Exs. 119–20.

[828] 4/29/05 TT at 22.

F. The Trial Court Wrongly Defined "Robbery" during Voir Dire

38. During voir dire, the trial court defined robbery as "tak[ing] something from you personally with the use of a weapon or violent force from your person or in your presence."[829] Robbery in Nevada does not include as an element violent force against a person. *See United States v. Edling*, 895 F.3d 1153, 1157 (9th Cir. 2018); *see also* Nev. Rev. Stat. § 200.380 ("Robbery is the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery.").

G. The Trial Court Improperly Rejected Defense Counsel's Motion to Argue Last

39. Due process considerations support allowing the defense to argue last. Because "death is a different kind of punishment," *Gardner v. Florida*, 430 U.S. 349 (1977), a higher standard of reliability is required for death penalty cases. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (Burger, C.J., Stewart, Powell, Stevens, JJ.) (penalty phase may not introduce factors that create "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty"). This heightened reliability mandates that Johnson be allowed to argue last during both the eligibility and selection phase.

40. This is structural error and this Court must grant relief. In the alternative, this error was not harmless beyond a reasonable doubt.

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[829] 4/21/05 TT III-PM at 32.

41. Insofar as prior counsel failed to object or raise this claim, counsel was deficient. But for counsel's deficient performance, there is a reasonable probability of a different result.

H. **Conclusion**

42. The trial court's improper rulings on evidentiary issues individually and cumulatively rendered Johnson's trial fundamentally unfair. *See Romano*, 512 U.S. at 12. These errors were not harmless beyond a reasonable doubt.

43. Insofar as trial or appellate counsel failed to raise these objections or claims in prior proceedings, they were ineffective, and there is a reasonable probability of a more favorable outcome if counsel had performed effectively.

CLAIM EIGHTEEN: JUROR MISCONDUCT AND BIAS DURING THE PENALTY PHASE

Johnson's convictions are invalid under the federal constitutional guarantees of: due process, the effective assistance of counsel, equal protection, a fair trial, a fair and impartial jury, a reliable sentence, and freedom from cruel and unusual punishment because Johnson's penalty retrial jurors were biased and engaged in juror misconduct. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

1. On April 19, 2005, jury selection began for the 2005 penalty phase. Two days later, Prospective Juror Lawrence Epter brought to the court's attention a very troubling account regarding another prospective juror—Jami Carpenter.[830] According to Epter, while sitting outside of the courtroom, Carpenter revealed to several other jurors that Johnson had already received a death sentence.[831] Carpenter informed the prospective jurors that she learned this information while watching the news earlier that morning.[832] Epter was clear that there were at least three other prospective jurors present for this conversation.[833] One of those prospective jurors was Kitty Vu.

2. While being questioned about the incident, Vu gave very specific

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[830] 4/21/05 TT III-AM at 3–5.

[831] *Id.*

[832] *Id.*

[833] *Id.*

details about Johnson's prior death sentence. Specifically, Vu believed that Johnson's prior sentence had been "decided by the Supreme Court in Nevada, however, it should have been decided by a jury."[834] This was something Epter also attributed to Carpenter.[835] Two other prospective jurors, Aaron Stam and David Shirbroun, confirmed the conversation took place.[836]

3. When confronted by the trial court, Carpenter denied that she provided this information to other members of the jury pool.[837] In fact, Carpenter denied any knowledge about whether there was even a prior death sentence.[838] The only thing she would acknoledge was that she heard on the news that a three-judge panel had previously heard Johnson's case.[839] In light of several statements to the contrary, the logical inference was that Carpenter was not being truthful. By lying during voir dire, Carpenter ensured her place on Johnson's jury. Indeed, she became the foreperson.[840]

4. Juror Carpenter's motive for lying became readily apparent after the conclusion of the penalty hearing. On May 11, 2005, Johnson's defense counsel met

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[834] *Id.* at 190.

[835] *Id.* at 4–5.

[836] *Id.* at 146, 186.

[837] *Id.* at 289–90.

[838] *Id.*

[839] *Id.*

[840] Trial counsel were ineffective for not challenging Juror Carpenter for cause, and the trial court erred by not sua sponte dismissing Juror Carpenter for cause.

with Teresa Knight, one of the alternate jurors.[841] Alternate Juror Knight informed defense counsel that, throughout the 2005 penalty phase, Juror Carpenter repeatedly stated that she was writing a book based on the information she learned from Johnson's case.[842] Alternate Juror Knight also stated that, before deliberations, Juror Carpenter had expressed discomfort because she already had her mind made up.[843]

5. On May 24, 2005, a defense investigator met with another alternate juror, Wilfredo Mercado. Alternate Juror Mercado confirmed that Juror Carpenter had said on a daily basis that different information brought up during the penalty phase would be used in her book.[844]

6. Because of these allegations against Juror Carpenter, the court held an evidentiary hearing.[845] At the hearing, Juror Carpenter, who was accompanied by counsel, again denied having any knowledge of Johnson's prior death sentence.[846] Juror Carpenter additionally denied that she was writing a book about Johnson's

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[841] Ex. 209.

[842] *Id.*

[843] *Id.*

[844] Ex. 210.

[845] 6/14/05 EH at 1.

[846] *Id.* at 11–12.

case.[847] Following the evidentiary hearing, defense counsel filed a post hearing brief. There is no record of the trial court addressing this brief. [848]

7. The evidence is clear: Juror Carpenter had an agenda to get on Johnson's jury from the moment she was called to serve. Juror Carpenter lied to get on Johnson's jury, because she had her sights set on writing a book. While it is not illegal for a juror to write a book, it is certainly illegal to lie under oath. Yet, that is what Juror Carpenter did—repeatedly. Multiple potential jurors and alternate jurors confirm this. These people—who had no motive to lie about Juror Carpenter—came forward because of the disturbing nature of Juror Carpenter's behavior.

8. Compounding the problem, Juror Carpenter admitted that she had her mind made up about Johnson's fate before hearing all the evidence.[849] Given the outcome, her lies, and her obsession with writing a book, it is not difficult to discern that she harbored bias against Johnson.

9. Juror Carpenter was acting under the influence of extreme bias. She knew that what she did was wrong—and therefore elected to repeatedly lie about it.

10. Errors based on juror bias are structural and not subject to harmless error analysis. *See Estrada v. Scribner,* 512 F.3d 1227, 1240 (9th Cir. 2008) (citing *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998)).

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[847] *Id.* at 19.

[848] Defense counsel were ineffective for not following up on this issue, and the trial court erred by not ruling on the post-trial brief.

[849] Ex. 209.

11. Johnson received ineffective assistance of appellate counsel for failure to raise this issue on appeal. If appellate counsel had raised the issue, there is a reasonable probability of a different result on direct appeal.

CLAIM NINETEEN: NO JURY FINDING THAT JOHNSON WAS THE TRIGGERMAN

Johnson's death sentences are invalid under the federal constitutional guarantees of due process, effective assistance of counsel, equal protection, a fair trial, freedom from cruel and unusual punishment, and a reliable sentence because the State failed to prove that Johnson was the triggerman. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

1. The Eighth Amendment prohibits any punishment that is not proportional to the crime. And a death sentence is not proportional unless the jury finds the defendant is sufficiently culpable for the capital crime committed. As a result, a jury cannot impose the death penalty on someone who did not (1) actually kill, (2) attempt to kill, or (3) intend to kill the victim. *See Enmund v. Florida*, 458 U.S. 782, 797 (1982). The only exception to this requirement is if the jury finds the defendant (1) was a major participant in the felony committed, and (2) displayed a reckless indifference to human life. *See Tison v. Arizona*, 481 U.S. 137, 151 (1987); *see also Hurst v. Florida*, 136 S. Ct. 616 (2016) (holding that factors making defendant eligible for death penalty must be proven to jury beyond a reasonable doubt).

2. Neither the jury that decided Johnson's guilt nor the jury that sentenced him to death made the necessary findings under *Enmund* and *Tison*. Specifically, the jury sentenced Johnson to death without determining whether he

(1) actually killed, attempted to kill, or intended to kill the victims; or (2) was a major participant in a violent felony and displayed a reckless indifference to human life.

3. The State argued several alternative theories of first-degree murder: felony murder, coconspirator liability, aiding and abetting, and premeditated and deliberate homicide.[850] The first three theories allowed the jury to convict without finding that Johnson intended to kill, actually killed, or attempted to kill, and consequently they do not satisfy *Enmund*.

4. Compounding the *Enmund* problem caused by the State's arguments, the trial court incorrectly instructed the jurors that coconspirator liability requires no specific intent to commit the underlying crime:

> Where two or more individuals join together in a common design to commit any unlawful act, each is criminally responsible for the acts of his confederates committed in furtherance of the common design. In contemplation of law, the act of one is the act of all. Every conspirator is legally responsible for an act of a co-conspirator that follows as one of the probable and natural consequences of the object of the conspiracy *even if it was not intended as part of the original plan* and even if he was not present at the time of the commission of such act.
>
> Where the purpose of the conspiracy is to commit a dangerous felony, each member runs the risk of having the venture end in homicide, even if he has forbidden the others to make use of deadly force. Hence, each is guilty of murder if one of them commits homicide in the perpetration of an agreed-upon robbery or attempted perpetration of said offense.[851]

The court instructed the jurors similarly on liability under a theory of aiding and

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[850] 6/8/00 TT at IV-196–97, IV-199, IV-201–02, IV-204–05.

[851] Ex. 67 at 25-26 (emphasis added).

abetting:

> Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each personally did every act constituting the offense charged.
>
> All persons concerned in the commission of a crime who either directly or actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.
>
> To aid and abet is to assist or support the efforts of another in the commission of a crime.
>
> A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime.
>
> The state is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.[852]

Finally, the court instructed the jurors that felony murder "carries with it conclusive evidence of premeditation and malice aforethought" and does not require an intentional killing:

> There is a kind of murder which carries with it conclusive evidence of premeditation and malice aforethought. This class of murder is murder committed in the perpetration, or attempted perpetration, of robbery and/or kidnapping. Therefore, a killing which is committed in the perpetration, or attempted perpetration, or robbery and/or kidnapping is deemed to be murder of the first degree, whether the killing was intentional or unintentional or accidental. This is called the Felony-Murder rule.

These instructions allowed the jury to sentence Johnson to death without meeting the requirements of *Enmund* and *Tison*.

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[852] *Id.* at 30.

5. It is unclear from the record which of the theories the jurors decided on. The jury returned general verdict forms, concluding that Johnson was guilty of first-degree murder but not saying under which theory.[853] And it is not even clear that the jurors were unanimous when they decided the theory; the trial court instructed the jurors and the State reiterated that unanimity was not required.[854]

6. There was additionally no requirement that the jurors either in 2000 or in 2005 find sufficient evidence to satisfy the *Tison* requirements beyond a reasonable doubt—specifically that Johnson was a major participant in the felonies and that he demonstrated a reckless disregard for life.

7. It is not clear either from the evidence that the jury concluded Johnson was the triggerman. No eyewitness to the murders testified. (The jurors in fact found this as a mitigating factor during the first penalty phase.[855]) Although three witnesses did testify that Johnson confessed to shooting at least one of the victims, serious problems exist with their statements.

8. First, there is evidence that Armstrong was an unindicted coconspirator whose testimony, if used alone, could not support Johnson's conviction. *See* Nev. Rev. Stat. § 175.291 (forbidding conviction based only on coconspirator testimony). Young told detectives two weeks after the homicides that

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[853] Ex. 68.

[854] 6/8/00 TT at IV-201–02; Ex. 67.

[855] Ex. 69.

Armstrong was involved.[856] Severs implicated Armstrong the next day.[857] And five days after that Smith told detectives about Armstrong's involvement.[858] Officers then flew to Hawaii to question Armstrong, and he admitted showing Johnson and Young where the victims lived and returning to the house the day Perkins discovered the bodies.[859] And Hart, Armstrong's friend, told the police that he overheard Johnson saying that Armstrong "sent [them] to the hippies."[860] In fact, the State during Young's trial told the jurors that Armstrong was involved:

> You will learn that ultimately Todd [sic] Armstrong is perhaps the one who takes these three by the house where these three boys live.
>
> Todd [sic] Armstrong, in a white vehicle, gets in the car with the wrongdoers and says, "I will show you where the easy marks live. I will show you where you can get a lot of money by robbing these boys."
>
> And Todd [sic] Armstrong, the evidence will show, set this up.[861]

9. Second, all three witnesses changed their statements several times, and, most significantly, none of the witnesses accused Johnson of being the triggerman when first interviewed by police. Detectives asked Bryan Johnson directly whether he knew which of the defendants was the triggerman, and he answered that he did not:

> TT: Did they say if one of them did the shooting that involved four people or did each of them do shooting?

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[856] Exs. 49, 187.
[857] Ex. 50.
[858] Ex. 51.
[859] Ex. 53.
[860] Ex. 54.
[861] Ex. 166 at 14.

A: I don't know. They . . . I think they both did. I'm not sure.[862]

Hart told detectives initially that he only heard about the homicides through Armstrong—he did not talk to any of the defendants.[863] And Severs initially told police that she knew nothing about the murders, then told police that she did not know which of the defendants shot Biddle, Gorringe, and Mowen.[864]

10. The statements from Armstrong, Severs, and Bryan Johnson contain several additional discrepancies, undermining their testimony—two years after first speaking with the police—that Johnson was the shooter. The witnesses changed their stories about why they went to the police, what they heard from the defendants, what the defendants took from the house, and their own involvement in the crimes.[865]

11. What's more, with several important details, the witnesses' statements contradict each other: (1) the people involved in the conversation at the Everman residence after the shootings; (2) what was taken from the victims; (3) who shot the victims; (4) whom the VCR at the Everman residence belonged to; (5) who orchestrated the crimes; (6) whether there was a third participant in the offenses;

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[862] Ex. 47.

[863] Ex. 46.

[864] Ex. 185.

[865] *See* Claim Three(A)(1).

(7) how the witnesses learned about the crimes; and (8) why and how the witnesses decided to go to the police.

12. The witness statements also conflicted with other evidence. Several of the statements mentioned that the defendants had taken a VCR from the victims' house. But a VCR is clearly visible in a crime scene photograph from the victims' house on August 14, 1998,[866] and a crime-scene report notes a VCR at the scene that same day.[867] And the timeline in the statements makes little sense. Not only do the statements not give the defendants enough time to commit the offenses, but news reports and other witness statements place people at the home during the day on August 14, 1998.[868] Finally, Severs's statement that she saw the story on the news the next more cannot possibly be true—the media could not have been aware of the deaths until after the bodies were discovered at 6:00 p.m.

13. Third, there is substantial evidence that the statements were coerced by improper police questioning.[869] Although police failed to record portions of the interviews, coercion can be inferred by the dramatic changes between initial and later interviews, statements from witnesses about their interactions with police, evidence of benefits for testifying and threats of reprisal for failing to testify, and vulnerabilities of witnesses due to their youth, suspected involvement in the

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[866] Ex. 123.

[867] Ex. 122 (highlighting added).

[868] Ex. 86 at 11; Exs. 197–99.

[869] Ex. 175; *see* Claim Three(A)(1).

shootings, suspected involvement in other criminal activity, impaired cognition, addiction, and mental illness.[870]

14. Fourth, at least one witness, Severs, was offered significant benefits for her testimony: The State did not prosecute Severs for possessing a stolen vehicle and released her from jail five months before trial—though she first had to tell prosecutors exactly what they wanted to hear.[871] And there is some suggestion that other witnesses received benefits. The State declined to prosecute Armstrong, despite evidence from several sources that he was involved.[872] Moreover, law enforcement had arrested Hart, Severs, and Bryan Johnson for various crimes in the months before and after the homicides, including driving under the influence, possessing stolen property, and obstructing a police officer; as far as can be discerned, none served jail or prison sentences.[873] Finally, Armstrong had a warrant out for juvenile conduct that the Clark County District Attorney's office cleared in April 1999.[874]

15. Fifth, the State was not even consistent during the various trials about the shooter's identity. During Young's first trial in September 1999, the prosecutor told the jurors that *Young* might have shot Mowen, Gorringe, and Biddle: "You will

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[870] Ex. 175.

[871] 6/7/00 TT at III-88–91, III-107–09, III-115–22., III-131–32; 1/18/00 PT; 10/14/99 PT.

[872] *See, e.g.*, Exs. 49–51, 53–54, Ex. 187.

[873] Ex. 193.

[874] Ex. 170.

learn, after shooting Peter Talamentez one time from close range, it is Donte Johnson *or Terrell Young* who then fires a shot into each one of these boys' head, standing over the bodies and firing a second shot, a third shot and a fourth shot."[875]

16. Sixth, the physical evidence does not support Johnson being the triggerman. During the trial of one of Johnson's codefendants, defense counsel elicited the following testimony from detective Thomas Thowsen:

> Q You're telling me that Donte Johnson pulled the trigger?
>
> A Yes.
>
> Q Okay. Can you tell me why you believe that?
>
> A Based on interviews of other defendants, based on physical evidence at the crime scene.
>
> Q Can you be any more specific?
>
> A We have, I believe, fingerprints. We have, in particular, on a Black and Mild cigarette/cigar pack that Mr. Johnson left at the scene.
>
> We have the victims' blood on his clothing along with his semen.[876]

17. The evidence cited by Thowsen does not show that Johnson was the shooter. The fingerprint was on a small, easily transportable cigar package, and it is impossible to say when, how, or by whom it was brought to the victims' house. At least one of the victims actually knew Johnson and bought drugs from him enclosed in cigar packages.[877]

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[875] Ex. 166 at 22 (emphasis added).

[876] *Id.* at 60–61.

[877] 6/7/00 TT at III-17.

18. As for the blood on the pants, undersigned counsel has obtained an expert who found that the blood-spatter evidence in this case shows something completely different—that the blood was not deposited on the pants while the wearer was "in the position of an active shooter."[878] Several facts support this conclusion. First, the stains are located on the back of the jeans.[879] Second, the distribution of the stains is "not typical of spatter" from "a gunshot or a blow."[880] Third, the stains had a "crusty" appearance.[881] "Stains that are created by freshly shed blood caused by a gunshot or a blow would not have a 'crusty' appearance. Instead, a 'crusty' appearance would suggest a bloodstain that had undergone physiological changes such as clotting prior to deposition."[882] And, for clotting to occur, time must pass "from initial onset of bleeding until a clot begins to form."[883] Fourth, Criminalist Thomas Wahl also described each of the stains as a "surface stain."[884] "Although this term is not included in any recognized standard terminology, it is suggestive of a transfer stain instead of a stain created by an impact such as a blow or a gunshot."[885] Fifth, the absence of stains on the front of

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[878] Ex. 177.

[879] *Id.*

[880] *Id.*

[881] Ex. 171; Ex. 177.

[882] Ex. 177.

[883] *Id.*

[884] Ex. 171; Ex. 177.

[885] Ex. 177

the pants suggests that "the wearer was not in the position of an active shooter" during "a possible spatter producing event."[886]

19. The blood-spatter evidence also undermines a statement given by Young.[887] Young told detectives that the victims were shot immediately before Young, Johnson, and Smith left the home.[888] But, again, the bloodstains were "crusty," meaning that time had passed between the gunshot and the blood being deposited on the jeans.

20. Johnson's capital murder conviction and subsequent death sentence violate the Eighth Amendment and due process principles, and this error is prejudicial per se. Alternatively, these errors were not harmless beyond a reasonable doubt.

21. Insofar as trial or appellate counsel failed to object or raise this claim in prior proceedings, they were ineffective, and there is a reasonable probability of a more favorable outcome if counsel had performed effectively.[889]

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[886] *Id.*

[887] Exs. 49, 187.

[888] *Id.* at 24–25.

[889] *See* Ex. 214.

CLAIM TWENTY: THE STATE'S PENALTY-PHASE PRESENTATION OF JOHNSON'S JUVENILE RECORD VIOLATED HIS CONSTITUTIONAL RIGHTS

Johnson's death sentence is invalid under the federal constitutional guarantees of due process, effective assistance of counsel, equal protection, a fair trial, a fair and impartial jury, a reliable sentence, and freedom from cruel and unusual punishment because the State's non-statutory aggravating evidence included juvenile offenses and misconduct. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

1. During Johnson's initial penalty hearing in 2000, the State introduced evidence that Johnson had committed juvenile offenses and served time in a juvenile facility.[890] The State also presented this evidence to the three-judge panel.[891]

2. After the Nevada Supreme Court granted Johnson a new penalty hearing, the State noted its intention again to rely on Johnson's juvenile records in seeking death.[892] Johnson objected, and the court excluded the records, reasoning that they were more prejudicial than probative.[893] But the court six days later changed course and allowed the evidence.[894]

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[890] 6/13/00 TT at I-64–96, II-63–122.

[891] 7/24/00 TT at I-19–23, I-123–24.

[892] Ex. 72; Ex. 74.

[893] Ex. 73; 4/28/04 PT at 16–17.

[894] 5/3/04 PT at 13.

3. The State introduced this evidence of Johnson's juvenile offenses and misconduct during the selection stage of the 2005 penalty phase. The State started its statement by telling the jurors that, "[t]o understand Donte Johnson, you have to go back to 1992, when he was 14 years old" because that was "when his criminal conduct began."[895] Specifically, the State said, Johnson committed an armed robbery at the age of 14, was placed in a "camp," then returned home, "defied his grandparents," and violated probation.[896] The next year, the State continued, a 15-year-old Johnson possessed a handgun at school and later took a vehicle without the owner's consent.[897] When he was 16 years old, the State concluded, Johnson was convicted of a bank robbery and was sent to a juvenile facility.[898]

4. The State then introduced testimony from an officer who had investigated the bank robbery in Los Angeles, a bank teller who had been working during that robbery, and a parole officer who testified about Johnson's conviction and placement in the California Youth Authority.[899]

5. The State also introduced two reports from probation officers that documented juvenile misconduct unrelated to Johnson's adult charges.[900] The first report notes that Johnson "will not attend school," is "difficult" and "uncooperative"

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[895] 4/28/05 TT at 4.

[896] *Id.*

[897] *Id.*

[898] *Id.* at 4–6.

[899] *Id.* at 38–64; 4/29/05 TT at 30–46.

[900] 4/29/05 TT at 32–35; *see* Ex. 117.

at home, and is involved with a gang.[901] The second report notes that Johnson drinks alcohol occasionally, smokes marijuana approximately four times each week, is not attending school, does not work, is involved in a gang, and is "difficult and uncooperative at home."[902] That same report stated that Johnson and his codefendants "were joking and playing around" during juvenile proceedings.[903]

6. During closing argument in the selection phase, the State relied heavily on the evidence of Johnson's juvenile misconduct, insisting to the jury that Johnson's teenage acts "tell you volumes about who this gentlemen is."[904] And the State again noted that Johnson and his codefendants "were joking and playing around" during juvenile proceedings and repeated a statement Johnson's grandmother had made when Johnson was 16 years old.[905] The State ended its rebuttal argument by imploring the jurors not to "forget about the bank robbery at age 16."[906]

7. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court ruled that a defendant who is under the age of 18 when a capital offense is committed is categorically ineligible for the death penalty. "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and

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[901] Ex. 117 at 9–10.

[902] Ex. 118 at 7–13.

[903] *Id.* at 12.

[904] 5/4/05 TT at 20–27.

[905] *Id.* at 25–27.

[906] *Id.* at 103.

whose extreme culpability makes them 'the most deserving of execution.'" *Id.* at 568 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). And the Court concluded in *Roper* that juveniles as a categorical rule are not the "worst of the worst." *See id.* at 569.

8. The Court rested this conclusion on scientific evidence showing three fundamental psychological and physiological differences between adolescents and adults. *Id.* at 569–70. First, scientific evidence demonstrates that juveniles lack maturity and a sense of responsibility, leading to reckless and ill-considered behavior. *Id.* at 569. Second, teenagers "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* Third, "the character of a juvenile is not as well formed as that of an adult." *Id.* In sum, this evidence shows that juveniles are not as morally culpable as adults for criminal activity and "render[s] suspect any conclusion that a juvenile falls among the worst offenders." *Id.* at 569–73.

9. After recognizing the diminished culpability of juveniles, the Supreme Court explained that the penological justifications for the death penalty (retribution and deterrence) were not served by punishing juveniles with the death penaly. *Id.* at 571. "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.* And because juveniles do not weigh costs and benefits of illegal conduct to the same extent as adults, the death penalty's deterrent effect on juveniles is far from clear. *Id.*

10. If a state's capital punishment regime must meet the constitutional requirement of narrowing the death penalty to "the worst offenders," and if *Roper* categorically excludes the State from prosecuting a juvenile as one of "the worst offenders," then *Roper* logically extends to preclude all of a capital defendant's juvenile criminal history from a capital jury's consideration at the penalty phase. Simply put, the crimes of the child are inapposite to individualized punishment of the adult. "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's deficiencies will be reformed." *Id.*

11. The State's argument in this case, of course, was that Johnson's crimes as an adult showed he had not been reformed. But Johnson's convictions for homicide as an adult do not render his offenses as a juvenile more blameworthy. "[O]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults. . . . [I]f 'death is different,' children are different too." *Miller v. Alabama*, 567 U.S. 460, 481 (2015) (internal quotation marks and citations omitted). Nothing in the Supreme Court's jurisprudence suggests a person's juvenile criminal history loses this "difference" once that person reaches the age of adulthood. Indeed it violates the letter and spirit of *Roper*'s and *Miller*'s holdings to use a capital defendant's juvenile history against him as a "miniature" record of violence morally equal to the record of violence committed by an adult.

12. In addition, there is substantial evidence and scholarship showing that juries, law enforcement agencies, and the criminal justice system are more merciful

toward white juvenile criminal offenders than toward black juvenile offenders:

> Numerous studies show that implicit bias affects the behavior of justice system stakeholders. The data indicating the overrepresentation of black youths at every critical stage in the juvenile justice system are dispositive. Thus, although African Americans comprise only 16% of the youth population, they make up 28% of juvenile arrests, 30% of referrals to juvenile court, 37% of the detained youth population, 34% of youth formally processed by the juvenile court, 30% of adjudicated youths, 35% of youths judicially waived to criminal court, 38% of youths in residential placement, and 58% of youths admitted to state adult prison. . . .
>
> [I]mplicit biases based on racial stereotypes conflate assessments of youth culpability, maturity, sophistication, future dangerousness, and severity of punishment. . . .
>
> These numbers indicate that, for many Americans who harbor these biases, the maxim is not that children are different, but that white children are different. That is, before black children are seen as amenable to rehabilitation, susceptible to peer pressure, and less culpable, they are seen as "prone to violence and crime . . . not in school or working, and likely to be incarcerated" at some point in their lives. Black children are black first, and children second.

Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 Loy. L.A. L. Rev. 1019, 1066–68 (2013) (examining "how racial disparities creep into the ostensibly race-neutral procedures of our modern-day juvenile justice system") (citations, footnotes, and alterations omitted); *see also* Lesley Alexandra O'Neill, Note, *An Aggravating Adolescence: An Analysis of Juvenile Convictions as Statutory Aggravators in Capital Cases*, 51 Ga. L. Rev. 673 (2017).

13. The State's heavy reliance on Johnson's juvenile criminal history benefitted from the racial disparities implicit in the juvenile criminal justice system. "The weight of history, the pseudo-scientific validation of the superpredator

myth, and the influence of the stereotype-saturated media conspire to enable many Americans, consciously or subconsciously, [to] link black youth with crime, violence, and dangerousness." Sterling, *supra*, at 1065–66. Although the prosecution never used the term, the specter of the young black "superpredator" hovered throughout the sentencing hearing. The State would not have benefitted as much from this pervasive and highly prejudicial stereotype had Johnson's juvenile history been properly excluded under the rule and rationale of *Roper*.

14. Finally, the State in introducing Johnson's juvenile record and the trial court in allowing the evidence ignored the coercive factors that led to Johnson's juvenile offenses. When Johnson was thirteen years old, he moved with his family to a drug-infested neighborhood.[907] Johnson during this time was under pressure to protect his family members.[908] When a gang member threatened to rape Johnson's young cousin, Johnson joined the gang that same day to protect her.[909] While with the gang, Johnson began getting in trouble with the law.

15. The State's unrestricted use of Johnson's juvenile history violated *Roper* and prejudiced Johnson's right to a reliable sentence, a fair trial and a racially unbiased sentencing hearing. The introduction of Johnson's juvenile history was structural error and prejudicial per se, and it warrants vacating his death

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[907] Ex. 132 at ¶2; Ex. 134 at ¶7; Ex. 135 at ¶8; Ex. 136 at ¶10; Ex. 138 at ¶6–7; Ex. 140 at ¶3; 6/14/00 TT at III-62–65; 4/29/05 TT at IX-157.

[908] 4/29/05 TT at IX-140.

[909] 6/14/00 at III-66–67, III-101; 4/29/05 TT at IX-142–43.

sentences. In the alternative, this error was not harmless beyond a reasonable doubt.

16. Insofar as this claim was not adequately raised in prior proceedings, trial and appellate counsel were ineffective, and there is a reasonable probability of a more favorable outcome if counsel had performed effectively.

17. Insofar as the State improperly acquired Johnson's juvenile records, the State committed misconduct, rending Johnson's trial fundamentally unfair. This misconduct was error that was not harmless beyond a reasonable doubt.

CLAIM TWENTY-ONE: DEATH PENALTY IS UNCONSTITUTIONAL

Johnson's death sentences are invalid under the federal constitutional guarantees of due process, confrontation, effective counsel, equal protection, an impartial jury, freedom from cruel and unusual punishment, and a reliable sentence because Nevada's death penalty is unconstitutional. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

A. **Nevada's Lethal-Injection Protocol is Unconstitutional**

1. Nevada law requires that the State execute condemned inmates by injecting a legal drug. *See* Nev. Rev. Stat. § 176.355(1).

1. Lethal Injection Is Unconstitutional In All Circumstances

2. "[E]volving standards of decency that mark the progress of a maturing society," along with an ever-expanding list of botched executions, compel the conclusion that lethal injection as a means of execution can never satisfy the demands of the Eighth Amendment. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958). Although there is Supreme Court authority to the contrary, *see, e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726 (2015); *Baze v. Rees*, 553 U.S. 35 (2008), these cases resulted in sharply divided opinions. In addition, the Supreme Court decided the cases without the benefit of factual development by the district court regarding the numerous executions in recent years, using various drug combinations, that resulted in prolonged pain and suffering.

3. Those instances of botched lethal injections include the following:

- Charles Brooks, Jr. (December 7, 1982, Texas): The executioner had a difficult time finding a suitable vein. The injection took seven minutes to kill. Witnesses stated that Brooks "had not died easily." *See* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 Ohio St. L.J. 63, 139 (2002) [hereinafter "Denno I"]; Deborah W. Denno, *Getting to Death: Are Executions Unconstitutional?*, 82 Iowa L. Rev. 319, 428–29 (1997) [hereinafter "Denno II"].

- James Autry (March 14, 1984, Texas): Autry took ten minutes to die, complaining of pain throughout. Officials suggested that faulty equipment or inexperienced personnel were to blame. *See* Denno II, *supra*, at 429; Denno I, *supra*, at 139.

- Thomas Barefoot (October 30, 1984, Texas): A witness stated that after emitting a "terrible gasp," and after the prison medical examiner declared him dead, Barefoot's heart was still beating. *See* Denno II, *supra*, at 430; Denno I, *supra*, at 139.

- Stephen Morin (March 13, 1985, Texas): It took almost 45 minutes for technicians to find a suitable vein, while they punctured him repeatedly, and it took another eleven minutes for Morin to die. *See* Denno II, *supra*, at 430; Denno I, *supra*, at 139; Michael L. Radelet, *Post-Furman Botched Executions*, Death Penalty Information Center, available at http://www.deathpenaltyinfo.org [hereinafter "Radelet"].

