

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI III,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CLARK,
STATE OF NEVADA, AND THE
HONORABLE DONALD M. MOSLEY,
DISTRICT COURT JUDGE,

Respondents.

CASE NO. 43895
District Court No. C172534

FILED

SEP 08 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

PETITIONER'S APPENDIX

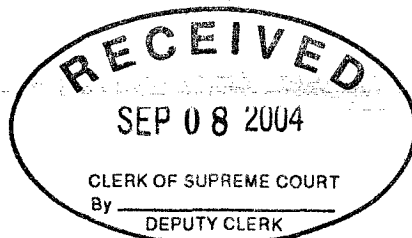
CARMINE J. COLUCCI, ESQ.
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Nevada Bar No. 000881
629 South Sixth Street
Las Vegas, Nevada 89101
(702) 384-1274

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Las Vegas, Nevada 89155-2212

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Attorneys for Respondent



INDEX

DOCUMENT

	<u>Page</u>
Motion for New Trial filed June 28, 2004.....	2-42
Notice of Clerical Error and/or Errata (Restoration of Civil Rights Application filed August 24, 2004.....	111-113
Order Denying Defendant's Motion for New Trial filed September 2, 2004.....	155-156
Receipt of Copy filed June 29, 2004.....	43
Reply to State's Opposition to Defendant's Motion for New Trial filed August 24, 2004.....	70-110
Reporter's Transcript of State's Motion to Compel Audio Taped Interview/Defendant's Motion for a New Trial filed August 30, 2004.....	114-154
State's Opposition to Defendant's Motion for New Trial filed August 10, 2004.....	44-69
Verdict filed April 16, 2004.....	1

1 CERTIFICATE OF MAILING

2 I HEREBY CERTIFY that on the 6th day of September, 2004, I deposited
3 in the United States Mail at Las Vegas, Nevada, a true and correct copy of
4 PETITIONER'S APPENDIX enclosed in a sealed envelope upon which first class
5 postage has been fully prepaid, addressed to:
6

7 DAVID ROGER
8 DISTRICT ATTORNEY
9 200 South Third Street, Suite 701
10 Post Office Box 552212
11 Las Vegas, Nevada 89155-2212

12 BRIAN SANDOVAL
13 Nevada Attorney General
14 100 North Carson Street
15 Carson City, Nevada 89701-4717

16 Attorneys for Respondent

17 Zoe McCaugh
18 an employee of
19 of CARMINE J. COLUCCI, CHTD.
20
21
22
23
24
25
26
27
28

1 VER

2 FILED IN OPEN COURT

3 APR 16 2004 4:30pm

4 SHIRLEY B. PARRAGUIRRE, CLERK

5 BY

DISTRICT COURT

MELISSA SWINN

DEPUTY

6 CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,

8 Plaintiff,

CASE NO: C172534

9 -vs-

DEPT NO: Dept. Number

10 ALFRED PAUL CENTOFANTI, III,

11 Defendant.

12
13 VERDICT

14 We, the jury in the above entitled case, find the Defendant ALFRED PAUL
15 CENTOFANTI, III, as follows:

16 COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON

17 (please check the appropriate box, select only one)

18 ☒ Guilty of First Degree Murder With Use of a Deadly Weapon

19 ☐ Guilty of First Degree Murder

20 ☐ Guilty of Second Degree Murder With Use of a Deadly Weapon

21 ☐ Guilty of Second Degree Murder

22 ☐ Guilty of Voluntary Manslaughter With Use of a Deadly Weapon

23 ☐ Guilty of Voluntary Manslaughter

24 ☐ Not Guilty

25 DATED this 16 day of April, 2004

26
27 
FOREPERSON

28 RECEIVED

APR 16 2004

CLERK

1 MOT
2 CARMINE J. COLUCCI, ESQ.
3 CARMINE J. COLUCCI, CHTD.
4 Nevada Bar #000881
5 629 South Sixth Street
6 Las Vegas, Nevada 89101
7 (702) 384-1274
8 Attorney for Defendant,
9 ALFRED P. CENTOFANTI III

FILED

JUN 28 4 48 PM '04

Shirley S. Ruggione
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

ALFRED P. CENTOFANTI III,

Defendant.

CASE NO. C172534

DEPT NO. XIV

Date of Hearing: 7-8-04
Time of Hearing: 9:00 am

MOTION FOR A NEW TRIAL

COMES NOW, the Defendant, ALFRED P. CENTOFANTI III, by and through his attorney, CARMINE J. COLUCCI, ESQ., of the law firm of CARMINE J. COLUCCI, CHTD., and moves this Court for an order setting aside the jury verdict of April 16, 2004, and granting the defendant a new trial for the reasons set forth herein.

This motion is made and based upon the Points and Authorities submitted herewith, the pleadings on file herein together with the affidavit of Mike Pfriender

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/////

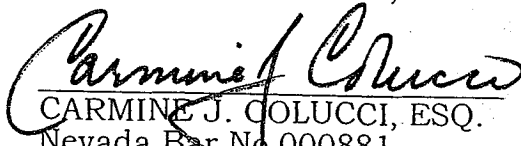
/////

MC

1 attached hereto.

2 DATED this 28th day of June, 2004.

3 CARMINE J. COLUCCI, CHTD.

4 
5 CARMINE J. COLUCCI, ESQ.

6 Nevada Bar No. 000881

7 629 South Sixth Street

8 Las Vegas, Nevada 89101

9 Attorney for Defendant

10 **NOTICE OF MOTION**

11 TO: THE STATE OF NEVADA; Plaintiff; and

12 TO: DAVID ROGER, DISTRICT ATTORNEY, its Attorney.

13 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned
14 will bring the foregoing Motion on for hearing before this Court at the Courtroom
15 of the above-entitled Court on the 8 day of July, 2004, at the hour of 9:00
16 a.m. of said day, or as soon thereafter as Counsel may be heard.

17 DATED this 28th day of June, 2004.

18 CARMINE J. COLUCCI, CHTD.

19 
20 CARMINE J. COLUCCI, ESQ.

21 Nevada Bar #000881

22 629 South Sixth Street

23 Las Vegas, Nevada 89101

24 Attorney for Defendant

25 **POINTS AND AUTHORITIES**

26 I.

27 **STATEMENT OF THE ISSUES**

28 A. Whether the defendant is entitled to a new trial based upon juror
misconduct for not disclosing her prior involvement in the criminal justice
process as a defendant which included a felony conviction which would have

1 precluded her from meeting the statutory requirements in order to sit as a
2 qualified juror in the instant case?

3 B. Whether the defendant is entitled to a new trial based upon juror
4 misconduct because juror Joshua Wheeler performed his own firearm testing
5 experiment during the trial?

6 C. Whether the defendant is entitled to a new trial based upon juror
7 misconduct as a result of juror Chris Kelly coming to court and sitting on the jury
8 while wearing a tee shirt that read "Do you know what a murderer looks like?"

9 D. Whether the defendant is entitled to a new trial based upon juror
10 misconduct as a result of two or more jurors sleeping during the presentation of
11 testimony during the trial in this case?

12 **II.**

13 **STATEMENT OF FACTS**

14 Prior to the commencement of the trial in the instant case, prospective
15 jurors were sent notices about their future jury service. With each notice,
16 prospective jurors were each sent an informational sheet which contained
17 information about the parking facilities, general jury information and about the
18 qualifications for jury service including four of the mandatory requirements. One
19 of the stated qualifications stated was: "You must be without a felony conviction."
20 See Exhibit A attached hereto.

21 In response to the notice, juror Caren Barrs was required to telephonically
22 contact the Jury Commissioner's office and to respond to various qualification
23 questions. One of the questions that required her response was whether she had
24 a felony conviction.

25 On March 22, 2004, the jury trial of the defendant commenced. Voir dire
26 was conducted by the Court and by counsel for the respective parties. A jury was
27 selected from the panel furnished through the Clark County Jury Commissioner's
28

1 office. The jury trial proceeded after the jury was selected and impaneled. On
2 April 16, 2004, the jury returned with its verdict of guilty of First Degree Murder
3 and With Use of a Deadly Weapon in the Commission of a Crime. Sentencing is
4 presently scheduled for July 9, 2004.

5 In May, 2004, the defendant decided to discharge his trial counsel and to
6 retain the undersigned as new counsel. Sentencing was originally scheduled for
7 May 28, 2004, but was continued until July 9, 2004, by stipulation of the parties
8 as an accommodation to new defense counsel so that he could obtain the files
9 from the defendant's trial counsel.

10 III.

11 ARGUMENT

12 A. DEFENDANT IS ENTITLED TO A NEW TRIAL BASED UPON JUROR 13 MISCONDUCT FOR NOT DISCLOSING HER PRIOR INVOLVEMENT IN THE 14 CRIMINAL JUSTICE PROCESS AS A DEFENDANT WHICH INCLUDED A 15 FELONY CONVICTION AND WHICH WOULD HAVE PRECLUDED HER FROM 16 MEETING THE STATUTORY REQUIREMENTS IN ORDER TO SIT AS A 17 QUALIFIED JUROR IN THE INSTANT CASE.

18 During a review of the pleadings and transcripts of the defendant's case and
19 after interviewing various people who had attended the trial, defendant's counsel
20 decided to investigate the backgrounds of the jurors. During the course of this
21 investigation, it became apparent that at least one juror had an undisclosed felony
22 conviction which precluded her from meeting the statutory requirements for being
23 a person qualified to sit on a jury. NRS 6.010 states in pertinent part as follows:

24 **6.010 Persons qualified to act as jurors.**

25 Except as otherwise provided in this section, every qualified elector of
26 the State, whether registered or not, who has sufficient knowledge of
27 the English language, and who has not been convicted of treason, a
28 **felony**, or other infamous crime, and who is not rendered incapable
by reason of physical or mental infirmity, is a qualified juror of the
county in which he resides. A person who has been convicted of a
felony is not a qualified juror of the county in which he resides until
his civil right to serve as a juror has been restored pursuant to NRS
176A.850, 179.285, 213.090, 213.155 or 213.157. (Emphasis added)

1 It is clear from a review of this statute, that, in order to qualify to be a juror,
2 the prospective juror must not have a felony conviction which has not been
3 expunged or sealed or must otherwise qualify under NRS 176A.850. The certified
4 documents submitted herewith, show that Caren Barrs, a member of the jury
5 impaneled in the instant case, was a convicted felon. She also had a
6 misdemeanor conviction which she also failed to disclose to the court or counsel.

7 Further, since the defense investigator was easily able to obtain certified
8 court documents evidencing this juror's felony and a misdemeanor conviction,
9 without a court order, it was evident that Barrs' convictions were not sealed or
10 expunged. Additionally, during the defense investigator's interview with Barrs,
11 she acknowledged the felony conviction and that she had not sealed her record,
12 had not had the conviction expunged or had her civil rights restored pursuant to
13 Florida law or NRS 176A.850. She was therefore ineligible, by statute, to sit as a
14 juror and deliberate in this case as she had not met the requirements of NRS
15 176A.850 or NRS 6.010 (See certified copies of Florida court documents attached
16 hereto as Exhibit B).

17 It is also clear that she could not have been truthful with the Jury
18 Commissioner as each prospective juror is asked via the phone survey whether he
19 or she has a felony conviction prior to being ordered to report for service. Ms.
20 Barrs must have answered the pertinent question by indicating that she did not
21 have a felony conviction in order to be included in the jury pool without being
22 subjected to further inquiry about this. Apparently, relying on the truthfulness
23 of the survey response, the Jury Commissioner did not attempt to verify her
24 response to the felony conviction question.

25 Prior to the commencement of voir dire, the court clerk administered the
26 oath to the panel of prospective jurors using the language set forth in NRS 16.030
27 (5) which states in pertinent part as follows:
28

1 **NRS 16.030. Drawing and examination of jurors; administration**
2 **of oath or affirmation.**

3 ...

4 5. Before persons whose names have been drawn are examined as
5 to their qualifications to serve as jurors, the judge or his clerk shall
6 administer an oath or affirmation to them in substantially the
7 following form:

8 Do you, and each of you, (solemnly swear, or affirm under the
9 pains and penalties of perjury) that you will well and truly answer all
10 questions put to you touching upon your qualifications to serve as
11 jurors in the case now pending before this court (so help you God)?

12 After this oath was given, during the voir dire conducted on March 16,
13 2004, this Court gave Ms. Barrs another opportunity to mention her prior
14 criminal history, including her felony conviction. She was asked:

15 THE COURT: Have you or a close friend or family member ever been
16 involved in the criminal justice process, either in prosecuting a case, or as
17 a witness, **or as a defendant?** (Emphasis added) (See Reporter's Transcript
18 attached hereto as Exhibit C at p. 62)

19 A review of her responses to the question asked by this Court, shows that
20 she evaded a direct response about her own record by responding to the Court's
21 question above by talking about her son's New York case. (See Exhibit C at p. 63).
22 She did not at any time mention anything about her own record. She also avoided
23 mentioning that she ever lived in Florida, the actual location of her felony
24 conviction, by responding to another of this Court's questions as set forth below:

25 THE COURT : And he (her son) moved to New York at some point ?

26 PROSPECTIVE JUROR BARRS : No I'm originally from New York State,
27 and we moved out here, and he and his other brother stayed in New
28 York State. One son came out here with us.

29 In *Meyer v. State* 119 Nev. Advance Opinion 61 (Dec. 19, 2003) the Nevada
30 Supreme Court stated:

31 Jurors who fail to disclose information or give false information
32 during voir dire commit juror misconduct, which, if discovered after
33 the verdict, may be grounds for a new trial under the standards
34 established for juror misconduct during voir dire as opposed to
35 misconduct that occurs during deliberations.

1 The felony conviction of Caren Barrs was not discovered until after the jury
2 verdict was rendered. It was not disclosed to the Court prior to jury service, as
3 required by law, despite this Court's specific inquiry. Juries must consist of 12
4 jurors except as provided in NRS 175.021, which is inapplicable. NRS 175.481
5 requires the verdict to be unanimous. Therefore, the defendant is entitled to have
6 the jury verdict vacated, as it was not rendered by twelve "qualified" jurors as
7 required by statute and he is also entitled to a new trial.

8 **B. DEFENDANT IS ENTITLED TO A NEW TRIAL BASED UPON JUROR**
9 **MISCONDUCT BECAUSE JUROR JOSHUA WHEELER PERFORMED HIS OWN**
10 **FIREARM TESTING EXPERIMENT DURING THE TRIAL.**

11 Once the jury selection process is completed, the clerk administers the oath
12 which the jurors took pursuant to NRS 16.070:

13 **NRS 16.070 Jury to be sworn; court may order jury into custody**
14 **of officer.**

15 1. As soon as the jury is completed, the judge or his clerk shall
16 administer an oath or affirmation to the jurors in substantially the
17 following form:

18 Do you, and each of you, (solemnly swear, or affirm under the
19 pains and penalties of perjury) that you will well and truly try the case
20 now pending before this court and a true verdict render according to
21 the evidence given (so help you God)?

22 ...

23 During the initial interview of Joshua Wheeler which was conducted by
24 licensed investigator Mike Pfriender on June 21, 2004, juror Joshua Wheeler told
25 him that he went shooting with his father sometime between the third week and
26 fourth week of the trial. Juror Wheeler concluded from this shooting session that,
27 "it would be impossible for it to come on a target all six times in under four
28 seconds even. It would be real tough." This comment was made in reference to
the testimony of the firearms experts and the theory that the defendant had fired
his weapon in an extremely rapid fire manner but was still able to hit the decedent
with every shot.

1 In the follow-up interview of June 24, 2004, juror Wheeler advised the
2 investigator that he and his father went shooting and the reason that they did so.
3 He stated that he specifically wanted to go out and see how many seconds that it
4 took to empty the gun he was shooting. See the affidavit of Mike Pfriender
5 attached hereto. That constituted an improper experiment and at the very least
6 constituted improper consideration of extrinsic evidence by juror Wheeler and
7 perhaps the other members of the jury if he shared it during deliberations.
8 Whether juror Wheeler alone or if other members of the jury considered this
9 extrinsic "evidence," consideration at all constitutes a violation of the defendant's
10 right to be present and to confront the witnesses against him which Wheeler now
11 had become. *Barker v. Nevada*, 95 Nev. 309, 594 P.2d 719 (1979). Joshua
12 Wheeler violated the terms of the jurors' oath by rendering his decision partially
13 based on evidence that was not presented to him in court. The conduct of juror
14 Wheeler met the two-prong test for a new trial as set forth in *Meyer v. State, supra*,
15 in that the misconduct occurred (the independent juror test) and it involved a
16 material issue in the case that undermined the defense's theory. In *Meyer*, the
17 Nevada Supreme Court cites *U.S. v. Navarro-Garcia*, 926 F.2d 818 (9th Cir. 1991).

18 When extrinsic evidence is presented to a jury that is considering a
19 criminal case, the defendant is entitled to a new trial 'if there exists
20 a reasonable possibility that the extrinsic material could have affected
21 the verdict.'

22 Therefore this juror's conduct constituted juror misconduct entitling the
23 defendant to the relief sought herein.

24 **C. DEFENDANT IS ENTITLED TO A NEW TRIAL BASED UPON JUROR
25 MISCONDUCT AS A RESULT OF JUROR CHRIS KELLY COMING TO COURT
26 AND SITTING ON THE JURY WHILE WEARING A TEE SHIRT THAT READ "DO
27 YOU KNOW WHAT A MURDERER LOOKS LIKE."**

28 During the trial, juror Chris Kelly went to court dressed in a shirt which
bore the writing, "Do you know what a murderer looks like?" In light of the
seriousness of the charges and the right of the defendant to a fair trial, this type

1 of activity was very inappropriate, highly prejudicial and constituted juror
2 misconduct. This also violated the spirit of the juror's oath set forth in NRS
3 16.070.