- Randy Wools (August 20, 1986, Texas): Wools had to assist execution technicians in finding an adequate vein for insertion. He died seventeen minutes after technicians inserted the needle. *See* Denno II, *supra*, at 431; Denno I, *supra*, at 139; *Radelet*, supra; *Killer Lends a Hand to Find a Vein for Execution*, L.A. Times (Aug. 20, 1986), http://tinyurl.com/z7nylnm.

- Elliot Johnson (June 24, 1987, Texas): Johnson's execution was plagued by repetitive needle punctures; it took executioners thirty-five minutes to find a vein. *See* Denno II, *supra*, at 431; Denno I, *supra*, at 139; *Radelet*, supra; *Addict Is Executed in Texas for Slaying of 2 in Robbery*, N.Y. Times (June 25, 1987), https://www.nytimes.com/1987/06/25/us/addict-is-executed-in-texas-for-slayng-of-2-in-robbery.html.

- Raymond Landry (December 13, 1988, Texas): Executioners for forty minutes "repeatedly probed" Landry's veins with syringes. Then, two minutes after the injection process began, the syringe came out of

Landry's vein, "spewing deadly chemicals toward startled witnesses." A plastic curtain was pulled so that witnesses could not see the execution team reinsert the catheter into Landry's vein. "After 14 minutes, and after witnesses heard the sound of doors opening and closing, murmurs and at least one groan, the curtain was opened and Landry appeared motionless and unconscious." Landry was pronounced dead twenty-four minutes after the drugs were initially injected. *See* Denno II, *supra*, at 431–32; Denno I, *supra*, at 139; Radelet, *supra*.

- Stephen McCoy (May 24, 1989, Texas): In a violent reaction to the drugs, McCoy "choked and heaved" during his execution. A reporter witnessing the scene fainted. *See* Denno II, *supra*, at 432; Denno I, *supra*, at 139; Radelet, *supra*.

- George Mercer (January 6, 1990, Missouri): A medical doctor was required to perform a surgical "cut down" procedure on Mercer's groin. *See* Denno II, *supra*, at 432; Denno I, *supra*, at 139.

- George Gilmore (August 31, 1990, Missouri): Officials used force to stick the needle into Gilmore's arm. *See* Denno II, *supra*, at 433; Denno I, *supra*, at 139.

- Charles Coleman (September 10, 1990, Oklahoma): Technicians had difficulty finding a vein, delaying the execution for ten minutes. *See* Denno II, *supra*, at 433; Denno I, *supra*, at 139.

- Charles Walker (September 12, 1990, Illinois): There was a kink in the IV line, and the needle was inserted improperly so that the chemicals flowed toward Walker's fingertips instead of his heart. As a result, Walker's execution took eleven minutes rather than the three or four minutes contemplated by the state's protocols, and the sedative chemical may have worn off too quickly, causing excruciating pain. When these problems arose, prison officials closed the blinds so that witnesses could not observe the process. *See* Denno II, *supra*, at 431; Denno I, *supra*, at 139; Radelet, *supra*; Niles Group Questions Execution Procedure, United Press International (1992).

- Maurice Byrd (August 23, 1991, Missouri): The machine used to inject the lethal dosage malfunctioned. *See* Denno II, *supra*, at 434; Denno I, *supra*, at 140.

- Ricky Rector (January 24, 1992, Arkansas): It took almost an hour for a team of eight to find a suitable vein. A curtain separated witnesses

from the injection team, but they could hear repeated, loud moans from Rector. *See* Denno II, *supra*, at 434–35; Denno I, *supra*, at 140; Joe Farmer, *Rector's Time Came, Painfully Late*, Ark. Democrat-Gazette, Jan. 26, 1992, at 1B; Marshall Fray, *Death in Arkansas*, The New Yorker, Feb. 22, 1993, at 105.

- Robyn Parks (March 10, 1992, Oklahoma): Parks violently gagged, jerked, spasmed and bucked in his chair after officials administered the drugs. A witness reported that Parks's death looked "painful and inhumane." *See* Denno II, *supra*, at 435; Denno I, *supra*, at 140; Radelet, *supra*.

- Billy White (April 23, 1992, Texas): Because White was a longtime heroin user, executioners had difficulty finding a vein that was not severely damaged. It took 47 minutes for White to die. *See* Denno II, *supra*, at 435–36; Denno I, *supra*, at 140; Radelet, *supra*.

- Justin May (May 7, 1992, Texas): May groaned, gasped and reared against his restraints during his nine-minute death. *See* Denno II, *supra*, at 436; Denno I, *supra*, at 140; Radelet, *supra*; Robert Wernsman, *Convicted Killer May Dies*, The Huntsville Item, May 7, 1992, at 1; Michael Graczyk, *Convicted Killer Gets Lethal Injection*, Denison Herald, May 8, 1992.

- John Gacy (May 10, 1994, Illinois): The lethal injection chemicals solidified, blocking the IV tube. Officials closed the blinds for ten minutes, preventing witnesses from watching the execution team replace the tubing. *See* Denno II, *supra*, at 435; Denno I, *supra*, at 140; Radelet, *supra*; Scott Fornek & Alex Rodriguez, *Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction*, Chi. Sun-Times, May 11, 1994, at 5; Lou Ortiz & Scott Fornek, *Witnesses Describe Killer's 'Macabre' Final Few Minutes*, Chi. Sun-Times, May 11,1994, at 5; Rob Karwath & Susan Kuczka, *Gacy Execution Delay Blamed on Clogged IV Tube*, Chi. Trib., May 11, 1994, at 1.

- Emmitt Foster (May 3, 1995, Missouri): Seven minutes after the lethal chemicals began to flow into Foster's arm, officials halted the execution because the chemicals stopped circulating. With Foster gasping and convulsing, blinds were drawn so witnesses could not view the scene. Officials pronounced death thirty minutes after the execution began, but they did not open the blinds until three minutes later. According to the coroner, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney. Foster did not die

until several minutes after a prison worker finally loosened the straps. *See* Denno II, *supra*, at 437; Denno I, *supra*, at 140; Radelet, supra; Editorial, *Witnesses to a Botched Execution*, St. Louis Post-Dispatch, May 8, 1995, at 6B; Tim O'Neil, *Too-Tight Strap Hampered Execution*, St. Louis Post-Dispatch, May 5, 1995, at 1B; Jim Salter, *Execution Procedure Questioned*, Kansas City (Mo.) Star, May 4, 1995, at C8.

- Ronald Allridge (June 8, 1995, Texas): Executioners conducted Allridge's execution with only one needle, rather than the two required by the protocol, because they could not find a suitable vein in his left arm. *See* Denno II, *supra*, at 437; Denno I, *supra*, at 140.

- Richard Townes (January 23, 1996, Virginia): It took 22 minutes for medical personnel to find a vein. After repeated unsuccessful attempts to insert the needle through the arms, they finally inserted the needle through the top of Townes's right foot. *See* Denno II, *supra*, at 437; Denno I, *supra*, at 140; Radelet, *supra*.

- Tommie Smith (July 18, I996, Indiana): From the time that the execution team began sticking needles into Smith's body, it took one hour and nine minutes for him to die. For sixteen minutes, the team failed to find adequate veins, and then a physician was called. The execution team gave Smith a local anesthetic, and the physician twice attempted to insert the tube in Smith's neck. When that failed, the team inserted an angiocatheter into Smith's foot. Only then did officials allow witnesses to view the process. The executioners finally injected the lethal drugs 49 minutes after the first attempt, and it took another twenty minutes before officials pronounced Smith's death. *See* Denno II, *supra*, at 437; Denno I, *supra*, at 140; Radelet, *supra*.

- Luis Mata (August 22, 1996, Arizona): Mata remained strapped to a gurney with the needle in his arm for one hour and ten minutes while his attorneys argued his case. When finally injected, his head jerked, his face contorted, and his chest and stomach sharply heaved. *See* Denno II, *supra*, at 438; Denno I, *supra*, at 140.

- Scott Carpenter (May 8, 1997, Oklahoma): Carpenter gasped, made guttural sounds, and shook for three minutes following the injection. Officials pronounced his death eight minutes later. *See* Denno I, *supra*, at 140; Radelet, *supra*; Michael Overall & Michael Smith, *22-Year-Old Killer Gets Early Execution*, Tulsa World, May 8, 1997, at A1.

- Michael Elkins (June 13, 1997, South Carolina): Liver and spleen problems caused Elkins's body to swell, requiring executioners to

search almost an hour—and seek assistance from Elkins—to find a suitable vein. *See* Denno I, *supra*, at 140; Radelet, supra; *Killer Helps Officials Find a Vein at His Execution*, Chattanooga Free Press, June 13, 1997, at A7.

- Joseph Cannon (April 23, 1998, Texas): It took two attempts to complete the execution. Cannon's vein collapsed and the needle popped out after the first injection. He then made a second final statement and was injected a second time behind a closed curtain. *See* Denno I, *supra*, at 141; Radelet, supra; *1st Try Fails to Execute Texas Death Row Inmate*, Orlando Sent., Apr. 23, 1998, at A16; Michael Graczyk, *Texas Executes Man Who Killed San Antonio Attorney at Age 17*, Austin Am.-Statesman, Apr. 23, 1998, at B5.

- Genaro Camacho (August 26, 1998, Texas): Camacho's execution was delayed approximately two hours because executioners could not find suitable veins in his arms. *See* Denno I, *supra*, at 141; Radelet, *supra*.

- Roderick Abeyta (October 5, 1998, Nevada): The execution team took twenty-five minutes to find a vein suitable for the lethal injection. *See* Denno I, *supra*, at 141; Radelet, *supra*; Sean Whaley, *Nevada Executes Killer*, L.V. Rev-J., Oct. 5, 1998, at 1A.

- Christina Riggs (May 3, 2000, Arkansas): The execution was delayed for eighteen minutes when prison staff could not find a vein. *See* Radelet, *supra*.

- Bennie Demps (June 8, 2000, Florida): It took the execution team 33 minutes to find suitable veins for the execution. "They butchered me back there," said Demps in his final statement. "I was in a lot of pain. They cut me in the groin; they cut me in the leg. I was bleeding profusely. This is not an execution, it is murder." The executioners had no problems finding one vein, but because the Florida protocol requires a second alternate intravenous drip, they continued to work to insert another needle, finally abandoning the effort after their prolonged failures. *See* Denno I, *supra*, at 141; Radelet, *supra*; Rick Bragg, *Florida Inmate Claimed Abuse in Execution*, N.Y. Times (June 9, 2000), http://tinyurl.com/z9k66yn; Phil Long & Steve Brousquet, *Execution of Slayer Goes Wrong: Delay, Bitter Tirade Precede His Death*, Miami Herald, June 8, 2000.

- Bert Hunter (June 28, 2000, Missouri): In a violent reaction to the drugs, Hunter's body convulsed against his restraints during what one witness called "a violent and agonizing death." *See* Denno I, *supra*, at

141; Radelet, *supra*; David Scott, *Missouri Executes Convicted Killer*, Associated Press, June 28, 2000.

- Claude Jones (December 7, 2000, Texas): Jones's execution was delayed 30 minutes while the execution team struggled to insert an IV. One member of the execution team commented, "They had to stick him about five times. They finally put it in his leg." *See* Radelet, *supra*.

- Joseph High (November 7, 2001, Georgia): For twenty minutes, technicians tried unsuccessfully to locate a vein in High's arms. Eventually, they inserted one needle in his chest, after a doctor cut an incision there, and inserted the other needle in one of his hands. Officials pronounced High dead one hour and nine minutes after the procedure began. *See* Denno I, *supra*, at 141; Radelet, *supra*.

- Joseph L. Clark (May 2, 2006, Ohio): It initially took executioners 22 minutes to find a suitable vein in Clark's left arm to insert the catheter. As the injection began, the vein collapsed. After an additional 30 minutes, the execution team succeeded in placing a catheter in Clark's right arm. However, the team again tried to inject the drugs into the left arm, where the vein had already collapsed. These difficulties prompted Clark to sit up, tell the executioners "It don't work," and ask, "Can you just give me something by mouth to end this?" Officials pronounced Clark dead 90 minutes after the execution began. *See* Radelet, *supra*; Andrew Welsh-Huggins, *Botched Execution Leads to Ohio Review*, Associated Press (May 12, 2006).

- Angel Diaz (December 13, 2006, Florida): After the initial injection, Diaz grimaced, contorted his face, and gasped for air for at least ten to twelve minutes. Prison officials administered a second injection, and 34 minutes passed before they declared Diaz dead. Shortly thereafter, Governor Jeb Bush halted all executions and selected a committee "to consider the humanity and constitutionality of lethal injections." *See* Radelet, *supra*; Terry Aguayo, *Florida Death Row Inmate Dies Only After Second Chemical Dose*, N.Y. Times, Dec. 15, 2006; Adam Liptak & Terry Aguayo, *After Problem Execution, Governor Bush Suspends the Death Penalty in Florida*, N.Y. Times, Dec. 16, 2006; Ellen Kreitzberg & David Richter, *But Can it be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions*, 47 Santa Clara L. Rev. 445, 445–46 (2007).

- Christopher Newton (May 24, 2007, Ohio): Executioners stuck Newton at least ten times before getting the shunts in place and injecting the needles. It then took over two hours for Newton to die. Officials blamed

the delay on Newton's weight—265 pounds. *See* Radelet, supra; *Ohio Lethal Injection Takes 2 Hours, 10 Tries*, Associated Press, May 24, 2007.

- John Hightower (June 26, 2007, Georgia): It took prison officials almost an hour to complete Hightower's execution, 40 minutes of which they spent trying to locate a usable vein. *See* Radelet, *supra*; Lateef Mungin, *Triple Murderer Executed After 40-Minute Search for Vein*, Atlanta J. Const., June 27, 2007.

- Curtis Osborne (June 4, 2008, Georgia): Executioners spent 35 minutes trying to find a suitable vein. After they administered the drugs, it took an additional 14 minutes before the in-chamber doctors pronounced Osborne's death. *See* Radelet, *supra*; Rhonda Cook, *Executioners Had Trouble Putting Murderer to Death: For 35 Minutes, They Couldn't Find Good Vein for Lethal Injection*, Atlanta J. Const., June 27, 2007.

- Rommell Broom (Sept. 15, 2009, Ohio): After two hours, executioners terminated their efforts to find a suitable vein in Broom's arms and legs. They failed despite Broom's assistance. "Broom said he was stuck with needles at least [eighteen] times, the pain so intense he cried and screamed out." Upon ordering the execution to stop, Governor Ted Strickland announced that he would seek physicians' advice on "how the man could be killed more efficiently." Executioners blamed Broom's extensive use of intravenous drugs for their difficulties. *See* Radelet, *supra*.

- Brandon Joseph Rhode (Sept. 27, 2010, Georgia): After the Supreme Court rejected Rhode's appeals, "[m]edics . . . tried for about 30 minutes to find a vein to inject the three-drug concoction." It then took 14 minutes for the lethal drugs to kill him. Greg Bluestein, *Georgia Executes Inmate Who Had Attempted Suicide*, Atlanta J. Constitution, Sept. 27, 2010.

- Dennis McGuire (January 16, 2014, Ohio): Ohio used a "new, untested cocktail of drugs," midazolam and hydromorphone, in this execution. "A reporter for the Columbus Dispatch, one of the witnesses at the execution, described Mr. McGuire as struggling, gasping loudly, snorting and making choking noises for nearly 10 minutes before falling silent and being declared dead a few minutes later." Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate Over Lethal Injections*, N.Y. Times, January 16, 2014.

- Jose Villegas (April 16, 2014, Texas): After courts denied Villegas a stay of his execution based on mental retardation, officials executed him using compounded phenobarbital. Villegas reportedly stated, "It does kind of burn. Goodbye." Linda Greenhouse, *Still Tinkering*, N.Y. Times, May 14, 2014.

- Clayton Lockett (April 30, 2014, Oklahoma): After a doctor in attendance pronounced Lockett unconscious, "things went visibly wrong." Lockett twitched, mumbled, attempted to lift his head and shoulders, and appeared to be in pain. The warden announced a "vein failure" and ordered the execution aborted. Approximately 43 minutes after the execution began, "Lockett died of a 'massive heart attack.'" Radelet, *supra*; Erik Eckholm & John Schwartz, *Oklahoma Vows Review of Botched Execution*, N.Y. Times, April 30, 2014. Following Lockett's execution, state officials convened a grand jury to study executions in Oklahoma, resulting in a May 2016 report that sharply criticized the state's oversight and implementation of its protocol. *See* Interim Report 14, In the Matter of Multicounty Grand Jury, Case No. SCAD-2012-61 (Okla. May 19, 2016), https://deathpenaltyinfo.org/files/pdf/MCGJ-Interim-Report-5-19-16.pdf.

- Joseph Wood (July 23, 2014, Arizona): After the execution team injected the chemicals, Wood repeatedly gasped for one hour and forty minutes before he died. Radelet, *supra*. Senator John McCain of Arizona described Wood's execution as tantamount to "torture." Ben Brumfield & Mariano Castillo, McCain: *Prolonged Execution Was Torture* (Sept. 8, 2014), http://www.cnn.com/2014/07/25/justice/arizona-execution-controversy/.

- Brian Terrell (Dec. 9, 2015. Georgia): "[I]t took an hour for the nurse assigned to the execution to get IVs inserted into both of the condemned man's arms. She eventually had to put one into Terrell's right hand. Terrell winced several times, apparently in pain." *See* Radelet, *supra*.

- Brandon Jones (Feb. 3, 2016, Georgia): Executioners spent 24 minutes trying to insert an IV into Jones's left arm, another 8 minutes into his right, and tried again, unsuccessfully, to insert it into his left arm. A physician was called to assist, in violation of several codes of medical ethics, and he or she spent another 13 minutes inserting and stitching the IV near Jones's groin. Six minutes later, Jones's eyes popped open. *See* Radelet, *supra*.

- Ronal Bert Smith, Jr. (December 8, 2016, Alabama): During the early part of his execution, Smith clenched his fists and raised his head. Smith then heaved, gasped, and coughed while struggling for breath. That lasted for thirteen minutes after the executioners administered the lethal drugs. Officials did not pronounce Smith's death until 34 minutes after the execution began.

- Alva Campbell (November 15, 2017, Ohio): The execution team spent 30 minutes trying to find a suitable vein on Campbell's arms before moving to his right leg. About 80 minutes after the execution was scheduled to begin, it appeared that the execution team had successfully inserted the syringe. But two minutes later, officials told media witnesses to leave and called off the execution. *See* Radelet, *supra*; Andrew Welsh-Huggins, *Ohio calls off execution after failing to find inmate's vein*, AP News (November 16, 2017), https://www.apnews.com/ac66f9c4dfd646ffbe6425981c3e2dd5.

- Doyle Lee Hamm (February 22, 2018, Alabama): The executioners tried for two and a half hours to find a suitable vein to inject the execution drugs into Hamm, who suffered from advanced lymphatic cancer and carcinoma. Hamm was left with ten to twelve puncture marks, including six in his groin and others that punctured his bladder and femoral artery. Officials eventually called off the execution. *See* Radelet, *supra*; Tracy Connor, *Lawyer described aborted execution attempt for Doyle Lee Hamm as 'torture*,' NBC News (Feb. 24, 2018), https://www.nbcnews.com/storyline/lethal-injection/lawyer-calls-aborted-execution-attempt-doyle-lee-hamm-torture-n851006.

4. In short, far from providing "a safe, reliable, effective and humane" method of execution consistent with the Eighth Amendment, lethal injection has been shown to be far less reliable than methods preceding it. *See* Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* (2014); *cf. Wood v. Ryan*, 759 F.3d 1076, 1102–03 (9th Cir. 2014) (Kozinski, J., dissenting from the denial of rehearing en banc) (suggesting that, "[i]f a state wishes to continue carrying out executions," it should return to earlier "more . . . foolproof" methods).

2. Lethal injection in Nevada is unconstitutional

5. On August 17, 2017, the Nevada Department of Corrections announced that it had developed a new execution protocol. Following an initial proposal that was unsigned and subsequently amended, NDOC produced a new signed execution protocol effective November 7, 2017. The protocol requires the State to carry out executions using three drugs: (1) Diazepam (a benzodiazepine); (2) Fentanyl (a narcotic); and (3) Cisatracurium (a paralytic).910 After a stay of execution was granted by the state district court,[911] which was later overturned by the Nevada Supreme Court, NDOC, 2018 WL 2272873, *3, the State issued a new protocol in June 2018, consisting still of three drugs, but this time using Midazolam rather than Diazepam.

6. Nevada's new drug protocol contravenes the Supreme Court's holding in *Baze v. Rees*, 553 U.S. 35 (2008), because Midazolam and Fentanyl cannot reliably induce a sufficient state of unawareness. Thus, Nevada's protocol carries impermissible risks that Johnson will be awake and aware during the execution and will suffocate to death.

7. First, Midazolam cannot render a human being insensate to pain or

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[910] Ex. 79.

[911] The state district court found the State's use of a paralytic drug in the execution presented an unconstitutional risk of injury and an objectively intolerable risk of harm in violation of the Eighth Amendment and the corresponding provision of the Nevada Constitution. *See* Ex. 192. The Nevada Supreme Court reversed the district court's order, but only on procedural grounds. *See NDOC*, 2018 WL 2272873, *2.

bring them to the plane of general anesthesia no matter the dosage given to an individual.[912] Further, Midazolam is not used by itself to induce general anesthesia in medical settings because it is not capable of creating a state of anesthesia where a person would not be rousable by pain.[913] Instead, Midazolam is used to relax patients and prepare them for stronger anesthesia.[914] It is also used for medical procedures that require light sedation, but in those cases it is always used with an adjunctive analgesic, i.e., pain-blocker.[915] Midazolam by itself has no effect on preventing the sensation of pain. Moreover, when it is used alone as a sedative in procedures, it has an amnestic effect that prevents a person from remembering the pain that they do experience; but a person would experience the pain when it happened.[916] Midazolam's inability to induce a state of general anesthesia is an accepted fact in the medical community.[917]

8. Of the twenty-seven autopsies of inmates executed with Midazolam that were reviewed, 85% showed pulmonary edema, which indicates the death was not instantaneous.[918] Pulmonary edema is an accumulation of fluid in the airspaces of the lungs and as it worsens, the affected individual experiences a sense of terror,

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[912] Ex. 190.

[913] *Id.* at 71.

[914] *Id.*

[915] *Id.*

[916] *Id.*

[917] *Id.*

[918] *Id.* at 86–96.

panic, drowning, and asphyxiation.[919] A person suffering from pulmonary edema would have been in distress and suffered extreme pain.[920]The source of the pulmonary edema is likely Midazolam.[921]

9. Eyewitnesses to executions from every state that have utilized Midazolam—Alabama, Arizona, Arkansas, Florida, Ohio, Oklahoma, and Virginia—observed that inmates showed signs of awareness or pain following consciousness checks and occasionally evidence of suffering pain prior to the check as well.[922]

10. The crucial fault of Midazolam is that it is a sedative-hypnotic, a drug designed to put someone to sleep. Thus, an inmate given Midazolam would fall asleep, and appear unconscious, but once pain or suffering is introduced, the body would overcome the inhibitory effect of Midazolam and rouse the inmate, who would then awaken to unfathomable pain and suffering. *See Irick v. Tennessee*, 585 U.S. __, 2018 WL 3767151, *1 (Aug. 9, 2018) (Sotomayor, J., dissenting from denial of application for stay) (pointing to medical experts who have opined that Midazolam will not keep the inmate from feeling pain); *accord Zagorski v. Parker*, 2018 WL 4900813, *1 (Oct. 11, 2018) (Sotomayor, J., dissenting from denial of application for stay) (noting Midazolam will not prevent the prisoner from feeling as if he is drowning, suffocating, and being burned alive from the inside).

11. Scientific literature verifies that administering a high dose of

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[919] *Id.* at 88.

[920] *Id.*

[921] *Id.* at 88–89.

[922] *Id.* at 130–58.

Fentanyl, a narcotic, does not reliably lead to a lack of awareness or consciousness. This recognition in the field of anesthesiology dates back 35 to 40 years, when practitioners using high dosages of Fentanyl (alone or with a limited additional agent like Diazepam) during open-heart surgeries discovered instances of patient awareness during the operation. As a result, anesthesiologists stopped using high-dose Fentanyl to achieve anesthetic depth during operations.

12. Scientific literature additionally establishes that Fentanyl does not reliably produce the lack of awareness necessary for a humane execution. In a study investigating wakefulness after high doses of Fentanyl, 10 patients were given the narcotic morphine and the anticholinergic scopolamine one hour before a procedure. Akihiko Watanabe, *Wakefulness during the induction with high-dose fentanyl and oxygen anesthesia*, Journal of Anesthesia, September 1988, Vol. 2, Issue 2. After then receiving 25 mcg/kg of Fentanyl, eight out of ten subjects followed commands. *Id.* Six out of ten subjects followed commands after receiving 100 mcg/kg of Fentanyl. *Id.* Those patients required supplemental administrations of diazepam until the response disappeared. *Id.* There are also documented reports in the scientific literature of patients administered dosages of Fentanyl and Diazepam at exponentially higher rates who experienced obvious awareness during a medical procedure. *See* Jonathan B. Mark, and Leslie M. Greenberg, *Intraoperative Awareness and Hypertensive Crisis during High-Dose Fentanyl-Diazepam-Oxygen Anesthesia*, Anest Analg, vol. 62, pp. 698–700 (1983) (83 kilogram male administered total dose of 8,000 mcg of Fentanyl, 40 mg of metocurine, and 10 mg of

diazepam still aware during electrocauterization during cardiopulmonary bypass operation); Nagaprasadarao Mummanemi, *Awareness and Recall with High-Dose Fentanyl-Oxygen Anesthesia*, Anesth Analg, vol. 59, pp. 948–49 (1980) (66 kilogram female administered 4,750 mcg Fentanyl not unaware and not amnesic during aortocoronary bypass surgery).

13. And it is not just the prospect of awareness that renders Nevada's execution protocol unconstitutional. Perhaps the most cruel and unusual aspect of the protocol is its proposal—a first—to use a paralytic as the final killer drug. Paralytics in prior execution protocols were used to induce paralysis, while potassium chloride induced a fatal heart attack. And states used paralytics only to hide the condemned inmate's torment to those viewing the execution. Here, the State would use a paralytic, Cisatracurium, as the third and final drug in the protocol to kill Johnson. Presumably, Cisatracurium would cause death by freezing the muscles, including the diaphragm, causing Johnson to die by suffocation.[923] The American Society of Veterinarians prohibits the use of paralytics to kill animals. *See* 218 J. Am. Veterinary Med. Assn. 669, 680 (2001) ("A combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent."); *see also* R. Rhoades, *The Humane Society of the United States, Euthanasia Training Manual* 133 (2002) (declaring "inhumane" the use of "any combination of sodium pentobarbital with a neuromuscular blocking agent"). Indeed, under Nevada law, animal euthanasia is to be carried out using only pentobarbital. Nev. Rev. Stat.

[923] *See* Ex. 194.

§ 638.005. NDOC's protocol therefore could not be used to put down a dog.

14. There is a substantial and unjustified risk that Johnson will be awake and aware when executioners administer the Cisatracurium, and that he will remain awake as his breathing muscles become paralyzed. Even if he is not breathing, Johnson can be alive and aware for approximately four to six minutes. During that time, he will be paralyzed and slowly suffocating to death.

15. Today, Nevada is the only state proposing to use a paralytic as the lethal drug in its injection protocol. The fact that Nevada is alone in this respect is probative evidence that the protocol is inconsistent with the evolving standards of decency that are enshrined in the Eighth Amendment. Cf. Coker v. Georgia, 433 U.S. 584, 595 (1976) (finding capital punishment for adult rape unconstitutional because Georgia was the only state that permitted capital punishment for adult rape); Kennedy v. Louisiana, 554 U.S. 407, 431, 446–47 (2008) (finding a consensus that capital punishment for child rape was unconstitutional despite the fact that it was allowed by six states' statutes). There are no parallels between Nevada's use of Cisatracurium to kill and other states' use of paralytics to control movement.

16. The substantial risk of conscious suffocation and suffering is exacerbated by the execution team's apparent absence of training using the new protocol. NDOC's announcement does not address the issue of training of medical personnel. The fact that the execution protocol uses a combination and sequence of drugs never used before means the team performing the execution will not have had experience with the process, particularly regarding the use of lethal doses of the

paralytic. The absence of any meaningful training is also troubling because Nevada has not had an execution in more than a decade, and officials performed the last execution with an entirely different combination of drugs.

B. Johnson's Challenge To Nevada's Lethal-Injection Scheme Is Cognizable

17. Johnson acknowledges this Court may also need to decide whether, and to what extent, a petitioner like Johnson may raise constitutional challenges to a State's proposed lethal injection in a federal habeas proceeding, as opposed to an action arising under 42 U.S.C. § 1983. *See Payton*, 658 F.3d at 893 n.2.

18. Though three recent challenges to lethal injection heard by the Supreme Court have arisen in the context of a Section 1983 action, *see Nelson v. Campbell*, 541 U.S. 637, 639 (2004); *Hill v. McDonough*, 547 U.S. 573, 576 (2006); *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015), those cases are not dispositive.

19. In the earliest decided case, *Nelson*, the Supreme Court acknowledged, but did not resolve, "the difficult question of how to categorize method-of-execution claims generally," while noting circumstances where such challenges might fall within the purview of habeas corpus. *See Nelson*, 541 U.S. at 644–45. Two years later, the Court in *Hill* held that the petitioner could proceed in a Section 1983 action, where his complaint alleged theories that "would not necessarily prevent the State from executing him by lethal injection" and were therefore more akin to a "challenge to the circumstances of his confinement." *See Hill*, 547 U.S. at 579–80.

20. The Ninth Circuit has provided no additional guidance on this issue. Habeas petitioners have twice claimed that California's lethal injection protocol is

unconstitutional; both times the court dismissed the claim as unripe because California did not have a protocol in place. *See Andrews v. Davis*, 798 F.3d 759, 785 (9th Cir. 2015), *opinion withdrawn and superseded on different grounds*, 866 F.3d 994 (9th Cir. 2017); *Payton v. Cullen*, 658 F.3d 890, 893 (9th Cir. 2011). The court in *Payton* expressly reserved ruling whether any renewed challenge "should be by way of habeas relief or through an action under 42 U.S.C. § 1983." *Payton*, 658 F.3d at 893 n.2.

21. In addition, at least one sitting judge in this district, the Honorable Robert C. Jones, has issued a Certificate of Appealability over the extent to which challenges to lethal injection are recognizable in habeas proceedings. *Riley v. McDaniel*, No. 3:01-CV-0096-RCJ-VPC, 2010 WL 3786070, at *60–61 (D. Nev. Sept. 20, 2010), *rev'd and remanded on other grounds*, 786 F.3d 719 (9th Cir. 2015).

22. Finally, in *Adams v. Bradshaw*, 644 F.3d 481 (6th Cir. 2011) (per curiam), the Sixth Circuit concluded that some challenges to lethal-injection protocols could be raised in habeas petitions, based on then-existing Supreme Court authority:

> Nowhere in *Hill* or *Nelson* does the Supreme Court state that a method-of-execution challenge is not cognizable in habeas or that a federal court "lacks jurisdiction" to adjudicate such a claim in a habeas action. Whereas it is true that certain claims that can be raised in a federal habeas petition cannot be raised in a § 1983 action, it does not necessarily follow that any claim that can be raised in a § 1983 action cannot be raised in a habeas petition. Moreover, *Hill* can be distinguished from this case on the basis that Adams has not conceded the existence of an acceptable alternative procedure. *See* 547 U.S. at 580. Thus, Adams's lethal-injection claim, if successful, could render his death sentence effectively invalid. Further, *Nelson*'s Statement that "method-of-execution challenges[] fall at the margins of habeas," 541 U.S. at

> 646, strongly suggests that claims such as Adams's can be brought in habeas.