4 Dressing in this type of attire evidences a lack of respect for the court
5 process. It also is evidence that juror Chris Kelly failed to take his oath and duties
6 as a juror seriously. Apparently he thought that this was a joke as he wore the
7 shirt bearing this message while he was seated one day in the jury box. It also
8 shows that juror Kelly had formulated the opinion that the defendant was a
9 murderer.

10 It is unknown by the defense whether this behavior was ever brought to the
11 Court's attention as it should have been by someone involved in this case.
12 Apparently this juror was never chastised for wearing this shirt nor was he
13 admonished about his duty not to formulate an opinion before the trial was over.
14 The shirt was worn to be "spiteful" as juror Josh Wheeler put it. This shirt's
15 message and this juror's actions evidence either his enmity or his bias against the
16 defendant, that he had made up his mind prior to having this case submitted to
17 the jury and that he did not take his duties seriously. Any one of these mental
18 attitudes constituted the denial of the defendant's constitutional rights to due
19 process of law and a fair trial. This juror misconduct also entitles the defendant
20 to the relief sought herein.

21 **D. DEFENDANT IS ENTITLED TO A NEW TRIAL BASED UPON JUROR**
22 **MISCONDUCT AS A RESULT OF TWO OR MORE JURORS SLEEPING DURING**
23 **THE PRESENTATION OF TESTIMONY DURING THE TRIAL IN THIS CASE.**

24 The failure to stay awake and alert during the trial constitutes a violation
25 of a juror's duty under NRS 16.070 also. The defense only learned about this
26 misconduct recently. This conduct was confirmed by juror Josh Wheeler. See the
27 Affidavit of Mike Pfriender attached hereto.

28 At this time, it is not known how often and for what periods of time the

1 jurors slept or whether they slept at the same time. Perhaps an evidentiary
2 hearing is required in order to make that determination. Josh Wheeler admitted
3 to the investigator that he and Chris Kelly (juror with "the tee shirt") slept during
4 portions of the trial.

5 The jurors' failure to pay full time and attention violated the defendant's
6 right to due process of law and a fair trial as guaranteed under the Fifth
7 Amendment, Sixth Amendment and Fourteenth Amendment of the Constitution
8 of the United States.

9 Sleeping through a trial, thereby missing testimony deprives a juror of the
10 ability to participate in a meaningful way in the deliberations which can result in
11 the permanent deprivation of a person's liability. However, NRS 50.065 seems to
12 preclude a juror from testifying about the deliberative process unless influenced
13 by outside forces. *Echaravarria v. State*, 108 Nev. 734 at 741, 839 P.2d 589
14 (1992), *Reibel v. State*, 106 Nev. 258 at 263, 790 P.2d 1004 (1990) and *Barker*,
15 *supra*. Nevertheless, the defendants rights under the Constitution of the United
16 States would supersede the limitations imposed by the state statute and case law
17 cited above. Therefore, for the above-stated reasons, the defendant is entitled to
18 a new trial.

19 CONCLUSION

20 Under both state and federal law for the reasons set forth above, the
21 defendant is entitled to have the jury verdict in this case set aside and must be

22 / / / / /

23 / / / / /

24 / / / / /

25 / / / / /

26 / / / / /

27 / / / / /

1 granted a new trial.

2 DATED this 28th day of June, 2004.

3 CARMINE J. COLUCCI, CHTD.

4 
5

6 CARMINE J. COLUCCI, ESQ.

7 Nevada Bar No. 000881

8 629 South Sixth Street

9 Las Vegas, Nevada 89101

10 Attorney for Defendant

1 AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

2 STATE OF NEVADA)
3 COUNTY OF CLARK) ss:

4 MIKE PFRIENDER, being first duly sworn, deposes and says:

5 1. That he is the Las Vegas Branch Manager of Frasco Investigative Services
6 and a private investigator duly licensed by the State of Nevada, and has personal
7 knowledge of all matters set forth herein except for those stated upon information
8 and belief and is competent to testify thereon.

9 2. That at the request of defense counsel, affiant has engaged in the post-
10 trial investigation into various matters relating to the instant case including the
11 backgrounds of several jurors.

12 3. That during the course of his investigation, affiant became aware that
13 juror Caren Barrs had a criminal history which included a possible felony
14 conviction.

15 4. That in an attempt to carefully document the existence of the felony
16 conviction, affiant secured a copy of certain public records from the State of
17 Florida which are attached as Exhibit B to defendant's motion for a new trial.

18 5. That affiant verified that these records pertained to this juror by
19 conducting a personal and telephone interview with her.

20 6. That during a phone interview with Ms. Barrs, she admitted that she had
21 a felony conviction in Florida and that it had not been sealed or expunged.

22 7. That affiant believes that Caren Barrs may have another misdemeanor
23 conviction which was not disclosed prior to or during the juror qualification or
24 selection (voir dire) process.

25 8. That affiant also interviewed juror Joshua Wheeler who stated that
26 during the time he served as a juror, he and his father went shooting for the
27 specific purpose of conducting a firearms test which related to testimony of
28

1 prosecutors and defense witnesses.

2 9. That when questioned about this, juror Wheeler stated "My dad had the
3 gun out cleaning it and I asked him how long it would take to empty it and he said
4 five (5) seconds! I didn't tell him what kind of gun was involved, but we both said
5 'Let's go try it' and that's how it happened. It was purely coincidental. I mean my
6 dad knew what was going on and I really didn't talk to him about the case. I may
7 have mentioned 2.3 seconds to him but I don't really remember."

8 10. That juror Wheeler conducted his own firearm testing in order to confirm
9 or to rebut the testimony of the expert witnesses on shooting speed and accuracy.

10 11. That Wheeler also stated that based on his own tests, using a .357
11 Magnum handgun, he formed an opinion on the shooting speed and accuracy as
12 it related to the acts of the defendant and this helped him formulate an opinion
13 about the defendant's intent.

14 12. That Wheeler also stated what he and other jurors saw during the trial,
15 juror Chris Kelly wear a tee shirt that he purchased during trial which Wheeler
16 characterized as "It being quite spiteful." The tee shirt had writing on it that said,
17 "Do you know what a murderer looks like?"

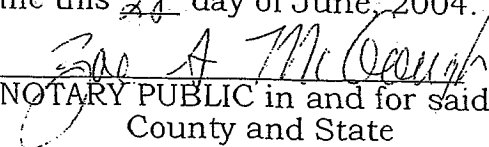
18 13. That juror Wheeler told affiant that as soon as juror Kelly came into
19 contact with the other jurors that they all noticed it and reacted to it.

20 14. That juror Wheeler also stated that at various times during the trial, that
21 both he and juror Chris Kelly slept.

22 15. That juror Wheeler went on to say that during the trial, juror Caren Barrs
23 took a lot of notes and other jurors relied on her notes in coming to a decision.

24 
25 MIKE PFRIENDER

26 SUBSCRIBED and SWORN to before
27 me this 28 day of June, 2004.

28 
NOTARY PUBLIC in and for said
County and State

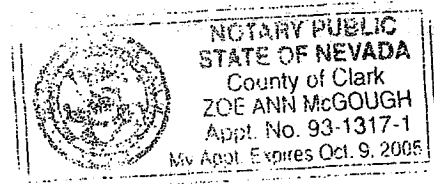
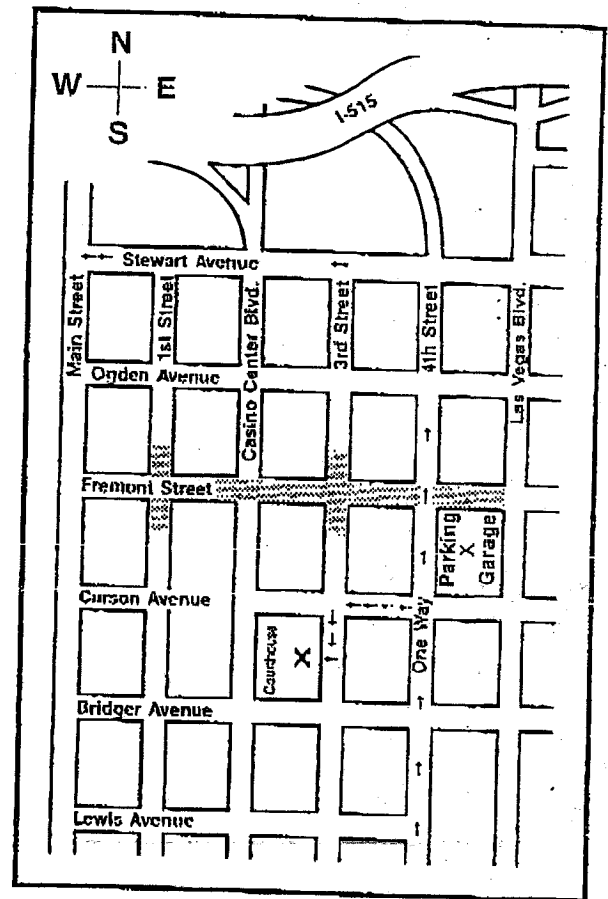


EXHIBIT A

**PRE-PAID PARKING AT
425 FREMONT STREET, ENTER FROM 4TH STREET**

PARKING FACILITIES

On your reporting date and while serving, parking is pre-paid at 425 Fremont Street. Bring your parking stub with you to Jury Services for validation. Maximum vehicle height is 8'2". If you require handicapped parking or your vehicle is over 8'2", please tell the parking attendant. We are unable to pay for parking in restricted areas, timed areas, or at parking meters.



JURY INFORMATION

YOUR EMPLOYER IS REQUIRED BY NEVADA STATE LAW, NRS 6.190, TO ALLOW YOU, AS A PROSPECTIVE JUROR, THE TIME OFF TO PARTICIPATE IN THE JURY PROCESS. AN EMPLOYER'S FAILURE TO COMPLY MAY RESULT IN A CIVIL ACTION AGAINST THE EMPLOYER.

On your scheduled APPEARANCE DAY, report to the Clark County Courthouse, main entrance, located at 200 South Third Street, and follow the signs to Jury Services. Please be seated until your number is called.

PROPER CLOTHING is required. No shorts, haltertops, muscle shirts, hats, or jogging suits are permitted. A suit and tie are not required.

BEVERAGES AND SNACKS may be purchased at the snack bar on breaks or during lunch. These items may not be taken into the courtroom. The Clark County Courthouse is a NO SMOKING building. Break and lunch times are determined by the Court.

ON THE FIRST DAY OF SERVICE YOU MUST BE PREPARED TO REMAIN AT THE COURTHOUSE UNTIL 5:00 P.M. You are welcome to bring a book, magazine, or personal work with you. However, local newspapers are not permitted.

Each person summoned to report is entitled to a fee of \$40 for each day after the second day of jury selection and, if sworn as a juror, is entitled to a fee of \$40 for each day of service. Mileage is reimbursed at 36.5 cents a mile for each mile traveled if the residence is 65 or more miles from the place of trial.

QUALIFICATION REQUIREMENTS FOR JURY SERVICE:

- 1) You must be a citizen of the United States.
- 2) You must be 18 years of age or older.
- 3) You must be a resident of Clark County.
- 4) You must be without a felony conviction.

EXHIBIT B

COUNTY COURT
PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CAREN BARRS

Sex F

Add: 1335 25th St. # 511

() St. Petersburg Traffic Division Clear A

() Clearwater Traffic Division

CHARGE Adverse Party in Return for
Healthless Check

CASE NO. CAC 90004652FAM

AGENCY REPORT NO. _____

() Traffic (Citation No.)

() Misdemeanor

() Felony

☒ On Warrant/
Capias

() Municipal Ord. Viol. () On View

OFFENSE OCCURRED IN:

() No. County

() St. Petersburg

() So. County

() Other

COMPLAINT

BEFORE ME, A NOTARY PUBLIC, personally appeared Det. C. F. Morelli

who, being duly sworn, says that on the 25 day of Jan

Pinellas County, Florida, on CAREN BARRS A.D. 19 80 in

det. C-73

Arrested on Circuit Capias

FILED

contrary to (statute) (Ordinance) §32.05 in such case made arrested against the peace
and dignity of the STATE OF FLORIDA (N.C.I.C. Code No. 2406)
Sworn to and Subscribed before me this

25 day of JAN 1980

W. P. McWhorter
Notary Public

Seal

of

PCSD
Affiant

(Affiant's address or agency)

My commission expires Notary Public 12-31-81
My Commission Expires 12-31-81

BOOKING ADVISORY

JAIL (located) Pinellas Co DATE 1-25-80 TIME 11:00 AM/PM
I HEREBY CERTIFY THAT the above named Defendant has been advised by me that he has a right to counsel and if unable to afford counsel, that one will be provided to him at no charge.

AMOUNT OF BOND/S \$ 250 ARRESTING/BOOKING OFFICER [Signature]

BOND OUT

Bonded 25 day of Jan 1980 at _____ AM/PM By Self

HEARING DATE/TIME _____ LOCATION _____

I, _____ (Bondsman) (Print) HEREBY AGREE TO HAVE

(Defendant) (Print)

present at advisory hearing noted below, and understand said hearing is within 72 hours from the time of arrest.

Bondsman Signature _____ DATE _____

ADVISORY AND SOLVENCY HEARING

The above named Defendant came before me for Advisory and Solvency hearing on the _____ day of _____, 19____, at _____ AM/PM, and was advised by me of the charge against him, his right to remain silent, that any statements by him may be used against him, his right to counsel, and, if he is financially unable to afford counsel, that counsel forthwith will be appointed; of his right to communicate with his counsel, family or friends, and that reasonable implementation will be afforded him to contact the foregoing.

I FURTHER CERTIFY THAT:

- () a. Defendant has advised the Court that he has retained counsel or will retain counsel, and the Court investigated Defendant's solvency and found the Defendant solvent and financially able to secure counsel.
- () b. The Court Investigated Defendant's solvency and appointed the Public Defender to represent Defendant.
- () c. The Defendant waived the right to counsel at the first appearance only.
 - () I hereby waive my right to counsel at the first appearance only.
 - () I, having been found solvent and financially able to secure counsel, I hereby waive counsel until my attorney files an appearance in this case or until I file a written request for a review of my solvency and ability to secure counsel.

BOND ACTION

TAKEN, if any _____

Defendant's Signature _____

JUDGE _____

I HEREBY ACKNOWLEDGE RECEIPT OF A COPY OF THE FOREGOING COMPLAINT AND ADVISORY

STATE OF FLORIDA - PINELLAS COUNTY

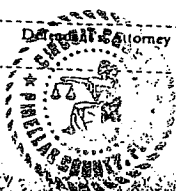
I hereby acknowledge receipt of a true copy of the foregoing complaint and advisory

appears among the files and

Address _____

Date 14 day of June 1980

[Signature]
Clerk of Circuit Court



IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

CASE NO. CRC 8000465CFANO

SPN: 87081

STATE OF FLORIDA

vs.

CAREN BARRS

CAPIAS

TO ALL AND SINGULAR THE SHERIFFS OF THE STATE OF FLORIDA, GREETING:

THESE ARE TO COMMAND YOU as you have heretofore been commanded
to take CAREN BARRS

..... if she
be found in your County, and her..... safely keep, so that you have
her..... body before the Judge of the above Court, at the Court-

house in Clearwater, Pinellas County, INSTANTER, to answer an Inform-
ation found and now pending in said Court for said County, for
OBTAINING PROPERTY IN RETURN FOR WORTHLESS CHECK (832.05); BOND SET AT \$250.00
INCLUDING SURCHARGE

and have then and there this writ, with due return of your action
endorsed thereon.

WITNESS, HAROLD MULLENDORE, is Clerk
of the Court, and the seal of said
Court at Clearwater, this 22nd
day of January...., 19.80...

HAROLD MULLENDORE
As Clerk of the Court

By: *Shirley A. Merrifield*
As Deputy Clerk

(SEAL)

STATE OF FLORIDA - PINELLAS COUNTY
I hereby certify that the foregoing is a true copy
as the same appears among the files and
records of this court.

To: 14 day of June 2004

JOSEPH F. BLAKER
Clerk of Circuit Court

By: *Joseph F. Blaker*
Deputy Clerk

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

CARE
STOW

CASE NO. CRC 8000465CFANO

SPN: 87081

STATE OF FLORIDA

vs.

CAREN BARRS

FILED

JAN 28 1980

HAROLD MULLENDORE
CLERK, CIRCUIT COURT

Deputy Clerk

FILED
JAN 23 PM 1:46
PINELLAS COUNTY
SHERIFF'S OFFICE

TO ALL AND SINGULAR THE SHERIFFS OF THE STATE OF FLORIDA, GREETING:
THESE ARE TO COMMAND YOU as you have heretofore been commanded
to take CAREN BARRS if she
be found in your County, and her safely keep, so that you have
her body before the Judge of the above Court, at the Court-
house in Clearwater, Pinellas County, INSTANTER, to answer an Inform-
ation found and now pending in said Court, for said County, for
OBTAINING PROPERTY IN RETURN FOR WORTHLESS CHECK (832-06), BOND SET AT \$250.00
INCLUDING SURCHARGE

and have then and there this writ, with due return of your action
endorsed thereon.

WITNESS, HAROLD MULLENDORE, as Clerk
of the Court, and the seal of said
Court at Clearwater, this 22nd
day of January, 19.80..

HAROLD MULLENDORE
As Clerk of the Court

(SEAL)

By: *Shirley A. Merrifield*
As Deputy Clerk

STATE OF FLORIDA - PINELLAS COUNTY
I hereby certify that the foregoing is a true copy
of the original as it appears among the files and
records of this court.

14 June 2004

DAVID BLAKER
Deputy Clerk

Loyanne
Deputy Clerk



CLERK OF CIRCUIT COURT
WARRANT IN DETENTION SHEET

To be furnished by the investigating officer/judge.

* DEFENDANT'S FULL NAME: Cohen, Barry

ALIAS: _____

LAST KNOWN ADDRESS: 551 N. 58th Ave, Clark

PLACE OF EMPLOYMENT: Morison Plant Hospital

AGE: 33 DOB: 6-23-46 HT. _____ WT. _____ HAIR: _____

EYES: _____ OTHER FEATURES: _____

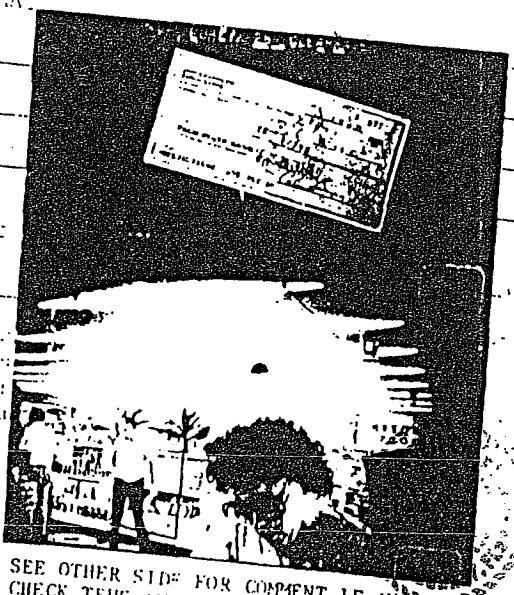
SSN: 078-36-9043

ARRESTING AGENCY: _____

PHOTO AVAILABLE: _____

IF OUT ON BOND, AMOUNT: _____

OTHER INFORMATION: _____



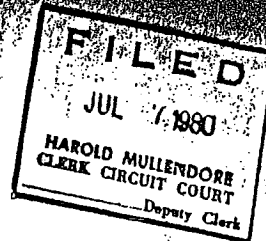
STATE OF FLORIDA - CLAY COUNTY
whereby I, the undersigned, is a true copy
of the original appears among the files and
records of the court.

14 June 47
J. B. BLAKER
Clerk of Circuit Court
Deputy Clerk

SEE OTHER SIDE FOR COMMENT IF ANY
CHECK TRUE IMAGE. NO COPY REVERSE

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

CASE NO. CRC 80-465 CFANO



STATE OF FLORIDA

vs.

CAREN BARRS

SPN 87081

OBTAINING PROPERTY IN RETURN FOR
WORTHLESS CHECK

JUDGMENT AND SENTENCE

The defendant, being present, and with counsel, Warren LaFray,
upon being caused to stand before the bar in the custody of the Sheriff, the Court pronounced
the following Judgment, to-wit:
You, Caren Barrs, having intelligently, understandingly
and advisedly entered a plea of (guilty) ~~(not guilty)~~ to the crime ~~(obtain property in return for worthless check)~~ of
~~(obtain property in return for worthless check)~~

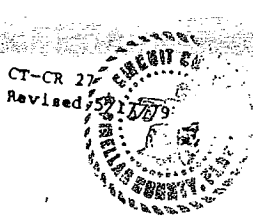
OBTAINING PROPERTY IN RETURN FOR WORTHLESS CHECK

as (charged) (indicted) in the Information filed herein, and having now identified yourself
to the Court as the defendant named herein, and saying nothing in bar or preclusion why the
judgment and sentence of the law should not now be pronounced against you, the Court hereby
adjudges you to be guilty ~~(not guilty)~~ of the crime ~~(obtain property in return for worthless check)~~
~~(obtain property in return for worthless check)~~

The defendant is advised of his right to appeal and of his right to have counsel for
appeal purposes.
The defendant is remanded to the custody of the Sheriff.
DONE AND ORDERED this 2nd day of July, 1980 in open Court, in
Clearwater, Florida.

Left four fingers	Left thumb	Right thumb	Right four fingers

Impressions made by B. J. Becker Deputy Sheriff
I hereby certify that the above and foregoing fingerprints on this Judgment are the
fingerprints of the defendant Caren Barrs, and that they were
placed thereon by said defendant in my presence, in open court, the 2nd day of
July, 1980.



STATE OF FLORIDA - PINELLAS COUNTY
hereby certifies that the above and foregoing fingerprints on this Judgment are the
fingerprints of the defendant Caren Barrs, and that they were
placed thereon by said defendant in my presence, in open court, the 2nd day of
July, 1980.
14 day of June, 1980
JOYANNE FLAKER
Deputy Clerk

Bryson

DATE: *7/2/80*

BUD CALDWELL
CLERK'S ACCOUNTING

Please furnish an itemized statement of all costs of Prosecution
in the following case.

Case No. Defendant St. Petersburg Clearwater Amount

80-465 CF *Caren Barris*
87081

NONE

H. H. Runey
7/3/80

INFORMATION *\$20.00*

TOTAL *\$20.00*

FILED
JUL 7 1980
HAROLD MULLENDORE
CLERK CIRCUIT COURT
E. H. [Signature] Deputy Clerk

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STATE OF FLORIDA

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Plaintiff

In the CIRCUIT

• Court

CAREN BARRS

of PINELLAS

County, Florida

SPN 87081

Defendant.

Case No. CRC 80-465 CFANO

CTC 80-1547 MMANC

Caren Barre

This cause coming on this day to be heard before me, and you, the defendant, CTC 80-1547 MMANO
Caren Barrs

ENTERED A PLEA OF GUILTY TO _____, being now present before me, and you

ENTERED A PLEA OF GUILTY TO
having: ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~
~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~
~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~

the offense of OBTAINING PROPERTY IN RETURN FOR WORTHLESS CHECK; the defendant being present
and with counsel, Warren LaFray

the court hereby adjudges you to be guilty of said offense; and

It appearing to the satisfaction of the Court that you are not likely again to engage in a criminal course of conduct, and that the ends of justice and the welfare of society do not require that you should suffer the penalty authorized by law;

Now, therefore, it is ordered and adjudged that the imposition of sentence is hereby withheld, and that you are hereby placed on probation for a period of FOUR YEARS * under the supervision of the Department of Corrections and its Officers, such supervision to be subject to the provisions of the laws of this State.

(1) Not later than the fifth day of each month, you shall submit to the court a written report of your progress during the preceding month.

- (1) Not later than the fifth day of each month, you will make a full and truthful report to your Probation Officer on the form provided for that purpose.
 (2) You will pay the State of Florida the amount of Ten Dollars (\$10) per month toward the cost of your supervision unless otherwise waived in compliance with Florida Statutes.
 (3) You will not change your residence or employment or leave the county of your residence without first procuring the consent of your Probation Officer.
 (4) You will neither possess, carry or own any weapons or firearm without first securing the consent of your Probation Officer.
 (5) You will live and remain at liberty without violating any law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your probation.
 (6) You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used.
 (7) You will work diligently at a lawful occupation and support any dependents to the best of your ability, as directed by your Probation Officer.
 (8) You will promptly and truthfully answer all inquiries directed to you by the Court or the Probation Officer, and allow the Officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions he may give you.
 (9) You will enroll, participate in and successfully complete any program or rehabilitative activity, residential or otherwise, your probation officer may so direct.
 (10) You will serve in a Community Correctional Facility operated by the Department of Corrections for a term of 120 DAYS. You will surrender yourself to the custody of the Sheriff no later than 12:00 Noon, July 9, 1980. (place of incarceration to be nearest defendant's place of employment.)
 (11) You will receive psychological counseling as required by your probation supervisor.
 (12) You will make full restitution within one year of this date.
 (13) You will have no interest, directly or indirectly, with any checking accounts.
 (14) You will pay the cost of this prosecution in the amount of \$ 20.00
- * 60 days probation

* 60 days probation as to CTC 80-1547 MMANO, to run concurrently with
CRC 80-465 CFANO.

Defendant is advised of right to appeal.

You are hereby placed on notice that the Court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision; and that if you violate any of the conditions of your probation, you may be arrested and the Court may revoke your probation and impose any sentence which it might have imposed before placing you on probation.

It is further ordered that when you have reported to the Probation Officer and have been instructed as in the conditions of probation, you shall be released from custody if you are in custody and if you are at liberty on bond, the sureties thereon shall stand discharged from liability.

It is further ordered that the Clerk of this Court file this order in his office, record the same in the Minutes of the Court, and forthwith provide certified copies of same to the Probation Officer for his use in compliance with the requirements of law.

DONE AND ORDERED IN OPEN COURT, this 11th day of May, 1964.

DONE AND ORDERED IN OPEN COURT, this the 2nd day of July, 19 80

cc: Sheriff

STATE OF FLORIDA - TREASURY DEPARTMENT

I acknowledge receipt of a certified copy of this order and that all conditions have been explained to me

Date: _____
Instructed by: _____

Original: Court
Copies: Probationer
File

Probationer
F. D. BLAKE
Chief of Circuit Court

Benly Clin

DC-900
Rev. 7/7

EXHIBIT C

FILED

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CLERK

CLERK

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OF

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CLARK PETERSON, ESQ.

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1 case until the entire thing is over.

2 Would you be able to make sure to follow the
3 law and not reach any decision until you heard everything
4 on the case, and the Judge gave the law in this case?

5 PROSPECTIVE JUROR SALAS: Yes.

6 MR. BLOOM: Thank you very much. Pass
7 for cause, Your Honor.

8 THE COURT: Thank you. The Defense
9 counsel may exercise the first peremptory challenge.

10 MR. BLOOM: Your Honor, we would ask
11 the Court to thank and excuse Juror No. 3, Mrs. Alley.

12 THE COURT: Thank you very much, ma'am.

13 THE CLERK: Badge No. 285, Caren Barrs,
14 B-a-r-r-s.

15 THE COURT: Is it Miss or Mrs. Barrs?

16 PROSPECTIVE JUROR BARRS: Mrs.

17 THE COURT: Mrs. Barrs, do you know of
18 any reason why you could not serve as a fair juror in this
19 particular case?

20 PROSPECTIVE JUROR BARRS: No.

21 THE COURT: Have you served as a juror
22 before?

23 PROSPECTIVE JUROR BARRS: No, I
24 haven't.

25 THE COURT: Are you or any of your

1 close friends or relatives involved in law enforcement, or
2 have you been in the past?

3 PROSPECTIVE JUROR BARRS: My husband
4 works for Prison Health Services. He's the booking
5 medication nurse at the Clark County Detention Center.

6 THE COURT: How long has he been
7 involved in that kind of work?

8 PROSPECTIVE JUROR BARRS: He's been
9 there almost five years now.

10 THE COURT: You have occasion to
11 discuss his work with him, I take it, from time to time?

12 PROSPECTIVE JUROR BARRS: Occasionally.

13 THE COURT: Do you think when this
14 matter is resolved and you have an opportunity to speak
15 with him about it, you would feel a compunction to explain
16 or justify your verdict to him?

17 PROSPECTIVE JUROR BARRS: Absolutely
18 not.

19 THE COURT: Do you think his employment
20 and your obvious relationship with him would have any
21 effect on your view of this case?

22 PROSPECTIVE JUROR BARRS: No.

23 THE COURT: Do you think you can be a
24 fair juror?

25 PROSPECTIVE JUROR BARRS: Yes.

1 THE COURT: Have you or a close friend
2 or family member ever been a victim of crime?

3 PROSPECTIVE JUROR BARRS: No.

4 THE COURT: Will you follow all the
5 instructions of the Court on the law, even though they may
6 differ from your personal conceptions of what the law
7 ought to be?

8 PROSPECTIVE JUROR BARRS: Yes, I will.

9 THE COURT: A person who is accused of
10 committing a crime is presumed to be innocent in a
11 criminal trial. Do you understand and agree with that?

12 PROSPECTIVE JUROR BARRS: Yes, I do.

13 THE COURT: Are you aware that the
14 defendant does not have to take the stand and testify or
15 offer any evidence if he chooses not to, and you can still
16 find him not guilty? That's because the burden is upon
17 the State to prove his guilt beyond a reasonable doubt.

18 PROSPECTIVE JUROR BARRS: Yes.

19 THE COURT: Have you or a close friend
20 or family member ever been involved in the criminal
21 justice process, either in prosecuting a case, or as a
22 witness, or as a defendant?

23 PROSPECTIVE JUROR BARRS: My son is
24 incarcerated in New York State on a burglary charge.

25 THE COURT: As we speak?

1 PROSPECTIVE JUROR BARRS: Yes.

2 THE COURT: New York City?

3 PROSPECTIVE JUROR BARRS: New York
4 State.

5 THE COURT: How old is your son?

6 PROSPECTIVE JUROR BARRS: He's 34.

7 THE COURT: And he moved to New York at
8 some point?

9 PROSPECTIVE JUROR BARRS: No. I'm
10 originally from New York State, and we moved out here and
11 he and his other brother stayed in New York state. One
12 son came out here with us.

13 THE COURT: When the situation occurred
14 that led to his prosecution, were you here?

15 PROSPECTIVE JUROR BARRS: No. I was in
16 New York State at that time. |

17 THE COURT: Do you have some idea of
18 what was alleged and the factual scenario?

19 PROSPECTIVE JUROR BARRS: Yes.

20 THE COURT: As you look at it at this
21 juncture, do you feel that he was treated fairly, or
22 perhaps not?

23 PROSPECTIVE JUROR BARRS: He was
24 treated fairly.

25 THE COURT: Of course, it was a

1 difficult situation?

2 PROSPECTIVE JUROR BARRS: Yes, it was.

3 THE COURT: Do you think that
4 notwithstanding that situation, that you can objectively
5 evaluate this case?

6 PROSPECTIVE JUROR BARRS: Yes, I do.

7 THE COURT: And you say a burglary?

8 PROSPECTIVE JUROR BARRS: Yes.

9 THE COURT: What did that involve?

10 PROSPECTIVE JUROR BARRS: My son and
11 two other of his friends entered a house. There was an
12 older lady in the house at the time. They didn't know she
13 was there and they attempted to steal -- an aunt of one of
14 the other boys, attempted to steal some of her jewelery.

15 THE COURT: Have you ever been, or do
16 you know anyone who has ever been a victim of domestic
17 violence?

18 PROSPECTIVE JUROR BARRS: Yes.

19 THE COURT: Tell me about that.

20 PROSPECTIVE JUROR BARRS: My mother by
21 my stepfather.

22 THE COURT: Were you living in the home
23 at the time?

24 PROSPECTIVE JUROR BARRS: Yes, I was.
25 I was five.

1 THE COURT: What length of time are we
2 talking about? Five years old through eight years or
3 something?

4 PROSPECTIVE JUROR BARRS: Probably five
5 through six, because he was killed in an accident shortly
6 after that.

7 THE COURT: So during this
8 year-and-a-half, two years, whatever, you observed
9 violence orchestrated against your mother?

10 PROSPECTIVE JUROR BARRS: I did, but I
11 vaguely remember it.

12 THE COURT: Do you think that would
13 have any bearing on your view of this case?

14 PROSPECTIVE JUROR BARRS: No, I don't.

15 THE COURT: Have you or someone you
16 know ever been accused of domestic violence, other than
17 the stepfather?

18 PROSPECTIVE JUROR BARRS: No one else,
19 no.

20 THE COURT: Tell us, please, of your
21 employment, your marital status, the number of children
22 you may have, and how long you've lived in Clark County.

23 PROSPECTIVE JUROR BARRS: I've been in
24 Clark County a little over six years. I'm a Hospice nurse
25 and case manager, home care supervisor. I have three

1 sons, one that lives here who is 27. The other two are in
2 New York State, and one is 38, and the other is 34.

3 THE COURT: And, of course, you've
4 indicated this position with the one son. Are either of
5 the others or their wives involved in a law-related
6 occupation?

7 PROSPECTIVE JUROR BARRS: No.

8 THE COURT: And how long have you been
9 with your current employment?

10 PROSPECTIVE JUROR BARRS: I have been
11 with the Hospice three-and-a-half years now.

12 THE COURT: Any other employment on
13 your part here in Clark County?

14 PROSPECTIVE JUROR BARRS: Yes. I was a
15 health and wellness director of an assisted living home,
16 and I also worked in an ICU unit at one of our main
17 hospitals here in the city.

18 THE COURT: Are you a nurse?

19 PROSPECTIVE JUROR BARRS: I am.

20 THE COURT: A Registered Nurse?

21 PROSPECTIVE JUROR BARRS: LPN.

22 THE COURT: And your husband's

23 occupation?

24 PROSPECTIVE JUROR BARRS: He is a
25 nurse, an LPN in the prison health services.

1 THE COURT: In Clark County what other
2 work has he done?

3 PROSPECTIVE JUROR BARRS: In Clark
4 County he worked as a security guard at one of the local
5 casinos.

6 THE COURT: And you moved from New York
7 when you came here?

8 PROSPECTIVE JUROR BARRS: From New York
9 State, yes.

10 THE COURT: Were you employed there?

11 PROSPECTIVE JUROR BARRS: Yes.

12 THE COURT: Tell me about that, please?

13 PROSPECTIVE JUROR BARRS: I have been a
14 nurse for 37 years, and I was employed in a hospital in
15 New York State, and also in three other hospitals in New
16 York State.