Adams, 644 F.3d at 483 (internal citations omitted; alteration in original). On this basis, the court denied the state's motion to dismiss the petitioner's habeas claim and remanded for factual development of his lethal-injection claim. *Id.*

23. After Adams, the Supreme Court decided Glossip, in which a bare majority of the court upheld the district court's denial of a preliminary injunction enjoining the use of Oklahoma's then-existing lethal injection protocol in an action brought under Section 1983. *Glossip*, 135 S. Ct. at 2738–46. Along the way, the *Glossip* majority interpreted *Hill* as holding "that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence." *Glossip*, 135 S. Ct. at 2738 (citing *Hill*, 547 U.S. at 579–80). But this Statement is not dispositive on whether and under what circumstances a petitioner may bring a lethal-injection challenge in habeas. Addressing the effect of *Glossip* on its prior decision in *Adams*, the Sixth Circuit adhered to its prior holding that some claims challenging lethal injection are cognizable in habeas:

> Notwithstanding the warden's assertion that a method-of-execution challenge can only be brought in a § 1983 action under Hill . . . , Adams can bring this claim in a § 2254 proceeding. As the warden submits, *Glossip* stated that *Hill* "held that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence." *Glossip*, 135 S. Ct. at 2738. As we observed in [*Adams I*], however, Adams's case is distinguishable from that presented in *Hill* because at least some of Adams's claims, if successful, would bar his execution, and Adams does not concede that lethal injection can be administered in a constitutional manner. *Cf. Hill*, 547 U.S. at 580.

Adams v. Bradshaw, 817 F.3d 284 (6th Cir. 2016).

24. The Nevada Supreme Court recently reiterated that lethal injection challenges are not cognizable in state habeas actions in Nevada Department of Corrections v. Eighth Judicial Dist. Court, Nos. 74679, 74722, 2018 WL 2272873, *2 (Nev. May 10, 2018) (unpublished order) (hereafter NDOC). In that case, petitioner Scott Dozier brought a lethal injection challenge in connection with a postconviction petition for writ of habeas corpus. And although the state district court granted an injunction and ordered a stay of the execution, the Nevada Supreme Court reversed the district court on procedural grounds holding that the lower court abused its discretion in considering the challenge. The Nevada Supreme Court explained that "this court has clearly stated that an inmate may not litigate a challenge to the lethal injection protocol in a post-conviction petition because it falls outside the relatively narrow statutory framework of NRS Chapter 34." *Id.* at *2 (citing McConnell).

25. As the Nevada Supreme Court made clear in McConnell in 2009 and again this year there is no mechanism in post-conviction habeas for bringing a lethal injection challenge. Thus such a claim cannot be procedurally defaulted, and this Court may address the merits of this claim. See Valerio v. Crawford, 306 F.3d 742, 767 (9th Cir. 2002).

C. Nevada's Death-Penalty Scheme Does Not Narrow The Class Of Persons Eligible For The Death Penalty

26. Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. *See*

Woodson v. North Carolina, 428 U.S. 280, 296 (1976). Thus, to pass constitutional muster, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. *See Arave v. Creech*, 507 U.S. 463, 474 (1993); *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

27. Despite the Supreme Court's requirement for restrictive use of the death penalty, Nevada law permits broad imposition of the death penalty for virtually and all first-degree murderers. For example, a defendant is eligible for the death penalty in Nevada if he or she: (1) commits a random murder; (2) commits one of various types of planned murders; (3) commits a murder while incarcerated; (4) commits a murder on a school bus; (5) commits a felony murder; or (6) has previous convictions for a "felony involving the use or threat of violence." Nev. Rev. Stat. § 200.033.

28. In addition, Nevada statutes do not limit first-degree murders within traditional bounds of premeditation and deliberation. As the result of the Nevada courts' use of unconstitutional definitions of reasonable doubt, express malice, premeditation, and deliberation, first-degree murder convictions occur absent proof of traditional elements beyond a reasonable doubt. In other words, the State can obtain a first-degree murder conviction—and a death sentence—in virtually every case where the prosecution can present evidence, not evidence beyond a reasonable doubt, that an accused committed an intentional killing.

29. Because of its unconstitutionally broad death-penalty scheme, Nevada has one of the highest populations of death-row inmates per capita in the nation.

Death Penalty Information Center, *Death Sentences Per Capita by State*, https://deathpenaltyinfo.org/death-sentences-capita-state.

30. The State exacerbated these problems here by saying falsely to the jurors during the 2005 penalty retrial that "not every murderer is eligible for the death penalty, not even First Degree Murderers," and that "[t]here has to be aggravating circumstances present," implying that Johnson already was classified as "the worst of the worst."[924] During closing argument, the State continued its incorrect characterization of Nevada law:

> Our legislature, the members of Carson City who meet every year, have decided that only certain murderers should face the death penalty. Not very person convicted of murder faces a potential death sentence. In fact, not even every first-degree murderer is eligible for death. Instead, our law makers have decided that there has to be something a little worse about a first-degree murder before we can seek—before we can even file the paperwork to seek the death penalty, and those are called "aggravators" or "aggravating circumstances." It's simply what makes one murder a little worse than another murder.[925]

D. The Death Penalty Is Cruel And Unusual

31. The death penalty is cruel and unusual and thus unconstitutional under the Eighth Amendment of the Federal Constitutional. *See Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting); *see also Glossip v. Gross*, 135 S. Ct. 2726, 2755-80 (2015) (Breyer, J., dissenting); *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008) ("[C]apital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the

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[924] 4/25/05 TT V-AM at 10.

[925] 4/27/05 TT VII-PM at 19–20.

two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.").

32. While the infliction of the death penalty may not have been considered "cruel" at the time of the adoption of the Nevada constitution in 1864, "the evolving standards of decency that make the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), have led to the recognition that killing as a means of punishment is always cruel. *See Furman v. Georgia*, 408 U.S. 238, 312 (White, J., concurring); *Walton v. Arizona*, 497 U.S. 639, 669–70 (1990) (Scalia, J., concurring).

33. In addition, a national consensus now rejects the death penalty. Twenty-three states have rejected or suspended the death penalty. *See* Death Penalty Information Center (DPIC), *States With and Without the Death Penalty*, https://deathpenaltyinfo.org/states-and-without-death-penalty. Of the remaining 27 states, eight have not carried out an execution in at least ten years. See DPIC, Number of Executions by State and Region Since 1976, https://deathpenaltyinfo.org/number-executions-state-and-region-1976. Only five states of the ones remaining carry out the vast majority of capital sentences in the country. *Id.*

E. Nevada's Death-Penalty Scheme is Unconstitutional Because Executive Clemency is Unavailable

34. Johnson's death sentences are invalid because Nevada has no real mechanism to provide for clemency in capital cases. Nevada law provides that prisoners sentenced to death may apply for clemency to the State Board of Pardons Commissioners. Nev. Rev. Stat. § 213.010. Executive clemency is an essential safeguard in a state's decision to deprive an individual of life, as indicated by the

fact that every one of the thirty-eight states that has the death penalty also has clemency procedures. *Ohio Adult parole Authority v. Woodward*, 523 U.S. 272, 282 n.4 (1998) (Stevens, J., concurring in part, dissenting in part). Having established clemency as a safeguard, these states must also ensure that their clemency proceedings comport with due process. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Nevada's clemency statutes, Nev. Rev. Stat. § 213.005 through 213.100, do not ensure that death penalty inmates receive procedural due process. *See Mathews v. Eldrige*, 424 U.S. 319, 335 (1976). As a practical matter, Nevada does not grant clemency to death penalty inmates.

35. The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional, requiring the vacation of Johnson's sentence.

F. Nevada's Death-Penalty Scheme Operates in an Unconstitutionally Arbitrary and Capricious Manner

36. The Nevada capital sentencing process permits juries to impose the death penalty for any first-degree murder accompanied by an aggravating circumstance. *See* Nev. Rev. Stat. § 200.303(4)(a). The statutory aggravating circumstances are so numerous and vague that they arguably exist in every first-degree murder case. *See* Nev. Rev. Stat. § 200.033. In addition, as a result of plea bargaining practices and the jury system in Nevada, defendants with offenses more aggravated than Johnson's have received sentences less than death.

37. Because of this arbitrary and capricious application of the death penalty, it is unconstitutional under the Eighth Amendment.

G. The Death Penalty in Nevada is Applied in a Racially Discriminatory Manner

38. Purely by virtue of an uncontrollable circumstance of birth—Johnson is Black and three of the four victims are White—Johnson's odds of receiving the death penalty are significantly higher. *See* DPIC, *Facts about the Death Penalty* (Nov. 5, 2018), https://deathpenaltyinfo.org/documents/FactSheet.pdf. Nevada's death penalty, like the death penalty around the country, is applied discriminatorily against Black males with White victims. It is arbitrary cruel and unusual punishment in violation of the Eighth amendment, and it also fails to equally protect non-White male offenders and victims, in violation of the Fourteenth Amendment. *See McCleskey v. Kemp*, 481 U.S. 279 (1987).

39. The Supreme Court of Washington recently recognized this racial disparity and declared Washington's death penalty unconstitutional. *State v. Gregory*, 427 P.3d 621 (Wash. 2018).

H. Conclusion

40. Execution in a manner that violates the Constitution, including the Eighth Amendment's prohibition on cruel and unusual punishment, is prejudicial per se.

41. Insofar as trial or appellate counsel failed to object or raise this claim in prior proceedings, they were ineffective, and there is a reasonable probability of a more favorable outcome if counsel had performed effectively.

CLAIM TWENTY-TWO: APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILNG TO RAISE MERITORIOUS CLAIMS FOR RELIEF

Johnson's convictions are invalid under the federal constitutional guarantees of due process, equal protection, a fair trial, a reliable sentence, effective assistance of counsel, and freedom from cruel and unusual punishment due to the ineffective assistance of appellate counsel for failing to object hearsay from the trial. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

A. **Appellate Counsel Was Ineffective In Failing To Challenge The Kidnapping Conviction**

1. Johnson suffered ineffective assistance of counsel when trial counsel failed to object to the kidnapping charges. The facts on the instant case demonstrate that any evidence of kidnapping was clearly incidental to the robbery. Trial counsel failed to file a pretrial motion dismissing the kidnapping charge. Accordingly, Johnson suffered ineffective assistance of counsel because trial counsel failed to object and file a motion to dismiss the kidnapping charges.

B. **Appellate Counsel Was Ineffective In Failing To Challenge The State's Impeachment Of Moises Zamora**

2. As part of their mitigation case during the 2005 penalty phase, the defense called Moises Zamora as a witness. During cross-examination, the prosecution elicited information regarding Zamora's prior misdemeanor

convictions.[926] The prosecution asked Zamora if he was a "convicted felon," and then followed up by asking if he had any felony or misdemeanor convictions.[927] Zamora responded that he had misdemeanor convictions, at which point the court sustained defense counsel's objection.[928]

3. Under Nevada law, the credibility of a witness can be impeached with evidence of a conviction for a crime that is "punishable by death or imprisonment for more than one year." Nev. Rev. Stat. § 50.095. In Nevada, misdemeanors are punished by "imprisonment for not more than 364 days." Nev. Rev. Stat. § 193.140. Thus, the prosecution introduced Zamora's misdemeanor convictions in direct violation of state law. Although an objection to this line of questioning was sustained, the harm had already been done. It is simply not possible for the jury to unlearn the inadmissible and prejudicial evidence they just heard.

4. The introduction of Zamora's misdemeanor convictions rendered Johnson's trial fundamentally unfair. *See Romano v. Oklahoma*, 512 U.S. 1, 12 (1994).

5. As the defense brought a timely objection to the deliberately improper impeachment of Zamora, there was no strategic reason for appellate counsel to not raise the issue. Had counsel raised this issue, there is a reasonable probability of a different result on direct appeal.

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[926] 4/29/05 TT at 189.

[927] *Id.*

[928] *Id.*

CLAIM TWENTY-THREE: ELECTED JUDGES, FAIR APPELLATE REVIEW, AND JUDICIAL BIAS

Johnson's convictions and death sentences are invalid under the federal constitutional guarantees of due process, the effective assistance of counsel, equal protection, a fair trial, a fair and impartial jury, a reliable sentence, and freedom from cruel and unusual punishment because Judge Sobel and Justice Becker suffered from judicial bias. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

A. Judge Sobel Suffered From Bias While Presiding over Johnson's Case

1. Judge Sobel presided over Johnson's 2000 trial. Around the time of Johnson's trial, Judge Sobel told an attorney in another case that the attorney "was 'f***ed' because he hadn't contributed while others had" to Judge Sobel's re-election campaign. *In the Matter of Honorable Jeffrey Sobel* at 2 (Comm. on Jud. Discipline, July 19, 2005). On a separate occasion, the disciplinary commission found that Judge Sobel's behavior "placed attorney Consul in the exceedingly uncomfortable position of having to admit and then explain the reason for his attendance at a campaign event for [Judge Sobel's] opponent . . . ." *Id.* at 2-3. Judge Sobel's egregious actions led to him being "permanently barred from serving as an elected or appointed judicial officer. . . ." *Id.* at 4.

2. Judge Sobel's behavior in those situations show that he was biased against defendants like Johnson, who did not contribute to his campaign efforts. *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009). Judge Sobel also

suffered from implicit bias because an average judge who would place counsel—even if in other cases—in such an uncomfortable position would not likely be neutral, creating an unconstitutional potential for bias. *Hurles v. Ryan*, 752 F.3d 768, 789 (9th Cir. 2014). Judicial bias is structural error, thus this Court must reverse Johnson's conviction.

3. Trial and appellate counsel were deficient in failing to raise this issue. No showing of prejudice is necessary, because judicial bias is structural error. But, even assuming a showing of prejudice is necessary, had counsel acted effectively, the result of Johnson's trial would have been different.

B. Justice Becker Had a Conflict of Interest at the Time she Participated in the 2006 Decision in this Case.

4. On November 7, 2006, Justice Becker lost her bid for re-election to the Nevada Supreme Court.[929] Shortly after, Justice Becker began negotiating for employment with the Clark County District Attorney's office, the prosecuting office in Johnson's case. *Id.* ("District Attorney David Roger said Becker first called him later that month [November] or in early December to discuss possibly working for his office."). On December 28, 2006, the Nevada Supreme Court issued its decision in the appeal from Johnson's second direct appeal. *See Johnson v. State*, 148 P.3d 767 (Nev. 2006).[930]

5. By January 5, 2007, The Las Vegas Review-Journal reported that Justice Becker was considering employment with the Clark County District

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[929] *See* Ex. 78.

[930] Rehearing was denied on June 29, 2007.

Attorney's office. *See* Ex. 77 ("Former Supreme Court Justice Nancy Becker is considering accepting a newly created position as an appellate attorney in the district attorney's office. Before she can accept the job, however, District Attorney David Roger will have to analyze his budget to find the necessary funds to pay Becker's salary."). Eventually the Clark County District Attorney and Justice Becker agreed that she should receive an exemption from Clark County to earn a salary close to what she received as a Nevada Supreme Court Justice. Justice Becker eventually received this exemption and the county paid her $120,000 annually.[931]

6. The Due Process Clause of the Fourteenth Amendment requires a trial before a judge with no bias against the defendant or interest in the outcome of the case. *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). The right to an unbiased judge includes the right to an appellate court free from biased justices. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016); *see also Aetna Life Ins. Co v. Lavoie*, 475 U.S. 813, 827-28 (1986). In determining whether a judge's failure to recuse is a constitutional question, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009); *see also Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (per curiam).

[931] *Id.*

7. Here, the financial incentive created by Justice Becker's negotiation of a salary with a party appearing before the court creates an unconstitutional potential for bias. An average judge in this position is not "likely" to be neutral. This error is structural, thus Johnson is entitled to relief. Alternatively, this error was not harmless beyond a reasonable doubt.

8. This subclaim was exhausted in a petition for rehearing that was provisionally filed with a motion for extension of time to file a petition for rehearing.[932] The Nevada Supreme Court addressed Johnson's argument that Justice Becker's participation in his appeal was improper, holding that if error occurred it would be harmless, but then returned as unfiled the petition for rehearing.[933] Insofar as prior counsel failed to properly present this claim, counsel were ineffective.

C. Judge Gates Suffered From Bias While Presiding over Johnson's Case

9. While presiding over Johnson's 2005 penalty phase hearing, Judge Gates employed Nancy Bernstein as a law clerk. Prior to working with Judge Gates, Bernstein was an intern for the Clark County District Attorney's Office. During her time at the District Attorney's office, Bernstein worked on Johnson's case and had access to his files. By not recusing himself from Johnson's case, Judge Gates suffered from bias. As explained above, judicial bas constitutes structural error.

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[932] Ex. 76.

[933] Ex. 23

Insofar as trial counsel did not object to Judge Gates presiding and advised Johnson to waive any conflict, counsel was ineffective.

D. The Nevada Supreme Court's Review of Johnson's Sentences Was Unconstitutional

10. The Nevada Revised Statutes require the Nevada Supreme Court to review each death sentence to determine whether the evidence supports the finding of aggravating circumstances and whether the sentence was imposed under the influence of passion, prejudice, and any other arbitrary factor. Nev. Rev. Stat. § 177.055(2). The Eighth Amendment requirement of reliability likewise mandates such a review. U.S. Const. amend. VIII; *see Gregg v. Georgia*, 428 U.S. 153, 195 (1976). The Nevada Supreme Court has never enunciated the standards it applies in conducting its review under this statute. The complete absence of standards renders the purported review unconstitutional under state and federal due process standards. This lack of standards is particularly troublesome because the justices of the Nevada Supreme Court are popularly elected; thus their rulings are colored by the need to be re-elected.

11. Due to the complete absence of any standards that could rationally direct the conduct of the litigation or control the outcome, Johnson could not litigate the issue of the excessiveness of his sentence, or whether his sentence was imposed under the influence of passion or prejudice. This is structural error. In the alternative, this error was not harmless beyond a reasonable doubt. Trial and appellate counsel were ineffective in failing to object. There is reasonable probability of a more favorable outcome if they had.

E. Because Nevada Judges Are Elected, They Cannot Conduct a Fair Proceeding in Capital Cases, As Required By the Due Process Clause of the Constitution

12. Judges and justices in Nevada's court system are popularly elected and thereby face the possibility of removal if they make a controversial or unpopular decision. This situation renders the Nevada judiciary insufficiently impartial to preside over a capital case under the state and federal Due Process Clauses. This impartiality is compounded by the inadequacy of the Nevada Supreme Court's review. At the time of the adoption of the Constitution, which is the benchmark for the protection afforded by the Due Process Clause, *see, e.g., Medina v. California*, 505 U.S. 437, 445-56 (1992), English judges qualified to preside in capital cases had tenure during good behavior.

13. Almost a hundred years prior to the adoption of the Constitution, in 1700, a provision requiring that "Judges' Commissions be made *quamdiu se bene gesserint*"[934] was considered sufficiently important to be included in the Act of Settlement, *see* W. Stubbs, Select Charters 531 (5th ed. 1884); and in 1760, a statute ensured judges' tenure despite the death of the sovereign, which had formerly voided their commissions. *See* W. Holdsworth, *History of English Law*, 196 (7th ed., A. Goodhart and H. Hanbury rev. 1956). Blackstone quoted the view of King George III, in urging the adoption of this statute, that the independent tenure of the judges was "essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to

[934] "*quamdiu se bene gesserint*" translates to "as long as they behave themselves properly." *Black's Law Dictionary* (10th ed. 2014).

the honor of the crown." *See* W. Blackstone, *Commentaries on the Laws of England* *258 (1765). The Framers of the Constitution, who included the protection of tenure during good behavior of federal judges under Article III of the Constitution, would not likely have taken a looser view of the importance of this due process requirement than King George III. In fact, the Framers used the grievance that the king had made the colonial "judges dependent on his will alone, for the tenure of their offices" to partly justify the Revolution. The Declaration of Independence para. 11 (U.S. 1776); *See* Smith, *An Independent Judiciary: The Colonial Background*, 124 U. Pa. L. Rev. 1104, 1112-52 (1976). At the time of the Constitution's adoption, none of the states permitted judicial elections. Smith, *supra*, at 1153-54.

14. The absence of any such protection for Nevada judges results in a denial of federal due process in capital cases because the possibilities of removal, and, at minimum, of a financially draining campaign, are threats that "offer a possible temptation to the average [person] as a judge . . . not to hold the balance nice, clear, and true between the state and the [capitally] accused." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); s*ee Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (Recusal is required when the probability of judicial bias is too high to be constitutionally tolerable.); *See also* Legislative Comm'n Subcomm. to Study the Death Penalty and Related DNA Testing Tr., Feb. 21, 2002 (former Justice Rose noting that the lesson of election campaigns, involving allegation that justices of Supreme Court "wanted to give relief to a murderer and rapist," was "not lost on the judges in the State of Nevada, and I have often heard it said by judges, 'a judge never lost his job by being

tough on crime.'"); *Beets v. State*, 821 P.2d 1044, 1056-58 (Nev. 1991) (Young, J., dissenting) ("Nevada has a system of elected judges. If recent campaigns are an indication, any laxity toward a defendant in a homicide case would be serious, if not fatal, campaign liability.").

15. The 2006 removal of a Nevada Supreme Court Justice for participating in an unpopular decision shows the incentives elected judges have to avoid unpopular decisions if they want to get re-elected. *Voters Like the R-J's Ideas—Guess Who Hates That?*, Las Vegas Rev. J., Nov. 12, 2006; Editorial, *Brian Greenspun on Tuesday's Victories Amid a Judicial Warning*, Las Vegas Sun, Nov. 9, 2006; Carri Geer Thevenot, *Supreme Court's Becker Falls to Saitta—Douglas Retains Seat—Political Consultant Says Justice Hurt by Guinn v. Legislature Ruling in 2003*, Las Vegas Rev. J., Nov. 8, 2006; Editorial, *Nancy Becker Must be Removed—Supreme Court Justice Backed Guinn v. Legisalture Travesty*, Las Vegas Rev. J., Nov. 5, 2006; Editorial, *Nancy_Becker has the Right—State Supreme Court Justice has Faithfully and Honestly Interpreted the Constitution*, Las Vegas Sun, Oct. 22, 2006; Jeff German, *Far Right Targets Justice Becker—Supreme Court Vote on Tax Increase was Right Thing to Do, She Says*, Las Vegas Sun, Oct. 15, 2006; Jon Ralston, *Campaign Ad Reality Check*, Las Vegas Sun, Oct. 15, 2006; Jon Ralston, *Jon Ralston is Impressed at the Clarity and Brevity Displayed by Lawyer-Politicians*, Las Vegas Sun, Sept. 22, 2006; Michael J. Mishnak, *Libertarian Lawyer has More Issues Up His Sleeve—Waters' Next Targets: Campaign Funds, Real Estate Tax*, Las Vegas Sun, Sept. 16, 2006; Sam Skolnik, *Who Owns Whom is*

Supreme Theme—Becker, Saitta Race is Rife with Accusations, Las Vegas Sun, Aug. 27, 2006. State lower court judges risk the same fate. In legislative hearings on a measure to eliminate judicial elections, one opponent stated "we do not want the judiciary to be independent of the people," and another referred to a specific court which had "replaced a judge two years ago . . . who functioned very well as a judge, but did not reflect the values of the community." Nev. Legislature, 75th Sess., Senate Committee on Judiciary, Minutes at 12-13 (Feb. 23, 2009) (SJR 2).

16. Elected judges cannot, consistent with the Constitution, preside over capital cases. This is structural error and Johnson is entitled to relief; alternatively, the error was not harmless beyond a reasonable doubt. Insofar as trial or appellate counsel failed to object or raise this claim in prior proceedings, they were ineffective. This is structural error. Prior counsel were ineffective in failing to raise this claim. Had counsel performed effectively, there is a reasonable probability of a more favorable outcome.

CLAIM TWENTY-FOUR: WRONG STANDARD FOR OUTWEIGHING DETERMINATION

Johnson's death sentences are invalid under the federal constitutional guarantees of due process, effective assistance of counsel, a jury verdict, equal protection, a fair trial, freedom from cruel and unusual punishment, and a reliable sentence because the trial court failed to instruct the jury that it could impose a death sentence only if mitigating factors did not outweigh aggravating factors beyond a reasonable doubt. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

A. **Juries Must Make Outweighing Determinations Using a Standard of Beyond a Reasonable Doubt**

1. The Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), for the first time applied the Sixth Amendment to a capital sentencing system in a "weighing state," like Nevada, where the jury must find that mitigation evidence does not outweigh aggravating factors in order to find the defendant eligible for death. And in *Hurst* the Court recognized for the first time that this "outweighing" requirement is an "element" of a capital sentence that must be submitted to the jury and proven beyond a reasonable doubt. *Id.* at 621 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)); *see Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) ("[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt."). With that recognition, the Court imported into weighing states fundamental constitutional guarantees at the penalty phases of capital murder trials. Among those fundamental protections is the constitutional

imperative that the State prove every statutory element of death eligibility beyond a reasonable doubt.

2. In light of *Hurst*, which applies retroactively, the trial court was required to give Johnson's jury a clear instruction that, in order to find Johnson eligible for the death penalty, the prosecutor must prove that there are insufficient mitigating circumstances to outweigh the aggravating circumstances *beyond a reasonable doubt*.

3. During the eligibility stage of the 2005 penalty phase, the trial court instructed the jurors to weigh mitigating evidence against any aggravating factors.[935] But the court failed to instruct the jury that it could only find Johnson eligible for the death penalty if the mitigating evidence did not outweigh the aggravating evidence beyond a reasonable doubt.[936]

4. The relevant capital sentencing statute, Nev. Rev. Stat. § 175.554(3), also fails to dictate the standard of proof that the State must prove in the eligibility stage of a penalty hearing.

5. An error with respect to the constitutional standard of proof beyond a reasonable doubt is structural error and prejudicial per se. In the alternative, the absence of the required instruction was an error that was not harmless beyond a reasonable doubt.

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[935] Ex. 75 at 6.

[936] *See generally* Ex. 75.

B. Trial Counsel were Ineffective for not Requesting an Instruction that the Beyond-a-Reasonable-Doubt Standard Applies to the Outweighing Determination

6. The Nevada Supreme Court in vacating Johnson's death sentences noted that the outweighing determination in Nevada is a finding of fact "necessary to authorize the death penalty in Nevada." *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002), *overruled by Nunnery v. State*, 263 P.3d 235 (Nev. 2011). Thus, the jury must make that finding *beyond a reasonable doubt*. *Id.* at 459. Although the Nevada Supreme Court later overruled that conclusion—in a decision that conflicts with *Hurst*—it remained good law and law of the case at the time of Johnson's penalty rehearing in 2005.

7. The court, thus, erred in failing to so instruct the jury. An error with respect to the constitutional standard of proof beyond a reasonable doubt is structural error and prejudicial per se. In the alternative, the absence of the required instruction was error that was not harmless beyond a reasonable doubt.

8. Defense counsel were ineffective for not insisting that the jury make the outweighing determination beyond a reasonable doubt. There is a reasonable probability of a different result had defense counsel requested the instruction and appellate counsel appealed the absence of the instruction. Johnson's death sentences are therefore invalid.

CLAIM TWENTY-FIVE: UNRECORDED BENCH CONFERENCES VIOLATED JOHNSON'S RIGHT TO MEANINGFUL APPELLATE REVIEW

Johnson's convictions and death sentences are invalid under the federal constitutional guarantees of due process, ineffective assistance, equal protection, a fair trial, a fair and impartial jury, a reliable sentence, and freedom from cruel and unusual punishment because the trial court engaged in unrecorded bench conferences. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

1. The clarity and integrity of the trial record is vital to preserving the possibility of meaningful appellate review, which is constitutionally required in capital cases. *See Draper v. Washington*, 372 U.S. 487, 497 (1963) (defendant has a right to a "record of sufficient completeness" to ensure meaningful appellate review); *see also Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (Stewart, Powell, Stevens, JJ., plurality) (noting meaningful appellate review as ensuring that "death sentences are not imposed capriciously or in a freakish manner"). Nevada law recognizes the defendant's right to record all proceedings in capital cases. Nev. Sup. Ct. Rule 250(5)(a); *see also In re the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Nev. Oct. 16, 2008), standard 2-10(b)(2). In the absence of defense counsel's consent not to record, which was not given here, the trial court is obligated to ensure that all proceedings are recorded. *Id.*

2. Recently, Justice Sotomayor emphasized this long-standing principle yet again: "[a] reliable, credible record is essential to ensure that a reviewing court—not to mention the defendant and the public at large—can say with confidence whether fundamental rights [guaranteed by the constitution] have been respected." *Townes v. Alabama*, 139 S. Ct. 18, 20 (2018) (Sotomayor, J., statement respecting denial of certiorari). This is especially pertinent in "matter[s] of life and death." *Id.*

3. Throughout the guilt and penalty phases of Johnson's trial, the parties made a significant number of objections and requests to approach the bench that were followed by unrecorded bench conferences, meaning the bases for the objections and the discussions between the parties and the court were not recorded or preserved.[937]

4. The unrecorded bench conferences included important substantive discussions. Such conduct insulates from appellate and post-conviction review the jury-selection procedures, the trial court's reasoning, the prosecutors' actions, and defense counsel's performance.

5. Absent a clear and complete record, it is difficult to determine what took place during trial. Many of the instances of off-the-record discussions contain no guidance in the surrounding transcript to explain what was being discussed.

[937] *See* 06/05/00 TT at I-70, 96; 06/06/00 TT at II-32, 88, 93; 06/07/00 TT at III-209, 264, 315; 05/05/05 TT at XI 63; 05/02/05 TT at X 152.

Because of the difficulty this has created, Johnson should not be required to show specific prejudice from counsel's error in failing to preserve the record

6. The trial court's failure to record these conferences is structural error. Alternatively, this error is not harmless beyond a reasonable doubt.

7. The parties must request recordings of bench conferences before or during trial, or the litigants must later state what was discussed on the record. If counsel does not request the recording of the bench conferences, or later make those discussions part of the record, the appellate court cannot or will not consider issues for which no record exists. Failure to object or to state the basis for an objection often results in the denial of appellate relief.

8. Johnson's trial counsel failed to object to these unrecorded conferences, simultaneously creating significant gaps in the trial transcript and failing to preserve the record for appeal. Due to trial counsel's failure, Johnson has been denied the opportunity of effective post-conviction review of his convictions and sentences. It is reasonably probable that had counsel not been ineffective, the results of the proceedings would have been different.

CLAIM TWENTY-SIX: THE TRIAL COURT VIOLATED JOHNSON'S RIGHTS UNDER INTERNATIONAL LAW

Johnson's convictions and death sentences are invalid under the federal constitutional guarantees of due process, effective assistance of counsel, equal protection, a fair trial, a fair and impartial jury, a reliable sentence, and freedom from cruel and unusual punishment because the proceedings in this case violate international law. U.S. Const. amends. V, VI, VIII, XIV; International Covenant on Civil and Political Rights, Art. 6; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

1. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognize the right to life. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, Art. 3 (1948) ("UDHR); International Covenant on Civil and Political Rights, adopted December 19, 1966, Art. 6, 999 U.N.T.S. 171 (entered into force March 23, 1976) ("ICCPR"). The ICCPR provides that "[n]o one shall be arbitrarily deprived of his life." ICCPR, Art. 6.

2. The United States Government and the State of Nevada are required to abide by norms of international law. *The Paquet Habana*, 175 U.S. 677, 701 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . .."). The Supremacy Clause of the United States Constitution specifically requires the State of Nevada to honor the United States' treaty obligations. U.S. Const. Art. VI.

3. Nevada is bound by the ICCPR because the United States has signed and ratified the treaty. Further, under Article 4 of the ICCPR, no country is permitted to derogate from Article 6. Nevada is bound by the UDHR because the document is a fundamental part of Customary International Law. Nevada has an obligation not to take life arbitrarily.