17 THE COURT: Any work outside of that
18 area?

19 PROSPECTIVE JUROR BARRS: I owned and
20 operated dog kennels for about ten years on my own. It's
21 more of a hobby.

22 THE COURT: Before you got involved in
23 nursing?

24 PROSPECTIVE JUROR BARRS: During the
25 same time?

1 THE COURT: There was a commercial
2 aspect to this?

3 PROSPECTIVE JUROR BARRS: Yes, it was.

4 THE COURT: You grew up in what city in
5 New York?

6 PROSPECTIVE JUROR BARRS: Owasco, New
7 York. It's a very small farming community in New York
8 State.

9 THE COURT: Is that upper New York?

10 PROSPECTIVE JUROR BARRS: It's near
11 Syracuse, New York.

12 THE COURT: Did you meet your husband
13 in New York?

14 PROSPECTIVE JUROR BARRS: Yes, I did.

15 THE COURT: What kind of work was he
16 doing?

17 PROSPECTIVE JUROR BARRS: At that time
18 he was a news room supervisor in a newspaper.

19 THE COURT: And then from that point to
20 his nursing, was there another occupation or two?

21 PROSPECTIVE JUROR BARRS: Yes. He
22 worked security in one of the local hospitals that I
23 worked in.

24 THE COURT: Is that where you met?

25 PROSPECTIVE JUROR BARRS: Yes, it is.

1 THE COURT: Have you any prejudice as
2 to the nature of the charge in this case?

3 PROSPECTIVE JUROR BARRS: No. I have
4 not.

5 THE COURT: Do you know any of the
6 other prospective jurors?

7 PROSPECTIVE JUROR BARRS: No, I don't.

8 THE COURT: Have you any racial
9 prejudice?

10 PROSPECTIVE JUROR BARRS: No.

11 THE COURT: Do you understand that an
12 Information is a mere accusation and not evidence, that
13 the Defendant is presumed to be innocent until proven
14 guilty, and that the State has the burden of proving the
15 defendant's guilt beyond a reasonable doubt?

16 PROSPECTIVE JUROR BARRS: Yes.

17 THE COURT: If you were charged with an
18 offense similar to the one that's alleged in this case, or
19 if you were prosecuting this case, would you want 12
20 individuals such as yourself to be on your jury?

21 PROSPECTIVE JUROR BARRS: Yes, I would.

22 THE COURT: Do you know of any reason
23 at all why you could not be completely fair and completely
24 impartial in hearing this matter?

25 PROSPECTIVE JUROR BARRS: No.

1 THE COURT: Mrs. Barrs, these
2 proceedings may be conducted in two segments. First, the
3 jury will determine if the defendant is guilty.
4 Punishment would not be considered at that time.

5 Second, if the jury finds the defendant
6 guilty of first degree murder, then the law of this state
7 requires that the jury set the punishment. I would set a
8 date for a hearing on the subject of punishment; do you
9 understand?

10 PROSPECTIVE JUROR BARRS: Yes.

11 THE COURT: In the State of Nevada
12 under these circumstances, there are two possible forms of
13 punishment that the jury may consider; life imprisonment
14 without the possibility of parole, or life imprisonment or
15 a term of 50 years with the possibility of parole.

16 Do you understand that?

17 PROSPECTIVE JUROR BARRS: Yes.

18 THE COURT: In your present state of
19 mind, could you consider fairly both possible forms of
20 punishment and select the one that you feel is most
21 appropriate?

22 PROSPECTIVE JUROR BARRS: Yes, I could.

23 THE COURT: Are there questions from
24 the State?

25 MR. PETERSON: Thank you, Judge.

1 Mrs. Barrs, have you or any of your sons
2 ever been divorced?

3 PROSPECTIVE JUROR BARRS: No.

4 MR. PETERSON: As a nurse, understand
5 that there's going to be probably some medical testimony
6 in this case, and you have to confine yourself to the
7 testimony that's presented in court.

8 You can't go and consult any of the text you
9 may have or resources you have; do you understand that?

10 PROSPECTIVE JUROR BARRS: I understand.

11 MR. PETERSON: Have you had hiring and
12 firing authority in any of your many jobs?

13 PROSPECTIVE JUROR BARRS: Yes, I have.

14 MR. PETERSON: How do you feel like in
15 making those decisions?

16 PROSPECTIVE JUROR BARRS: It's
17 necessary and I have no problem with that.

18 MR. PETERSON: In the incident
19 involving your son in New York, were you called on to be a
20 witness to assist either the Prosecution or the Defense in
21 that matter?

22 PROSPECTIVE JUROR BARRS: No, I wasn't.

23 MR. PETERSON: You answered with some
24 enthusiasm, I thought, when the Judge asked do you
25 think -- if you were either charged, either the defendant

1 or the State in this case, could you be fair. And you
2 answered like you had something there you wanted to say.

3 What is it that made you answer in that way?

4 PROSPECTIVE JUROR BARRS: Over the
5 years when I've worked with the public I've had to deal
6 with several different conflicting opportunities. And
7 I've always prided myself to be extremely fair, and to
8 look at both sides equally.

9 It's something that I wanted done for me if
10 I'm in that position, and I've always tried to give that
11 back to other people.

12 MR. PETERSON: Thank you, ma'am. Pass
13 for cause, Judge.

14 THE COURT: Thank you.

15 Defense counsel?

16 MR. BLOOM: Thank you, Your Honor.
17 Good afternoon, Mrs. Barrs.

18 In this case there is going to be the
19 presentation of considerable graphic evidence, photographs
20 of the death, the deceased Virginia Centofanti. Ask a
21 couple questions with regard to the impact of graphic
22 evidence.

23 You would be directed if you are a juror on
24 this case to look at that evidence for the evidentiary
25 value it has, because it will have evidence to help us

1 understand what happened.

2 But not allow the emotional response of
3 seeing a dead woman and seeing her shot and seeing blood
4 and things like that that will be depicted in a
5 photograph, and not allow that to well up in you such an
6 emotional response that your emotions would cloud your
7 objectivity, cloud your ability to look at it for
8 evidentiary value of what's being presented.

9 Do you think you can do that?

10 PROSPECTIVE JUROR BARRS: Yes, I do.

11 MR. BLOOM: Have you seen in your
12 experience as a nurse circumstances of some rather graphic
13 or dramatic injuries?

14 PROSPECTIVE JUROR BARRS: I've had
15 several occasions to be called to the emergency room to
16 work in the emergency room when they were short when I was
17 at the hospital, and we had quite number of domestic
18 violence cases come in that needed to be treated.

19 MR. BLOOM: Domestic violence or any
20 other kind of violence? Have you seen gunshot injuries?

21 PROSPECTIVE JUROR BARRS: Yes, I have.

22 MR. BLOOM: Could you please tell me
23 the difference between Registered Nurse, RN, and the LPN
24 designation?

25 PROSPECTIVE JUROR BARRS: A Registered

1 Nurse has probably a year more education up to a Master's
2 Degree. An LPN, I, for instance, had two years of
3 schooling instead of the three to four years.

4 Basically, we are governed by this in
5 different states under what we can do according to law
6 under an RN's scope of practice. And, basically, an RN
7 earns more money and they also do more supervising and
8 more directorship type things.

9 MR. BLOOM: Your position puts you in
10 contact with patients, am I correct?

11 PROSPECTIVE JUROR BARRS: Very much so.

12 MR. BLOOM: You mentioned that your
13 mother was a victim of domestic violence when you were a
14 child. That can have long ranging impacts. Do you think
15 it will impact you in this case?

16 PROSPECTIVE JUROR BARRS: No, I don't.

17 MR. BLOOM: You never even said
18 anything about whether or not the allegation was domestic
19 violence against a woman or against a man. Do you believe
20 there could be a situation where there could be some
21 domestic violence against a man?

22 PROSPECTIVE JUROR BARRS: Yes, I do.

23 MR. BLOOM: You've made some very
24 important decisions in your life, but you have -- from my
25 notes here have not served as a juror before?

1 PROSPECTIVE JUROR BARRS: I have not.

2 MR. BLOOM: Do you believe in this case
3 considering the many experiences you had in your life, and
4 the questions were put regarding hiring and firing, those
5 are important decisions as well?

6 Do you think this decision as you were
7 sitting on a jury involving Mr. Centofanti that it would
8 be one of the most important decisions you would be making
9 in your life?

10 PROSPECTIVE JUROR BARRS: Oh,
11 definitely.

12 MR. BLOOM: You mentioned that
13 sometimes you treat people who have been the victim of
14 domestic violence.

15 Would there be anything about that
16 experience that might cause you to set it aside and look
17 at the evidence we presented in this courtroom, as the
18 Judge said what happens in this courtroom.

19 Would you be able to do that?

20 PROSPECTIVE JUROR BARRS: I think I
21 could.

22 MR. BLOOM: Pass for cause, Your Honor.
23 Thank you very much.

24 THE COURT: Counsel approach the bench,
25 please.

1 ROC
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9 ALFRED P. CENTOFANTI III

Shirley B. Pausgen
JUN 29 9 15 AM '04

FILED

10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 STATE OF NEVADA,
13 Plaintiff,

CASE NO. C172534

DEPT NO. XIV

14 vs.

15 ALFRED P. CENTOFANTI III,
16 Defendant.

Date of Hearing: 7/8/04
Time of Hearing: 9AM

17 RECEIPT OF COPY

18 RECEIPT OF A COPY of MOTION FOR NEW TRIAL is hereby acknowledged
19 this 21 day of June, 2004.

20 DAVID ROGER
21 DISTRICT ATTORNEY

22 BY

Clark Petersen
23 Clark Petersen, Esq.
24 Nevada Bar No. 006088
25 Becky Goettsch, Esq.
26 Nevada Bar No. 006316
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FILED

AUG 10 2 24 PM '04

Shirley W. Benjamin
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ALFRED PAUL CENTOFANTI, III.,
#1730535

Defendant.

CASE NO: C172534

DEPT NO: XIV

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL

DATE OF HEARING: 08/12/04
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
BECKY GOETTSCH, Chief Deputy District Attorney, and hereby submits the attached
Points and Authorities in Opposition to Defendant's Motion For New Trial.

This Opposition is made and based upon all the papers and pleadings on file herein,
the attached points and authorities in support hereof, and oral argument at the time of
hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIESSTATEMENT OF FACTS

Jury trial in this case commenced on March 15, 2004. Jury selection spanned approximately two trial days. The jury venire was composed of individuals who were summoned by the Jury Commissioner and asked to call in to confirm their report time. Clark County resident Caren Barrs received her jury summons and immediately called to inform the Jury Commissioner that she was a convicted felon from 1980 in Florida for a charge that amounted to "bad checks." She was not able to talk to a live person at that time and provided the commissioner with information via the telephonic information system. When she was quizzed regarding prior felony convictions, she pushed the button indicating she was a convicted felon.

When she actually did talk to a Jury Commissioner representative, she disclosed her felon status along with the fact the conviction dated back to 1980 and that her civil rights had been restored. The Jury Commissioner told her to report for jury duty. Ms. Barrs did so and disclosed, once again, her felony conviction in writing. Ms. Barrs was later chosen to sit on the jury. See attached affidavit of Caren Barrs.

The trial lasted approximately one month after in excess of 40 witnesses were called. Some of the testimony became repetitive and tangential by the nature of the defense. On a few limited occasions during the course of the trial, two individuals were allegedly seen by others "sleeping" or at least having their eyes closed during trial. No objection was made by the defense. Neither party, nor the bailiff, nor the Court noticed any "sleeping behavior" warranting comment or admonition.

In addition, Juror No. 5, was a young man traveling from out of town to serve jury duty on a daily basis. On one occasion, he wore a T-shirt to trial which was believed to be advertising a local band. On the T-shirt were the words "Do you know what a murderer looks like?" One juror found the T-shirt inappropriate and told the young man to change his clothes, cover it up, etc. See attached affidavits collectively. She also brought it to the attention of the bailiff. Neither party was made aware of the T-shirt during the trial.

1 On April 16, 2004, the jury in the above-entitled case found the defendant guilty of
2 First Degree Murder. The jury was polled and all jurors concurred in the vote. The
3 defendant hired a new attorney who filed a Motion for a New Trial based on juror
4 misconduct, on June 28, 2004, well after the statutory time period for filing a Motion for
5 New Trial. Specifically, the defendant argues that one juror was previously convicted of a
6 felony and did not disclose the information to the parties, that one juror conducted an
7 independent firearm experiment, that one juror wore a t-shirt, halfway through trial, that
8 stated "Do you know what a murderer looks like?" and lastly, that two jurors were sleeping
9 during the trial, all of which denied him a fair trial.

10 **I. THE DEFENDANT'S MOTION IS UNTIMELY AND SHOULD BE**
11 **DENIED BASED ON JURISDICTIONAL GROUNDS.**

12 The Court may grant a new trial to a defendant if required as a matter of law or
13 upon the discovery of newly discovered evidence. NRS 176.515. A motion based on newly
14 discovered evidence must be made within two (2) years after a finding of guilt. However, a
15 motion for new trial based on any grounds other than newly discovered evidence must be
16 made within seven (7) days after verdict. NRS 176.515.

17 The Defendant is seeking a new trial based on reasons other than newly discovered
18 evidence. Therefore, the defendant was required by statute to file his motion for a new trial
19 within seven days. The verdict was received on April 16, 2004. The Motion was due on
20 April 23, 2004. The Defendant's Motion for a New Trial was filed on June 28, 2004,
21 approximately two months too late. NRS 176.515. There is no basis for the untimeliness of
22 the Defendant's motion and therefore, the Defendant's motion should be denied.

23 The case law interpreting NRS 176.515 interprets this deadline strictly. In
24 Depasquale v. State, 106 Nev. 843, 803 P.2d 218 (1990), the Defendant was convicted of
25 first degree murder and sentenced to death. Eight (8) days after the final verdict, he filed a
26 motion for a new trial. The District Court declined to hear the motion due to its
27 untimeliness. On appeal, the Nevada Supreme Court held that since the Defendant missed
28 the seven (7) day deadline imposed by NRS 176.515 by filing his motion for new trial eight

1 (8) days after the completion of the proceedings, the District Court did not err in failing to
2 hear the motion.

3 In fact, this Court lacks jurisdiction if a motion for a new trial is not timely filed. The
4 language of NRS 176.515 is taken verbatim from Federal Rule of Criminal Procedure 33.
5 The Nevada Supreme Court has relied on Rule 33 in interpreting NRS 176.515. The time
6 limits in Rule 33 have been held to be jurisdictional. If a motion is not timely filed, the
7 Court lacks power to consider it. U.S. v. Dukes, 727 F.2d 34, 38 (2nd Cir. 1987). Since the
8 Defendant's Motion is late, the Court similarly lacks jurisdiction to consider the Motion.

9 Furthermore, NRS 176.515 specifically states, "A motion for a new trial based on any
10 other grounds must be made within 7 days after verdict or finding of guilt *or within such*
11 *further time as the Court may fix during the 7 day period.*" (emphasis added). The statute
12 does allow for an extension of time of the seven (7) days if the Court so grants an extension,
13 however, the Legislature was clear that this *request* for an extension must take place during
14 the seven (7) day period. The Defense did not ask for an extension of time. Furthermore,
15 there is no valid reason for extending the time in this case. Therefore, the Defendant's
16 motion remains untimely and should be dismissed.

17 II. THE DEFENDANT'S REQUEST FOR A NEW TRIAL FAILS 18 ON ITS MERITS

19 The granting of a new trial is within the trial court's discretion and will not be
20 reversed on appeal absent abuse. Sanborn v. State, 107 Nev. 399 (1991). The Defendant
21 argues that he is deserving of a new trial as a matter of law based on juror misconduct. The
22 analysis of these issues must be 1) did any misconduct occur; and 2) if there was
23 misconduct, is it sufficiently or prejudicial to the defendant to justify a new trial. Meyer v.
24 State, 80 P.3d 447 457 (2003).

25 ///

26 ///

27 ///

28 ///

1 A. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL BASED ON A
2 PRIOR FELONY CONVICTION OF CAREN BARRS BECAUSE HER
3 CIVIL RIGHTS HAVE BEEN RESTORED, ENTITLING HER TO SERVE
4 ON A JURY, AND SHE DID NOT COMMIT MISCONDUCT DURING
5 VOIR DIRE.

6 1. CAREN BARRS IS QUALIFIED TO SIT ON A JURY BECAUSE
7 HER CIVIL RIGHTS HAVE BEEN RESTORED

8 Defendant cites NRS 6.010 for the proposition that Caren Bars is not qualified to
9 serve on a jury. This justification for a new trial must fail because she was in fact qualified
10 to sit on the jury. NRS 6.010 reads:

11 Except as otherwise provided in this section, every qualified
12 elector of the State, whether registered or not, who has sufficient
13 knowledge of the English language, and who has not been
14 convicted of treason, a felony, or other infamous crime, and who
15 is not rendered incapable by reason of physical or mental
16 infirmity, is a qualified juror of the county in which he resides.
17 A person who has been convicted of a felony is not a qualified
18 juror of the county in which he resides until his civil rights to
19 serve as a juror has been restored pursuant to NRS 176A.850,
20 179.285, 213.090, 213.155 or 213.157.

21 Defendant conveniently fails to cite NRS 213.157 which reads in pertinent part:

22 1. Except as otherwise provided in subsection 2, a person
23 convicted of a felony in the State of Nevada who has served his
24 sentence and has been released from prison:

25 (a) Is immediately restored to the following civil rights:

26 (1) The right to vote; and

27 (2) The right to serve as a juror in a civil action.

28 (c) Six years after the date of his release from prison, is
restored to the right to serve in a criminal action.

Of course, since the felony conviction was in Florida and not Nevada, the Court must look to
Florida law to see if Florida automatically restores a person's civil rights after completion of
sentence.

Fla. Stat. § 940.05 (2004), states:

Any person who has been convicted of a felony may be entitled
to the restoration of all the rights of citizenship enjoyed by him
or her prior to conviction if the person has:

(1) Received a full pardon from the board of pardons;

(2) Served the maximum term of the sentence imposed upon
him or her;

or

(3) Been granted his or her final release by the Parole
Commission.

1 In State v. Haden, 370 So. 2d 849, 851 (Fla. App. 1979), referring to Fla. Stat. § 940.05, the
2 Florida court explained:

3 On September 10, 1975, certain Rules of Executive Clemency of
4 Florida were promulgated which were effective November 1,
5 1975. Included therein were two provisions material to this case.
6 By Section 9 of the Rules it was provided that 'A. When a
7 person receives final release from the Florida **Parole and
8 Probation Commission**, Department of Offender Rehabilitation
9 or county jail, his **civil rights shall be automatically reinstated**,
except the right to possess or own a firearm shall be specifically
withheld.'

Under that provision of the clemency rules, restoration of civil
rights would be automatic following completion of service of
sentence by one who so completed his sentence on or after
November 1, 1975.

10 Caren Barrs' Judgment of Conviction was filed on July 10, 1980, and she was sentenced to
11 four (4) years probation. Her civil rights were, therefore, automatically restored sometime in
12 1984. Consequently, she was **qualified** to serve on the jury.

13 **2. MS. BARRS DID NOT COMMIT MISCONDUCT DURING VOIR
14 DIRE**

15 Even if she was ultimately qualified to sit as a juror, the issue becomes whether she
16 committed misconduct by failing to inform the parties of the conviction during voir dire.
17 Whether Caren Barrs' failure to mention her prior felony warrants a new trial is a two step
18 inquiry. The first inquiry is whether there was "misconduct." To constitute misconduct, the
19 failure of a juror to answer a question touching upon potentially prejudicial information must
20 amount to an "intentional concealment." Canada v. State, 113 Nev. 938, 941, 944 P.2d 781,
21 783 (1997); Lopez v. State, 105 Nev. 68, 89, 769 P.2d 1276, 1290 (1989); Hale v. Riverboat
22 Casino, 100 Nev. 299, 305, 682 P.2d 190, 193 (1984). As the United States Supreme Court
23 has stated, "To invalidate the result of a three-week trial because of a juror's mistaken,
24 though honest response to a question, is to insist on something closer to perfection than our
25 judicial system can be expected to give." Hale, 100 Nev. at 306, 682 P.2d at 194, quoting
McDonough Power Equipment v. Greenwood, 104 S.Ct. 845, 850 (1984).

26 In the attached affidavit, Caren Barrs explained that she believed she did disclose her
27 prior felony conviction. She entered the appropriate data via telephone and in person and
28 was told to appear for jury duty. She also wrote the information down on the Jury

1 Commissioner information sheet. There has been no "intentional concealment" on her part,
2 and it is not juror misconduct. *See Echavarria v. State*, 108 Nev. 734, 740 (1992) (failure to
3 disclose assault by juror was not intentional because juror considered it a "fight" not an
4 assault where he was a victim).

5 The second inquiry (if intentional concealment is found by the court) is whether the
6 misconduct amounted to harmless or prejudicial error. *Canada*, 113 Nev. at 941, 944 P.2d at
7 783, citing *Geary v. State*, 110 Nev. 261, 265, 871 P.2d 927, 930 (1994) vacated on other
8 grounds by *Geary v. State*, 112 Nev. 1434, 930 P.2d 719 (1996); *see also*, *Hale*, 100 Nev. at
9 306, 682 P.2d at 194. "A new trial must be granted unless it appears, beyond a reasonable
10 doubt, that no prejudice has resulted." *Canada*, 113 Nev. at 941, 944 P.2d at 783, quoting
11 *Lane v. State*, 110 Nev. 1156, 1163, 881 P.2d 1358, 1362-64 (1994). Not every incident of
12 misconduct justifies a new trial. *Meyer v. State*, 80 P.3d 447 453 (2003). Factors to be
13 considered when determining whether juror misconduct constituted harmless error include
14 "whether the issue of innocence or guilt is close, the quantity and character of the error, and
15 the gravity of the crime charged." *Canada*, 113 Nev. at 941, 944 P.2d at 783, quoting
16 *Rowbottom v. State*, 105 Nev. 472, 486, 779 P.2d 934, 943 (1989).

17 The character of the error made by Caren Barr is minimal. It's a crime that occurred
18 more than twenty years ago. The crime was for obtaining property in return for a worthless
19 check. Her civil rights had been restored and she was allowed to regain her right to vote as
20 well as her nursing license. Most importantly however, Ms. Barrs told the Jury
21 Commissioner on more than one occasion about the felony conviction. She did not
22 intentionally conceal the conviction. In fact, the Jury Commissioner told her to appear for
23 jury service and she did so.

24 In addition, there is absolutely no prejudice to the defendant. Normally, a juror's
25 prior conviction for any crime would be prejudicial to the State and not the Defendant. Also,
26 Defendant had no problem with Caren Barr being on the jury in light of the fact her son is
27 currently in prison in New York, having served eighteen years of incarceration, which she
28 did disclose during voir dire. The question of guilt or innocence was not so close in this case

1 that a twenty year old worthless check conviction for one juror would prejudice the
2 defendant.

3 Most importantly, however, it is well established that the fact a juror on voir dire,
4 concealed bias or prejudice, and thereafter was sworn and served, does not constitute the
5 type of misconduct covered by the statute for a new trial. Such misconduct that warrants a
6 new trial is only that which occurs after the jury has been impaneled and sworn. State v.
7 Marks, 15 Nev. 33 (1880); State v. Harvey, 62 Nev. 287, 290 (1944)(noting that legislative
8 intent dictates that a subsequently discovered ground for challenge of a juror cannot be used
9 as grounds for a new trial and judicial construction to avoid the harshness of the rule would
10 be improper).

11 **B. JOSHUA WHEELER DID NOT CONDUCT FIREARM TESTING OR USE**
12 **ANY INAPPROPRIATE EVIDENCE TO REACH A VERDICT**

13 The defendant next asserts that Juror Wheeler committed misconduct by conducting
14 an experiment with a gun in order to evaluate the evidence. First, it must be established that
15 Joshua Wheeler even conducted an inappropriate test, reenactment, or experiment; and
16 therefore, committed misconduct. Although the defendant's investigator indicates that such
17 an experiment was conducted, the attached affidavit shows that Mr. Wheeler did not conduct
18 any test or experiment regarding a 9 mm murder weapon. Mr. Wheeler did at some point
19 during the pendency of the trial have an opportunity to shoot a .357 Magnum with his father
20 as part of his everyday life. There is nothing inappropriate about a juror going about living
21 his daily life and using his daily experiences and common sense to deliberate and reach a
22 conclusion.

23 It should also be noted that Mr. Wheeler never considered the shooting with his father
24 to be an experiment or a test. He never discussed it with anyone in the jury room and never
25 even discussed firearms experience with the other jurors, which is indicative of how Mr.
26 Wheeler treated the experience of shooting with his father as a nonissue in the case or
27 deliberations.

28 Even if we assume however, that Joshua Wheeler's did something wrong in shooting
the .357, it does not inherently warrant a new trial. Whether it warrants a new trial requires

1 the District Court to look at two issues: What evidence can the Court consider in setting
2 aside a verdict; and whether the defendant was prejudiced.

3 "Not every incidence of juror misconduct requires the granting of a motion for a new
4 trial." Meyer v. State, 119 Nev. Adv. Rep. 61, 80 P.3d 447, 454 (2003), quoting Barker v.
5 State, 95 Nev. 309, 313, 594 P.2d 719, 721 (1979). "Each case turns on its own facts, and on
6 the degree and pervasiveness of the prejudicial influence." Meyer, 80 P.3d at 454, quoting
7 United States v. Paneras, 222 F.3d 406, 411 (7th Cir. 2000).

8 NRS 50.065 states in pertinent part:

- 9 2. Upon an inquiry into the validity of a verdict or indictment:
10 (a) A juror shall not testify concerning the effect of anything
11 upon his or any other juror's mind or emotions as influencing
12 him to assent to or dissent from the verdict or indictment or
concerning his mental processes in connection therewith.
(b) The affidavit or evidence of any statement by a juror
indicating an effect of this kind is inadmissible for any purpose.

13 However, where the misconduct involves extrinsic information or contact with the jury, juror
14 affidavits or testimony establishing the fact that the jury received the information or was
15 contacted are permitted. Meyer, 80 P.2d at 454. A motion for a new trial may only be
16 premised upon juror misconduct where such misconduct is readily ascertainable from
17 objective facts and overt conduct without regard to the state of mind and mental processes of
18 any juror. Id. The District Court's factual inquiry is limited to determining the extent to
19 which jurors were exposed to the extrinsic evidence. Id. at 456.

20 If Juror Wheeler told the jury, "I went out and conducted a test and this is the result
21 and this means he's guilty," that would be an extrinsic effect on a jury and subject to proof
22 via affidavit. However if Juror Wheeler happened to have a life experience that he may or
23 may not have used in his own mind to form an opinion, such as "it would be impossible for it
24 to come on a target all six times in under four seconds even. It would be real tough," he has
25 not committed misconduct. But most importantly, his statements regarding this is simply not
26 admissible to impeach a verdict as it gets into his mental processes. The latter reflects the
27 situation at bar.
28

1 This conclusion is confirmed by Meyer v. State, 80 P.3d at 447. On this case, the
2 defendant was convicted of sexual assault of his estranged wife. The victim later recanted.
3 At issue were raised bumps on the victim's scalp and an issue arose as to whether the bumps
4 were from abusive hair pulling or Accutane medication. During deliberations one juror
5 discussed how the bumps were similar to hair pulling she had seen in her work with
6 domestic violence victims. Another consulted a PDR regarding the medication. Defendant
7 brought a new trial based on juror misconduct. *See also Barker v. Nevada*, 95 Nev. 309, 311
8 (1979) (fact foreperson reported to jury effects if heroin on body was harmless error).

9 The appellate court found no misconduct on the part of a juror using her every day
10 experience with domestic violence victims. This is similar to Mr. Wheeler shooting with his
11 father. The court went on to find that consulting the PDR, and relaying it to other jurors,
12 was prejudicial misconduct. In the case at bar, however, Mr. Wheeler never even discussed
13 shooting experience with other jurors. Therefore, any impeachment of the verdict by Josh
14 Wheeler's mental processes is impermissible.

15 Furthermore, **Prejudice is shown whenever there is a reasonable probability or**
16 **likelihood that the juror misconduct affected the verdict.** *Id.* at 454. A conclusive
17 presumption of prejudice applies only in the most egregious cases, such as jury tampering.

18 However, other types of extrinsic material, such as media
19 reports, including television stories or newspaper articles,
20 generally do not raise a presumption of prejudice. *Jurors'*
21 *exposure to extraneous information via independent research or*
22 *improper experiment is likewise unlikely to raise a presumption*
23 *of prejudice.* In these cases, the extrinsic information must be
24 analyzed in the context of the trial as a whole to determine if
25 there is a reasonable probability that the information affected the
26 verdict.

27 *Id.* at 456. To determine whether there is a reasonable probability that juror misconduct
28 affected a verdict, a court may consider a number of factors.

For example, a court may look at how the material was
introduced to the jury (third-party contact, media source,
independent research, etc.), the length of time it was discussed by
the jury, and the timing of its introduction (beginning, shortly
before verdict, after verdict, etc.) Other factors include whether
the information was ambiguous, vague, or specific in content;
whether it was cumulative of other evidence adduced at trial;

whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.). *In addition, a court must consider the extrinsic influence in light of the trial as a whole and the weight of evidence.*

Id. See also United States v. Rogers, 121 F.3d 12, 17 (1st Cir. 1997) (Use of dictionary by juror not prejudicial per se).

There does not appear to be any evidence that Joshua Wheeler even *discussed* his shooting *experience* with other jurors, let alone the performance of any sort of test or experiment. See attached affidavits. It should also be noted that it was uncontroverted in this case, by both the defense and prosecution experts, that there were two separate shooting "moments" at the murder scene due to the fact one set of shell casings were between the end table and the end of the couch and the other set of shell casings were near the body, by the fireplace and exercise bike. Even the defense expert said that the shooting took place in two parts, or the shots were separated by a pause, and it appeared that the defendant "followed" the victim around the coffee table, all of which supports a first degree murder conviction regardless of how fast the defendant could empty the gun, which is allegedly the nature of Juror Wheeler's alleged experiment. In light of that overwhelming evidence, no evidence of self-defense as put forth by the defendant, the fact none of Juror |Wheeler's experiences regarding guns was brought to the deliberations, Mr. Wheeler's shooting a .357 with his father is of no consequence and does not justify a new trial.

C. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL DUE TO A SHIRT WORN BY A JUROR

The defendant alleges that one of the jurors wore a t-shirt to trial, during the evidence portion, stating, "Do you know what a Murderer looks like?" or something similar. One juror, later to be elected the jury foreperson, noticed the t-shirt and pointed it out to the bailiff and to the juror that it was not appropriate. The juror then apparently made efforts to conceal it during trial. Neither party noticed it during the trial and no record was made regarding any shirts worn by jurors. There is no evidence the shirt was made for the trial or

1 that the juror was making any comment on the evidence. The t-shirt appeared older and
2 pertained to a local band. See attached affidavits.

3 It is inconceivable how this fact could warrant a new trial and an undoing of months
4 of time and expense by our Courts. A juror's clothing choice does not constitute misconduct
5 absent a finding that the clothing reflects a preconceived opinion or is otherwise
6 inappropriate for Court. The defense cites no authority to the contrary and there is
7 absolutely no authority for the defense's position that a juror's clothing choice warrants a
8 new trial.

9 This is especially true since no record was made at the time it was worn and no
10 inquiry was made as to the Juror intent, if any. There is no misconduct in a juror wearing
11 whatever he or she wants to Court. There is now no method of inquiry as to what the juror
12 meant by the shirt, if it affected what he was thinking about the case or how it factored in to
13 his deliberations if at all. To make such an inquiry of the juror at this time is inadmissible
14 intrinsic juror testimony precluded by NRS 50.065, as discussed *supra*.

15 **D. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL DUE TO A**
16 **ALLEGED SLEEPING BY JURORS**

17 The defendant must first establish misconduct: i.e. that the jurors were sleeping
18 during the trial. In his moving papers, the defendant specifically accuses Joshua Wheeler of
19 sleeping. He denies ever falling asleep during trial. There is some evidence that Juror no. 7,
20 Chris Kelly, did nod off a few isolated times during the trial. The juror sitting next to him,
21 Matt Adams, indicated that he nudged him immediately each time and Juror Kelly then woke
22 up. These were during times when the evidence was becoming tedious and repetitive per the
23 juror's own opinion. See affidavit of Juror Adams. There is no evidence that this juror
24 missed critical portions of testimony or had trouble participating in deliberations because he
25 missed evidence due to sleeping. See attached affidavits.

26 If our American justice system is going to grant a new trial every time a juror nods off
27 during trial, there will never be a case tried to verdict. Cases uniformly decline to order a
28 new trial in absence of convincing proof jurors were actually asleep during material portions

1 of testimony. Hasson v. Ford Motor Co., 32 Cal.3d 388, 411 (1982). It is inconceivable that
2 the nodding off on a limited basis over a month long trial has somehow prejudiced the
3 defendant to the point of needing a new trial. Cf. Geary v. State, 110 Nev. 261, 264 (1994)
4 (fact juror wrote brief note to daughter during trial but testified she did not miss evidence
5 and participated fully in deliberations did not warrant new trial); Callegari v. Maurer, 4
6 Cal.App.2d 178, 184 (1935) (fact juror slept during trial is not grounds for disturbing verdict
7 if it does not appear that sleep was for such a length of time or at such a stage of trial to
8 affect ability to fairly consider case).

9 It should also be noted that the defense did not raise an issue during trial regarding
10 juror inattentiveness even though he sat closest to the jury. See Rivera v. United States, 295
11 F.3d 461 (5th Cir. 2002) (defendant waived misconduct claim based on jurors sleeping when
12 it was not raised until after verdict). There was no record made, no objection lodged and no
13 call for an admonition by the judge. As a result, this issue was not preserved as it is virtually
14 impossible now to determine, assuming arguendo that anyone was sleeping, when it took
15 place, by who or how long.

16 The United State Supreme Court has addressed the danger to the administration of
17 justice when jurors are allowed to later comment upon the sanctity of deliberations to
18 impeach their verdict:

19 Let it once be established that verdicts solemnly made and
20 publicly returned into court can be attacked and set aside on the
21 testimony of those who took part in their publication and all
22 verdicts could be, and many would be followed by an inquiry in
23 the hope of discovering something which might invalidate a
24 finding. Jurors would be harassed and beset by the defeated
25 party in an effort to secure from them evidence of the facts which
might establish misconduct sufficient to set aside a verdict. If
evidence thus secured could be thus used, the result would be to
make what was intended to be a private deliberation, the constant
subject of public investigation - to the destruction of all
frankness and freedom of discussion and conference.