4. Trial counsel was ineffective for failing to raise an objection on this basis. Appellate counsel was ineffective for failing to raise this claim on direct appeal. Had counsel acted effectively, there is a reasonable probability of a different result.

CLAIM TWENTY-SEVEN: IMPLICIT BIAS IN THE JURY

Johnson's convictions are invalid under the federal constitutional guarantees of due process, equal protection, a fair trial, a reliable sentence, effective assistance of counsel, and freedom from cruel and unusual punishment due to the trial court's failure to protect against the seating of jurors suffering from implicit bias and the court's failure to provide any instructions to curb the effect of implicit bias. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

1. Implicit bias "refers to the automatic attitudes and stereotypes that appear in individuals."[938] In the context of death penalty cases, implicit bias accounts for "racial disparities in the modern death penalty."[939] Moreover, death-qualified jurors harbor greater racial biases than jurors eliminated by death-qualification.[940] A study recently found that "the more the mock jurors showed implicit bias that related to race and the value of human life, the more likely they were to convict a Black defendant relative to a White defendant."[941]

2. No death sentence predicated on implicit racial bias can be constitutional. The Eighth Amendment jurisprudence on the death penalty

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[938] Justin D. Levinson, Robert J. Smith, & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 518 (2014).

[939] *Id.*

[940] *Id.* at 521.

[941] *Id.*

explicitly seeks to end the arbitrary application of the death penalty. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."). Application of the death penalty based on race is the definition of arbitrary application. Thus, the trial court erred by failing to screen for implicit bias. The court further erred by failing to instruct the seated jurors about the dangers of implicit bias. This error is structural. In the alternative, this error was not harmless beyond a reasonable doubt.

3. Trial counsel were deficient in failing to object, failing to request that the trial court conduct screening, and in failing to request instructions about the dangers of implicit bias. Counsel's deficient performance was prejudicial. Appellate counsel was ineffective for failing to raise this claim on appeal.

CLAIM TWENTY-EIGHT: VIOLATION OF JOHNSON'S RIGHT TO FREEDOM OF ASSOCIATION

Johnson's death sentences are invalid under the federal constitutional guarantees of freedom of association, due process, equal protection, effective assistance of counsel, a fair trial, freedom from cruel and unusual punishment, and a reliable sentence because the State introduced evidence of Johnson's constitutionally protected association with a gang. U.S. Const. amends. I, V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

1. In 2004, the State noted that it intended to call a "gang intelligence officer" during the penalty phase and introduce evidence that Johnson was a member of the "Six Deuce Brims."[942] Johnson objected, and the trial court ruled the evidence inadmissible in the State's case-in-chief.[943]

2. Despite this ruling, the State introduced multiple items showing Johnson's gang ties during the selection stage of the 2005 penalty hearing. The trial court first admitted, without objection, two probation officer's reports from Johnson's time in the juvenile justice system in California.[944] Both reports note Johnson's gang affiliation.[945]

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[942] Ex. 71 at ¶16; Ex. 72 at ¶16.

[943] Ex. 73 at 15; 5/3/04 PT at 18–33.

[944] Exs. 117–18.

[945] Ex. 117 at 9–11; Ex. 118 at 10–13.

3. The trial court then admitted, over defense counsel's objection, a packet of disciplinary reports from Clark County Detention Center.[946] These documents also note Johnson's gang ties.[947]

4. Because the evidence did not prove or negate any issues before the jury and showed only Johnson's association with a gang, introduction of this evidence violated Johnson's right to association, as guaranteed by the First Amendment. *See Dawson v. Delaware*, 503 U.S. 159, 167 (1992).

5. Admission of this evidence was structural error and prejudicial per se. *See Flanagan v. State*, 846 P.2d 1053, 1058 (Nev. 1993). Alternatively, admission of this evidence was not harmless beyond a reasonable doubt.

6. Insofar as trial and appellate counsel failed to object on First Amendment grounds or raise this claim in prior proceedings, they were ineffective. There is a reasonable probability of a more favorable outcome if counsel had performed effectively.

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[946] Ex. 121; 4/29/05 TT at IX-97–98.

[947] Ex. 121 at 43.

CLAIM TWENTY-NINE: JOHNSON IS INELIGIBLE FOR THE DEATH PENALTY

Johnson's death sentences are invalid under the federal constitutional guarantees of due process, effective assistance of counsel, equal protection, a fair trial, a fair and impartial jury, a reliable sentence, and freedom from cruel and unusual punishment because of his youth and borderline intellectual functioning, which render him ineligible for the death penalty. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

1. Johnson is ineligible for the death penalty under the Eighth Amendment.

A. **Johnson's Youth Renders Him Ineligible for the Death Penalty**

2. Johnson was born on May 27, 1977.[948] When the offenses occurred in this case, Johnson was 21 years old.

3. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court ruled that a defendant who is under the age of 18 when a capital offense is committed is categorically ineligible for the death penalty. "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Id.* at 568 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). And the Court concluded in *Roper* that juveniles as a categorical rule are not the "worst of the worst." *See id.* at 569.

[948] Ex. 81.

4. The Court rested this conclusion on scientific evidence showing three fundamental psychological and physiological differences between adolescents and adults. *Id.* at 569–70. First, scientific evidence demonstrates that juveniles lack maturity and a sense of responsibility, leading to reckless and ill-considered behavior. *Id.* at 569. Second, teenagers "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* Third, "the character of a juvenile is not as well formed as that of an adult." *Id.* In sum, this evidence shows that juveniles are not as morally culpable as adults for criminal activity and "render[s] suspect any conclusion that a juvenile falls among the worst offenders." *Id.* at 569–573.

5. After recognizing the diminished culpability of juveniles, the Supreme Court explained that the penological justifications for the death penalty (retribution and deterrence) were not served by punishing juveniles with the death penaly. *Id.* at 571. "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.* And because juveniles do not weigh costs and benefits of illegal conduct to the same extent as adults, the death penalty's deterrent effect on juveniles is far from clear. *Id.*

6. The evidence distinguishing adults from minors for purposes of moral culpability also distinguishes adults from "late adolescents," i.e., people 21 years of age and younger. Recent research demonstrates that late adolescents do not have fully developed brains, are immature, and are vulnerable to peer pressure and risk-

taking behavior. *See* Sawyer et al., *The Age of Adolescence*, The Lancet, Jan. 2018, at 1 (advocating for an expansion of the traditional age of adolescence); Bretka Stetka, *Extended Adolescence: When 25 is the New 18*, Scientific American (Sept. 19, 2017), https://www.scientificamerican.com/article/extended-adolescence-when-25-is-the-new-181/ ("[D]elayed adolescence is no longer a theory, but a reality."); Twenge and Park, *The Decline in Adult Activities Among U.S. Adolescents, 1976–2016*, Child Development, 2017, at 1 (recognizing decline in "adult activities" by adolescents); *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, 21 Developmental Science 2 (2017) (finding that self-regulation develops into late adolescence before plateauing between the ages of 23 and 26); Alexandra Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temple L. Rev. 769 (2016) (summarizing behavioral and neurological research of late adolescents); Sara B. Johnson, Robert W. Blum & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. Adolescent Health 216, 217 (2009), http://www.jahonline.org/article/S1054-139X(09)00251-1/fulltext ("[T]here is little empirical evidence to support age 18, the current legal age of majority, as an accurate marker of adult capacities."); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brian*, 1021 Annals N.Y. Acad. Sci. 77, 83 (2004), http://thesciencenetwork.org/docs/BrainsRUs/ANYAS_2004_Giedd.pdf (explaining that regions of the brain responsible for impulse inhibition,

weighing of consequences, and strategizing are not fully developed until mid-twenties).

7. In addition, the Supreme Court in *Roper* gave examples of activities limited to people who have reached "adulthood"—voting, serving on a jury, and marrying without parental permission. *Roper*, 543 U.S. at 579–87. But the Court easily could have found other provisions restricting activities for late adolescents. For example, 48 states and the District of Columbia have provisions to extend juvenile court authority to an age beyond 18. *See* Jurisdictional Boundaries, US Dep't of Justice, https://www.ojjdp.gov/ojstatbb/structure_process/qa04106.asp. Similarly, 37 states require gamblers to be 21 years of age. *See* Legal Gambling Age in the United States, LegalGamblingUSA.com, http://www.legalgamblingusa.com/legal-gambling-age.html. Federal law prohibits licensed firearms dealers from selling a handgun to persons they have reason to believe are under 21. 18 U.S.C. § 922(b)(1), (c)(1). And all states restrict alcohol purchases to people 21 years of age or older. *See* State Guide to Drinking Age Law, Nat'l Yoyth Rights Ass'n, https://www.youthrights.org/issues/drinking-age/laws-in-all-50-states/.

8. Accordingly, late adolescents are undeserving of execution in the same way as their slightly younger counterparts: they are less morally culpable, and their execution serves neither of the aims of capital punishment. The American Bar Association recently recognized this, recommending that states exclude those 21 years of age or younger from execution. ABA House of Delegates Recommendation 111 (adopted Feb. 2018). The ABA pointed to a "growing medical consensus that key

areas of the brain relevant to decision-making and judgment continue to develop into the early twenties." *Id.* at 1. In addition to scientific advances, the resolution also pointed to changes in death-penalty jurisprudence, changing societal treatment of late adolescents, and declining levels of executions of late adolescents. *Id.* at 4–10. The resolution also included research that youthful defendants are more likely than adult defendants to be wrongfully convicted and noted that executing youthful offenders serves no penological purpose. *Id.* at 8, 11–12.

9. A Kentucky Circuit Court recently declared the Kentucky death-penalty statute unconstitutional for those under 21 years of age at the time of the offense. *Kentucky v. Bredhold*, No. 14-CR-161 (Ky. Cir. Ct. Aug. 1, 2017). The court held execution of youthful offenders violated the Eighth Amendment's prohibition against cruel and unusual punishment because of a national consensus against execution of offenders younger than 21 and the disproportionate punishment for youthful offenders. *Id.* To support the latter holding, the court pointed to recent scientific studies and research showing that the brain continues to develop into the twenties. *Id.* at *6–10. And the court found the defendant unfit for the death penalty for the same reasons the Supreme Court in *Roper* found teenagers under 18 unfit: a lack of maturity, a susceptibility to peer pressure and emotional influence, and a character in flux and therefore amenable to rehabilitation. *Id.*

10. Similarly, a federal Connecticut district court recently addressed the new scientific research surrounding this issue and extended constitutional protections to a late adolescent. *Cruz v. United States*, 2018 WL 1541898 (D. Conn.

Mar. 29, 2018). The court, relying on *Roper*, concluded that a mandatory sentence of life without the possibility of parole for an 18 year old violated the Eighth Amendment. The court noted that "when the *Roper* Court drew the line at age 18 in 2005, the Court did not have before it the record of scientific evidence that is now before this court." *Id.* at *25.

B. Johnson Is Ineligible For The Death Penalty Under *Atkins V. Virginia*

11. Johnson suffers from intellectual disability, thus he is ineligible for the death penalty.[949] *See Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002). In the alternative, the same reasons justifying a categorical exemption from the death penalty for people suffering from intellectual disability, *see Atkins,* 536 U.S. at 320–21, also justify a categorical exemption from the death penalty for people with borderline intellectual functioning: People with borderline intellectual functioning are more likely to falsely confess and are less able to offer meaningful mitigation evidence or assist counsel. *See id.* at 320–21.[950] And, like intellectual disability, borderline intellectual functioning is a double-edged sword—the State can use evidence of borderline intellectual functioning as evidence in favor of the death penalty. *See id.* at 321. Thus, Johnson's borderline intellectual functioning renders him ineligible for execution under the Eighth Amendment.

[949] Ex. 173.

[950] Ex. 143.

C. In Combination, Johnson's Youth and Borderline Intellectual Functioning Render Him Ineligible for the Death Penalty

12. The combination of Johnson's borderline intellectual functioning and his youth amplified the concerns present in both *Atkins* and *Roper*: Johnson cannot reliably be classified as the "worst of the worst," he was less able to assist in his own defense, and he was more susceptible to coercive actions by law enforcement.

D. Conclusion

13. Executing Johnson in light of his ineligibility for the death penalty is prejudicial per se, and it warrants permanently setting aside his capital sentence.

14. Insofar as trial or appellate counsel failed to object or raise this claim in prior proceedings, they were ineffective, and there is a reasonable probability of a more favorable outcome if counsel had performed effectively.

CLAIM THIRTY: CUMULATIVE ERROR

Johnson's convictions and death sentences are invalid under the federal constitutional guarantees of due process, effective assistance of counsel, equal protection, a fair trial, a fair and impartial jury, a fair tribunal, a reliable sentence, and freedom from cruel and unusual punishment because of the cumulative effect of the errors in this case. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1 §§ 3, 5, 6, 8, 9, 10, 15, 18; Nev. Const. Art. 4, § 21.

SUPPORTING FACTS

1. "The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973)); *see Jackson v. Brown*, 513 F.3d 1057, 1085 (9th Cir. 2008). The basis for relief on a cumulative error claim is grounded in the Due Process Clause of the Fourteenth Amendment. *Chambers*, 410 U.S. at 302–03. As explained in *Parle*, the "cumulative effect of multiple errors can violate due process even where no single error rises to the level of constitutional violation or would independently warrant reversal." 505 F.3d at 927 (citing *Chambers*, 410 U.S. at 290 n.3); *see Montana v. Egelhoff*, 518 U.S. 37, 53 (1996); *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978); *Harris v. Wood*, 64 F.3d 1432, 1438–39 (9th Cir. 1995).

2. Each of the errors discussed in this petition independently mandates relief. Even if that were not the case, however, the aggregate effect of these violations considered cumulatively rendered the trial fundamentally unfair and a

violation of due process, warranting habeas relief. *See Parle*, 505 F.3d at 927; *see also Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) (concluding that cumulative effect of counsel's ineffectiveness and erroneous exclusion of evidence warranted habeas relief); *Conde v. Henry*, 198 F.3d 734, 741–42 (9th Cir. 1999) (explaining that combination of trial court errors resulted in per se prejudice).

3. These errors also violated Johnson's right to an individualized sentencing decision, as required by the Eighth Amendment. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (Burger, C.J., Stewart, Powell, Stevens, JJ.). The need for an individualized decision precludes the introduction of factors that create "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* Statements that the sentencer must be able to consider all mitigation evidence are legion. *See Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency."); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) ("[T]he sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'"). The cumulative effect of the errors in this case prevented the jury from fully considering all the relevant evidence of mitigation. This was error under the Eighth Amendment.

4. Fundamentally, the errors in Johnson's trial prevented a fair trial. In light of these substantial problems, it is impossible to conclude that the jury

actually found Johnson guilty or deserving of the death penalty under a valid theory. The cumulative effect of the errors in this case are error that is not harmless beyond a reasonable doubt. Thus, Johnson is entitled to relief.

5. To the extent that this claim has not been adequately presented previously, trial and appellate counsel were ineffective, and there is a reasonable probability of a more favorable outcome if counsel had performed effectively.

VI. PRAYER FOR RELIEF

WHEREFORE, petitioner prays that the court grant petitioner relief to which petition may be entitled in this proceeding.

DATED this 13th day of February, 2019.

Respectfully submitted
Rene L. Valladares
Federal Public Defender

/s/ Randolph M. Fiedler
Assistant Federal Public Defender

/s/ Ellesse Henderson
Assistant Federal Public Defender

/s/ Jose German
Assistant Federal Public Defender

VERIFICATION

Under penalty of perjury, the undersigned declare that they are counsel for the Petitioner Donte Johnson named in the foregoing Petition and know the contents thereof; that the pleading is true of their own knowledge except as to those matters stated on information and belief and as to such matters they believe them to be true. Petitioner personally authorized the undersigned counsel to commence this action.

DATED this 13th day of February, 2019.

Respectfully submitted
Rene L. Valladares
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/s/ Randolph M. Fiedler
Assistant Federal Public Defender

/s/ Ellesse Henderson
Assistant Federal Public Defender

/s/ Jose German
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(1) and EDCR 7.26(c)(1), the undersigned hereby certifies that on February 13, 2019, a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) was served by United States Mail, postage prepaid, and addressed as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

DONTE JOHNSON, Petitioner, v. WILLIAM GITTERE, Warden of Ely State Prison, and AARON FORD, Attorney General of the State of Nevada, Respondents.	Case No. Dept. No. **EXHIBITS TO PETITION FOR WRIT OF HABEAS (POST-CONVICTION)** (Death Penalty Habeas Corpus Case)

VOLUME 1
EXHIBITS 1 - 7

1. Petition for Writ of Mandamus, Johnson v. State, Case No. 36093, In the Supreme Court of the State of Nevada (May 10, 2000)

2. Order denying Petition, Johnson v. State, Case No. 36093, In the Supreme Court of the State of Nevada (June 8, 2000)

3. Petition for Writ of Mandamus, Johnson v. State, Case No. 36461, In the Supreme Court of the State of Nevada (July 21, 2000)

4. Supplemental Authorities in Support of Petition for Writ, Johnson v. State, Case No. 36461, In the Supreme Court of the State of Nevada (July 21, 2000)

5. Order denying Petition for Writ of Mandamus, Johnson v. State, Case No. 36461, In the Supreme Court of the State of Nevada (July 21, 2000)

6. Judgment of Conviction, State v. Johnson, Case No. 153154, District Court, Clark County (October 3, 2000)

7. Judgment of Conviction (Amended), State v. Johnson, Case No. 153154, District Court, Clark County (October 9, 2000)

DATED this 13th day of February, 2019.

Respectfully submitted
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/s/ Randolph M. Fiedler
Assistant Federal Public Defender

/s/ Ellesse Henderson
Assistant Federal Public Defender

/s/ Jose German
Assistant Federal Public Defender

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DISTRICT COURT

CLARK COUNTY, NEVADA

DONTE JOHNSON,

Petitioner,

v.

WILLIAM GITTERE, Warden of Ely State Prison, and AARON FORD, Attorney General of the State of Nevada,

Respondents.

Case No. A-19-789336-W
Dept. No. 6

EXHIBITS TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

(Death Penalty Habeas Corpus Case)

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VOLUME 1

1. Petition for Writ of Mandamus, Johnson v. State, Case No. 36093, In the Supreme Court of the State of Nevada (May 10, 2000)
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6. Judgment of Conviction, State v. Johnson, Case No. 153154, District Court, Clark County (October 3, 2000)
7. Judgment of Conviction (Amended), State v. Johnson, Case No. 153154, District Court, Clark County (October 9, 2000)

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8. Appellant's Opening Brief, Johnson v. State, Case No. 36991, In the Supreme Court of the State of Nevada (July 18, 2001)
9. Respondent's Answering Brief, Johnson v. State, Case No. 36991, In the Supreme Court of the State of Nevada (November 27, 2001)
10. Appellant's Reply Brief, Johnson v. State, Case No. 36991, In the Supreme Court of the State of Nevada (January 15, 2002)
11. Appellant's Supplemental Opening Brief, Johnson v. State, Case No. 36991, In the Supreme Court of the State of Nevada (July 30, 2002)
12. Respondent's Supplemental Answering Brief, Johnson v. State, Case No. 36991, In the Supreme Court of the State of Nevada (August 29, 2002)
13. Appellant's Supplemental Reply Brief, Johnson v. State, Case No. 36991, In the Supreme Court of the State of Nevada (October 2, 2002)
14. Per Curiam Opinion (affirmed in part vacated in part and remanded) , Johnson v. State, Case No. 36991, In the Supreme Court of the State of Nevada (December 18, 2002)

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15. Motion to Amend Judgment of Conviction, State v. Johnson, Case No. 153154, District Court, Clark County (April 8, 2004)

16. Amended Judgment of Conviction, State v. Johnson, Case No. 153154, District Court, Clark County (April 20, 2004)

17. Judgment of Conviction, State v. Johnson, Case No. 153154, District Court, Clark County (June 6, 2005)

18. Appellant's Opening Brief, Johnson v. State, Case No. 45456, In Supreme Court of the State of Nevada (February 3, 2006)

19. Respondent's Answering Brief, Johnson v. State, Case No. 45456, In Supreme Court of the State of Nevada (April 5, 2006)

20. Appellant's Reply Brief, Johnson v. State, Case No. 45456, In Supreme Court of the State of Nevada (May 25, 2006)

21. Judgment Affirming Death Sentence (45456) , Johnson v. State, Case No. 45456, In Supreme Court of the State of Nevada (December 28, 2006)

22. Notice of filing of writ of certiorari, Johnson v. State, Case No. 45456, In Supreme Court of the State of Nevada (April 5, 2007)

23. Order (denying motion to late file Petition for Rehearing), Johnson v. State, Case No. 45456, In Supreme Court of the State of Nevada (June 29, 2007)

24. Petition for Writ of Habeas Corpus, State v. Johnson, Case No. 153154, District Court, Clark County (February 11, 2008)

25. Pro Per Petition, Johnson v. State, Case No. 51306, In the Supreme Court of the State of Nevada (March 24, 2008)

26. Response to Petition Writ of Habeas Corpus, State v. Johnson, Case No. 153154, District Court, Clark County (April 29, 2008)

27. Order denying Pro Per Petition, Johnson v. State, Case No. 51306, In the Supreme Court of the State of Nevada (May 6, 2008)

28. Supplemental Brief in Support of Petition for Writ of Habeas Corpus, State v. Johnson, Case No. 153154, District Court, Clark County (October 12, 2009)

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29. Second Supplemental Brief in Support of Petition for Writ of Habeas Corpus, State v. Johnson, Case No. 153154, District Court, Clark County (July 14, 2010)

30. Response to Petition Writ of Habeas Corpus, State v. Johnson, Case No. 153154, District Court, Clark County (January 28, 2011)

31. Reply to Response to Petition Writ of Habeas Corpus, State v. Johnson, Case No. 153154, District Court, Clark County (June 1, 2011)

32. Reply Brief on Initial Trial Issues, State v. Johnson, Case No. 153154, District Court, Clark County (August 22, 2011)

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35. Response to Second Petition for Writ of Habeas Corpus (Post-Conviction), State v. Johnson, Case No. 153154, District Court, Clark County (December 15, 2014)

36. Reply to Response to Second Petition for Habeas Corpus (Post-Conviction), State v. Johnson, Case No. 153154, District Court, Clark County (January 2, 2015)

37. Appellant's Opening Brief, Johnson v. State, Case No. 65168, In Supreme Court of the State of Nevada (January 9, 2015)

38. Findings of Fact and Conclusions of Law), State v. Johnson, Case No. 153154, District Court, Clark County (February 4, 2015)

39. Respondent's Answering Brief, Johnson v. State, Case No. 65168, In Supreme Court of the State of Nevada (May 7, 2015)

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40. Appellant's Reply Brief, Johnson v. State, Case No. 65168, In Supreme Court of the State of Nevada (November 18, 2015)

41. Opinion, Johnson v. State, Case No. 65168, In Supreme Court of the State of Nevada (October 5, 2017)

42. Appellant's Petition for Rehearing, Johnson v. State, Case No. 65168, In Supreme Court of the State of Nevada (November 22, 2017)

43. Order Denying Rehearing En Banc, Johnson v. State, Case No. 65168, In Supreme Court of the State of Nevada (January 19, 2018)

44. Order of Affirmance, Johnson v. State, Case No. 67492, In the Supreme Court of the State of Nevada (February 9, 2018)

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45. Autopsy Report for Peter Talamantez (August 15, 1998)

46. Las Vegas Metropolitan Police Dept. Voluntary Statement of Ace Rayburn Hart_Redacted (August 17, 1998)

47. Las Vegas Metropolitan Police Dept., Voluntary Statement of Brian Johnson_Redacted (August 17, 1998)

48. Indictment, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (September 2, 1998)

49. Las Vegas Metropolitan Police Dept., Voluntary Statement of Terrell Young_Redacted (September 2, 1998)

50. Las Vegas Metropolitan Police Dept., Voluntary Statement of Charla Severs _Redacted (September 3, 1998)

51. Las Vegas Metropolitan Police Dept., Voluntary Statement of Sikia Smith_Redacted (September 8, 1998)

52. Superceding Indictment, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (September 15, 1998)

53. Las Vegas Metropolitan Police Dept., Voluntary Statement of Todd Armstrong_Redacted (September 17, 1998)

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54. Las Vegas Metropolitan Police Dept., Voluntary Statement of Ace Hart_Redacted (September 22, 1998)

55. Testimony of Todd Armstrong, *State of Nevada v. Celis*, Justice Court, Clark County, Nevada Case No. 1699-98FM (January 21, 1999)

56. Trial Transcript (Volume VIII), *State of Nevada v. Smith*, District Court, Clark County, Nevada Case No. C153624 (June 17, 1999)

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57. Trial Transcript (Volume XVI-AM), *State of Nevada v. Smith*, District Court, Clark County, Nevada Case No. 153624 (June 24, 1999)

58. Motion to Permit DNA Testing of Cigarette Butt (August 17, 1998)

59. Trial Transcript (Volume VI), *State of Nevada v. Young,* District Court, Clark County, Nevada, Case No. C153154 (September 7, 1999)

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60. Interview of Charla Severs (September 27, 1999)

61. Motion to Videotape Deposition of Charla Severs, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (September 29, 1999)

62. Opposition to Videotape Deposition of Charla Severs, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (October 6, 1999)

63. Transcript of Video Deposition of Charla Severs (Filed Under Seal), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (October 6, 1999) FILED UNDER SEAL

64. Cellmark Report of Laboratory Examination (November 17, 1999)

65. Motion for Change of Venue, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (November 29, 1999)

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66. Records from the California Youth Authority_Redacted

67. Jury Instructions (Guilt Phase), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (June 8, 2000)

68. Verdict Forms (Guilt Phase), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (June 9, 2000)

69. Special Verdict, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (June 15, 2000)

70. Affidavit of Kristina Wildeveld (June 23, 2000)

71. Amended Notice of Evidence Supporting Aggravating Circumstances, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (March 17, 2004)

72. Second Amended Notice of Evidence Supporting Aggravating Circumstances, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (April 6, 2004)

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73. Opposition to Second Amended Notice of Evidence Supporting Aggravating Circumstances, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (April 20, 2004)

74. Reply to Opposition to Notice of Evidence Supporting Aggravating Circumstances, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (April 26, 2004)

75. Jury Instructions (Penalty Phase 3) , *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (April 28, 2005)

76. Petition for rehearing, *Johnson v. State of Nevada*, Nevada Supreme Court, Case No. 45456 (March 27, 2007)

77. John L. Smith, *Mabey takes heat for attending his patients instead of the inauguration*, Las Vegas Review-Journal (January 5, 2007)

78. Sam Skolnik, *Judge out of order, ethics claims say*, Las Vegas Sun (April 27, 2007)

79. EM 110 - Execution Procedure_Redacted (November 7, 2017)

80. *Nevada v. Baldonado*, Justice Court, Clark County, Nevada Case No. 04FH2573X (March 30, 2004)

81. Birth Certificate John White Jr_Redacted

82. Declaration of Eloise Kline (November 19, 2016)

83. Jury Questionnaire 2000_Barbara Fuller_Redacted (May 24, 2000)

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84. Media Jury Questionnaire 2000

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85. Media Jury Questionnaire 2005

86. News Articles

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87. State's Exhibit 63 – Photo

88. State's Exhibit 64 – Photo

89. State's Exhibit 65 – Photo

90. State's Exhibit 66 – Photo

91. State's Exhibit 67 – Photo

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97. State's Exhibit 79 – Photo

98. State's Exhibit 80 – Photo

99. State's Exhibit 81 – Photo

100. State's Exhibit 82 – Photo

101. State's Exhibit 86 – Photo

102. State's Exhibit 89 – Photo

103. State's Exhibit 92 – Photo

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105. State's Exhibit 116 – Photo

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108. State's Exhibit 130 – Photo

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110. State's Exhibit 137 – Photo

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113. State's Exhibit 148 – Photo

114. State's Exhibit 151 – Photo

115. State's Exhibit 180 – Photo

116. State's Exhibit 181 – Photo

117. State's Exhibit 216 - Probation Officer's Report - Juvenile_Redacted

118. State's Exhibit 217 - Probation Officer's Report_Redacted

119. State's Exhibit 221 – Photo

120. State's Exhibit 222 – Photo

121. State's Exhibit 256

122. Las Vegas Metropolitan Police Dept. Crime Scene Report (August 14, 1998)

123. VCR at Terra Linda

124. VCR Remote Control Buying Guide

125. Jury Instructions (Penalty Phase 3), *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (May 4, 2005)

126. Motion to Bifurcate Penalty Phase, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (April 27, 2004)

127. Motion to Reconsider Request to Bifurcate Penalty Phase, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (April 11, 2005)

128. Special Verdicts (Penalty Phase 3) , *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (April 28, 2005)

129. Verdict (Penalty Phase 3) , *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (May 5, 2005)

130. Declaration of Arthur Cain (October 29, 2018)

131. Declaration of Deborah White (October 27, 2018)

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132. Declaration of Douglas McGhee (October 28, 2018)

133. Declaration of Elizabeth Blanding (October 29, 2018)

134. Declaration of Jesse Drumgole (October 27, 2018)

135. Declaration of Johnnisha Zamora (October 28, 2018)

136. Declaration of Johnny White (October 26, 2018)

137. Declaration of Keonna Bryant (October 30, 2018)

138. Declaration of Lolita Edwards (October 30, 2018)

139. Declaration of Loma White (October 31, 2018)

140. Declaration of Moises Zamora (October 28, 2018)

141. Declaration of Vonjelique Johnson (October 28, 2018)

142. Los Angeles Dept. of Child & Family Services_Redacted

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143. Psychological Evaluation of Donte Johnson by Myla H. Young, Ph.D. (June 6, 2000)

144. Psychological Evaluation of Eunice Cain (April 25, 1988)

145. Psychological Evaluation of John White by Harold Kates (December 28, 1993)

146. Student Report for John White

147. School Records for Eunnisha White_Redated

148. High School Transcript for John White_Redacted

149. School Record for John White_Redacted

150. Certified Copy SSA Records_Eunice Cain_Redacted

151. Declaration of Robin Pierce (December 16, 2018)

152. California Department of Corrections Records_Redacted (April 25, 2000)

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153. Letter from Maxine Miller to Lisa Calandro re forensic lab report (April 13, 1999)

154. Letter from Lisa Calandro Forensic Analytical to Maxine Miller (April 20, 1994)

155. Memorandum re call with Richard Good (April 29, 1999)

156. Letter from Maxine Miller to Berch Henry at Metro DNA Lab (May 7, 1999)

157. Letter from Maxine Miller to Richard Good (May 10, 1999)

158. Letter from Maxine Miller to Tom Wahl (May 26, 1999)

159. Stipulation and Order, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (June 8, 1999)

160. Stipulation and Order, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154, (June 14, 1999)

161. Letter from Maxine Miller to Larry Simms (July 12, 1999)

162. Stipulation and Order, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154 (December 22, 1999)

163. Letter from Maxine Miller to Nadine LNU re bullet fragments (March 20, 2000)

164. Memorandum (December 10, 1999)

165. Forensic Analytical Bloodstain Pattern Interpretation (June 1, 2000)

166. Trial Transcript (Volume III), *State of Nevada v. Young*, District Court, Clark County, Nevada, Case No. C153461 (September 7, 1999)

167. Trial Transcript (Volume VII), *State of Nevada v. Young*, District Court, Clark County, Nevada, Case No. C153461 (September 13, 1999)

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168. National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Washington, D.C.: The National Academies Press (2009)

169. Las Vegas Metropolitan Police Dept. Forensic Lab Report of Examination (September 26, 1998)

170. Todd Armstrong juvenile records_Redacted

171. Handwritten notes on Pants

172. Declaration of Cassondrus Ragsdale (December 16, 2018)

173. Report of Dr. Kate Glywasky (December 19, 2018)

174. Curriculum Vitae of Dr. Kate Glywasky

175. Report of Deborah Davis, Ph.D. (December 18, 2018)

176. Curriculum Vitae of Deborah Davis, Ph.D.

177. Report of T. Paulette Sutton, Associate Professor, Clinical Laboratory Sciences (December 18, 2018)

178. Curriculum Vitae of T. Paulette Sutton

179. Report of Matthew Marvin, Certified Latent Print Examiner (December 18, 2018)

180. Curriculum Vitae of Matthew Marvin

181. Trial Transcript (Volume V), *State of Nevada v. Smith*, District Court, Clark County, Nevada Case No. C153624 (June 16, 1999)

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182. Trial Transcript (Volume VI), *State of Nevada v. Smith*, District Court, Clark County, Nevada Case No. C153624 (June 16, 1999)

183. Las Vegas Metropolitan Police Dept. Interview of Tod Armstrong _Redacted (August 17, 1998)

184. Las Vegas Metropolitan Police Dept. Interview of Tod Armstrong _Redacted (August 18, 1998)

185. Las Vegas Metropolitan Police Dept. Interview of Charla Severs_Redacted (August 18, 1998)

186. Las Vegas Metropolitan Police Dept. Interview of Sikia Smith_Redacted (August 17, 1998)

187. Las Vegas Metropolitan Police Dept. Interview of Terrell Young_Redacted (September 2, 1998)

188. Declaration of Ashley Warren (December 17, 2018)

189. Declaration of John Young (December 10, 2018)

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190. Brief of Plaintiffs-Appellants, *Abdur'rahman v. Parker*, Tennessee Supreme Court, Nashville Division, Case No. M2018-10385-SC-RDO-CV

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191. Sandoz' Inc.'s Motion for Leave Pursuant to NRAP 29 to Participate as Amicus Curiae in Support of Real Parties in Interest, *Nevada v. The Eighth Judicial Disrict Court of the State of Nevada*, Nevada Supreme Court, Case No. 76485

192. Notice of Entry of Order, *Dozier v. State of Nevada*, District Court, Clark County, Nevada, Case No. 05C215039

193. Declaration of Cassondrus Ragsdale (2018.12.18)

194. Affidavit of David B. Waisel, *State of Nevada*, District Court, Clark County, Case No. 05C215039 (October 4, 2018)

195. Declaration of Hans Weding (December 18, 2018)

196. Trial Transcript (Volume IX), *State of Nevada v. Smith*, District Court, Clark County, Nevada Case No. C153624 (June 18, 1999)

197. Voluntary Statement of Luis Cabrera (August 14, 1998)

198. Voluntary Statement of Jeff Bates (handwritten)_Redacted (August 14, 1998)

199. Voluntary Statement of Jeff Bates_Redacted (August 14, 1998)

200. Presentence Investigation Report, State's Exhibit 236, *State v.* Young, District Court, Clark County, Nevada Case No. C153461_Redacted (September 15, 1999)

201. Presentence Investigation Report, State's Exhibit 184, *State v. Smith*, District Court, Clark County, Nevada Case No. C153624_Redacted (September 18, 1998)

202. School Record of Sikia Smith, Defendant's Exhibit J, *State v. Smith*, District Court, Clark County, Nevada (Case No. C153624)

203. School Record of Sikia Smith, Defendant's Exhibit K, , *State v. Smith*, District Court, Clark County, Nevada (Case No. C153624)

204. School Record of Sikia Smith, Defendant's Exhibit L, , *State v. Smith*, District Court, Clark County, Nevada (Case No. C153624)

205. Competency Evaluation of Terrell Young by Greg Harder, Psy.D., Court's Exhibit 2, *State v. Young*, District Court, Clark County, Nevada Case No. C153461 (May 3, 2006)

206. Competency Evaluation of Terrell Young by C. Philip Colosimo, Ph.D., Court's Exhibit 3, *State v. Young*, District Court, Clark County, Nevada Case No. C153461 (May 3, 2006)

207. Motion and Notice of Motion in Limine to Preclude Evidence of Other Guns Weapons and Ammunition Not Used in the Crime, State *v.*

Johnson, District Court, Clark County, Nevada Case No. C153154 (October 19, 1999)

208. Declaration of Cassondrus Ragsdale (December 19, 2018)

209. Post –Evidentiary Hearing Supplemental Points and Authorities, Exhibit A: Affidavit of Theresa Knight, *State v.* Johnson, District Court, Clark County, Nevada Case No. C153154

210. Post –Evidentiary Hearing Supplemental Points and Authorities, Exhibit B: Affidavit of Wilfredo Mercado, *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154

211. Genogram of Johnson Family Tree

212. Motion in Limine Regarding Referring to Victims as "Boys", *State v. Johnson*, District Court, Clark County, Nevada Case No. C153154

213. Declaration of Schaumetta Minor, (December 18, 2018)

214. Declaration of Alzora Jackson (February 11, 2019)

DATED this 14th day of February, 2019.