26 McDonald v. Pless, 238 U.S. 264, 267-68 (1915).

27 This is exactly what has occurred in this case. After a conviction of First Degree
28 Murder, the defense has hired an investigator to fish for any slight or perceived inappropriate

1 behavior on anyone's part. This cannot justify the flushing of months of judicial resources,
2 nor does any of it prejudice the fair trial of the defendant, nor is it fair to jurors. The Court
3 summed it up best by stating:

4 Allegations of juror misconduct, incompetency, or inattentive-
5 ness raised for the first time in days, weeks, or months after the
6 verdict, seriously disrupt the finality of the process. Moreover,
7 full and frank discussion in the jury room, juror's willingness to
8 return an unpopular verdict, and the community's trust in a
system that relies on the decisions of lay people would all be
undermined by a barrage of post-verdict scrutiny of juror
conduct.

9 Tanner v. United States, 483 U.S. 107, 121 (1983).

10 CONCLUSION

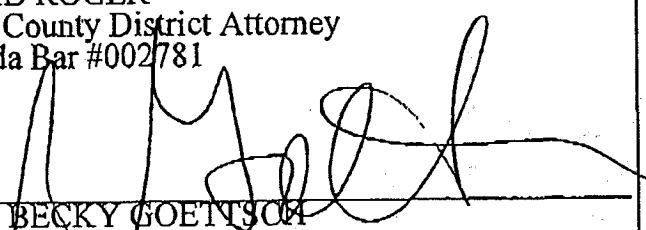
11 For all of the foregoing reasons, including the untimely nature of the motion, the
12 Defendant's Motion for a New Trial should be denied.

13 DATED this 10th day of August, 2004.

14 Respectfully submitted,

15 DAVID ROGER
16 Clark County District Attorney
17 Nevada Bar #002781

18 BY

19 
20 BECKY GOETTSON
21 Chief Deputy District Attorney
22 Nevada Bar #006316

23 CERTIFICATE OF FACSIMILE TRANSMISSION

24 I hereby certify that service of State's Opposition, was made this 10th day of
25 August, 2004, by facsimile transmission to:

26 CARMINE COLUUCI, ESQ.

27 BY M. Warner
28 Employee of the District Attorney's Office

AFFIDAVIT

STATE OF NEVADA

COUNTY OF CLARK

} ss:

JOSH WHEELER, being first duly sworn, deposes and says:

1. That I am a resident of Clark County, Nevada and that I served as a juror in State of Nevada v. Alfred P. Centofanti, III., Case No. C172534.

2. That during the evidence portion of the trial I had an opportunity to shoot a .357 Magnum gun with my father. This was an activity we had done before.

3. That I did not shoot the .357 to conduct any experiments or reenactments or test fires of the evidence that was presented in the trial.

4. That I never mentioned shooting the .357 Magnum to the other jurors during deliberations.

5. That I did speak with an investigator for the defense and was aware that it was tape recorded.

6. That during the interview with the defense investigator I was asked if anyone conducted any experiments and I replied "No."

7. That during the interview with the defense investigator I was asked if anyone drew any diagrams regarding the evidence and I replied "No."

8. That none of my shooting experience was addressed or brought up during deliberations.

9. That during the evidence portion of the trial I was aware that another juror had worn a t-shirt that others thought was improper. The shirt appeared old and the controversial writing was on the back of the shirt near the belt.

10. That the other juror's clothing had no bearing or effect on my verdict.

11. That I did not sleep during the evidence portion of the trial.

12. That I was aware that on one occasion another juror did fall asleep but he was awakened by other jurors immediately.

1 13. That this occurred during the end of the trial when no new material was being
2 presented.

3 14. That at no time during deliberations did any juror indicate that they had missed
4 evidence or were unable to deliberate because they were sleeping.

5 I declare under penalty of perjury under the law of the State of Nevada that the
6 foregoing is true and correct.

7

8 Executed on 8/16/04
9 (Date)

Josh Wheeler
JOSH WHEELER

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28 BG/mmww

AFFIDAVIT

STATE OF NEVADA }
COUNTY OF CLARK } ss:

EMILY CARLSEN, being first duly sworn, deposes and says:

1. That I am a resident of Clark County, Nevada and that I served as a juror in State of Nevada v. Alfred P. Centofanti, III., Case No. C172534.

2. That neither before nor during deliberation did any juror discuss conducting any test, experiment, or reenactment regarding the evidence.

3. That juror Wheeler never mentioned during deliberation any experience shooting a weapon.

4. That my verdict was not affected by any clothes worn by any other juror during the trial.

5. That during the trial I was not aware of whether other jurors may or may not have been sleeping during the course of the trial.

6. That at no time during deliberations did any juror indicate that they had missed evidence or were unable to deliberate because they were sleeping.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on

7/6/04
(Date)

Emily Carlsen
EMILY CARLSEN

BG/mmw

AFFIDAVIT

STATE OF NEVADA }
COUNTY OF CLARK } ss:

ALAN MILLER, being first duly sworn, deposes and says:

1. That I am a resident of Clark County, Nevada and that I served as a juror in State of Nevada v. Alfred P. Centofanti, III., Case No. C172534.

2. That neither before nor during deliberation did any juror discuss conducting any test, experiment, or reenactment regarding the evidence.

3. That juror Wheeler never mentioned during deliberation any experience shooting a weapon.

4. That my verdict was not affected by any clothes worn by any other juror during the trial. I was aware of Juror Kelly wearing a shirt with writing others found inappropriate but the controversial writing was in small print and not visible unless viewed in close proximity.

5. That during the trial I was not aware of whether other jurors may or may not have been sleeping during the course of the trial.

6. That at no time during deliberations did any juror indicate that they had missed evidence or were unable to deliberate because they were sleeping.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on 8/6/04
(Date)


ALAN MILLER

BG/mmww

AFFIDAVIT

STATE OF NEVADA }
COUNTY OF CLARK } ss:

MATT ADAMS, being first duly sworn, deposes and says:

1. That I am a resident of Clark County, Nevada and that I served as a juror in State of Nevada v. Alfred P. Centofanti, III., Case No. C172534.

2. That neither before nor during deliberation did any juror discuss conducting any test, experiment, or reenactment regarding the evidence.

3. That juror Wheeler never mentioned during deliberation any experience shooting a weapon.

4. That my verdict was not affected by any clothes worn by any other juror during the trial.

5. That during the evidence portion of the trial, I did notice that one other juror was nodding off and I immediately nudged him to wake him up.

6. That this occurred during repetitive portions of the trial and there was no indication that he had missed critical evidence or that his sleeping deprived him of the ability to participate in a meaningful way in deliberations.

6. That at no time during deliberations did any juror indicate that they had missed evidence or were unable to deliberate because they were sleeping.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on

8/6/04
(Date)

MATT ADAMS

AFFIDAVIT

STATE OF NEVADA

COUNTY OF CLARK

} ss:

DENORIO
PAUL DENARIO, being first duly sworn, deposes and says:

1. That I am a resident of Clark County, Nevada and that I served as a juror in State of Nevada v. Alfred P. Centofanti, III, Case No. C172534.

2. That neither before nor during deliberation did any juror discuss conducting any test, experiment, or reenactment regarding the evidence.

3. That juror Wheeler never mentioned during deliberation any experience shooting a weapon.

4. That my verdict was not affected by any clothes worn by any other juror during the trial.

5. That during the trial I was not aware of whether other jurors may or may not have been sleeping during the course of the trial.

6. That at no time during deliberations did any juror indicate that they had missed evidence or were unable to deliberate because they were sleeping.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on

8/6/04
(Date)

Paul Denorio
PAUL DENARIO DENORIO

BG/mmw

AFFIDAVIT

STATE OF NEVADA }
COUNTY OF CLARK } ss:

NANCY GORDINIER, being first duly sworn, deposes and says:

1. That I am a resident of Clark County, Nevada and that I served as a juror in State of Nevada v. Alfred P. Centofanti, III., Case No. C172534.

2. That neither before nor during deliberation did any juror discuss conducting any test, experiment, or reenactment regarding the evidence.

3. That juror Wheeler never mentioned during deliberation any experience shooting a weapon.

4. That my verdict was not affected by any clothes worn by any other juror during the trial.

6. That I did notice another juror wearing a shirt with writing I found inappropriate and informed the bailiff and told the juror to remove the shirt or turn it inside out.

7. That during the trial I was not aware of whether other jurors may or may not have been sleeping during the course of the trial.

8. That at no time during deliberations did any juror indicate that they had missed evidence or were unable to deliberate because they were sleeping.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on

Aug 6, 2004
(Date)

Nancy Gordinier
NANCY GORDINIER

BG/mmw

AFFIDAVIT

STATE OF NEVADA
COUNTY OF CLARK

} ss:

RICARDO SMYTHE, being first duly sworn, deposes and says:

1. That I am a resident of Clark County, Nevada and that I served as a juror in State of Nevada v. Alfred P. Centofanti, III., Case No. C172534.

2. That neither before nor during deliberation did any juror discuss conducting any test, experiment, or reenactment regarding the evidence.

3. That juror Wheeler never mentioned during deliberation any experience shooting a weapon.

4. That my verdict was not affected by any clothes worn by any other juror during the trial.

5. That during the trial I was not aware of whether other jurors may or may not have been sleeping during the course of the trial.

6. That at no time during deliberations did any juror indicate that they had missed evidence or were unable to deliberate because they were sleeping.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on

8-05-04

(Date)


RICARDO SMYTHE

BG/mmww

Aug 05 04 02:57p

08/05/2004 13:30 FAX 3840146

DA CRIMINAL DIVISION

002

P. 1

AFFIDAVIT

STATE OF NEVADA

COUNTY OF CLARK

} ss:

JAMES OWENS, being first duly sworn, deposes and says:

1. That I am a resident of Clark County, Nevada and that I served as a juror in State of Nevada v. Alfred P. Centofanti, III., Case No. C172534.

2. That neither before nor during deliberation did any juror discuss conducting any test, experiment, or reenactment regarding the evidence.

3. That juror Wheeler never mentioned during deliberation any experience shooting a weapon.

4. That my verdict was not affected by any clothes worn by any other juror during the trial.

5. That during the trial I was not aware of whether other jurors may or may not have been sleeping during the course of the trial.

6. That at no time during deliberations did any juror indicate that they had missed evidence or were unable to deliberate because they were sleeping.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on

5 August 2004
(Date)
JAMES OWENS

BG/rmw

Aug-05-04 02:29P IDI I

. *WJ Miller

2-233-6529

P.01

AFFIDAVIT

STATE OF NEVADA }
COUNTY OF CLARK } ss:

DIANA MILLER, being first duly sworn, deposes and says:

1. That I am a resident of Clark County, Nevada and that I served as a juror in State of Nevada v. Alfred P. Centofanti, III., Case No. C172534.

2. That neither before nor during deliberation did any juror discuss conducting any test, experiment, or reenactment regarding the evidence.

3. That juror Wheeler never mentioned during deliberation any experience shooting a weapon.

4. That my verdict was not affected by any clothes worn by any other juror during the trial.

5. That during the trial I was not aware of whether other jurors may or may not have been sleeping during the course of the trial.

6. That at no time during deliberations did any juror indicate that they had missed evidence or were unable to deliberate because they were sleeping.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on

5-August-2004
(Date)

Diana E. Miller
DIANA MILLER

BG/mmw

AFFIDAVIT

STATE OF NEVADA }
COUNTY OF CLARK } ss:

CAREN BARRS, being first duly sworn, deposes and says:

1. That I am a resident of Clark County, Nevada and that I served as a juror in State of Nevada v. Alfred P. Centofanti, III., Case No. C172534.

2. That neither before nor during deliberation did any juror discuss conducting any test, experiment, or reenactment regarding the evidence.

3. That Juror Wheeler never mentioned during deliberation any experience shooting a weapon.

4. That my verdict was not affected by any clothes worn by any other juror during the trial.

5. That during the trial I was not aware of whether other jurors may or may not have been sleeping during the course of the trial.

6. That at no time during deliberations did any juror indicate that they had missed evidence or were unable to deliberate because they were sleeping.

7. That I was convicted of a felony involving bad checks over twenty (20) years ago in Florida.

8. That when I called into the jury commissioner and was quizzed over the telephonic information system, I pushed the number indicating that I did in fact have a felony conviction.

9. That I have never been convicted of anything in Nevada.

10. That I also indicated in writing to the jury commissioner that I did have a felony conviction in Florida in excess of twenty (20) years ago.

11. That I have had my rights restored as a result of that felony conviction and I am allowed to vote and maintain my nursing license.

12. That due to the fact that I had already disclosed this information on two (2)

1 occasions, I was under the impression that the Court and parties knew from my prior
2 disclosure that I did have a felony conviction.

3 13. That I did not intentionally conceal my felony conviction from the Court or the
4 parties.

5 I declare under penalty of perjury under the law of the State of Nevada that the
6 foregoing is true and correct.

7
8 Executed on Aug. 6 2004
9 (Date)

Caren Barrs
CAREN BARRS

1 REPL
2 CARMINE J. COLUCCI, ESQ.
3 CARMINE J. COLUCCI, CHTD.
4 Nevada Bar #000881
5 629 South Sixth Street
6 Las Vegas, Nevada 89101
7 (702) 384-1274
8 Attorney for Defendant,
9 ALFRED P. CENTOFANTI III

FILED

AUG 24 3 10 PM '04

Shirley B. Rungius
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

ALFRED P. CENTOFANTI III,

Defendant.

CASE NO. C172534

DEPT NO. XIV

Date of Hearing: 8/26/04
Time of Hearing: 9:00 a.m.

REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW, the Defendant, ALFRED P. CENTOFANTI III, by and through his attorney, CARMINE J. COLUCCI, ESQ., of the law firm of CARMINE J. COLUCCI, CHTD., who now files this Reply to the State's Opposition to the Defendant's Motion for New Trial.

This reply is based upon the points and authorities submitted herewith, the exhibits attached hereto, and all papers, pleadings and court records on file

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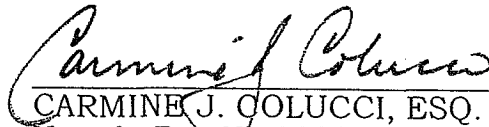
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/////

1 herein.

2 DATED this 24th day of August, 2004.

3 CARMINE J. COLUCCI, CHTD.

4 

5 CARMINE J. COLUCCI, ESQ.

6 Nevada Bar No. 000881

7 629 South Sixth Street

8 Las Vegas, Nevada 89101

9 Attorney for Defendant

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I.**

12 **THE DEFENDANT WAS NOT A QUALIFIED JUROR AS HER**

13 **CIVIL RIGHTS WERE NEVER RESTORED**

14 The state concedes that the Centofanti case juror Caren Barrs was
15 convicted in Florida of a felony which occurred in 1980. At the time that she was
16 convicted, she lost her civil rights including the right to serve as a juror in Florida
17 until those civil rights were restored. The state at page 5 of its opposition has
18 asserted **as fact**, "THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL BASED
19 ON A PRIOR FELONY CONVICTION OF CAREN BARRS BECAUSE HER CIVIL
20 RIGHTS HAVE BEEN RESTORED, ENTITLING HER TO SERVE ON A JURY, AND
21 SHE DID NOT COMMIT MISCONDUCT DURING VOIR DIRE." Attached hereto as
22 Exhibit A is a certified document from the Office of Executive Clemency of the
23 State of Florida, Florida Parole Commission, which unequivocally shows that **Ms.**
24 **Barrs has not had her civil rights restored in Florida.** Since 1980 she has not
25 been qualified to be a juror in Florida and she has therefore not qualified to sit as
26 a juror in Nevada at the time that the Centofanti matter was tried.

27 The state has also asserted as fact that Ms. Barrs' civil rights were restored
28 after twenty years by law in Florida. They have asserted in their Ex Parte Motion
and Order to Jury Commission to Release Juror Information for Juror Number

1 Three in State of Nevada v. Alfred Paul Centofanti III, at page two, "Pursuant to
2 Florida law, after a period of twenty (20) years, a felon's Civil Rights are restored."
3 This is also not true.

4 The state has cited no statute or case law as authority for this proposition
5 which the defense asserts is not the state of the law in Florida. The pertinent
6 Florida law and article of the Florida constitution concerning the suspension and
7 restoration of civil rights are set forth below:

8 **Fla. Stat. § 944.292 Suspension of civil rights.**

9 (1) Upon conviction of a felony as defined in s. 10, Art X of the State
10 Constitution, the civil rights of the person convicted shall be
11 suspended in Florida until such rights are restored by a full pardon,
conditional pardon, or restoration of civil rights granted pursuant to
s. 8, Art. IV of the State Constitution.

12 (2) This section shall not be construed to deny a convicted felon
13 access to the courts, as guaranteed by s. 21 Art. I of the State
Constitution, until restoration of her or his civil rights.

14 **Fla. Stat. § 944.293 Initiation of restoration of civil rights.**

15 With respect to those persons convicted of a felony, the following
16 procedure shall apply: Prior to the time an offender is discharged
17 from supervision, an authorized agent of the department shall obtain
18 from the Governor the **necessary application and other forms**
19 **required for the restoration of civil rights.** The authorized agent
shall assist the offender in completing these forms and shall ensure
that the application and all necessary material are forwarded to the
Governor before the offender is discharged from supervision.
(Emphasis added)

20 **Art. IV, Section 8, Fla. Const.**

21 1. (a) Except in cases of treason and in cases where impeachment
22 results in conviction, the governor may, by executive order filed with
23 the custodian of state records, suspend collection of fines and
24 forfeitures, grant reprieves not exceeding sixty days and, with the
approval of two members of the cabinet, grant full or conditional
pardons, restore civil rights, commute punishment, and remit fines
and forfeitures for offenses.