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(1) and EDCR 7.26(c)(1), the undersigned hereby certifies that on February 14, 2019, a true and correct copy of the foregoing EXHIBITS TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) was served by United States Mail, postage prepaid, and addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, NV 89155

Amanda C. Sage
Senior Deputy Attorney General
100 N. Carson St.
Carson City, NV 89701

William Gittere, Warden
Ely State Prison
P.O. Box 1989
Ely, NV 89301

/s/ Sara Jelinek
An Employee Of The
Federal Public Defender
District Of Nevada

EXHIBIT 6

EXHIBIT 6

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ORIGINAL

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STEWART L. BELL
DISTRICT ATTORNEY
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Attorney for Plaintiff

FILED
Oct 3 4 22 PM '00
Shirley B. Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

JUDGMENT OF CONVICTION

WHEREAS, on the 17th day of September, 1998, Defendant, DONTE JOHNSON, entered a plea of Not Guilty to the crimes of COUNT I - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060, 193.165); COUNT II - CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPING AND/OR MURDER (Felony - NRS 199.480, 200.380, 200.310, 200.320, 200.010, 200.030); COUNTS III, IV, V & VI - ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); COUNTS VII, VIII, IX, & X - FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165); and COUNTS XI, XII, XIII & XIV - MURDER WITH USE OF A DEADLY WEAPON (Open Murder) (Felony - NRS 200.010, 200.030, 193.165); and

WHEREAS, the Defendant DONTE JOHNSON, was tried before a Jury and the Defendant was found guilty of the crimes of COUNT I - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060, 193.165); COUNT II - CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPPING AND/OR MURDER (Felony - NRS

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199.480, 200.380, 200.310, 200.320, 200.010, 200.030); COUNTS III, IV, V & VI - ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); COUNTS VII, VIII, IX, & X - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165); and COUNTS XI, XII, XIII & XIV - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), and the Jury verdict was returned on or about the 9th day of June, 2000. Thereafter, a Three-Judge Panel, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS 175.552 and 175.554, found that there were two (2) aggravating circumstances in connection with the commission of said crime, to-wit:

1. The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnaping in the first degree, and the person charged:

(a) Killed or attempted to kill the person murdered;

(b) Knew or had reason to know that life would be taken or lethal force used.

2. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

That on or about the 26th day of July, 2000, the Three-Judge Panel unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, and determined that the Defendant's punishment should be DEATH as to COUNTS XI, XII, XIII & XIV - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the 3rd day of October, 2000, the Defendant being present in court with his counsel, JOSEPH SCISCENTO, Deputy Special Public Defender, and DAYVID J. FIGLER, Deputy Special Public Defender, and GARY L. GUYMON, Chief Deputy District

Attorney, also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdicts and, in addition to the $25.00 Administrative Assessment Fee, the Defendant is sentenced as follows:

COUNT I - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for BURGLARY WHILE IN POSSESSION OF A FIREARM;

COUNT II - a Maximum term of SEVENTY-TWO (72) months with a Minimum parole eligibility of SIXTEEN (16) months in the Nevada Department of Prisons for CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPPING AND/OR MURDER, to run consecutive to Count I;

COUNT III - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for ROBBERY plus an equal and consecutive Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count II;

COUNT IV - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for ROBBERY plus an equal and consecutive Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count III;

COUNT V - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for ROBBERY plus an equal and consecutive Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count IV;

COUNT VI - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for ROBBERY plus an equal and consecutive Maximum term of ONE HUNDRED EIGHTY (180) months with

a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count V;

COUNT VII - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for FIRST DEGREE KIDNAPPING plus an equal and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count VI;

COUNT VIII - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for FIRST DEGREE KIDNAPPING plus an equal and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count VII;

COUNT IX - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for FIRST DEGREE KIDNAPPING plus an equal and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count VIII;

COUNT X - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for FIRST DEGREE KIDNAPPING plus an equal and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count IX;

COUNT XI - DEATH for FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON, and pay $33,605.95 Restitution jointly and severally with co-offenders Sikia Lafayette Smith and Terrell Cochise Young;

COUNT XII - DEATH for FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON;

COUNT XIII - DEATH for FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON;

COUNT XIV - DEATH for FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON.

Credit for time served 776 days.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 3 day of October, 2000, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE
for Judge Jeffrey Sobel GB

DA#98-153154X/kjh
LVMPD EV#9808141600
BURG W/WPN; CONSP ROBB/ KIDNAP/MURDER; 1° KIDNAP W/WPN; 1° MURDER W/WPN - F

EXHIBIT 7

EXHIBIT 7

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FILED

Oct 9 5 01 PM '00

Shirley B. Parraguirre
CLERK

JOC
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

JUDGMENT OF CONVICTION

WHEREAS, on the 17th day of September, 1998, Defendant, DONTE JOHNSON, entered a plea of Not Guilty to the crimes of COUNT I - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060, 193.165); COUNT II - CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPING AND/OR MURDER (Felony - NRS 199.480, 200.380, 200.310, 200.320, 200.010, 200.030); COUNTS III, IV, V & VI - ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); COUNTS VII, VIII, IX, & X - FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165); and COUNTS XI, XII, XIII & XIV - MURDER WITH USE OF A DEADLY WEAPON (Open Murder) (Felony - NRS 200.010, 200.030, 193.165); and

WHEREAS, the Defendant DONTE JOHNSON, was tried before a Jury and the Defendant was found guilty of the crimes of COUNT I - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060, 193.165); COUNT II - CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPPING AND/OR MURDER (Felony - NRS

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1. The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnaping in the first degree, and the person charged:

(a) Killed or attempted to kill the person murdered;

(b) Knew or had reason to know that life would be taken or lethal force used.

2. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

That on or about the 26th day of July, 2000, the Three-Judge Panel unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, and determined that the Defendant's punishment should be DEATH as to COUNTS XI, XII, XIII & XIV - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the 3rd day of October, 2000, the Defendant being present in court with his counsel, JOSEPH SCISCENTO, Deputy Special Public Defender, and DAYVID J. FIGLER, Deputy Special Public Defender, and GARY L. GUYMON, Chief Deputy District

Attorney, also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdicts and, in addition to the $25.00 Administrative Assessment Fee, the Defendant is sentenced as follows:

COUNT I - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for BURGLARY WHILE IN POSSESSION OF A FIREARM;

COUNT II - a Maximum term of SEVENTY-TWO (72) months with a Minimum parole eligibility of SIXTEEN (16) months in the Nevada Department of Prisons for CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPPING AND/OR MURDER, to run consecutive to Count I;

COUNT III - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for ROBBERY plus an equal and consecutive Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count II;

COUNT IV - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for ROBBERY plus an equal and consecutive Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count III;

COUNT V - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for ROBBERY plus an equal and consecutive Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count IV;

COUNT VI - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for ROBBERY plus an equal and consecutive Maximum term of ONE HUNDRED EIGHTY (180) months with

a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count V;

COUNT VII - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for FIRST DEGREE KIDNAPPING plus an equal and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count VI;

COUNT VIII - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for FIRST DEGREE KIDNAPPING plus an equal and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count VII;

COUNT IX - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for FIRST DEGREE KIDNAPPING plus an equal and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count VIII;

COUNT X - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for FIRST DEGREE KIDNAPPING plus an equal and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count IX;

COUNT XI - DEATH for FIRST DEGREE MURDER plus an equal and consecutive DEATH for USE OF A DEADLY WEAPON, and pay $33,605.95 Restitution jointly and severally with co-offenders Sikia Lafayette Smith and Terrell Cochise Young;

COUNT XII - DEATH for FIRST DEGREE MURDER plus an equal and consecutive DEATH for USE OF A DEADLY WEAPON;

COUNT XIII - DEATH for FIRST DEGREE MURDER plus an equal and consecutive DEATH for USE OF A DEADLY WEAPON;

COUNT XIV - DEATH for FIRST DEGREE MURDER plus an equal and consecutive DEATH for USE OF A DEADLY WEAPON.

Credit for time served 776 days.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 17 day of October, 2000, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE
JEFFREY D. SOBEL

DA#98-153154X/kjh
LVMPD EV#9808141600
BURG W/WPN; CONSP ROBB/ KIDNAP/MURDER; 1° KIDNAP W/WPN; 1° MURDER W/WPN - F

EXHIBIT 8

EXHIBIT 8

ORIGINAL

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 36991

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APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No. 36991

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APPELLANT'S OPENING BRIEF

STATEMENT OF THE ISSUES

1. The Trial Court Erred in Denying Appellant's Motion to Suppress Evidence Illegally Seized.

2. The Trial Court Erred in Allowing the Prosecution to Admit Prejudicial Evidence of Other Weapons.

3. Fundamental Fairness and Due Process Support Appellant's Claim that a Defendant Should be Allowed to Argue Last in the Penalty Phase of a Capital Case.

4. The Penalty Phase of Appellant's Trial Should Have Been Bifurcated Into Two Separate and Distinct Procedures.

5. It Was Error for the Trial Court to Deny Appellant's Request for an Evidentiary Hearing Grounded Upon Allegations of Private Communication With a Juror and Possible Exposure of That Juror to Media Coverage of the Trial.

6. It Was Error For the Trial Court to Deny the Motion for New Trial Where the Prosecutor Offered an Inconsistent Theory and Facts Regarding the Crime and When the Court Failed to Inquire Regarding the Circumstances of a Victim Family Member Being in the Restricted Area of the Jury Lounge.

SPECIAL PUBLIC DEFENDER

CLARK COUNTY NEVADA

7. The Three-Judge Panel Procedure For Imposing a Sentence of Death is Unconstitutional Under the Due Process Guarantee of the Federal Constitution Pursuant to the Precedent Set Forth by the United States Supreme Court in **Apprendi v. New Jersey**.

8. The Three-Judge Panel Sentencing Procedure is Constitutionally Defective.

9. The Absence of Procedural Protections in the Selection and Qualification of the Three-Judge Jury Violates the Appellant's Right to an Impartial Tribunal, Due Process and a Reliable Sentence.

10. Use of Nevada's Three-Judge Panel Procedure to Impose Sentence in a Capital Case Produces a Sentencer Which is not Constitutionally Impartial and Violates the Eighth and Fourteenth Amendments.

11. The Statutory Reasonable Doubt Instruction is Unconstitutional.

12. The Trial Court Erred in Denying Appellant's Motion to Settle the Record Regarding Possible Failure of the Two Appointed Panel Judges to Read the Transcripts of the Guilt Phase of Appellant's Trial.

13. The Trial Court Abused its Discretion When it Held Fifty-Nine (59) Off the Record Bench Conferences Thus Depriving Appellant of a Complete Record For Purposes of Direct Appeal and Post-Conviction Habeas Relief.

STATEMENT OF THE CASE

On or about September 2, 1998, Donte Johnson, Appellant herein, was charged by Grand Jury Indictment with one (1) count of burglary while in possession of a firearm; four (4) counts of murder with use of a deadly weapon (open); four counts of robbery with use

of a deadly weapon, and four (4) counts of first degree kidnapping with use of a deadly weapon in violation of Nevada Revised Statutes, NRS 205.060, 193.165, 200.010, 200.030, 193.165, 200.310, 200.320, 193.165, respectively in connection with the shooting deaths of Matthew Mowen, Jeffrey Biddle, Tracey Gorringe, and Peter Talamantez which occurred in Las Vegas, Nevada on or about August 14, 1998.

On or about September 8, 1998, Appellant appeared before the Honorable Jeffrey Sobel, District Court Judge, Eighth Judicial District Court, Department V for initial arraignment in this case denominated C153154. The prosecutor advised the State will file a Notice of Intent to Seek the Death Penalty. Prior to the court's canvassing of Appellant, defense counsel requested the matter be continued until the transcript of the grand jury proceedings were received.

On September 16, 1998, in open court, neither Appellant or counsel present, the prosecutor filed a superseding Indictment which added an additional charge; conspiracy to commit robbery and/or kidnapping and/or murder in violation of NRS 199.480, 200.380, 200.310, 200.320, 200.010, 200.030 respectively.

On September 17, 1998, Appellant appeared for continued arraignment, entered a plea of not guilty and waived the sixty day rule. The court granted counsel's request for twenty-one days from the file stamp date of the grand jury transcripts for filing of a writ.

On October 8, 1998, the trial court denied Appellant's motion to set bail.

On February 25, 1999, upon inquiry from the court, Appellant withdrew his proper person motion to dismiss counsel and appoint

outside counsel.

On March 23, 1999, Appellant filed a proper person motion with the court, seeking to have his counsel file the motions listed therein. Appellant also filed a motion a successive motion, in proper person, to dismiss counsel and appoint alternate counsel.

On April 12, 1999, with no deputy district attorney present, the court entertained Appellant's proper person motion to dismiss counsel and appointment of alternate counsel, and denied the motion.

On May 17, 1999, upon inquiry from the court, Appellant stated he wanted to withdraw his proper person motion to proceed with co-counsel and investigator.

On June 29, 1999, the trial court granted defense counsel's motion to continue trial grounded on recent evidence of a new confidential informant, and a new allegation of murder which resulted in counsel not being ready for trial.

On January 6, 2000, the trial court entertained an evidentiary hearing on Appellant's motion to suppress evidence. The court set a briefing schedule and continued the matter.

On March 2, 2000, the court issued its ruling on pre-trial motions pending. The court denied the following motions: Appellant's motion to argue last at the penalty phase, for disqualification from jury venire of all potential jurors who would automatically vote for the death penalty if Appellant found guilty of capital murder, disclosure of exculpatory evidence pertaining to impact of Appellant's execution upon victim's family members, prohibit use of peremptory challenges to exclude jurors who express concern about capital punishment, preclude evidence of alleged co-conspirator statements, disclosure of any disqualification of district attorney, to require

prosecutor to state reasons for exercising peremptory challenges, change of venue, to dismiss State's notice of intent to seek death penalty on ground Nevada death penalty statute, unconstitutional for inspection of police officer's personnel files, in limine for order prohibiting prosecutor misconduct in argument, in limine to prohibit any reference to the first phase as the "guilt phase", to apply heightened standard of review and care as State is seeking death penalty, in limine to preclude the introduction of victim impact evidence, to bifurcate penalty phase, in limine to prevent the State from telling complete story, Appellant's proper person motion to disqualify the court without prejudice.

The court continued the motion to suppress illegally seized evidence, refused to rule on the motion to authenticate and federalize all motions, objections, etc., continued the motion to preclude evidence of alleged co-conspirator statements, the motion in limine to preclude evidence of other guns, weapons and ammunition not used in the crime, the motion in limine regarding co-defendant's sentences; and in regard to the motion for discovery and evidentiary hearing regarding the manner and method of determining in which murder cases the death penalty will be sought the court directed the State to provide this information to defense counsel if it exists. The court granted the motion in limine to preclude evidence of witness intimidation. The court directed counsel to physically meet and agree upon jury instructions prior to trial.

On April 18, 2000, the court denied Appellant's motion to suppress evidence seized by police in a warrantless search.

On June 1, 2000, the court, after entertaining argument, denied Appellant's motion to preclude evidence of alleged co-

conspirators statement.

On or about June 5, 2000, jury trial commenced before the Honorable Jeffrey Sobel, District Court Judge.

On or about June 9, 2000, the jury returned a verdict of guilty on all thirteen (13) counts.

On June 13, 2000, the penalty phase began. The jury began verdict deliberation on June 15, 2000; two notes were received from the jury that date. On June 16, 2000, a hung jury was declared.

On July 13, 2000, the court denied Appellant's motion for a new trial.

On July 20, 2000, the court denied Appellant's motion for imposition of life without the possibility of parole as well as his request for a statistical analysis of how the two other judges for the three judge panel were picked.

On July 24, 2000, the three-judge panel assembled consisting of the Honorable Judges: Jeffrey D. Sobel, Michael R. Griffin, and Steve Elliot. On the record the prosecutor disclosed the inducement regarding Charla Severs and defense counsel stated his objection regarding the constitutionality of the three-judge panel. On July 28, 2000, the three-judge panel, having found that the aggravating circumstances or circumstances outweigh any mitigating circumstance or circumstances imposed a sentence of death as to counts XI through XIV, murder of the first degree with use of a deadly weapon.

STATEMENT OF FACTS

SYNOPSIS

The three bedroom single family residence located at 4825 Terra Linda in Las Vegas was occupied by Tracey Gorringe, age 21, Matthew Mowen, age 19, and Jeffrey Biddle, age 19. It was a party

place for many young people where they would recreate, drink beer and use drugs.

On August 14, 1998, around 6:00 p.m. in the evening, Justin Perkins went to the Terra Linda residence. The gate to the yard was open and the door to the house was ajar. When Perkins pushed the door open he saw Gorringe, Mowen and Biddle lying on the blood covered floor. Their hands were bound behind their backs with duct tape, their ankles were bound. There was blood everywhere.

Perkins ran to the neighbor's house, 911 was called. Paramedics and the police arrived. The three young men were pronounced dead. The police in securing the crime scene found the deceased body of Peter Talamantez in the next room. Like the others, he was bound with duct tape, hands behind his back, ankles bound and blood about his head. Like the others, he had a gunshot wound in the back of his head.

The house had been ransacked. Crime scene analysts found that there was no forced entry into the home. Next to the bodies of each of the young men were their empty, opened wallets. No paper currency was found in the house.

In the front room was an entertainment center, the television askew, stereo shifted, patch cords hanging, no VCR, cords and miscellaneous items for a playstation, but no playstation.

CSA Grover lifted a fingerprint from a Black and Mild, three by five inch cigar box. Cigarette butts found lying near the deceased are collected and preserved. Four .380 empty cartridge cases were retrieved, each near the body of one of the victims as well as some bullet fragments.

The fingerprint found on the Black and Mild cigar box

matched those of Appellant, Donte Johnson. The DNA from the cigarette butts was also from Appellant.

The mother of Tod Armstrong owned, but did not reside in a home at 4812 Everman Drive, Las Vegas. This property was a few blocks from the Terra Linda residence. Tod Armstrong, Ace Hart and Bryan Johnson lived in the house. Armstrong, Hart and Johnson used drugs. In late July, early August, Ace Hart brought Appellant, Appellant's girlfriend, Charla Severs, and Appellant's Friend Terrell Young to the Everman house to stay.

The week prior to the homicides Matthew Mowen came over to the Everman residence and attempted to buy drugs from Appellant. Mowen said, in front of Appellant, Armstrong, Hart and Young that they made a lot of money while on tour with the Phish rock group by selling snack food and drugs.

Prosecution witness Charla Severs, Appellant's live in girlfriend at the time of these events, lived with Appellant at the Thunderbird and moved with him and Terrell Young to Tod Armstrong's house at the beginning of August. Appellant and Young brought a duffle bag with them to the Everman house. In the bag were handguns, rifles, duct tape and brown gloves.

According to Severs, late on the night of August 13/early morning of August 14th, Appellant and Terrell Young left the Everman residence with the duffle bag. Appellant was wearing black Calvin Klein Jeans. She was asleep when he returned, they had a VCR and a playstation, Appellant had approximately $200 dollars and a pager. He tells her he killed somebody.

Severs, whose storey changed throughout the investigation had been brought back from New York on a material witness warrant and

who was held in custody for an extended period of time, said Appellant told her a boy was out watering the lawn at the Terra Linda house and he made him go inside at gunpoint. He was made to lay down on the floor where there was another boy laying. He and Young taped up the boys laying face down on the floor. A third person showed up and then a fourth. The third was made to lay down on the floor and was also taped. Appellant took the fourth person into the other room, hit him with the weapon and shot him in the back of the head. He said he shot four people.

Tod Armstrong, who showed Appellant and Terrell Young where Matt Mowen's house was saw the VCR, the playstation and a blue pager taken from the Terra Linda residence. Appellant told Armstrong about committing the murders when he returned to the Everman house.

On August 15th, the day after the homicides, Bryan Johnson and Ace Hart came over to the Everman house to get ready for a job interview. Ace Hart was living at Bryan Johnson's but his clothes were at the Everman residence. Appellant allegedly told them he committed the robbery and homicides at Terra Linda taking the money, the VCR, playstation and pager. Appellant and Young buried the pager in the back yard at the Everman residence.

On August 17th, Tod Armstrong, Ace Hart and Bryan Johnson are at the Johnson home. Bryan had an argument with his mother and his father called the police who responded to the residence. Johnson gave them a recorded statement regarding the homicides. Ace Hart gave a statement and Tod Armstrong gave a statement. Armstrong signed a consent to search form for the Everman residence.

The police go to the Everman residence at 3:00 a.m. on August 18th. The SWAT team enters the residence. Appellant, Charla

Severs and a third person are escorted out of the house and handcuffed with flexcuffs.

In the house the police see the VCR and playstation which they impound then find a Black and Mild cigar box in Appellant's belongings. In the master bedroom they find a duffel bag, guns and duct tape. They find a black pair of Calvin Klein jeans. On the back of the jeans, lower portion, Las Vegas Metropolitan Police Department Sergeant Hefner sees eight blood droplets.

In the backyard of the Everman residence, the analyst sees an area that has recently been disturbed. He digs there and recovers two keys from the Thunderbird Hotel and a blue pager.

Lashawnya Wright was the live-in girlfriend of Sikia Smith; she knew Appellant and Terrell Young. She was released from jail on August 12th, 1998. On August 13, 1998, Young and Appellant came to the apartment Wright and Smith shared at the Fremont Plaza Hotel and visited with Smith. They had a duffel bag full of guns. Around 5:00 p.m., Young and Appellant leave. About two hours later they return and again visit with Smith. Much later the three of them leave together. Wright gave Smith her pager saying, "I'll page you if I need you tonight." She paged him throughout the night and Smith never returned the page.

Fourteen hours later, Smith came up the stairs. Appellant and Young remained at the bottom of the staircase. Smith is carrying a VCR and a playstation. Wright hears the three talking about what they had done and Appellant is saying he wants the VCR and pays Smith twenty dollars for it. Young and Smith both wanted the playstation and they argue. Later that day, she saw Smith with a .380 automatic, he sold it.

The next day Wright saw Appellant outside on the street. He stopped at a newsstand and bought the Saturday Review-Journal. The headline read, "Four young men slain in Southeast." Appellant said, "We made the front page" to Smith.

Prints taken from the bottom of the VCR impounded at the Everman residence matched those of Sikia Smith.

Each of the four young men died from a single gunshot wound to the back of the head from close range. Projectile pieces were removed from each skull. Ballistic expert Richard Goode concluded the cartridge cases, all four, were .380 all fired by the same gun. The .380 handgun was never found.

The Eight blood droplets on the black jeans were human blood; the blood of victim Tracey Gorringe. On the inside of the flap which covered the zipper of the black jeans, female epithelial cells were found. Semen was mixed in with the epithelial cells. The majority of the cells in the contaminated stairs were epithelial. DNA analysis of the semen cells returned positive to Appellant.

On June 9, 2000, the jury returned verdicts of count I - burglary while in possession of a firearm (felony) - guilty; count II - conspiracy to commit robbery and/or kidnapping and/or murder (felony) - guilty; count III, IV, V, and VI, robbery with use of a deadly weapon (felony) - guilty; counts VII, VIII, IX, X - first degree kidnapping with use of a deadly weapon (felony) - guilty; counts XI, XII, XIII, XIV - murder with use of a deadly weapon (felony) - guilty.

Penalty phase began on June 13, 2000. Jury deliberation commenced on June 15, 2000. Two notes were received from the jury. First:

> What do we do if someone's belief system has changed to where the death penalty is no longer an appropriate punishment under any circumstances?

The answer from the court:

> To the members of the jury, from Judge Jeffrey D. Sobel, I'm not permitted to answer your question.

The second note:

> What happens if we cannot resolve our deadlock?

On June 16, 2000, outside the presence of the jury, statements and argument regarding the jury notes. Following arguments, the court advised the jury foreperson would be brought into closed courtroom and questioned. The foreperson identified the one juror, number 7, who would not consider the death penalty. Juror number 7 brought into closed courtroom and questioned by the judge regarding the note and his feelings on the death penalty. The court ruled juror number 7 to stay on the jury.

The jury was assembled and questioned by the court regarding the second note. Jury requested to be allowed to continue deliberations.

An additional note was received from the jury:

> We find ourselves stalemated. There does not appear to be any possibility of movement by either side.

The court had the jury brought in and questioned the foreman regarding the note. The jury panel did not disagree. No juror expressed the belief that additional instruction or clarification would assist them.

The jury recessed. Defense counsel argued to the court that the jury was not taking the **Bennett** instruction into consideration, that they could not consider life without and life with possibility

of parole. The request was denied, as was a request for a **Bennett-Allen** charge hybrid.

The jury was recalled and a hung jury was declared.

The verdict, and special verdict forms were made court exhibits at the request of defense counsel.

The Appellant's motion for new trial was denied, as was the motion for imposition of life without the possibility of parole, or, in the alternative, motion to empanel jury for sentencing hearing and/or for disclosure of evidence material to the constitutionality of three-judge-panel procedure, and defense counsel request for a statistical analysis on how the two other judges were picked.

On July 24, 2000, the three-judge-panel assembled consisting of the Honorable Judges Jeffrey D. Sobel, Michael R. Griffin, and Steve Elliot. On July 26, 2000, the second day the judges retired to deliberate at 11:25 a.m. At 1:21 p.m., they returned their verdict having found aggravating circumstances outweighed any mitigating circumstances impose a sentence of death as to counts XI - XIV - murder of the first degree with use of a deadly weapon.

On October 3, 2000, the trial court denied Appellant's motion to set aside death sentence/or motion to settle record. Appellant was adjudged guilty of all counts and sentenced to the maximum term of incarceration on each count, all counts to run consecutive. A sentence of death was imposed on counts XI through XIV. The order of execution and warrant of execution signed and filed in open court, with an automatic stay of execution, timely notice of appeal was filed.

FACTS RELEVANT TO ISSUE ONE

Prior to trial, Appellant filed a motion to suppress

evidence seized from the master bedroom at 4815 Everman on August 18, 1998 on the ground that it was illegally seized. The State filed an opposition. The court, on January 6, 2000, held an evidentiary hearing (A. App., Vol. 6, pp. 1340-1346, 1503; Vol. 7, pp. 1612-1622, 1632-1651, 1723-1726).

The prosecution called Las Vegas Metropolitan Police Department Homicide Detective Thomas Thowsen and Las Vegas Metropolitan Police Homicide Sergeant Ken Hefner. Appellant's girlfriend at the time of the seizure, Charolette Severs and Appellan6t testified in support of the motion (A. App., Vol. 6, pp. 1503-1504).

Thowsen went to the Everman residence on August 18, 1999, at 3:00 a.m. with the purpose of searching the house and expecting to find Appellant. He had a consent to search the house signed by Tod Armstrong (A. App., Vol. 6, pp. 1520-1521).

When Thowsen arrived at the residence the SWAT team was inside the house; Appellant, Charolette Severs, and a third person had been restrained in flexcuffs and were outside of the residence. Appellant was taken into custody for questioning (A. App., Vol. 6, pp. 1510, 1540-1541).

Thowsen had talked to Tod Armstrong, Ace Hart, and Bryan Johnson. He learned that Tod Armstrong lived at the Everman house and that Ace Hart had lived there until about a week or two prior to the interview. He said he also learned that there were some other people that would come and visit the house occasionally.

Detective Buczek was present during the interview of Armstrong at the Las Vegas Metropolitan Police Department Homicide Office. Armstrong said his mother owned the property; she lived in

Hawaii, he lived in the Everman house. Armstrong had the only key to the residence which he gave to Sergeant Hefner. According to Thowsen, Armstrong said Appellant would sometimes come over. Armstrong was specifically asked if Appellant paid rent, he said Appellant did not. Donte did not have a key to the house and would climb in a window. Armstrong said Appellant kept some of his belongings in the living room and a mater bedroom (A. App., Vol. 6, pp. 1511, 1517).

Thowsen said Armstrong did not give him any information that led him to believe Appellant lived at the Everman residence, either permanently or temporarily, that he would just show up sometimes. Thowsen was present, when Sergeant Hefner questioned Appellant, after Appellant was taken out of the Everman residence and cuffed and placed at the curb. Thowsen said Hefner specifically asked Appellant if he lived there and Appellant said he did not (A. App., Vol. 6, pp. 1518-1519).

Thowsen and Buczek interviewed Ace Hart on August 17th at 6:30 p.m., six or seven hours prior to going to the Everman residence. Buczek asked Hart, "Did there come a time when you met some people that eventually moved into the house with you?" Hart's response was, "yeah." Buczek also asked Hart, "Could you tell me what happened when they moved in?" He was referring to Appellant. Thowsen said that Appellant started showing up at the Everman house about a month before August 18th (A. App., Vol. 6, pp. 1522-1524).

On August 17th, in an interview of Tod Armstrong conducted by Thowsen and Buczek, Armstrong was asked if there were some other people living there with him. Armstrong answered "off and on. They weren't really living - off and on, yes. Staying there. They weren't really living there, but they'd come in and out of the house. . . .

Day 1 guess considered living there." They's come and go as they pleased (A. App., Vol. 6, pp. 1525-1526).

Thowsen was told by Armstrong Appellant could be found in the mater bedroom approximately seven hours prior to going to the Everman house. Thowsen had no information that Appellant lived anywhere but at the Everman residence. On August 17th, Thowsen and Buczek interviewed Bryan Johnson. Buczek asked Johnson, "Okay. And would that be during the time period where, uh, uh, Delco and Red were staying?" Johnson indicated that Donte Johnson was staying at the Everman residence. Thowsen knew this before going there.

Thowsen believed that it was Tod Armstrong who told him about a duffle bag containing weapons that belonged to either Young or the Appellant. He did not recall if Armstrong told him that it would be found in the master bedroom (A. App., Vol. 6, pp. 1529-1530, 1532-34, 1537, 1539).

Thowsen did not get a search warrant because he didn't need one. Tod Armstrong signed a consent to search (A. App., Vol. 6, pp. 1543-1544).

Sergeant Hefner supervised and monitored the investigation, he was given a key to the Everman residence by Tod Armstrong who told him it was the only key. He was going to the residence to arrest Appellant; he was not going to let him go. Appellant was placed under arrest for outstanding warrants after homicide took custody of him from the SWAT officers who had placed him in flexcuffs (A. App., Vol. 6, pp. 1558-1561, 1574-1575).

Hefner found a gym bag containing a partial roll of duct tape, a VCR and a handgun adjacent to the television and a pair of black jeans in the living room area of the Everman house. In the

mater bedroom he found several other pair of jeans, including one pair that had what appeared to be bloodstain on it, a rifle and some shoes. He said because this room lacked furniture and looked like a junk room it confirmed to him that no one was living in the bedroom (A. App., Vol. 6, pp. 1570-1572).

Hefner said that he could get a telephonic search warrant very quickly, half an hour, twenty minutes. That if he had any inclination that Appellant resided in the house he would have secured a search warrant (A. App., Vol. 6, pp. 1578-1579).

Charlotte Severs declared a hostile witness by the court, stayed at the Everman residence, sleeping there every night for fourteen days prior to being pulled out of there on August 18th by the SWAT team. Appellant and Johnson slept there with her. She testified that Appellant provided drugs to Tod Armstrong as a way of paying rent to stay in the Everman house. Appellant stayed in the master bedroom and kept the kept the clothes that he had there. There was a lock on the bedroom door which Appellant would only lock the door when "me and him was doing something." Severs kept her clothing and personal things in the master bedroom. She considered that room her space. She had come to the Everman residence to stay there at Appellant's request. Appellant slept at the Everman residence everyone of the fourteen days that preceded August 18th (A. App., Vol. 6, pp. 1585-1588, 1590).

Severs gave a taped statement to the police the night of the 18th. She told them she only stayed there a couple of nights. Tod Armstrong and Ace Hart kept clothes in the master bedroom. They, and others, went into the master bedroom, hang out, use the stereo. She and Donte did not have a key to the house. Tod was home a lot so a

key wasn't needed. Sometimes she would go through the back window. No one slept in the master bedroom except her and Appellant. She considered herself, Appellant and Young living in the master bedroom (A. App., Vol. 6, pp. 1592-1594, 1599-1600).

Appellant, Donte Johnson, testified that he did not recall being asked, while being handcuffed and sitting on the curb, if he lived in the house. He said he was living at the Everman residence on August 18, 1998, had been for close to a month. Appellant said there was one key to the residence. Prior to September 18, 1998, the last time he saw the key was when Tod Armstrong gave the key to him when he was going to his girlfriend's (A. App., Vol. 6, pp. 1604-1606).

In Appellant's reply filed after the hearing, the court was advised of the following:

In the opening statement of the related Sikia Smith trial prosecutor Gary Guymon stated:

> You will also learn that sometime in early July, Donte Johnson and Terrell Young moved into the house there on Everman. (Attached Exhibit "A", Gary Guymon, Trial of Sikia Smith, Transcript, 6/16/99, p. 13).

Further:

> You will learn that Todd Armstrong has not been arrested yet, but you will learn he is a suspect in this case and that he, too, may be subject to prosecution if and when the evidence comes forward and is available." (Exhibit "A", Gary Guymon, Trial of Sikia Smith, Transcript, 6/16/99, p. 23).

(A. App., Vol. 6, pp. 1633-1634).

On April 18, 2000, the court issued it's written decision denying Appellant's motion to suppress, finding Appellant was not a person with an expectation of privacy with respect to the living room

and master bedroom at the Everman residence (A. App., Vol. 7, pp. 1723-1726).

FACTS RELEVANT TO ISSUE TWO

On October 19, 1999, Appellant filed a motion in limine to preclude evidence of other gun and ammunition not used in the crime (A. App., Vol. 3, pp. 743-750).

In the motion Appellant sought to preclude the State from introducing a .30 caliber rifle seized when Appellant fled from a vehicle stopped by police on August 17, 1998, as well as two firearms recovered from a search of the Everman residence on August 18, 1998. These two weapons were a .22 Ruger rifle model 10/22 and a VZOR .50 caliber pistol. The forensic report states that the murder weapon was a .38 caliber. None of the seized guns recovered could fire the .38 caliber bullets (A. App., Vol. 3, p. 745).

Appellant argued in the motion that th guns were not relevant evidence and arguendo that even if relevant it was inadmissible as being prejudicial, confusing or a waste of time under NRS 48.035. Appellant attached to the motion the forensic laboratory reports of Richard Good in support of his statement that the murder weapon was a .38 caliber. Appellant also attached a Review Journal newspaper article and picture that showed prosecutor Guymon holding up two rifles. The caption below the photograph read:

> During closing arguments Monday in the murder trial of Terrell Young, Deputy District Attorney Gary Guymon holds up weapons used in the August 14, 1998, slaying that left four men dead.

Defense counsel argued that the possibility of the mistake and confusion was evident with this picture (A. App., Vol. 3, pp. 746-756).

The State filed an opposition to the motion arguing that the weapons were brought to the Terra Linda residence by Appellant and his accomplices and used during the crime (A. App., Vol. 4, pp. 791-800).

At the November 18, 1999, motion calendar the court addressed the motion asking if there was reason to believe the Ruger and the Enforcer were used by the co-defendants. If so, what was that based upon. He asked for transcripts from the other cases. The prosecutor advised the court that the transcripts were not necessary. Brian Johnson and Charla Severs knew about the guns; both of the co-defendants gave statements indicating the guns were involved. The court stated that it would be satisfied that if they were in that house and that duffle bag left on the night of the alleged crime, they're coming in. The fact they leave the house in the company of the alleged co-defendants and co-perpetrators is going to be enough to get them in for me without a Petrocelli hearing (A. App., Vol. 6, pp. 1341-1352).

On December 2, 1999, the State filed a supplemental opposition asserting that Tod Armstrong, Ace Hart, Charla Severs and Bryan Johnson described the weapons. Also the two prior convicted co-defendants, Sikia Smith and Terrell Young describe them in their voluntary statements (A. App., Vol. 6, pp. 1314-1316).

The State also argued that Charla Severs said they left the Everman house on August 13, 1998, with the duffle bag and that Tod Armstrong said they returned to the Everman residence with it. That the voluntary statement of Sikia Smith and Terrell Young support the position that Appellant brought the bag to the Terra Linda residence (A. App., Vol. 6, pp. 1317-1318).

In Appellant's reply filed November 15, 1999, Appellant

argued that there was no evidence that the guns were used in the murder and noted that the testimony of the co-defendants could not be used (A. App., Vol. 4, pp. 950-955).

On June 1, 2000, the court considered the motion. Defense counsel argued that the State had no proof that the guns were present, they cannot place the guns at the scene of the crime. The court stated:

> If they can place the guns leaving the house that night, going toward the other place, I think they're entitled to do it. And that, to me, is the only issue. Id. at 1817.

The court denied the motion in limine (A. App., Vol. 7, pp. 1813-1818).

FACTS RELEVANT TO ISSUE THREE

In a pretrial motion, Appellant sought to argue last at the penalty phase asserting that due process considerations supported a defendant's right to argue last to the jury; and that **NRS 2001.033**, upon examination, indicates the State's burden is illusory (A. App., Vol. 5, pp. 1058-1062).

The State filed an opposition tot eh motion premised upon NRS 175.141(5) (A. App., Vol. 6, pp. 1386-1388).

On March 2, 2000, the Court denied the motion (A. App., Vol. 7, p. 1670).

FACTS RELEVANT TO ISSUE FOUR

Prior to trial, Appellant filed a pre-trial motion to bifurcate the penalty phase seeking to preclude the introduction of "character" and "bad act" evidence that was not relevant to the statutory aggravating circumstances until such time as the jury had determined whether he was eligible for the death penalty (A. App.,

Vol. 5, pp. 1143-1145).

The prosecution opposed the motion on the ground that a bifurcated penalty phase was unwarranted and that Appellant's concern that character evidence, what was admissible in the penalty phase of a capital murder case may be used to determine his death eligibility was unfounded given the charges in the trial phase (A. App., Vol. 6, pp. 1359-1361).

On March 2, 2000, the court denied the motion (A. App., Vol. 7, p. 1680).

FACTS RELEVANT TO ISSUE FIVE AND SIX

On June 8, 2000, the prosecutor gave his first closing argument to the jury. In the course of his argument he made the following statements:

A. The entertainment center from the Terra Linda home which once housed the VCR that was found in Donte Johnson's residence.

B. Peter Talamantez' pager that's buried in the backyard where Donte Johnson stays.

C. Point number eight, Matt's VCR at Donte's house.

D. Point number nine, Pete's pager at Donte's house. Pager found buried in the backyard of the Everman house where Donte Johnson stayed.

E. Physical corroboration when the pager is buried in the defendant's backyard.

F. Point number nine, gun in Deco's room.

G. Point number twelve -- duct tape in Deco's room. ... and isn't it interesting that there is a partial roll of duct tape recovered from the room where Donte Johnson stays.

H. Somebody - the true killer apparently wore Donte Johnson's pants to the crime scene and then returned those pants to Donte Johnson's

bedroom before the police showed up.

I. Matt's VCR at Deco's house for Donte Johnson to be found not guilty, apparently somebody took Matt's VCR from the Terra Linda and placed it in the home where Donte Johnson stayed.

J. Peter's pager at Deco's house. For Donte Johnson to be found not guilty you must conclude speculate that somebody else buried the pager in Donte's backyard. ...

K. The Ruger in Deco's room. Isn't it interesting that all these witnesses described the guns that Donte had possession of, and sure enough we find the Ruger rifle in his - in his room.

L. And the duct tape in Deco's room. Apparently the true killer, for you to find Donte Johnson not guilty, placed a partial roll of duct tape in Donte Johnson's room before the police showed up.

(A. App., Vol. 13, pp. 3173, 3180, 3181, 3194-95, 3196-97).

When the jury recessed, defense counsel moved for a mistrial or in the alternative, a motion for a new trial on the ground that during closing argument the prosecutor consistently referred to the Everman residence as Appellant's room, Appellant's house, Appellant's yard. However, in response to Appellant's motion to suppress the jeans found in the master bedroom at the Everman residence, the State had argued that he had no legitimate privacy interest. The prosecutor stated that it was not an inconsistent position but was done for the sake of simplicity and the court's ruling that Appellant was not a co-tenant of the house was not inconsistent with the State's position.

The court denied the motion (A. App., Vol. 13, pp. 3203-3204).

B. On June 16, 2000, the court received a note from juror number one which stated: "I have an incident that occurred last week

that I need to bring to your attention as soon as possible." The juror was interviewed in open court outside the presence of the other jurors. She stated that last week when the jury was dismissed and left for the evening they went to the parking garage. Most of the group went to the first elevator; she went to the second elevator due to the location of her vehicle. Juror number 7 came p behind her and startled her. While waiting for the elevator they were talking when the elevator arrived everyone got out except one African American man who had some kind of a bag with him. It was the day of the testimony regarding the duffel bag and the guns. It startled her that he did not get off the elevator but then thought the other juror being there she would get in the elevator. When she got on the elevator she pushed the button for the third floor and asked the other juror what floor he wanted. He said he was on three also. When the elevator stopped at the third floor she got off. The other juror did not. About a minute later the elevator opened again and he got off. She said it was odd that he said he was on three, then stayed on the elevator with the other gentleman and then got off on three later. She indicated she had a fear of the African American (A. App., Vol. 17, pp. 3578, 3997, 4000-4001).

Further, after the jury was dismissed, juror, Kathleen Bruce asked both the State and defense attorneys if the media was referring to her on the previous evenings news broadcast when it related that the "hold out" juror was a woman. Attorney Kristina Wildeveld, whose affidavit was attached to the motion for a new trial, and who had been present when the jurors spoke with counsel stated that she herself had watched the evening news the night before and it contained an account that the jury was hung and that the "hold-out" was a woman juror.

Wildeveld stated that juror Bruce brought this fact out on her own without my prompting or previous discussion. Wildeveld further stated in her affidavit that when counsel for Appellant inquired how she knew what was on television she nervously responded that she had discussed the matter with her husband. It appeared to Wildeveld that juror Bruce had full and complete personal knowledge of the entire news account (A. App., Vol. 15, pp. 3578-79).

Juror Connie Patterson also implied that she had been discussing the matter and was aware of the media accounts (A. App., Vol. 15, pp. 3572- 3579).

On June 16, 2000, it was brought to the attention of the court that a member of one of the victim's families was in the jury lounge where a magazine was found. The court said it was a non-issue given that there was a controversy in the County regarding the death penalty and it had been the subject of newspaper articles for the past week concerning the death penalty practice in Nevada.

Nothing further occurred regarding the incident with the exception of defense counsel's question as to why a victim's family member would be in the jury lounge. The court stated there was no real segregation of the jurors from witnesses, family members or lawyers. In the new courthouse, this would be remedied (A. App., Vol. 15, pp. 3590-3592).

On June 23, 2000, Appellant filed a motion for new trial and a request for an evidentiary hearing (A. App., Vol. 15, pp. 3570-3593).

On June 30, 2000, the State filed an opposition to the new trial motion.

On July 10, 2000, the Appellant's reply was filed (A. App.,

Vol. 15, pp. 3603-3615; Vol. 17, pp. 4096-4100).

On July 13, 2000, the trial court denied the motion (A. App., Vol. 17, pp. 4175-4176).

FACTS RELEVANT TO ISSUES SEVEN, EIGHT, NINE AND TEN

The aggravating circumstances alleged by the prosecution in seeking imposition of a sentence of death after the court struck **NRS 200.033(3)** were:

> The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnaping in the first degree, and the person charged:
>
> (a) Killed or attempted to kill the person murdered;
>
> (b) Knew or had reason to know that life would be taken or lethal force used.

NRS 200.033(4).

> The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

NRS 200.033(5).

> The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

NRS 200.033(12). (A. App., Vol. 14, pp. 3274; Vol. 19, pp. 4433-34).

On July 10, 2000, after a mistrial in the penalty phase, Appellant filed a "motion for imposition of life without the possibility of parole sentence; or, in the alternative, motion to empanel jury for sentencing hearing and/or for disclosure of evidence

material to constitutionality of three judge panel procedure."

The motion presented four (4) arguments. First, the United States Supreme Court decision in **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) renders unconstitutional all sentencing schemes where the legislature has vitiated the irrevokable responsibility of a jury to find or utilize the percipient elements necessary to impose a maximum sentence after conviction on the underlying offense. Second, the lack of any statutory or common law procedures for the three judge panel creates a jurisdictional ambiguity that renders the sentencing body powerless to perform the sentencing functions; the absence of true random appointment of the two additional district court judges renders the appointment process unconstitutional. Third, the oath to follow the law does not encompass the personal bias and feelings that are paramount to establish a trier of fact in accordance with the standards mandated by **Morgan v. Illinois**, 504 U.S. 719, 112 S. Ct. 2222, 119 L.Ed.2d 492 (1992). Fourth, the duty to have a reasoned moral response as a guide post for sentencing is violated by the Nevada three-judge panel scheme rendering it unconstitutional (A. App., Vol. 17, pp. 4019-4095).

On July 17, 2000, the State filed an opposition of five responsive arguments. First, the United States Supreme Court did not declare the three-judge panel process for imposing a sentence of death unconstitutional under the Due Process Clause in **Apprendi**, supra. Second, the three-judge panel process defined in **NRS 175.556** is not ambiguous. Third, Nevada's process for the selection of judges of a three-judge panel for capital murder sentencing does not violate a defendant's right to an impartial tribunal. Fourth, the three-judge panel in capital sentencing does not violate the Eighth or the

Fourteenth Amendments. Fifth, the defendant has no right to voir dire any member of the panel or the Nevada Supreme Court (A. App., Vol. 17, pp. 4132-4147).

On July 18, 2000, Appellant filed a reply to the State's opposition. The motion was heard by the court on July 20, 2000 (A. App., Vol. 17, pp. 4153-4158, 4180-4190).

The court denied the motion in its entirety as well as the motion to stay then gave his analysis of **Apprendi**, supra (A. App., Vol. 17, pp. 4180-4184).

FACTS RELEVANT TO ISSUE ELEVEN

On June 8, 2000, defense counsel objected to the reasonable doubt instruction; and proffered an additional instruction, marked A, which the court did not believe to be proper under established law. The statutory instruction was given (A. App., Vol. 10, p. 2543; Vol. 13, pp. 3148, 3150).

FACTS RELEVANT TO ISSUE TWELVE

On September 5, 2000, Appellant filed a motion to set aside death sentence or in the alternative, motion to settle record pursuant to the Nevada Supreme Court decision in **Hollaway v. State**, 116 Nev. Adv. Op. No. 83, 6 P.3d 987 (Aug. 23, 2000); arguing that the three-judge panel, as a sentencing body had an absolute obligation to review and consider all evidence from the guilt phase. Further that it was error for Judge Elliot to fail to review the transcripts in their entirety (A. App., Vol. 19, pp. 4586-4592).

The motion was grounded on the statement of the trial court on July 24, 2000, to defense counsel's request that the (two other) judges read the transcripts of the guilt phase. The trial court stated that Judge Griffin indicated he was going to read the

transcript. There was no statement regarding Judge Elliot (A. App., Vol. 18, pp. 4257-4258).

On September 15, 2000, the State filed an opposition. On October 2, 2000, the Appellant filed a reply to the state's response (A. App., Vol. 19, pp. 4601-4610, 4614-15).

On October 3, 2000, the court denied the motion stating:

> The motion is denied. With reference to the record, it's going to stand the way it is. I don't know whether the judges read the transcript or not. As the record already indicates, they had ample opportunity and expressed the desire to read the record. I know that because there had been a mis-communication in the Public Defender's Office, that we had to chop the hearing up, that the judges actually had more time than usual to read the transcript.
>
> I don't read Holloway the way, apparently, Mr. Sciscento and you do, Mr. Figler. But Mr. Sciscento authored the Points and Authorities. We have had, in this state for many years, remands for penalty hearings and three-judge panels where I would assume that neither the new jury who is only hearing the penalty phase - and this has been for many decades - never heard all of the guilt evidence. And I think probably the judges here had more of an examination of the record than normally would take place either on a remand or before a three-judge panel. For those reasons and the reasons stated in the opposition, it's denied (A. App., Vol. 19, pp. 4638-4639).

The jury found twenty-three (23) mitigating factors, the three-judge panel found two (2) (A. App., Vol. 19, pp. 4435-36, 4439, 4444, 4591-92).

FACTS RELEVANT TO ISSUE THIRTEEN

The trial court held fifty-nine (59) unrecorded bench conferences during the guilt and penalty phases of the trial (A. App., Vol. 8, pp. 1855, 1888, 1911, 1916, 1933, 1941, 1948, 1961, 1989, 2029, 2036, 2081; Vol. 9, pp. 2306, 2340, 2341-42; Vol. 10, pp. 2396,

2461, 2469, 2516; Vol. 13, pp. 3024, 3051, 3053, 3056, 3063, 3108, 3133, 3144, 3146, 3198; Vol. 14, pp. 3298, 3310, 3328, 3335, 3345, 3368; Vol. 15, pp. 3379, 3389, 3396, 3406, 3423, 3440, 3454, 3465, 3468, 3469, 3499, 3520; Vol. 16, pp. 3649, 3675, 3685, 3816, 3823, 3839, 3845, 3847, 3853, 3862).

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE ILLEGALLY SEIZED.

The trial court erred in finding that Donte Johnson was not a person with an expectation of privacy with respect to the master bedroom of the Everman residence. The capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. See, **Rakas v. Illinois**, 439 U.S. 128, 99 S. Ct. 421, 58 L.Ed.2d 387 (1978) citing, **Katz v. United States**, 389 U.S. 347, 353, 88 S. Ct. 507, 512, 19 L.Ed. 576 (1967).

Further, in **Rakas**, supra, the court explained:

> [T]he holding in Jones can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his "interest" in those premises might not have been a recognized property interest at common law. See Jones v. United States, 362 U.S. at 261, 80 S. Ct. at 731.

Id. at 430.

Donte Johnson had been living at the Everman residence for two weeks, he had no other residence, all his belongings were there.

A search of a person's effects without a warrant ins generally "per se unreasonable" under the Fourth Amendment to the United States Constitution. See, **Katz**, supra. An exception to the warrantless search is consent by a person with authority, **Schneckloth v. Bustamonte**, 412 U.S. 218, 93 S. Ct. 2041, 36 L.Ed.2d 854 (1973).

In order for a third party to give consent to a search of the defendant's property the consenting party must have joint access or control over the property for most purposes, so that the third party can consent to the search in his own right. **U.S. v. Matlock**, 415 U.S. 164, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974).

In **Matlock**, the Supreme Court declared:

> [T]hat common authority is not to be implied from mere property interest a third-party has in the property, for the authority which justifies the third-party consent does not rest upon the law of property, but rather on mutual use of the property by persons generally having joint access or control for most purposes so that it is reasonable to recognize that any of the co-habitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched. **Matlock**.

In the case of **United States v. Duran**, 957 F.2d 499 (7th Cir. 1992) the Court of Appeals held:

> [I]t would be incorrect to treat spouses ... the same as any two individuals sharing living quarters. Two friends inhabiting a two-bedroom apartment might reasonably expect to maintain exclusive access to their respective bedrooms, without explicitly making this expectation clear to one another. ... In the context of a more intimate marital relationship, the burden upon the government [to prove common authority] should be lighter. **U.S. v. Duran**.

Relationships involving roommates or cotenant generally receive more protection than those involving intimate relationships

like husband and wife and child parents.

In **State v. Hacker**, 209 S.E.2d 569 (1974), the court held that an individual who was presumably the landlord of the defendant, who had consented to the warrantless search of the accused's bedroom in a house, was shown not to have common authority over the bedroom searched and therefore could not properly consent to a search.

In **State v. Warfield**, 198 N.W. 854 (1924), the Court held that a warrantless search of the accused's room in a rooming house and the seizure of a flashlight, reflector, clothing, jewelry, and other articles of personal property were held to be invalid and the evidence therefore inadmissible in a prosecution for burglary where the only authority the officers had for searching the room was the rooming housekeeper's consent. In **State v. Tucker**, 574 P.2d 1295 (Ar. 1978), the Court held that a warrantless search was invalid and the evidence seized therefore inadmissible at the Defendant's prosecution for murder, where the accused had exclusive possession of the bedroom and the sole authority. The police had to conduct the search emanated from the consent of the accused's cotenant.

In **Tucker**, the Court recognized that the bedroom was used as a sleeping quarter and a storage room by the accused; there was no evidence that it was used for any other purposes. As such, the court related, even though the consenting cotenant was a co-owner of the house, it could not be held that she had joint access or control within the meaning of **Matlock**.

In the case of **State v. Matias**, 451 P.2d 257 (1969) the Court held that a warrantless search of the bedroom of an overnight guest consented to by the tenant of the premises, was invalid, and the consent of the tenant operated only to waive the tenant's own right

to protection from an unreasonable search and seizure.

In the case of **People v. Douglas**, 213 N.W.2d 291 (1973), the court held that a confession was invalid when the confession was based upon illegally seized evidence when the police searched a bedroom of a co-tenant based on the consent to search of the co-tenant.

Donte Johnson lived at the Everman residence, in lieu of rent he gave Tod Armstrong drugs. He had an expectation of privacy in the bedroom. Armstrong lacked the authority to allow a search of the bedroom. The search violated Mr. Johnson's right to privacy. This right is secured in the Fourth Amendment of the United States Constitution. The police violated Donte Johnson's rights, when they relied upon the consent of a co-tenant of the house who did not have the authority to consent to a search of Appellant's bedroom which he did not share. The police had an opportunity to secure a search warrant and did not do so. The trial court was wrong when it found that Appellant was not a person with an expectation of privacy in the bedroom. The motion to suppress should have been granted. Appellant is entitled to relief.

II.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO ADMIT PREJUDICIAL EVIDENCE OF OTHER WEAPONS.

The trial court erred in allowing the State to adduce into evidence two assault rifles that had no probative value. See **U.S. v. Hitt**, 981 F.2d 422 (1992).

The State sought to introduce the weapons alleging that they were used the night of the murder. There was no evidence that these guns were ever used. The State in its arguments to the court repeatedly emphasized voluntary statements given by Sikia Smith and

Terrell Young, original co-conspirators, that described the weapons they took to the residence where the victims were killed. They gave no testimony and were not cross-examined by the defense. It would be improper to base a decision on their previously given statements. Charla Severs did not see the guns that were used that night, she did not see the guns that were allegedly in the duffle bag; she never looked into the bag the next day to confirm that there were indeed guns.

In **U.S. v. Tai**, 994 F.2d 1204, the court addressed the issue of whether it was proper for the prosecution to present guns allegedly used in the commission of the crime where there was no evidence that those guns presented were actually used.

> Clearly the guns had no proper probative value. Although both Suk Lee and Jung Lee testified that they had seen Tai carrying a gun, neither of them described the gun nor in any way compared it to the guns displayed during closing argument. Thus, as of the time the guns were admitted, no connection had been drawn between Tai's possession of them and his acts of extortion. Nor could the guns have been admitted as conditionally relevant, for no further testimony was to be heard in the case. And, although the government was kind enough to explain, while displaying the guns to the jury, that Tai "carried them when he was with Suk Kyong Lee" (cite omitted) no such evidence had been introduced and closing argument was not the time to introduce it. United State v. Van Whye, 965 F.2d 528, 533 (7th Cir. 1992).
>
> So the guns were relevant only to the extent they showed Tai to be the kind of person who would carry such weapons, thus making it more likely that he was the kind of person who committed extortion. Yet for that purpose, of course, the guns were not admissible. Fed. R.Civ. P. 404(b). Tai at 1209. (Emphasis added).

Id. at 1211.

The instant matter is similar to **Tai**, supra, in that the

prosecution could not show that the assault guns were used, yet the jury was made to believe that the guns were, in fact, used in the crime. **NRS 48.035** requires a weighing of the probative value against its potential for undue prejudice. It cannot be argued that the introduction of the assault rifles were relevant only to the extent that they showed Appellant to be the kind of person who would own such weapons making it more likely, in the minds of the jurors that he was the kind of person who would commit the crime.

The trial court erred in allowing the State to enter the assault weapons into evidence where there was no evidence that the guns were actually used. Appellant is entitled to relief.

III.

FUNDAMENTAL FAIRNESS AND DUE PROCESS SUPPORT APPELLANT'S CLAIM THAT A DEFENDANT SHOULD BE ALLOWED TO ARGUE LAST IN THE PENALTY PHASE OF A CAPITAL CASE.

In **State v. Jenkins**, 15 Ohio St.3d 164, 214-215 (1984), the Ohio Supreme Court stated that the decision to allow the defense to open and close final argument in the penalty phase is within the sound discretion of the trial court. **Jenkins**, makes it clear that the trial court properly may allow the defense the right to argue last to the jury.

Due process considerations support allowing the defense to argue last. A case of this magnitude deserves the maximum judicial consideration to guarantee a fair trial. The United States Supreme Court has recognized that "death is a different kind of punishment, than any other which may be imposed in this country." **Gardner v. Florida**, 430 U.S. 349 (1977). It is clear that a higher standard of due process is required in death cases than other cases because of the

severity and finality of the punishment which may be involved. The Supreme Court, in considering the scope of due process stated:

> [I]t is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special consideration.

Griffin v. Illinois, 351 U.S. 12, 28 (1956).

Furthermore, the Court has repeatedly held:

> [T]he extent to which procedural process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss, ..."

Goldberg v. Kelly, 397 U.S. 254 at 262-263 (1970), quoting **Joint Anti-Fascist Refugee Committee v. McGrath**, 341 U.S. 123, 168 (1951) (Frankfurther, J. concurring).

NRS 200.033 states that the aggravating circumstances of which the accused was convicted must outweigh the mitigating factors. It might at first glance appear that the prosecution actually bears the burden at the penalty phase. However, a more careful examination of the practical application of the statute indicates that the burden is largely illusory. Once the prosecution proves the specifications, it need do nothing at the penalty phase. If the defense chooses not to put on any mitigating evidence, a death sentence will result.

The Defendant has some burden, and bears at least some of the burden in arguing that he should be allowed to live. If Defendant fails to present mitigating factors to create a reasonable doubt in the minds of the jurors, he may well lose his life. The defense should be allowed to argue last since he is the party who would be defeated if no evidence was offered on either side. At least two other jurisdictions have sought to alleviate the inherent unfairness

in allowing the prosecution to speak last before the jury. The Kentucky statute which prescribes a penalty phase hearing states:

> The prosecuting attorney shall open and the defendant shall conclude the argument.

Ky.Rev.Stat.Section 532.025(1)(A).

California has reached the same result through judicial interpretation. In **People v. Bandhauer**, 66 Cal.2d 524, 530-531 (1967), the court stated:

> Equal opportunity to argue is ... consistent with the Legislature's strict neutrality in governing the jury's choice of penalty ... Accordingly, hereafter the prosecution should open and the defense respond. The prosecution may then argue in rebuttal and the defense close in surrebuttal.

The essential fairness of this position has application in Nevada. The defense should open with mitigation and the prosecution may then counter. The prosecution should then make a closing statement, followed by the closing statement of the defense.