25 (b) In cases of treason the governor may grant reprieves until
26 adjournment of the regular session of the legislature convening next
27 after the conviction, at which session the legislature may grant a
pardon or further reprieve; otherwise the sentence shall be executed.

1 (c) There may be created by law a parole and probation commission
2 with power to supervise persons on probation and to grant paroles or
3 conditional releases to persons under sentences for crime. The
4 qualifications, method of selection and terms, not to exceed six years,
5 of members of the commission shall be prescribed by law.

6 Attached hereto as Exhibit B is a copy of the Restoration of Civil Rights
7 Application presently in use in Florida. The state has not asserted, nor has the
8 defense investigation disclosed that Ms. Barrs has properly applied for and had
9 her civil rights restored through the process required by Florida law. In fact, in
10 Exhibit A it is stated that an application for restoration is not even pending.

11 II.

12 **JUROR BARRS DID COMMIT MISCONDUCT BEFORE AND** 13 **DURING VOIR DIRE AND AFTER TRIAL WAS CONCLUDED**

14 What is also abundantly clear is that although Ms. Barrs swears under oath
15 that she did, she never disclosed her felony conviction to the Clark County Jury
16 Commissioner. See the affidavit of the Clark County Jury Commissioner attached
17 hereto as Exhibit C. To make matters worse, after the trial was concluded, Ms.
18 Barrs was not truthful in her affidavit which is attached to the state's opposition,
19 when she said she disclosed her felony conviction to the Jury Commissioner, and
20 she was not truthful when she told the prosecutor, Becky Goettsch, that her civil
21 rights had been restored 20 years ago. See copy of Ms. Barrs' affidavit which is
22 attached hereto as Exhibit D.

23 To compound the previously mentioned intentional concealment, Ms. Barrs
24 claims that since she disclosed her conviction to the Clark County Jury
25 Commissioner, **by telephone, verbally and in writing**, which she never did, she
26 felt that she was not required to mention it to the court even when directly asked.
27 She goes on to state in her affidavit, declaring under penalty of perjury, that her
28 statements therein were true, "That I have had my rights restored as a result of
that felony conviction and I am allowed to vote and maintain my nursing license."

1 This statement insinuates that she took some affirmative action to get her rights
2 restored even though the state claims that her rights were automatically restored.
3 Neither of these statements is true.

4 In her Voter Registration application, dated March 16, 2000 which is
5 attached hereto as Exhibit E, Ms. Barrs declared under penalty of perjury that,
6 "I am not laboring under any felony conviction or other loss of civil rights which
7 would make it unlawful for me to vote." This was also not true. If she has voted,
8 she has voted unlawfully. If she has concealed her conviction from the registrar
9 of voters, why would she reveal it to the Jury Commissioner? She knew or should
10 have known that her record was not sealed or expunged and that her civil rights
11 were not restored as she contacted the clerk in Florida to get copies of her record
12 in 1998.

13 Even the prosecutor, Clark Peterson, picked up on Ms. Barrs' reluctance to
14 disclose her conviction and present status when he conducted his voir dire of her.
15 See transcript of Voir Dire at pp. 71-72 of Exhibit C to the Defendant's Motion for
16 a New Trial. If all of the parties were supposedly "aware of her conviction" why
17 would the Court feel the need to explicitly ask her a question whose purpose was
18 partly to discover the very thing that she intentionally concealed?

19 The state has asserted in their opposition to Defendant's Motion for New
20 Trial, at p. 6, that Ms. Barrs did not commit misconduct during voir dire. They
21 bolster this assertion by stating: "When she (Barrs) arrived in court she assumed
22 that all parties were aware of her prior felony conviction and did not **offer** the
23 information during the jury selection process." Who advised Ms. Barrs that as a
24 prospective juror in a murder case, she was allowed to disclose whatever
25 information that she felt like offering? She was asked a direct question in voir dire
26 by this Court.

27 The state then offers the explanation that she telephonically disclosed, in
28

1 person and then **“wrote down the information on the Jury Commissioner**
2 **information sheet.”** As previously mentioned, there was no writing or other
3 method of disclosure so this apparent assertion of fact is false. So Ms. Barrs not
4 only did not “offer” this information, she made the conscious and intentional
5 decision not to disclose it. Nevertheless, she did intentionally disclose her son’s
6 information (See pp. 62-64 of Exhibit C to the Defendant’s Motion for a New Trial).

7 While the defense asserts that since Ms. Barrs was objectively and therefore
8 legally never a qualified juror, and that no further inquiry needs to be made for
9 the Defendant’s motion to be granted on that ground alone, this Court should
10 recognize that the defense is entitled to honest answers to voir dire questions
11 especially when they are asked by this Court. The Nevada Supreme Court has
12 held that “where a juror has failed to reveal potentially prejudicial information
13 during voir dire, the relevant inquiry is whether the juror is guilty of intentional
14 concealment” *Canada v. State*, 113 Nev. 938, 944 P.2d 781 (1997).
15 Conviction of a felony is potentially prejudicial information. The Nevada Supreme
16 Court held in *Canada* that the trial court abused its discretion by failing to find
17 that the juror had intentionally concealed important information during voir dire
18 when in fact he did.

19 Now the State seeks to justify the act of intentional concealment by Ms.
20 Barrs, asserting that she “assumed” her civil rights were restored under a Florida
21 law when they were not and because she mistakenly “assumed” that all parties
22 (and the Court?) were aware of her felony conviction. Why she made these
23 incorrect “assumptions” is unknown but the facts are unrefutable – Caren Barrs
24 is a convicted felon whose civil rights have not been restored in Florida. Nevada
25 cannot restore the civil rights of a felon convicted and disenfranchised under
26 Florida law. See Op. Atty Gen. Nev. 146, 96-27 (1996) attached hereto as Exhibit
27 F.
28

1 The state has conceded that since the felony conviction was in Florida and
2 not Nevada, the Court must look to Florida law to see if Florida automatically
3 restored her rights. See page 5 of the state's opposition. Obviously her civil rights
4 were not restored although they **may** have been if she had filed the necessary
5 application and the appropriate Florida state government agency had determined
6 that she met the qualifications. However, these two steps must be taken first.

7 Ms. Barrs made contact with the Pinellas County criminal court on July
8 20, **1998**, eighteen years after her conviction in order to obtain copies of
9 documents from her case. It would probably take an evidentiary hearing in order
10 to discern exactly why she wanted those copies but it may very well have been so
11 that she could start the restoration of civil rights application process which
12 Florida law requires and which she apparently never completed. Fla. Stat.
13 §940.05 (2004) states:

14 **Fla. Stat. § 940.05 (2004)**

15 Any person who has been convicted of a felony **may** be entitled to the
16 restoration of all the rights of citizenship enjoyed by him or her prior
to conviction if the person has:

- 17 (1) Received a full pardon from the board of pardons;
18 (2) Served the maximum term of the sentence imposed upon him or
her; or
19 (3) Been granted his or her final release by the Parole Commission.
(Emphasis added)

20 This contact with the clerk in Pinellas County shows that in 1998 she had
21 some concern about her felony conviction and this contact provided her with an
22 opportunity to get documentary or verbal confirmation on the status of the
23 restoration of her civil rights. If the defense could obtain this information without
24 any court orders, certainly Ms. Barrs could get it. It is obvious that this
25 conviction, up to today, is a matter of public record and has not been sealed or
26 expunged under Florida law and her civil rights have not been restored.

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III.

JUROR WHEELER DID CONDUCT A FIREARM TEST

With respect to the statements of juror Josh Wheeler to the state's investigator which conflict with the statements contained in the Defendant's original motion, the defense is prepared to offer the testimony of Mike Pfriender in order to rebut Mr. Wheeler's latest statements and to prove the accuracy of the defense's assertions regarding the shooting test conducted by him. There were two interviews with Mr. Wheeler. One was recorded and one was not. See the affidavit of Mike Pfriender attached hereto as Exhibit G.

IV.

DEFENDANT IS ENTITLED TO A NEW TRIAL DUE TO THE INAPPROPRIATE CONDUCT OF OTHER JURORS

With respect to the inappropriately lettered tee shirt worn by the juror which was mentioned in the Defendant's initial moving papers, the defense is prepared to bring in several witnesses who saw him wearing the shirt before the case was ever submitted to the jury. Most of the other jurors also saw the shirt that said "Do you know what a Murderer looks like?" See the affidavits of the jurors attached to the state's opposition. This shows his inability to take this case seriously, which is a violation of his oath, and his decision predisposition. It was unbelievably inappropriate given the gravity and gruesomeness of the case and shows that this juror was unfit for service. Further, the jury foreman, Nancy Gordinier, in her affidavit, claims that she brought this to the bailiff's attention. It is unknown if the Court was made aware of it, but this act of immaturity and conscious disregard for the seriousness of the proceedings by this juror would, at least, have required his removal from the jury.

The defense is also prepared to present witnesses who saw two of the jurors sleeping during the case for periods of time which had to have an impact on their

1 ability to remember and to consider the evidence presented to them. An inquiry
2 must be made in this area in order to insure that the Defendant was given due
3 process and a fair trial as guaranteed under the Fifth, Sixth and Fourteenth
4 Amendments to the Constitution of the United States.

5 **V.**

6 **DEFENDANT'S MOTION IS NOT UNTIMELY**

7 The defense asserts that NRS 176.515 does not even apply to this situation.
8 This was misconduct which facilitated the seating of a person who was not even
9 qualified to be a juror in the first instance. She was not even a juror at the time
10 of her initial concealments. But even juror misconduct should not be protected
11 by this statute. If this Court determines that juror misconduct which occurs
12 during a trial is subject to this statute, the conduct in this case must be viewed
13 as a continuing pattern of concealment which commenced when she responded
14 to the jury summons and continued through all of her contact with the Jury
15 Commissioner and then even with this Court up to today. She signed her affidavit
16 in support of the state's opposition on August 6, 2004, still asserting as under
17 oath, statements which the attached exhibits clearly show are untrue. Neither
18 this "juror" or the state ever bothered to check the accuracy of these important
19 statements which are asserted under oath as true.

20 As set forth above, juror Barrs intentionally engaged in a pattern of non-
21 disclosure. Initially neither this Court, the state or defense had any reason to
22 suspect that she would engage in activity that would violate her oath as a
23 venireman and then as a juror. The state now asserts a position where it asks
24 this Court to reward this deception by upholding this juror's fitness to serve on
25 this jury as a result of her being untruthful with this Court or anyone connected
26 with this case. NRS 176.515 was not enacted for this purpose.

27 This intentional concealment made the discovery of her prior felony
28

conviction virtually impossible during the seven (7) days following the verdict. The defense does not have unfettered access to a person's local criminal history or scope or the National Criminal Information Center (NCIC) data base as the state does. Even if it did, Ms. Barrs' conviction may not have been discovered because it was a Florida conviction **and** it is assumed that Ms. Barrs did not register in Nevada as a convicted felon. Therefore, this is not the type of situation contemplated and therefore covered under the above referenced statute.

Although the defense is not conceding this, this issue could conceivably come under the section of NRS 176.515, relating to newly discovered evidence which sets forth a two (2) year time limitation. But the defense asserts that if the juror was not legally qualified in the first instance, this deficiency cannot be cured by the passage of time especially where deception and concealment from everyone prevented discovery even by the most diligent inquiry.

Further, the Defendant's constitutional right to due process and the right to a fair trial would be violated by holding him to a legal standard that he could not have possibly met. This is not like the late discovery of a witness or some documentary evidence which the defense should have discovered through normal investigation. This juror's intentional non-disclosure caused this Court and all parties not to challenge her qualifications. In the civil arena, this action would be considered fraud. Can this Court hold the defense to a higher standard in requiring it to discover this felony conviction than the Jury Commissioner whose duty it is to screen jurors or to the higher standard then this Court even though the Court asked the direct question or the state who has access to scope and NCIC? To do so would be to defy common sense as well as the principles of due process and fundamental fairness.

For the above stated reasons, the defense asserts that this Court cannot reward fraudulent concealment of information required to be disclosed in response

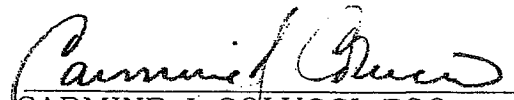
1 to this Court's own question and in response to her oath to answer truthfully all
2 questions put forth to her. There is no law which authorizes a juror to pick and
3 choose what information not to disclose when asked a direct question by the
4 Court or by the parties which absolutely probes her qualifications to be a juror.
5 Someone other than the defense should have the obligation to determine whether
6 a juror is legally even eligible to sit as a juror. Everyone assumes that the Jury
7 Commissioner only calls up qualified candidates for jury service. Apparently, she
8 too must rely upon the honesty of those called up.

9 CONCLUSION

10 Because this juror intentionally concealed her felony conviction from the
11 Jury Commissioner and then claimed that she had advised the Jury
12 Commissioner, telephonically, verbally and in writing, when it is clear that she did
13 not do so, and for all of the above stated reasons as well as those raised in the
14 initial moving papers in this motion, the Defendant asserts that he was denied his
15 right to be tried by twelve "qualified" jurors and that his constitutional rights
16 under the Constitution of the United States to due process and a fair trial as
17 guaranteed under the Fifth, Sixth and Fourteenth Amendments were violated and
18 therefore the Defendant's Motion for a New Trial should be granted.

19 DATED this 24th day of August, 2004.

20 CARMINE J. COLUCCI, CHTD.


21 
22 CARMINE J. COLUCCI, ESQ.
23 Nevada Bar No. 000881
24 629 South Sixth Street
25 Las Vegas, Nevada 89101
26 Attorney for Defendant
27
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RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing REPLY TO STATE'S
OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL is hereby
acknowledged this 24 day of August, 2004.

DAVID ROGER
CLARK COUNTY DISTRICT ATTORNEY



BECKY GOETTSCH
Nevada Bar No. 6316
Deputy District Attorney
200 South Third Street
Las Vegas, NV 89155
Attorney for Plaintiff

EXHIBIT A

STATE OF FLORIDA



JEB BUSH, GOVERNOR, CHAIRMAN
CHARLES CRIST, ATTORNEY GENERAL

TOM GALLAGHER, CHIEF FINANCIAL OFFICER
CHARLES H. BRONSON, COMMISSIONER OF AGRICULTURE
MRS. JANET H. KEELS, COORDINATOR

PHONE 850/488-2952

OFFICE OF EXECUTIVE CLEMENCY

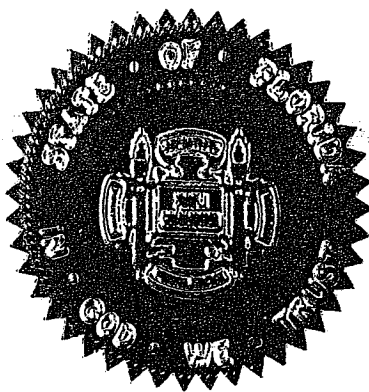
2601 BLAIRSTONE ROAD
BUILDING C, ROOM 229
TALLAHASSEE, FLORIDA 32399-2450

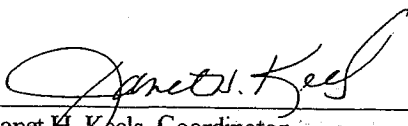
STATE OF FLORIDA,
COUNTY OF LEON.

I HEREBY CERTIFY that I, Janet H. Keels, am Coordinator of the Office of Executive Clemency of the State of Florida which is located in the Florida Parole Commission. I further certify that this seal is the official seal of the Florida Parole Commission. As Coordinator of the Office of Executive Clemency, I am custodian of the records of the clemency office. The Office of Executive Clemency is the custodian of and has access to all records of civil rights restorations in the State of Florida.

I have made a thorough search of the clemency records and there is no record of restoration of civil rights; specific authority to sit as a juror, to vote, to receive, possess or transport in commerce a firearm, or a pardon of any kind, having been granted by the Governor and Cabinet of the State of Florida to a **CAREN BARRS, DOB 06/23/1946**, in connection with her felony conviction in the State of Florida.

Therefore, I certify that the civil rights of **CAREN BARRS** have not been restored. In addition, there is no application pending for clemency at this time for the above-named person.




Janet H. Keels, Coordinator
Office of Executive Clemency
of the State of Florida
Florida Parole Commission

August 17, 2004

EXHIBIT B

OFFICE OF EXECUTIVE CLEMENCY

2601 Blairstone Road
Building C, Room 229
Tallahassee, FL 32399-2450
Phone 850-488-2952

INFORMATION AND INSTRUCTIONS ON APPLYING FOR RESTORATION OF CIVIL RIGHTS

(If you are applying for other types of clemency, please see instructions for applying for clemency.)

THIS PROCESS IS NOT AN ADVERSARIAL PROCEDURE AND YOU DO NOT NEED AN ATTORNEY TO REPRESENT YOU.

It is important that the completed application form be entirely legible; therefore, please print or type. It should be fully and accurately completed.