Appellant was denied due process and is entitled to relief.

IV.

THE PENALTY PHASE OF APPELLANT'S TRIAL SHOULD HAVE BEEN BIFURCATED INTO TWO SEPARATE AND DISTINCT PROCEDURES.

Character or bad act evidence must not be used to influence or determine whether a defendant is death eligible. Such evidence is not relevant to the statutory aggravating circumstances and should not be heard by jurors prior to a determination of a defendant's death eligibility.

The "aggravating circumstances/mitigating factors" scheme for determining death eligibility is essential to the process of narrowing the class of defendants who are death eligible. See, **Arave v. Creech**, 507 U.S. 463, 470-74, 113 S. Ct. 1534, 123 L.Ed.2d 188

(1993); **Middleton v. State**, 114 Nev. 1089, 968 P.2d 296, 314 (1998). Character evidence must not be used to determine whether a defendant is death eligible. It is of questionable value in establishing an appropriate penalty. See, **Allen v. State**, 99 Nev. 485, 665 P.2d 238 (1983).

Evidence presented pursuant to **NRS 175.552(3)** can influence the decision to impose death, but this comes after the narrowing to death eligibility has occurred. **Middleton**, supra at 315.

Support for a bifurcated penalty phase is also found in a recent decision by the United States Supreme Court. In **Buchanan v. Angelone**, 522 U.S. 269, 118 S. Ct. 757, 760, 139 L.Ed.2d 702 (1998), the court explained as follows:

> Petitioner initially recognizes, as he must, that our cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. Tuilaepa v. California, 512 U.S. 967, 971, 114 S. Ct. 2630, 2634, 129 L.Ed.2d 750 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. Id. at 971, 114 S. Ct. at 2634. In the selection phase, the jury determines whether to impose a death sentence upon an eligible defendant. Id. at 972, 114 S. Ct. at 2634-2635.

Appellant is not unmindful that this Honorable Court has consistently held that **NRS 175.141**, which mandates that counsel for the Office of the District Attorney must open and conclude argument, and **NRS 200.030(4)** are constitutional. See, **Witter v. State**, 112 Nev. 908, 921 P.2d 886 (1996).

Trial counsel preserved the issue for appeal. See, **Riddle v. State**, 96 Nev. 589, 613 P.2d 1031 (1980).

It is the position of Appellant that the failure to

bifurcate the penalty phase of a capital trial violates procedural due process and fundamental fairness in violation of the Fourteenth Amendment to the United States Constitution. Appellant includes this issue for reconsideration by this Court and for possible federal review.

V.

IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING GROUNDED UPON ALLEGATIONS OF PRIVATE COMMUNICATION WITH A JUROR AND POSSIBLE EXPOSURE OF THAT JUROR TO MEDIA COVERAGE OF THE TRIAL.

"Any private communication with a juror in a criminal case on any subject connected with the trial is presumptively prejudicial . . . The burden is on the respondent to show that these communications had no prejudicial effect on the jurors . . . A hearing before the trial court is the proper procedure to the sentence of death should be vacated and the case remanded to the District Court with directions to hold a hearing to determine whether the incidents complained of was harmful to Appellant, and if after hearing it is found to have been harmful, to grant a new penalty hearing before a newly empaneled jury.

Appellant, in the motion for new trial/request for evidentiary hearing, alleged prejudice as a result of the juror misconduct. A supporting Affidavit of Deputy Special Public Defender, Kristina Wildeveld, reciting the statements made by jurors Kathleen Bruce and Connie Patterson demonstrating both private communication and media coverage of the trial was attached. The trial court abused its discretion by failing to hold an evidentiary hearing on the affidavit of attorney Wildeveld (A. App., Vol. 15, pp. 3570-3579).

The United States Constitution, Amendment VI, right to a

jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. A defendant's **United States Constitution, Amendment VI** rights are violated even if only one juror was unduly biased or improperly influenced. See, **Irvin v. Dowd**, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L.Ed.2d 751 (1961); **United States v. Keating**, 147 F.3d 895, 903 (9th Cir. 1998).

Whether a defendant is prejudiced by juror misconduct is a fact question to be determined by the trial court. . . . See, **Rowbottom v State**, 105 Nev. 472, 779 P.2d 934 (1989); **Barker v. State**, 95 Nev. 309, 313, 594 P.2d 719, 721-22 (1979). The trial court herein failed to make that determination. The sentence of death should be vacated and the matter remanded to the District Court for a hearing in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not it was prejudicial.

VI.

IT WAS ERROR FOR THE TRIAL COURT TO DENY THE MOTION FOR NEW TRIAL WHERE THE PROSECUTOR OFFERED AN INCONSISTENT THEORY AND FACTS REGARDING THE CRIME AND WHEN THE COURT FAILED TO INQUIRE REGARDING THE CIRCUMSTANCES OF A VICTIM FAMILY MEMBER BEING IN THE RESTRICTED AREA OF THE JURY LOUNGE.

The court should have found that no new significant evidence was adduced to support the inconsistent theories taken between the prosecution in response to Appellant's motion to suppress the black jeans seized during the search of the Everman residence wherein the State asserted that Appellant did not live at the Everman residence and lacked standing to contest the search, and its closing argument to the jury wherein it consistently referred to the residence, bedroom and yard as being those of the Appellant. See, **Thompson v. Calderon**,

120 F.3d 1045 (9th Cir. 1997) (A. App., Vol. 7, pp. 1612-1622; Vol. 13, pp. 3173-3180, 3181, 3194-95, 3196-97, 3202). It was improper to allow the prosecutor to change position in the same trial. The court should have granted the motion for a new trial.

The court further abused its discretion in failing to make inquiry upon learning that a family member of one of the victims was in the clearly marked, restricted jury lounge area; calling it a "non-issue." Appellant was charged with four homicides and the State was seeking imposition of the death penalty; the court had a duty to ascertain whether there had been contact or influence upon the jurors and whether it was prejudicial. See, **Isbell v. State**, 97 Nev. 222, 626 P.2d 1274 (1981). Appellant is entitled to relief.

VII.

THE THREE JUDGE PANEL PROCEDURE FOR IMPOSING A SENTENCE OF DEATH IN UNCONSTITUTIONAL UNDER THE DUE PROCESS GUARANTEE OF THE FEDERAL CONSTITUTION PURSUANT TO THE PRECEDENT SET FORTH BY THE UNITED STATES SUPREME COURT IN **APPRENDI V. NEW JERSEY**.

The three-judge panel procedure of **NRS 175.556(1)** violates the Due Process Clause of the **Fourteenth Amendment** to the **United States Constitution**. In **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct 2348, 147 L.Ed.2d 435 (2000), the court held: "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt," (Id. at 2362-63) citing to its earlier decision in **Jones v. United States**, 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999) stating: "with that exception, [fact of a prior conviction] we endorse the statement of the rule set forth in the concurring opinions in that case." [I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that

increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-253, 119 S. Ct. 1215 (opinion of Stevens, J.); see also, Id. at 253, 119 S. Ct. 1215 (opinion of Scalia, J.) Id. at 2363. Id. (footnote omitted).

Justice Scalia, in his concurring opinion cogently asserts:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee - what it has been assumed to guarantee throughout our history - the right to have a jury determine those facts that determine the maximum sentence the law allows . . .
>
> The guarantee that "[I]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury" has no intelligible context unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by a jury. Id. at 2367.

Justice Thomas, in a concurring opinion, adits that he was wrong in **Almendarez-Torres v. United States**, 534 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998), where he was the deciding fifth vote for the majority. He now is confident that all elements which impose or increase punishment must go to the jury. Id. at 2379.

He, after a lengthy and exhaustive historical analysis of jury elements and sentencing enhancements, supported a broader application of the constitutional rights than recognized in the majority opinion. He explained his reasons:

> First, it is irrelevant to the question of which facts are elements that legislatures have allowed sentencing judges discretion in determining punishment. . . .

> Second, and related, one of the chief errors of Almendarez-Torres - an error to which I succumbed - was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. For the reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment - for establishing or increasing the prosecutor's entitlement - it is an element. (To put the point differently, I am aware of no historical basis for treating as a non-element a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. . . .
>
> Third, I think it clear that the common-law rule would cover the McMillan situation of a mandatory minimum sentence. . . . [It] is expected punishment has increased as a result of the narrow range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish, i.e., minimum mandatory triggers are elements of the offense. Id. at 2378-2379.

In **Apprendi**, supra, the court clearly elucidated the guideline for differentiating sentencing factors from elements of an offense: "The relevant inquiry is not one of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Id. at 2365.

Under the Nevada Statutory structure a defendant convicted of first degree murder is not death eligible until an aggravating circumstance is found. See **NRS 200.030(a)**. The existence, or finding of an aggravating circumstance converts a life sentence penalty into a possible death sentence.

In the instant matter two of the aggravating circumstances alleged by the prosecution were fact based: 1) The murder was

committed while the person was engaged, alone, or with others, in the commission of or an attempt to commit or flight after committing of attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnaping in the first degree, and the person charged: a) killed or attempted to kill the person murdered, b) knew or had reason to know that life would be taken or lethal force used, (**NRS 200.033(4)**) and 2) The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody. (**NRS 200.033(5)**).

It cannot be refuted that the existence or non-existence of these aggravating circumstances is a factual determination. The three judge panel deprived appellant of his right to a jury determination under both the sixth and fourteenth amendments to the United States Constitution. Appellant's conviction was not final when **Apprendi**, supra was announced; therefore the decision is applicable herein. See, **Powell v. Nevada**, 511 U.S. 79, 114 S. Ct. 1280, 128 L.Ed.2d 1 (1994). Appellant's death sentence should be reversed and remanded to the district court for a jury determination of the appropriate penalty.

VIII.

THE THREE-JUDGE PANEL SENTENCING PROCEDURE IS CONSTITUTIONALLY DEFECTIVE.

The Nevada capital sentencing scheme contains unique provisions allowing imposition of sentence by a panel of three district court judges in situations where the jury has been unable to

reach a unanimous decision as to the sentence to be imposed[1] or where the first degree murder conviction is based upon a guilty plea.[2] Although the statutory scheme refers to this sentencing body as a "panel" of judges, it functions in the same way as a jury: it is required to make the same findings to support the sentence as a jury;[3] and the statutory scheme does not suggest that the procedure for

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[1] **NRS 175.556** provides:

"If a jury is unable to reach a unanimous verdict upon the sentence to be imposed, the supreme court shall appoint two district judges from judicial districts other than the district in which the plea is made, who shall with the district judge who conducted the trial, or his successor in office, conduct the required penalty hearing to determine the presence of aggravating and mitigating circumstances, and give sentence accordingly. A sentence of death may be given only by unanimous vote of the three judges, but any other sentence may be given by the vote of a majority."

[2] **NRS 175.558** provides:

"When any person is convicted of murder of the first degree upon a plea of guilty or a trial without a jury and the death penalty is sought, the supreme court shall appoint two district judges from judicial districts other than the district in which the plea is made, who shall with the district judge before whom the plea is made, or his success or in office, conduct the required penalty hearing to determine the presence of aggravating and mitigating circumstances, and give sentence accordingly. A sentence of death may be given only by unanimous vote of the three judges, but any other sentence may be given by the vote of a majority."

[3] **NRS 175.554** provides, in pertinent part:

"2. The jury, the trial judge or the panel of judges shall determine:

(a) Whether an aggravating circumstance or circumstances are found to exist;
(b) Whether a mitigating circumstance or circumstances are found to exist; and
(c) Based upon these findings, whether the defendant should be sentenced to:
(1) Life imprisonment with the possibility of parole or life imprisonment without the possibility of parole, in cases in which the death penalty is sought; or
(2) Life imprisonment with the possibility of parole, life imprisonment without the possibility of parole or death, in cases in which the death penalty is sought.

3. The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

4. When a jury or a panel of judges imposes a sentence of death, the court shall enter its finding in the record, or the jury shall render a written verdict signed by the foreman. The finding or verdict must designate the aggravating circumstance or circumstances sufficient to outweigh the aggravating circumstance or circumstances found."

reaching the ultimate determination as to sentence or the substantive considerations applicable to that determination.

The preliminary issue in the analysis of the three-judge panel statutes, which the Nevada Supreme Court has not addressed, is the most basic definitional one: What is a "three-judge panel"? Is it a special court, composed of three judicial officers exercising judicial functions? Is it a court composed of a single district judge with the other judges participating in a non-judicial role? Or is it something else? Neither the statute nor the Supreme Court's decisions addresses this fundamental question; and the only judicial decision from any jurisdiction with a remotely comparable statute has held it unconstitutional. Beginning the analysis at this basic point makes clear that the statutory scheme is unconstitutional and that the constitutional difficulties produced by putting this scheme into practice, see part C, below, arise from this basic unconstitutional confusion.

A) Is the Three-Judge Panel a Court?

The Nevada Constitution explicitly prescribes the structure of the court system of the state, and it provides for committing the judicial power to "a Supreme Court, District Court, and Justices of the Peace." Nev. Const. Art. 6 § 1; Art. 6 §6. The Constitution does not provide for any kind of hybrid three-judge district court, nor does it delegate to the legislature the power to establish such courts.[4] The absence of any constitutional warrant for establishing

[4] This is in clear contrast to the federal system. The United States Constitution provides only for the establishment of the Supreme Court and leaves to the legislative branch the power to create, and regulate the jurisdiction of, "such inferior courts as the Congress may from time to time ordain and establish." **U.S. Const. Art. III § 1; Art. I, § 8.** The Nevada Constitution does not delegate any such power to the legislature and it explicitly provides for the establishment and jurisdiction of the district courts. **Nev. Const. Art. 6, §§ 8,9** (delegating to legislature power to establish and regulate justices of

a three-judge court of any kind renders the legislative attempt to create such a court a nullity. See, e.g., **State of Nevada v. Hallock**, 14 Nev. 202, 205-206 (1879). This fundamental absence of legislative power to create a new, non-constitutional court was the basis of the decision in **People ex rel. Rice v. Cunningham**, 61 Ill.2d 353, 336 N.E.2d 1 (1975). Under the law then in effect, **1973 Ill. Rev. Stats. Ch. 38, ¶ 1005-8-1A**, following a conviction of murder with specified aggravating circumstances, sentence would be imposed by a three-judge court composed of the trial judge and two other trial judges assigned by the chief judge of the judicial circuit.[5] The Illinois Supreme Court held this provision unconstitutional, reasoning as follows:

> "The constitution of 1970 ... provides that `[t]he judicial power is vested in a Supreme Court, an Appellate Court, and Circuit Courts.' (Art. VI, sec. 1.) The present judicial article contains no provision for legislative creation of new courts. [Citation]. It is clear, therefore, that the legislature has no constitutional authority to create a new court under Article VI of the 1970 Constitution.
>
> While the organization and the number of judges required for a determination of a proceeding in the Supreme Court and in the appellate court are expressly stated (**Ill. Const. (1970), art. VI, secs. 3 and 5**), the present Constitution is silent as to the number of judges required for the determination of a proceeding in the circuit court. This court, however, has consistently held that circuit (and superior, as classified under the previous constitution) court judges occupy independent offices with equal powers and duties, and that they cannot and do not act jointly or as a group. [Citations] .... The State has not cited nor has our research

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peace and municipal courts); **Art. 6 § 1** (explicitly allowing legislature power to establish "Courts for municipal purposes only in incorporated cities and towns.")

[5] In Illinois, the courts of general jurisdiction are called circuit courts, analogous to our district courts.

> disclosed any authority that the judicial amendment of 1962 or the provisions of the judicial article of the 1970 Constitution were intended to contravene the long-standing view that proceedings in the circuit court are to be conducted by one judge.
>
> In the present case the provision of the death penalty statute providing for the three-judge panel requires that they act collectively in determining the existence of any of the enumerated circumstances and in pronouncing sentence. This is not merely a procedural requirement, but rather it involves the scope of a circuit judge's jurisdiction. The provision, therefore, is constitutionally defective because each of the judges constituting the panel is deprived of the jurisdiction vested in him by the 1970 Constitution."

336 N.E.2d at 5-6. The court followed **Rice** in **In re Contest of Election for Off. of Gov.**, 93 Ill.2d 463, 444 N.E.2d 170, 173-174 (1983), holding unconstitutional a statute providing for the submission of election contests to a "state election contest panel," which was composed of a panel of three circuit judges exercising the jurisdiction of a circuit court.[6]

The Nevada constitutional scheme is precisely analogous to the Illinois one. Our Constitution vests the relevant judicial power in the Supreme Court and the district courts. **Art. 6 § 1.** Nothing in the Nevada Constitution remotely suggests a legislative power to create new courts. In fact, the specific provisions allowing the establishment and regulation of municipal courts and justice courts, the establishment of family court divisions of the district courts,

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[6] No other state has a three-judge panel statute which is the same as Nevada's in requiring judges from other judicial districts to be appointed to the panel. Only three other states currently have statutes providing for three-judge sentencing panels in capital cases, and none of them provides for resort to a three-judge panel following a hung jury. See **Schad v. Arizona**, 501 U.S. 624, 111 S.Ct. 2491 (1991) (relevance of practice in other states to analysis of whether practice satisfies due process principles). The **Rice** decision is apparently the only judicial decision which addresses the constitutionality of the three-judge panel procedure.

and the use of referees by family divisions, **Art. 6 §§ 1, 6(2), 8, 9,** imply the absence of power in the legislature to create other courts, through application of the rule that the expression of one thing amounts to the exclusion of others. E.g., **Galloway v. Truesdell**, 83 Nev. 13, 26, 422 P.2d 237 (1967) (expressio unius est exclusio alterius applied to jurisdictional provisions of constitution).

Just as the Illinois court recognized that the circuit judges have "equal powers and duties," the Nevada Supreme Court has recognized that the district judges have "equal and coextensive jurisdiction." E.g., **State Engineer v. Sustacha**, 108 Nev. 223, 225, 826 P.2d 959 (1992); **Rohlfing v. District Court**, 106 Nev. 902, 906, 803 P.2d 659 (1990); **Warden v. Owens**, 93 Nev. 255, 256, 563 P.2d 81 (1977); **NRS 3.230.** In **Warden v. Owens**, the Supreme Court relied on this constitutional rule in concluding, under **Article 6, § 6** of the constitution, that a district court could not revive a defendant's right of appeal in a habeas corpus proceeding by "remanding" the case to another district court for reimposition of sentence: the court held that the district court had "no jurisdiction to ... direct that court how to proceed." 93 Nev. at 256 (citations omitted).[7] Thus, as the Illinois Supreme Court concluded, if three judges preside together over the same case, each judge is deprived of the constitutional jurisdiction which he or she wields in presiding over a constitutional court, to the extent that the other judges exercise their equal, constitutional power in the same case. **People ex rel Rice v. Cunningham**, supra, 336 N.E.2d at 6. "This is not merely a procedural

[7] There is also no constitutional authorization in Nevada for "collegial" decision-making by district courts. **Cf. PETA v. Bobby Berosini Ltd.**, 111 Nev. __, 894 P.2d 337 (1995) (collegial decision-making of Supreme Court requires grant of rehearing where disqualified judicial officer participated in decision); **Nev. Const. Art. 6 §§ 2, 3.**

requirement, but rather involves the scope of a circuit judge's jurisdiction." Id.; see also, **Ex parte Gardner**, 22 Nev. 280, 284, 39 P. 570 (1895) ("It is not possible for one court to reach out and draw to itself jurisdiction of an action pending in another court ...").[8]

The pernicious and unconstitutional effects of this infringement on the jurisdiction of the district court are not mere abstractions: every disagreement among the judges on a point of law makes the unconstitutionality manifest. Suppose, for instance, that the presiding judge - - who is holding his or her own "court" in the case at trial or in receiving the guilty plea - - concludes after the sentencing proceeding that the defendant should be sentenced to death. Suppose further that the two judges from out of the district decide that a sentence less than death should be imposed. Since the statute allows a sentence less than death to be imposed by a majority of the panel, **NRS 175.556**, **NRS 175.558**, the two extra-territorial judges can, in effect, overrule the decision of the presiding judge at sentencing. Clearly, this situation is inconsistent with any of the district judges exercising the constitutional power of a court.

In short, by erecting a species of court not contemplated by the Constitution, the legislature has acted without constitutional authority in establishing the three-judge panel court and has violated

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[8] Indeed, a district judge cannot exercise any judicial authority as a court outside the judicial district in which he or she is commissioned. **Miller v. Ashurst**, 86 Nev. 241, 243, 468 P.2d 357 (1970); **Madison Nat'l Life v. District Court**, 85 Nev. 6, 9, 449 P.2d 256 (1969); **Ex parte Gardner**, supra, 22 Nev. at 284; cf. **NRS 1.050(4)** (stipulation to change place of holding court). While a district judge may exercise judicial power in another judicial district under assignment as an acting judge of that district by the chief justice or by stipulation, **NRS 3.040(1)**; **NRS 3.220**; **Walker v. Reynolds Elec. & Eng'r Co.**, 86 Nev. 228, 232-233, 468 P.2d 1 (1970), no such commission can serve to authorize a judge of another district to exercise jurisdiction in a pending case in which a judge of the district also exercises the same jurisdiction.

the separation of powers, **Nev. Const. Art. 3 § 1**, by unconstitutionally interfering with the jurisdiction of the district court. See e.g., **Lindauer v. Allen**, 85 Nev. 430, 434-435, 456 P.2d 851 (1969); **Pacific L.S. Co. v. Ellison R. Co.**, 46 Nev. 351, 359, 213 P. 700 (1923). There is no relevant distinction between Nevada and Illinois law on this subject. Nonetheless, in **Colwell v. State**, 112 Nev. 807, 812 n.4, 919 P.2d 403 (1996), the Nevada Supreme Court rejected without analysis an argument based on **Cunningham** merely on the ground that the decision construing Illinois law was not "persuasive."

The Nevada Constitution, however, has always been interpreted as strictly as the Illinois Constitution in rejecting courts not specifically authorized by the Constitution. Thus the Nevada Supreme Court's unique attempt in the context of capital sentencing to disregard all of its constitutional jurisprudence in order to save a manifestly unfair and death-prone procedure fails the basic federal constitutional due process and equal protection test of rationality: there is no rational distinction between the Court's previous applications of the constitution to invalidate legislation purporting to create non-constitutional courts and the situation presented by the non-constitutional three-judge "court" prescribed by the capital sentencing statute. Put differently, a capital defendant, has a liberty interest under the state constitution in not being sentenced by a body which is not constitutionally authorized. Since the Nevada Constitution contains no warrant for establishing a three-judge court, the imposition of sentence by such a non-constitutional court would therefore violate the federal constitutional right to due process of law. **Hicks v. Oklahoma**, 447 U.S. 343, 100 S.Ct. 2227

(1980). Finally, the use of such a death-prone mechanism violates the reliability guarantee of the Eighth Amendment.

B) Is the Three-Judge Panel a Hybrid Court, Composed of One Judge and Two Judges Functioning in a Non-Judicial Role?

As shown above, a three-judge panel in which all three judges exercise judicial power is an unconstitutional monstrosity. It is equally problematic, however, if the three judges do not all act in a judicial capacity. It is barely conceivable that the statutory scheme could contemplate that the trial judge would preside over the penalty hearing as the constitutional "district court," while the other two district judges participated in the sentencing decision not as judicial officers exercising judicial functions but as quasi-jurors or assessors.[9] This construction would present equally difficult constitutional problems.

It is clear from the statutory scheme that the three-judge panel conducts exactly the same analysis in sentencing as a jury. **NRS 175.554, NRS 175.558;** cf. **NRS 175.556.** This structure contemplates a "highly subjective" decision as to the appropriate punishment, e.g., **Dawson v. State**, 103 Nev. 76, 80, 734 P.2d 221 (1987) (citations omitted), and it includes an untrammeled power to decline to impose a death sentence, whatever the result of the sentencing calculus may be. **Bennett v. State**, 106 Nev. 135, 144, 787 P.2d 797 (1990). In reaching this decision, the statute does not suggest that the jurors,

[9] An assessor is "[A] person learned in some particular science or industry, who sits with the judge on the trial of a cause requiring such special knowledge and gives his advice." **Black's Law Dictionary 117 (6th ed. 1990)**; see **Calmer S.S. Corp. v. Scott**, 345 U.S. 427, 432, 73 S.Ct. 739, 742 (1953); (referring to practice of having maritime experts sit with court in cases in admiralty); **Wiseman, The Limits of Vision: Karl Llewellyn and the Merchant Rules, 100 Harv. L. Rev. 465, 512-514 and n.218 (1987)** (referring to Lord Mansfield's practice of empaneling juries of experts in cases involving law merchant).

or the members of a three-judge panel, exercise a judicial - - or, as it were, professional - - discretion. Cf. **NRS 176.033(1)(a); NRS 176.035; NRS 176.045.**[10] There is certainly nothing in the legislative history of the provision to suggest that the legislature contemplated any role for the panel different from that of the jury. See **Nev. Legislature, 59th Sess., Senate Judiciary Committee, Minutes at 1-2 (March 16, 1977)** (referring to sentencer using "same criteria" as jury.)[11]

In short, in fulfilling the function of sentencing, the two appointed members of the panel could as easily be selected from members of the County Commission, or the legislature, or the Elks: they cannot, as shown above, exercise judicial power without violating the Constitution; and their role in sentencing is that of individuals chosen to express a "reasoned moral response" to the offense and the offender in the same way that lay jurors would. But this role as surrogate jurors violates the Constitution also.

It is clear that the separation of powers provision of the Nevada Constitution prohibits the assignment by the legislature of non-judicial duties to district judges. **Nev. Const. Art. 3 § 1.** In

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[10] Imposing equivalent standards for sentencing by a jury or a three-judge panel is also required to avoid constitutional problems. It goes without saying that a differential standard for sentencing based upon whether the defendant pleads guilty or not, or whether a defendant goes to trial but does not obtain a unanimous verdict, would violate the federal **Fifth and Sixth Amendment** guarantees. Cf. **United States v. Jackson**, 390 U.S. 570, 88 S.Ct. 1209 (1968). While the United States Supreme Court has held that a state may commit the capital sentencing decision to a judge or a jury, e.g., **Spaziano v. Florida**, 460 U.S. 447, 464, 104 S.Ct. 3154 (1984), it has never suggested that a state may provide a differential standard for imposition of the death penalty depending on which type of sentencer is employed.

[11] The scanty legislative history on the use of the three-judge panel focuses primarily on the difficulty of empaneling sentencing juries. See **Nev. Legislature, 59th Sess., Senate Judiciary Committee, Minutes at 2 (March 14, 1977)**; Minutes at 10 (March 3, 1977). The sole constitutional issue considered in this context was whether the United States and Nevada constitutions required that a capital sentence always be imposed by a jury, id.; and there was no discussion of the validity, under any constitutional provision, of erecting a different species of district court.

Desert Chrysler-Plymouth v. Chrysler Corp., 95 Nev. 640, 644-645, 600 P.2d 1189 (1979), the legislature gave district courts the duty of determining, in an application for injunctive relief, whether "good cause" existed for establishing a new automobile dealership in a market area. Although the court proceeding was in form one for injunctive relief, the Supreme Court held that the proceeding was in fact a "pre-licensing fact-finding," which was prohibited under the separation of powers doctrine as a non-judicial function. Id; **Galloway v. Truesdell**, 83 Nev. 13, 23-31, 422 P.2d 237 (1967) (legislative imposition of duty on district court to examine qualifications of ministers to be certified to perform marriages, and to find facts on those issues, invalid under separation of powers); see also, **Esmeralda Co. v. District Court**, 18 Nev. 438, 439 (1884) ("The duties performed by the district judge in pursuance of the statute did not become judicial acts merely because they were performed by a judicial officer.")

In the case of the three-judge panel, nothing in the statute suggests that the sentencing function it performs is a judicial function, in the manner of a normal judicial sentencing. See **NRS 176.033(1)(a); NRS 176.035; NRS 176.045.** Rather, the panel functions essentially as a surrogate jury; and since the two judges designated to sit with the trial judge do not, and cannot, exercise judicial power as judicial officers presiding over a court, they have a role indistinguishable from that of a lay juror. Accordingly, however much the fact-finding and weighing conducted in the capital sentencing proceeding resembles a judicial act in form, in fact it is no more an exercise of judicial power than the fact-finding conducted in **Desert Chrysler-Plymouth**. The statute therefore violates the constitutional

separation of powers doctrine by imposing non-judicial duties upon judicial officers.

The unconstitutionality of the three-judge panel statute, which commits essentially the functions of jurors to assigned judges, is demonstrated by two contrasting of situations in which the Constitution does authorize judges to exercise authority which is not, strictly speaking, the adjudicative power which the Constitution grants to courts. **Nev. Const. Art. 6 §§ 4, 6.** The Commission on Judicial Discipline includes two members who are justices of the Supreme Court or judges. **Nev. Const. Art. 6 § 21(2)(a),(8).** The Commission is a "constitutionally established `court of judicial performance and qualifications,'" with jurisdiction analogous to that given by the Constitution to the district courts, **Whitehead v. Commission on Judicial Discipline**, 110 Nev. 128, 160 n.24, 869 P.2d 795 (1994); but the members (including the judicial personnel members) do not function as "judges" exercising the constitutional power given to courts. This is made clear by the fact that the members of the Commission are separately granted immunity for their official acts, id. at 159-160; **Admin. and Proc. Rules for Nevada Commission on Judicial Discipline**, Rule 13; and this would not be necessary for the judicial members if they were exercising the authority of their judicial offices. Similarly, the Commission gives no particular power to any of its individual members, including the judicial members, id., **Rule 3**, and its members are subject to disqualification or peremptory challenge under the Commission's own rules, id., **Rule 3(6,7,8)**, and not under the general rules for judicial disqualification. Cf. **NRS 1.225, NRS 1.235.**

The constitutional provision for the Commission demonstrates

two things: first, the legislature and the people recognized that a constitutional amendment was necessary to establish a new court not provided for in the constitutional structure of the district and supreme courts. Such a provision was enacted in order to establish the Commission but was not enacted to establish any three-judge district court. Second, the legislature and the people recognized that assigning judges to perform adjudicative duties which did not belong to their jurisdiction as district courts would require constitutional authorization, which was enacted to allow judges to sit on the Commission, but was not enacted to allow judges to sit as panel members on non-constitutional three-judge tribunals.

Similarly, the Constitution provides that the members of the Supreme Court sit on the Board of Pardons. **Nev. Const. Art. 5 § 14(1)**. Plainly, the justices do not exercise a judicial power in this capacity, cf. **State v. Echaverria**, 69 Nev. 253, 257, 248 P.2d 414 (1952) (only pardons board and not court has power to commute sentence): they sit as individuals chosen ex officio but not exercising the power of their judicial office. See **Kelch v. Director**, 107 Nev. 827, 834, 835, 822 P.2d 1094 (1991) (Steffen, J., concurring) (justices do not sit as court on Board of Pardons but as individual members of executive branch board); see also, **Creps v. State**, 94 Nev. 351, 358 n.5, 581 P.2d 842 (1978). Here again, where judicial officers serve in a non-judicial capacity, and not as a constitutional court, constitutional authorization was required; and such authority was not obtained to establish the three-judge capital sentencing court. Accordingly, the attempt of the statute to assign the duties of judicial jurors to district judges violates the constitutional separation of powers provision.

C) Conclusion

As shown above, the three-judge jury panel statutes are unconstitutional whether they require district judges to share their exclusive and co-extensive jurisdiction as judicial officers presiding over a court or to act in a non-judicial role as surrogate jurors. In addition to the confusion generated by this ambiguity as to the role of the district judges in itself, it also produces unconstitutional vagueness and confusion as to how counsel can attempt to ensure the impartiality of the panel. For instance, the statues give no guidance as to whether the assigned members of the panel sit as judges and if counsel is therefore limited to pursuing disqualification pursuant to **NRS 1.230**, or to seek to litigate the question whether a capital defendant is entitled to a peremptory challenge of the judges. Cf. **SCR 48.1.**[12] If the judges serve in a non-judicial role, the statutes given no indication how the parties are to ensure the impartiality of the panel, either by invoking the procedures for conducting voir dire of jurors, or by invoking the judicial duty to disclose all information which the parties could consider relevant to the question of disqualification. **Code of**

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[12] **SCR 48.1** provides for peremptory disqualification of the presiding judge in civil actions. This provision is "designed to insure a fair tribunal by allowing a party to disqualify a judge thought to be unfair or biased." **Jahnke v. Moore**, 737 P.2d 465, 467 (Idaho Ct. App. 1987). A movant may be said to properly take advantage of a peremptory challenge when the litigant is concerned that the judge may be biased or unfair for some real or imagined reason. *Id.*" **Smith v. District Court**, 107 Nev. 674, 677, 818 P.2d 849 (1991). The purpose of the rule is simply "promoting the concept of fairness." Id. at 678. It is not open to question that capital cases, in which the stakes for the litigants are nothing less than life and death, require heightened concern for fairness and accuracy. See, e.g., **Johnson v. Mississippi**, 486 U.S. 578, 584, 108 S.Ct. 1981 (1988); **Ford v. Wainwright**, 477 U.S. 399, 411, 414, 106 S.Ct. 2595 (1986) (plurality); **Paine v. State**, 110 Nev. 609, 619, 877 P.2d 1025 (1994) (addressing barred claims due to "gravity of sentence"). SCR 48.1, by limiting the use of peremptory challenges to civil cases, affords a protection to the fairness of the proceedings to litigants who have only money at stake, while denying it to those whose lives and liberty are in issue. Thus the rule violates the state and federal equal protection guarantees by erecting an irrational - - indeed, perverse - - classification. E.g., **Barnes v. District Court**, 103 Nev. 679, 685, 748 P.2d 483 (1987); **Nev. Const. Art. 4 § 21**; **U.S. Const. Amend. XIV**.

Judicial Conduct, Canon 3(E)(1). The failure of the statutory scheme to define the role of the members of the panel, in a way which permits adequate analysis of the procedure and adequate means for ensuring its impartiality, renders it unconstitutional.

Appellant is entitled to relief.

IX.

THE ABSENCE OF PROCEDURAL PROTECTIONS IN THE SELECTION AND QUALIFICATION OF THE THREE-JUDGE JURY VIOLATES THE APPELLANT'S RIGHT TO AN IMPARTIAL TRIBUNAL, DUE PROCESS AND A RELIABLE SENTENCE.

Even assuming arguendo that the judicial-jury panel proceeding does not in itself violate the constitution, the absence of neutral and effective mechanisms for selecting and qualifying the panel members to act as jurors in a capital case violates the state and federal guarantees of due process of law, equal protection of the laws, and a reliable sentence. **Nev. Const. Art. 1 §§ 6, 8; U.S. Const. Amends VIII, XIV.**

A) Selection of Judges

The statutory scheme for appointment of panel members does not provide any procedure or criteria for the selection of the panel members. The Nevada Supreme Court has declined to disclose the method by which panel members are selected: instead, in **Paine v. State**, 110 Nev. 609, 618, 877 P.2d 1025 (1994), the Supreme Court merely asserted that there is nothing improper in its selection procedure, without specifying what it is. The Supreme Court's position raises fundamental constitutional issues:

First, Appellant is aware of no situation in which litigants are forced to accept a decision-maker's assertion that a secret proceeding, in which the manner of proceeding is not disclosed, is

both procedurally fair and produces proper results. Secrecy with respect to the standards employed and the actual procedure for selection is presumptively improper:

> "Unaccountable secrecy, with its attendant opportunity to harass, intimidate, favor, raise or lower standards in particular unreported cases, to satisfy their view of what ought to be or not be, is a power beyond any known to our law. A tribunal that operates in secrecy can indulge its suspicions, yield to public pressure, even its whims, send zealous agents with a deliberate intent to find grounds to bring a judge beneath its influence for good or purposes of their own. Their purposes can run the gamut used by secret power to bend compliance to their wishes. Whether they do or not, the existence of the possibility must render them strictly accountable whenever their proceedings surface."

Matter of Chiovero, 524 Pa. 181, 570 A.2d 57, 60 (1990), quoted in **Whitehead v. Comm'n on Judicial Discipline**, 111 Nev. 70, n.46, 893 P.2d 866 (1995). "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification." Id. at 269. (Shearing, J., dissenting), quoting **Matter of Krynicki**, 983 F.2d 74, 75 (7th Cir. 1992) (on motion to seal) (Easterbrook, J.) Where there are no published standards or procedures for judicial action, secrecy exacerbates the lack of adequate procedural protections. "Unabridged discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." **In re Gault**, 387 U.S. 1, 87 S.Ct. 1428, 1438 (1967). Such unbridled discretion exercised in a secret proceeding, of which there is no record, is fundamentally inconsistent with our historical traditions and with the adversary process. See generally, **In re Oliver**, 333 U.S. 257, 273, 68 S.Ct. 489

(1948).[13]

Second, the absence of procedural standards and the secrecy of the selection process deprive the parties of all the constitutional protections which the adversary system provides, such as adequate notice of the proceedings, adequate opportunity to litigate the issues arising in those proceedings, and an adequate record upon which the matter can be reviewed. In capital cases, a complete record of the proceedings is clearly necessary for adequate review under the federal constitution, see **Dobbs v. Zant**, 506 U.S. 357, 113 S.Ct. 835, 836 (1993) (per curiam), and a record of the selection process for members of a three-judge panel is clearly necessary to any review of the propriety of that procedure. See, **State v. Smith**, 326 N.C. 792, 392 S.E.2d 362, 363 (N.C. 1990) (trial court's failure to record private

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[13] There is no legal justification for such secrecy. The standards, policies and actions of the Nevada Supreme Court in the selection and appointment of panel members are not "declared by law to be confidential", and the information is therefore subject to public disclosure. **NRS 239.010**; **Neal v. Griepentrog**, 108 Nev. 660, 665, 837 P.2d 432 (1992); **Donrey of Nevada v. Bradshaw**, 106 Nev. 630, 632, 798 P.2d 144 (1990). The Code of Judicial Conduct also prescribes disclosure to the parties of all relevant proceedings in every case; **Canon 3(B)(7)(a)(ii)** requires the court to give prompt notification to the parties "of the substance of the ex parte communication and allow[] an opportunity to respond." **The Commentary to Canon 3(b)(7)** makes clear that

> "[T]o the extent reasonably possible, all parties or their lawyers shall be included in communication with a judge
> ....
> A judge must disclose all ex parte communications ... regarding a proceeding pending or impending before a judge
> ....
> [and]
> If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties."

Unlike conferences with court personnel, which are permitted "to aid the judge in carrying out the judge's adjudicative responsibilities," **Canon 3(b)(7)(c)**, the contacts involved in selecting members of a three-judge panel do not relate to the adjudication of a substantive legal issue, but relate to the constitutional permissibility of the court's standards, if any, in making the selection of the panel members and its adherence to those standards in particular cases. Any contacts between Supreme Court personnel and prospective members of three judge-panels clearly regard a "pending or impending" proceeding, and the substance of those communications must be disclosed.

conversations with prospective jurors precluded meaningful appellate review). In turn, the combination of the standardlessness of the selection proceedings with the secrecy of the procedure and the absence of adversary litigation leaves any error in that proceeding immune from identification or correction.

The mere assertion that the court has done nothing improper does nothing to diminish the constitutional problem, because what the Supreme Court assumes is a proper selection procedure may not survive constitutional scrutiny. For instance, the statistical evidence strongly indicates that the selection of judges is not random. The Nevada Supreme Court may believe that there is no impropriety in relying disproportionately upon judges who are willing to serve on panels as a method of selection, but as shown below, such a standard is constitutionally impermissible. Without disclosure of the method of selection, such an improper procedure is impervious to examination or correction.

Finally, the circumstantial evidence of the effects of the selection process - - whatever that process is - - contradicts the Supreme Court's mere assertion that the selection process is proper. In general, it can hardly be gainsaid that a tribunal which imposes a sentence of death in almost 90% of the cases which come before it, **Beets v. State**, 107 Nev. 957, 975, 821 P.2d 1044 (1991) (Young, J., dissenting); see id. at 970-971 (Steffen, J., concurring), is a "tribunal organized to return a verdict o f death."[14] A procedure

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[14] This motion is based upon the currently available public information with respect to the selection of three-judge panels and the rate of imposition of the death penalty by those panels as represented in the Nevada Supreme Court's decision in **Beets**. Defendant is entitled to rely upon the readily available information in making a prima facie case, or a case for further discovery, see below, because the other relevant information as to the actual selection process and the rate of death-imposition by juries is in the possession of other parties - - the state and the courts - - and is not readily available

which produces such a result is, prima facie, not working rationally to select "the few cases in which [a death sentence] is imposed from the many cases in which it is not." **Furman v. Georgia**, 408 U.S. 238, 314, 92 S.Ct. 2726 (1972) (White, J., concurring) (emphasis supplied).[15]

More particularly, the normal protection against use of impermissible factors in the selection of judges or jurors from an available pool is random selection. Under state law, when a method of judge assignment is specified, it is random selection. See **SCR 48.1(2)(a)** (random selection of replacement for challenged judge); **Washoe District Court Rules, Rule 2(1)** (random assignment of cases); **Eighth Judicial District Court Rules, Rule 1.60(a)** (same). Generally speaking, random selection ensures against arbitrary action because it "affords no room for impermissible discrimination against individuals or groups." **United States v. Eyster**, 948 F.2d 1196, 1213 (11th Cir. 1991) (citations omitted). Random selection does not contemplate that judges may volunteer for duty, no more than it would allow the same panel to be selected each time.[16] Similarly, public

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for sophisticated statistical analysis by the defendant.

[15] This extreme rate of death sentencing is even more striking because the three-judge jury may impose a sentence less than death by a majority vote, **NRS 175.556**, **NRS 175.558**, a power which a sentencing jury does not have. **NRS 175.556**. Thus, assuming a constitutional degree of impartiality, three-judge juries should impose death sentences at a rate significantly less than lay juries.

[16] These data strongly indicate that the Supreme Court relies on those judges who are actively willing to be appointed to three-judge panels as the method of selection. Reliance upon self-selection for participation in capital sentencing proceedings, however, is virtually the antithesis of using objective and neutral selection criteria. See **State v. Lopez**, 107 Idaho 726, 692 P.2d 370, 380 (App. 1984); **United States v. Branscome**, 682 F.2d 484 (4th Cir. 1982) (use of volunteers on grand jury introduces "subjective criterion" for service not authorized by statute); **United States v. Kennedy**, 548 F.2d 608, 609-610 (5th Cir.), cert. denied 434 U.S. 865 (1977); see also **Duren v. Missouri**, 439 U.S. 357, 367-370, 99 S.Ct. 664 (1979) (state practice allowing women to decline jury service unconstitutional where exemption not "appropriately tailored" to "important state interest"); **Taylor v. Louisiana**, 419 U.S. 522, 531-537, 95 S.Ct. 692 (1975) (state system excluding women from jury service unless they filed declaration volunteering for service unconstitutional). Thus the empirical evidence indicates that the

access to the selection process ensures that the selection is based solely upon objective and permissible criteria. Cf. **United States v. Davis**, 546 F.2d 583, 589 (5th Cir), cert. denied 431 U.S. 906 (1977) (no indication that court was "left in the dark about the procedures employed behind closed doors" in computerized drawing of names for jury pool).

Finally, any assumption that the selection of panel members is made on a strictly constitutional basis is undermined by an accusation made by the immediate past chief justice of Nevada. In responding to a motion to disqualify him in a case which had been decided by a three-to-two vote, the justice claimed that the current chief justice, who voted with the minority, "will appoint a substitute whom he believes will favor his view in this case," in order "to achieve a result that ordinarily would not be achieved ...." **Snyder v. Viani**, No. 23726, Response of Justice Rose to Motion to Disqualify Him, Affidavit at 14 (March 8, 1995). The sworn accusation by a member of the Supreme Court that the selection of judges for appointment to replace disqualified justices, pursuant to **Nev. Const. Art. 6 § 4** and **NRS 1.225(5)**, is manipulated by the court to favor certain results removes any constitutionally-adequate basis for assuming that the appointment of judges to three-judge juries in capital cases is consistent with constitutional standards.

B) Qualification of Judges

In addition to the absence of constitutionally-adequate selection criteria, the statute fails to provide for adequate inquiry

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Supreme Court selection process is not neutral. See, **Castaneda v. Partida**, 430 U.S. 482, 497, 97 S.Ct. 1272 (1977) ("selection procedure that is susceptible of abuse" supports showing of discrimination based upon statistical evidence).

by the Supreme Court or by the parties into the impartiality of the individual members of the three-judge jury. The necessity for such exploration in particular cases is, again, a function of the role of the judges in the panel proceeding: in the sentencing proceeding the judges do not act as judges but as jurors. **The law guides the sentencer up to a point, but a decision not to impose the death penalty may be made on any basis at all: no legal principle or set of facts ever requires a sentencer to impose death.**[17] Since the panel's discretion, at that point, is as untrammelled as a jury's, the same protections used to ensure the jury's impartiality must also be applied to the judges. The need for exploration of the panel judges' biases and prejudices is also compelled by the fact that the judges have no track record to examine in capital cases. In the normal death penalty case, the judge plays no role at all in the sentencing and is required only to pronounce the sentence imposed by the jury. **Hardison v. State**, 104 Nev. 530, 534-535, 763 P.2d 52 (1988). Thus there is generally no public basis for investigating a judge's sentencing biases in capital cases; and because of the judge's limited role in the normal capital cases, a judge may not have examined his or her own attitudes regarding capital sentencing. This is true in particular of the judges who are assigned from other judicial districts: the parties are likely to have no familiarity at all with the records or known biases of those judges from communities foreign to the district of conviction.

The necessity of inquiry into the panel members'

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[17] "Nevada's statute does not require the jury to impose the death penalty under any circumstance, even when the aggravating circumstances outweigh the mitigating circumstances. Nor is the defendant required to establish any mitigating circumstances in order to be sentenced to less than death." **Bennett v. State**, 106 Nev. 135, 144-145, 787 P.2d 797 (1990) (footnote omitted).

impartiality cannot be evaded by reference to the judges' general oath to follow the law. Cf. **Paine v. State**, supra, 110 Nev. at 618. In general, the reliance on the court's oath as an assurance of regularity is in part based upon the theory that "if a court errs in matters of law, its errors may be corrected .... effectively on appeal ....", **Allen v. Rielly**, 15 Nev. 452, 455 (1880) as opposed to "the unjust actions of jurors, caused by prejudice or undue feeling." **Eureka Bank Cases**, 35 Nev. 80, 149 (1912). Again, this is not the situation in three-judge panel situations where the judges act in effect as jurors.

Irrespective of prior Nevada Supreme Court decisions, inquiry by the parties is absolutely crucial to determine if any of the judges' biases and attitudes are inconsistent with the constitutionally-required degree of impartiality above and beyond and oath to follow the law. See **Morgan v. Illinois**, supra, 112 S.Ct. at 2235.[18]

The constitutional inadequacy of relying upon the judge's general oath to follow the law as a guarantee of impartiality is equally apparent with respect to disclosure by the judges of specific bias. Courts routinely recognize that judges can be swayed by biases and prejudices which affect lesser mortals. See, e.g., **In Interest of McFall**, 556 A.2d 1370, 1376 (Pa. Super. 1989), affirmed 617 A.2d 707, 714 (Pa. 1992) (pending criminal investigation of judge);

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[18] Of course the Eighth and Fourteenth Amendments do not require a categorical, conscious refusal to follow the law as a basis for disqualification: an opinion with respect to the death penalty (or to any subsidiary question involved in imposing it) is disqualifying if it will "prevent or substantially impair" a sentencer's ability to follow the law. **Wainwright v. Witt**, 469 U.S. 412, 424 n.5, 105 S.Ct. 844, 852 n.5 (1985) (emphasis supplied). With respect to judges, the Nevada Supreme Court has recognized that even the appearance of bias is disqualifying. **PETA v. Bobby Berosini, Ltd.**, 111 Nev. __, 894 P.2d 337 (1995).

Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985) (potential employment relationship with law firm in pending case); **United States v. Murphy**, 768 F.2d 1518, 1538 (7th Cir. 1984) (close personal relationship between judge and prosecutor); **Spires v. Hearst Corp.**, 420 F.Supp. 304, 306-307 (C.D. Cal. 1976) (flattering publicity about judge in party's newspaper); see generally **In re Murchison**, 349 U.S. 133 (1955); **Tumey v. Ohio**, 273 U.S. 510, 532 (1927).[19]

The Supreme Court in **Paine** assumed that the general judicial oath to follow the law and the availability of judicial disqualification proceedings were adequate to prevent imposition of sentence by a biased panel. Once again, the available empirical evidence shows that the Supreme Court's assumption is false. In general, of course, neither the parties nor the judge may be fully aware of a disqualifying condition. See **PETA v. Bobby Berosini, Ltd.**, supra, 111 Nev. 431. This problem is particularly acute with respect to the panel members from outside the district, about whom the parties may know nothing, and who themselves will know nothing about the case at the time of their appointment.[20] In the cases about which

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[19] The Nevada Supreme Court regularly recognizes the possibility that judicial officers can be biased against parties. E.g., **Buschauer v. State**, 106 Nev. 890, 896, 804 P.2d 1046 (1990) (remand for resentencing before different judge after erroneous consideration of polygraph results and victim impact statement by original judge); **Wolf v. State**, 106 Nev. 426, 428, 794 P.2d 721 (1990) (reversing denial of petition for postconviction relief and ordering new sentencing hearing before different judge, where original sentencing judge exposed to recommendation by prosecution in violation of plea agreement); **Gamble v. State**, 95 Nev. 904, 909, 604 P.2d 335 (1979) (same): **Van Buskirk v. State**, 102 Nev. 241, 244, 720 P.2d 1215 (1986) (same); **Collins v. State**, 89 Nev. 510, 514, 515 P.2d 1269 (1973); **Santobello v. New York**, 404 U.S. 257, 263, 92 S.Ct. 495 (1971).

[20] The lack of available information about judges from other districts, in which community standards may be vastly different from those in the district of conviction, is particularly troublesome because district judges must run in contested elections. **Nev. Const. Art. 6 § 5**. Whether a judge from another district has expressed opinions during election campaigns which would be grounds for disqualification (or the likely reaction in the judge's home district to the imposition of a sentence less than death), is information not reasonably available to the parties and counsel in the district of conviction.

information is available, neither the judge's general oath to follow the law, nor the ethical requirement to disclose potentially disqualifying evidence, **Code of Judicial Conduct, Canon 3(E)(1)**, has been adequate to secure an impartial panel. For instance, one of the most recent panels imposed the death penalty in a case in which the defendant killed two victims, including one woman, by inflicting head injuries. **State v. Calambro**, Washoe County Case No. CR-94-0198. One of the judges selected for the panel, **In the Matter of Appointment of District Judges**, Order (January 9, 1995), according to published and uncontradicted reports, had maintained a close personal relationship with a woman who was shot in the head, in an alleged attempted murder and suffered serious and permanent injury as a result. The prosecution of the assailant was still pending at the time of the **Calambro** sentencing. See **"View From The Bench," Las Vegas Sun, p.4D (March 31, 1994); "Jury Gives Up On Gunman," Las Vegas Sun, p.1A (June 2, 1994); State v. Schlafer**, Clark County Case No. C118099. This situation would clearly justify excusal for cause of a juror, or, at minimum, a searching inquiry into the juror's capacity to be impartial. See e.g., **Hunley v. Godinez**, 975 F.2d 316, 319 (7th Cir. 1992) (and cases cited); cf. **Hall v. State**, 89 Nev. 366, 370-371, 513 P.2d 1244 (1973) (disqualification of juror who was crime victim not required where full voir dire on issue established that juror could be impartial). Review of the record in **Calambro**, however, reveals that there was no disclosure to the parties of this information, which would certainly be "relevant to the question of disqualification." **Code of Judicial Conduct, Canon 3(E)(1)**, Commentary.

There is no question that a capital sentencing proceeding must comply with the requirements of due process of law. E.g., **Morgan**

v. Illinois, 504 U.S. __, 112 S.Ct. 2222, 2228 (1992); **Gardner v. Florida**, 430 U.S. 349, 351, 97 S.Ct. 1197 (1977) (plurality opn.) Under the **Eighth Amendment**, heightened scrutiny of procedural requirements reflects the "a special `need for reliability in the determination that death is the appropriate punishment' in any capital case." **Johnson v. Mississippi**, 486 U.S. 578, 584, 108 S.Ct. 1981 (1988), quoting **Gardner v. Florida**, 430 U.S. 349, 363-364, 97 S.Ct. 1197 (1977) (plurality), and **Woodson v. North Carolina**, 428 U.S. 280, 305, 96 S.Ct. 2978 (1976) (White, J., concurring); accord, **Ford v. Wainwright**, 477 U.S. 399, 411, 414, 106 S.Ct. 2595 (1986) (plurality) (in capital cases, Eighth Amendment requires "heightened standard of reliability"). The absence of any substantive or procedural standards for the selection and qualification of members of three-judge panels, and the concealment by the Supreme Court of its procedures and criteria for making the selection of panel members, deprive the parties of any opportunity to litigate the propriety of the court's actions, and explicitly afford a "lowered standard of reliability" with respect to these proceedings. In light of the extraordinary rate of imposition of capital sentences by three-judge panels, the evidence that the selection of panel members does not proceed on a neutral basis, and the evidence that factors relevant to disqualification are routinely not disclosed, the absence of procedural protections in the selection and qualification of panel members deprives the defendant of the most fundamental requirement of due process, an impartial tribunal. E.g., **Marshall v. Jerrico, Inc.**, 446 U.S. 238, 242, 100 S.Ct. 1610 (1980); **In re Murchison**, 349 U.S. 133, 136, 75 S.Ct. 623 (1955); **In re Ross**, 99 Nev. 1, 7-18, 656 P.2d 832 (1983). Rather, these procedures result in the defendant being sentenced by "a

tribunal organized to return a verdict of death." **Morgan v. Illinois**, supra, 112 S.Ct. at 2231, quoting **Witherspoon v. Illinois**, 391 U.S. 510, 520, 88 S.Ct. 1770 (1968).

Accordingly, the three-judge panel procedure cannot constitutionally be applied to any defendant.

Appellant is entitled to relief.

X.

USE OF NEVADA'S THREE-JUDGE PANEL PROCEDURE TO IMPOSE SENTENCE IN A CAPITAL CASE PRODUCES A SENTENCER WHICH IS NOT CONSTITUTIONALLY IMPARTIAL AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Although the federal constitution does not prescribe the specific form which a state's capital punishment procedure must take, e.g., **Spaziano v. Florida**, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164 (1984); **Jurek v. Texas**, 428 U.S. 262, 279, 96 S.Ct. 2950 (1976), whatever procedure is employed must comply with constitutional standards of due process and must result in a reliable determination which satisfies the Eighth Amendment requirement that the sentence reflect a "reasoned moral response" to the offense and the offender. **Penry v. Lynaugh**, 492 U.S. 302, 319, 109 S.Ct. 2934 (1989); quoting **California v. Brown**, 479 U.S. 538, 545, 107 S.Ct. 837 (1987) (O'Connor, J., concurring). The Nevada three-judge jury procedure satisfies neither of these requirements.

For example, the three-judge jury procedure deprives a defendant of a reliable sentence which is an expression of the "conscience of the community," **Witherspoon v. Illinois**, supra, 391 U.S. at 519, with respect to the offense and the offender: a judge from Reno or Carson City as much as one from Yerington or Tonopah or Elko cannot function as the "link between contemporary community

values and the penal system," id. at 519 n.15, with respect to a homicide committed in Las Vegas. A legislature may determine that the "conscience of the community" should be expressed by committing the sentencing decision to the presiding judge. See **Spaziano v. Florida**, supra, 468 U.S. at 464. But there is nothing in the Supreme Court's jurisprudence which suggests that the legislature may constitutionally replace an expression of the "conscience of the community" as to the appropriate sentence with a mechanism which routinely substitutes a sentencer who will express the conscience of a different community,[21] which has an entirely different "reasoned moral response" to the offense and the offender. Cf. **Alvarado v. State**, 486 P.2d 891, 899-905 (Alaska 1971) (vicinage).

While committing the sentencing decision to a randomly-assigned trial judge may not, in itself, violate the federal constitution, e.g., **Spaziano v. Florida**, 468 U.S. 447, 464, 104 S.Ct. 3154 (1984), committing that decision to a jury of judges which functions in the same way as a jury, but which is drawn from a population which is radically unrepresentative of the community violates the guarantees of due process, equal protection, and a reliable sentence.

In short, the wide latitude which states have to fashion capital sentencing proceedings does not include the power to establish sentencing bodies which are selected without any procedural protections consistent with due process principles, Accordingly, the statutory scheme for convening a three-judge panel is invalid.

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[21] Of course, when a particular community is so inflamed against a defendant that a change of venue is required, the trial and sentencing proceedings may be committed to a less prejudiced community; but this procedure is allowed only out of necessity, when an impartial tribunal cannot be obtained in the normal venue of the prosecution.

XI.

THE STATUTORY REASONABLE DOUBT INSTRUCTION IS UNCONSTITUTIONAL.

Appellant is not unmindful that this Honorable Court has consistently found the reasonable doubt instruction of **NRS 175.211** to be constitutionally valid. See, **Lord v. State**, 107 Nev. 28, 806 P.2d 548 (1991).

However, trial counsel objected to the instruction and therefore preserved the issue. See, **Riddle v. State**, 96 Nev. 589, 613 P.2d 1031 (1980) (A. App., Vol. 13, pp. 3148, 3150).

It is the position of Appellant that the statutory reasonable doubt jury instruction as given does not provide the jury with meaningful principles or standards to guide it in evaluating the evidence. **United States v. Wosepka**, 757 F.2d 1006, 1009, modified 787 F.2d 1294 (9th Cir. 1985). Appellant includes this issue to preserve it for possible federal review.

XII.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SETTLE THE RECORD REGARDING POSSIBLE FAILURE OF THE TWO APPOINTED PANEL JUDGES TO READ THE TRANSCRIPTS OF THE GUILT PHASE OF APPELLANT'S TRIAL.

It is the position of the Appellant that under **Hollaway v. State**, 116 Nev. Adv. Op. No. 83, 6 P.3d 907 (August 23, 2000), that a three-judge panel has a duty to consider all evidence adduced at the guilt phase in determining the appropriate penalty in a capital case. Further, that it was error for Judge Elliot not to review the transcripts of the guilt phase in their entirety; and error for the trial court to deny Appellant's motion to settle the record as to whether the two appointed judges, Judge Griffith and Judge Elliot did,

in fact, read the record.

In **Hollaway**, supra, this Court reaffirmed the modern legal concept that death penalty cases are, in fact, different. ("We are cognizant that because the death penalty is unique in its severity and irrevocability. . . ."). This Court also required anew instruction be given regarding consideration of mitigation which clarified the existing law. The instruction reads:

> In determining whether mitigating circumstances exist, jurors have an obligation to make an independent and objective analysis of all the relevant evidence. Arguments of counsel or a party do not relieve jurors of this responsibility. Jurors must consider the totality of the circumstances of the crime and the defendant, as established by the evidence presented in the guilt and penalty phases of the trial. Neither the prosecution's nor the defendant's insistence on the existence or nonexistence of mitigating circumstances is binding upon the jurors. (Emphasis added) Id. at 10.

It is the position of Appellant that three-judge panel, has an obligation, therefore, to review and consider all evidence from the guilt phase. A summary to the panel, from counsel is not adequate.

The record, due to the trial court's refusal to settle the record, does not reflect that the two judges appointed to the panel reviewed the transcripts of the guilt phase of Appellant's trial.

It is the position of Appellant that it was structural error not to have the three-judge panel review the entire transcripts of the guilt phase. See, **Manley v. State**, 199 Nev. Lexis 30, 979 P.2d 703 (June 7, 1999).

This Court should find that **Hollaway**, supra, applies to a three-judge panel setting in a capital sentencing and remand the matter to the district court to settle the record.

XIII.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT HELD FIFTY-NINE (59) OFF THE RECORD BENCH CONFERENCES THUS DEPRIVING APPELLANT OF A COMPLETE RECORD FOR PURPOSES OF DIRECT APPEAL AND POST-CONVICTION HABEAS RELIEF.

It was error of the trial court to hold fifty-nine (59) off the record bench conferences, without observing the safeguards incorporated into **Supreme Court Rule 250(5)(a)**. The rule states, in pertinent part:

> The court shall ensure that all proceedings in a capital case are reported and transcribed, but with the consent of each party's counsel the court may conduct proceedings outside the presence of the jury or the court reporter. If any objection is made or any issue is resolved in an unreported proceeding, the court shall ensure that the objection and resolution are made part of the record at the next reported proceeding.

See, **SCR 250(5)(a)**.

The record herein does not reflect that there was consent by participating counsel to unreported bench conferences or that the results of the conferences were made part of the record.

The unreported bench conferences occurred in both the guilt and penalty phases of the jury proceedings (A. App., Vol. 8, pp. 1855, 1888, 1911, 1916, 1933, 1941, 1948, 1961, 1989, 2029, 2036, 2081; Vol. 9, pp. 2306, 2340, 2341-42; Vol. 10, pp. 2396, 2461, 2469, 2516; Vol. 13, pp. 3024, 3051, 3053, 3056, 3063, 3108, 3133, 3144, 3146, 3198; Vol. 14, pp. 3298, 3310, 3328, 3335, 3345, 3368; Vol. 15, pp. 3379, 3389, 3396, 3406, 3423, 3440, 3454, 3465, 3468, 3469, 3499, 3520; Vol. 16, pp. 3649, 3675, 3685, 3816, 3823, 3839, 3845, 3847, 3853, 3862).

A capital defendant in Nevada has an automatic appeal and mandatory review of his death sentence. See, **NRS 177.055**. An indigent defendant must be furnished a transcript on appeal. **State**

ex rel Marshall v. Eighth Judicial District Court, 80 Nev. 478, 396 P.2d 680 (1964). "Meaningful, effective appellate review depends upon the availability of an accurate record covering lower court proceedings relevant to the issues on appeal. Failure to provide an adequate record on appeal handicaps appellate review and triggers possible Due Process Clause violation." See, **Lopez v. State**, 105 Nev. 68, 769 P.2d 1276, 1287 (1989).

It is axiomatic that an incomplete record equally handicaps the appellate in any post-conviction habeas corpus petition.

This matter should be remanded to the District Court to ascertain if the transcripts can be reconstructed sufficiently to provide a meaningful record for review; or whether reversal is mandated; see, **Lopez**, supra at 1287-1288 fn. 12.

CONCLUSION

For the reasons more fully articulated above, this case should be reversed and remanded to the district court for a new and fair trial.

Respectfully submitted,

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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 a reference to the page of the transcript or appendix where the matter relied on is to be found. 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 27th day of June, 2001.

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DECLARATION OF MAILING

DONNA POLLOCK, an employee with the Clark County Special Public Defender's Office, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 27th day of June, 2001, declarant deposited in the United States mail at Las Vegas, Nevada, a copy of the Appellant's Opening Brief in the case of Donte Johnson vs. The State of Nevada, Case No. 36991, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to Frankie Sue Del Papa, Nevada Attorney General, 100 North Carson Street, Carson City, Nevada 89701, that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on ~~the 27th day~~ of June, 2001.

DONNA POLLOCK

RECEIPT OF A COPY of the foregoing **Appellant's Opening Brief** is hereby acknowledged this 27th day of June, 2001.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By

EXHIBIT 10

EXHIBIT 10

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 36991

FILED

JAN 15 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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