The Executive Clemency Board will consider, but not be limited to, the following factors when determining whether to grant an applicant restoration of civil rights:

- (1) The nature of the offense;
- (2) Whether the applicant has any history of mental instability, drug or alcohol abuse;
- (3) Whether the applicant has a prior or subsequent criminal record, including traffic offenses;
- (4) The applicant's employment;
- (5) Whether the applicant is current or delinquent on child support requirements;
- (6) Letters submitted in support of, or opposition to, the grant of executive clemency.

The information which we request from you on the application form, and if you are interviewed by a Parole Examiner of the Florida Parole Commission, is needed to help provide the basis of an informed judgment as to whether or not you should be granted restoration of civil rights. This is our only purpose in asking you to complete and sign the application and requesting that an investigation be made. You are under no obligation to furnish any information. However, unless you do provide us with this information, we will be unable to process your application.

In making inquiries with respect to these matters, the Florida Parole Commission may interview you, persons who execute character affidavits or who write letters of reference concerning you, neighbors, employers, and other individuals who may be able to provide relevant information concerning you. While such inquiries are made discreetly and a reasonable effort is made not to disclose the reason for the investigation, we cannot assure that under no circumstances will the nature of the inquiry become known to some of the persons interviewed.

The Investigator will request you sign a notarized release statement to facilitate such investigation,

however, it may not be necessary to make contact with all individuals listed in such release statement. Pursuant to the Privacy Act of 1974, Chapter V, Section 552a, you will need to authorize any criminal justice agency, police department, sheriff's office, Federal or State agency, to make full disclosure and furnish copies of any information in its possession to any authorized Investigator of the Florida Parole Commission, as to your past and present background; and further authorize any and all physicians, hospitals, clinics, public health authorities and others to furnish full information about your physical and mental history and condition.

Executive clemency files are maintained to provide for the exercise of the Governor and Cabinet's constitutional clemency power and are, of course, routinely made available to them, members of their staff and other officials concerned with these proceedings. After the Board either grants or denies an application, an Order is prepared as to each grant of clemency and a copy of each order is maintained in the Office of Executive Clemency as an official record. Upon specific request, we advise anyone who asks whether a named person has applied for, been granted or denied clemency. Disclosures of the contents of Executive Clemency files to anyone may be made by the Governor when the disclosure is required by law or the ends of justice.

PLEASE NOTE: All information submitted to the Office of Executive Clemency becomes the property of this office and will not be returned. Please keep copies of any paperwork you think you may need in the future.

EXHIBIT C

1 AFFT
2 CARMINE J. COLUCCI, ESQ.
3 CARMINE J. COLUCCI, CHTD.
4 Nevada Bar #000881
5 629 South Sixth Street
6 Las Vegas, Nevada 89101
7 (702) 384-1274
8 Attorney for Defendant,
9 ALFRED P. CENTOFANTI III

10
11
12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

14 STATE OF NEVADA,

15 Plaintiff,

16 vs.

17 ALFRED P. CENTOFANTI III,

18 Defendant.

CASE NO. C172534

DEPT NO. XIV

Date of Hearing: 8/26/04

Time of Hearing: 9:00 a.m.

19
20 AFFIDAVIT OF JUDY ROWLAND IN SUPPORT OF REPLY TO
21 OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL

22 STATE OF NEVADA)
23) ss:
24 COUNTY OF CLARK)

25 I JUDY ROWLAND, being first duly sworn, deposes and says:

26 1. That I am the Clark County Jury Commissioner.

27 2. That on August 19, 2004, I received a court order directing me to give
28 juror information about former juror Caren Barrs to Carmine J. Colucci, Esq., the
defendant's counsel in this case.

3. That Mr. Colucci requested that I advise him about whether former juror
Caren Barrs had ever advised me or any members of my staff about her felony
conviction in Florida, prior to her jury service in the Centofanti trial.

4. That I have searched our telephone records, computer records, spoke
with all of the representatives of my office who had contact with her and have

1 checked for any writings that she or anyone else might have tendered to us and
2 am satisfied that despite having contact with our office on three (3) occasions
3 when she requested a change in her jury service reporting date, before her jury
4 service and despite having access to me and my representatives during the term
5 of her jury service, she did NOT disclose to us that she had a felony conviction.

6 5. That the four pages attached hereto collectively as Exhibit 1, titled Pool
7 Summary Report Participant Detail, show the dates that she called, the dates that
8 her service dates were deferred to and under NOTES any important information
9 that she provided to us.

10 6. That I have reviewed her affidavit dated August 6, 2004, which is
11 attached to the State's Opposition to Defendant's Motion for New Trial and based
12 upon our records and the recollections of our representatives, I have concluded
13 that she could not have and did not respond on our telephonic information system
14 indicating that she had a felony conviction.

15 7. That Ms. Barrs did not indicate to us, in writing, on a jury information
16 sheet that she had a felony conviction prior to her scheduled jury service.

17 8. That Ms. Barrs was not given and therefore did not complete a verbal,
18 computer, telephone or paper questionnaire wherein she disclosed her felony
19 conviction to us.

20 9. That we take it very seriously when a potential juror advises us that he
21 or she has a felony conviction and upon being so advised we investigate further
22 and document any information provided to us for possible disclosure to the court.

23 10. That no one in our office ever advised Ms. Barrs that her felony conviction
24 would be disclosed to the court, the state or the defense by us since we did not
25 know about her felony conviction.

26 11. That Ms. Barrs was clearly advised both by the printed material on the
27 jury summons and telephonically that a felony conviction was important to
28

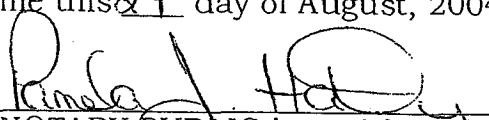
1 disclose as it could disqualify a person from jury service.

2 12. That all juror information about Ms. Barrs was previously provided to the
3 district attorney's office pursuant to this Court's previously issued order.

4 DATED this 24 day of August, 2004.

5
6 
7 JUDY ROWLAND

8 SUBSCRIBED and SWORN to before
9 me this 24 day of August, 2004.

10 
11 NOTARY PUBLIC in and for said
12 County and State

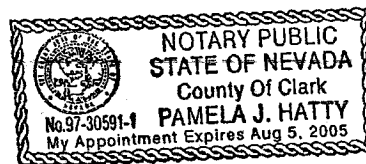


EXHIBIT 1

**Pool Summary Report
Participant Detail**

Date: 8/20/04

Time: 1:39 PM

INACTIVE

Current Status

Last Name: **BARRS** Participant No: 100224264
First Name: **CAREN** Pool No: 001030921
Responded: **Responded** User Edt: admnjs10 Jurisdiction Code: DISTRICT
Next Report Date: Pool Type: PETIT
Status: **Deferred** Pool Seq: 0874 Regular
Room: Event No: Return Date: 9/30/2003
No Attendances: 2 No AWOL: Times Deferred: 1
Notes: DR APPOINTMENT 8/21

FTA

FTA Status	No. FTA	No. Show Cause	No. Warrants Printed
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Birthstone

Address: 8734 WARTAGN MEADOWS
City: LAS VEGAS State: NV
Zip: 89131- Mileage:
Home Phone: 702-240-2866 Work Phone: 702-604-3940 Local:
Occupation: NURSE DOB: 6/23/1946 Gender: Female
Voter Reg No: Court Emp:
Drivers Licence: State:

Disqualified/Excused

Disqualified: Date:
Excused: * Date: 8/21/2003 Accept: Yes Deferred To: 10/2/2003

Pool Summary Report
Participant Detail

Date: 8/20/04
Time: 1:39 PM

INACTIVE

Current Status

Last Name: **BARRS** Participant No: 100224264
First Name: **CAREN** Pool No: 001031004
Responded: **Responded** User Edt: admnjs10 Jurisdiction Code: DISTRICT
Next Report Date: Pool Type: PETIT
Status: **Deferred** Pool Seq: 0030 Regular
Room: Event No: Return Date: 10/2/2003
No Attendances: 2 No AWOL: Times Deferred: 2
Notes: BUSY WORK 9/30

FTA

FTA Status	No. FTA	No. Show Cause	No. Warrants Printed
------------	---------	----------------	-------------------------

Birthstone

Address: 8437 WARTAGN MEADOWS STREET
City: LAS VEGAS State: NV
Zip: 89131- Mileage:
Home Phone: 702-240-2866 Work Phone: 702-604-3940 Local:
Occupation: NURSE DOB: 6/23/1946 Gender: Female
Voter Reg No: Court Emp:
Drivers Licence: State:

Disqualified/Excused

Disqualified: Date:
Excused: * Date: 9/30/2003 Accept: Yes Deferred To: 12/10/2003

Pool Summary Report
Participant Detail

Date: 8/20/04

Time: 1:39 PM

INACTIVE

Current Status

Last Name: **BARRS** Participant No: 100224264
First Name: **CAREN** Pool No: 001031210
Responded: **Responded** User Edt: admnjS03 Jurisdiction Code: DISTRICT
Next Report Date: Pool Type: PETIT
Status: **Deferred** Pool Seq: 0027 Regular
Room: Event No: Return Date: 12/10/2003
No Attendances: 2 No AWOL: Times Deferred: 3
Notes: BUSY WORK 9/30
MOM HAS ALZHEIMERS IN NY MUST GO GET HER IN ALZHEIMERS
HOME 12-2

FTA

FTA Status

No. FTA

No. Show Cause

No. Warrants
Printed

Birthstone

Address: 8437 WARTAGN MEADOWS STREET
City: LAS VEGAS State: NV
Zip: 89131- Mileage:
Home Phone: 702-240-2866 Work Phone: 702-604-3940 Local:
Occupation: NURSE DOB: 6/23/1946 Gender: Female
Voter Reg No: Court Emp:
Drivers Licence: State:

Disqualified/Excused

Disqualified:

Date:

Excused: *

Date: 12/2/2003 Accept: Yes Deferred To: 3/15/2004

**Pool Summary Report
Participant Detail**

Date: 8/20/04

Time: 1:39 PM

ACTIVE

Current Status

Last Name: **BARRS** Participant No: 100224264
First Name: **CAREN** Pool No: 001040314
Responded: **Responded** User Edt: admnjs07 Jurisdiction Code: DISTRICT
Next Report Date: 3/15/2004 Pool Type: PETIT
Status: **Juror** Pool Seq: 0285 Regular
Room: **DEPT. 14** Event No: **C172534** Return Date: 3/15/2004
No Attendances: 23 No AWOL: Times Deferred: 3
Notes: BUSY WORK 9/30
MOM HAS ALZHEIMERS IN NY MUST GO GET HER IN ALZHEIMERS
HOME 12-2

FTA

FTA Status	No. FTA	No. Show Cause	No. Warrants Printed
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Birthstone

Address: 8437 WARTAGN MEADOWS STREET
City: LAS VEGAS State: NV
Zip: 89131- Mileage:
Home Phone: 702-240-2866 Work Phone: 702-604-3940 Local:
Occupation: NURSE DOB: 6/23/1946 Gender: Female
Voter Reg No: Court Emp:
Drivers Licence: State:

Disqualified/Excused

Disqualified:	Date:		
Excused:	Date:	Accept:	Deferred To:

EXHIBIT D

AFFIDAVIT

STATE OF NEVADA }
COUNTY OF CLARK } ss:

CAREN BARRS, being first duly sworn, deposes and says:

1. That I am a resident of Clark County, Nevada and that I served as a juror in State of Nevada v. Alfred P. Centofanti, III., Case No. C172534.

2. That neither before nor during deliberation did any juror discuss conducting any test, experiment, or reenactment regarding the evidence.

3. That Juror Wheeler never mentioned during deliberation any experience shooting a weapon.

4. That my verdict was not affected by any clothes worn by any other juror during the trial.

5. That during the trial I was not aware of whether other jurors may or may not have been sleeping during the course of the trial.

6. That at no time during deliberations did any juror indicate that they had missed evidence or were unable to deliberate because they were sleeping.

7. That I was convicted of a felony involving bad checks over twenty (20) years ago in Florida.

8. That when I called into the jury commissioner and was quizzed over the telephonic information system, I pushed the number indicating that I did in fact have a felony conviction.

9. That I have never been convicted of anything in Nevada.

10. That I also indicated in writing to the jury commissioner that I did have a felony conviction in Florida in excess of twenty (20) years ago.

11. That I have had my rights restored as a result of that felony conviction and I am allowed to vote and maintain my nursing license.

12. That due to the fact that I had already disclosed this information on two (2)

1 occasions, I was under the impression that the Court and parties knew from my prior
2 disclosure that I did have a felony conviction.

3 13. That I did not intentionally conceal my felony conviction from the Court or the
4 parties.

5 I declare under penalty of perjury under the law of the State of Nevada that the
6 foregoing is true and correct.

7
8 Executed on

Aug. 6 2004
(Date)

Caren Barrs
CAREN BARRS

EXHIBIT E

Voter Registration Application

State of Nevada

BARRS, CAREN C
AFF: AHA 0654321
REG: 0669328

Application is
complete!

OFFICE USE ONLY

CANCELLED:

RECEIVED FROM:

INACTIVE:

- ☐ agency
☐ field registrar
☐ mail
☐ other

Precinct Code: 6019

Received/Witnessed by

... you must
vote in person at the next election, unless you have your absent
ballot request notarized or comply with other provisions of state law
(NRS 293.272).

05511-19 6054 Use pen-please print clearly-black ink preferred

1	Reason(s) for registration: <input type="checkbox"/> new registration <input checked="" type="checkbox"/> address change <input type="checkbox"/> party change <input type="checkbox"/> name change			
2	Mr. Mrs. Miss Ms.	First Name CAREN	Middle Name C	Last Name BARRS Jr. Sr. II III IV
3	Address Where You Live (not a post office box) IMPORTANT! You may not list your address as a business unless you actually reside there. 3153 Mediterranean Dr Las Vegas NV 89117			
4	Address Where You Get Your Mail (if different from #3) Apt.# City Zip Code			
5	Birth Date (mo/day/yr) 6/23/46	6 Place of Birth (State or Country) Cayuga County (Auburn) NY	Social Security, Nevada Driver's License, or Identification Card Number (required)	8 Telephone Number (optional) 702 240 9579
9	Party Registration (check only one box) <input checked="" type="checkbox"/> Democratic Party <input type="checkbox"/> Republican Party <input type="checkbox"/> Green Party <input type="checkbox"/> Independent American Party <input type="checkbox"/> Libertarian Party <input type="checkbox"/> Natural Law Party <input type="checkbox"/> Reform Party <input type="checkbox"/> No Party Affiliation (Nonpartisan) <input type="checkbox"/> Other Party (write on line below)		Important: If you do not affiliate with either the Democratic or Republican political party, you will receive a Nonpartisan Ballot and will not be allowed to vote for party candidates at the PRIMARY ELECTION. Registering "nonpartisan" means you have no political party affiliation.	
10	"I swear or affirm that: • I am a citizen of the United States; • on the date of the next election I will have attained the age of 18 years; • I will have continuously resided in the State of Nevada, in my county at least 30 days and in my precinct at least 10 days before the next election; • the present address listed herein is my sole legal place of residence and I claim no other place as my legal residence; and • I am not laboring under any felony conviction or other loss of civil rights which would make it unlawful for me to vote."			
11	Name and Address on Your Last Voter Registration: First Name Last Name Street Name and Number City/State/Zip		"I declare under penalty of perjury that the foregoing is true and correct" Executed on: March 16 2000 (date) Signature of Applicant: Caren Barrs SIGNATURE OF APPLICANT REQUIRED! (Application No.) AHA 654321	
12	IMPORTANT! If you are assisting a person to register to vote by mail and you are NOT a field registrar or an employee of a voter registration agency, you MUST complete the following. Failure to do so is a felony.			
CERTIFIED COPY DOCUMENT ATTACHED IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE				
Name (print) Street Name and Number City/State/Zip				

AUG 19 2000

EXHIBIT F

1 of 100 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEVADA

OPINION No. 96-27

1996 Nev. AG LEXIS 27; 1996 Op. Atty Gen. Nev. 146

September 25, 1996

SYLLABUS:

[*1]

CIVIL RIGHTS; FELONS; VOTING: Felons convicted in a Nevada district court may have their civil rights restored pursuant to NRS. Nevada can only restore the civil rights of Nevada felons. Federal felons may have their civil rights restored only by presidential pardon. Whether Nevada must afford full faith and credit to the restoration of civil rights by a foreign jurisdiction depends on the individual circumstances.

REQUESTBY:

The Honorable Stewart L. Bell
Clark County District Attorney
500 South Grand Central Parkway
Post Office Box 552215
Las Vegas, Nevada 89155-2255

OPINIONBY:

FRANKIE SUE DEL PAPA, Attorney General
CHARLES HILSABECK, Deputy Attorney General, Litigation Division

OPINION:

You have requested an opinion on the "correct course of action" to take on the request of a Clark County resident who is a federal felon convicted in the United State District Court, Southern District of New York, who wishes to regain the right to vote. Your inquiry raises several questions.

QUESTION ONE

How do Nevada felons (felons convicted in a Nevada district court) obtain restoration of their civil rights?

ANALYSIS

Article 2, § 1 of the Nevada Constitution states: "no person who has been or may be convicted [*2] of treason or felony in any state or territory of the United States, unless restored to civil rights" may vote. There are several statutory mechanisms in place for restoration of civil rights to Nevada felons depending on whether the felon is on probation, receives a pardon, successfully completes probation, or serves a sentence.

NRS 176.227 provides for the restoration of civil rights of a convicted person after honorable discharge from probation by the district court where the felon was convicted. If the convicted person was granted an honorable discharge from probation, has not previously been restored to his civil rights, and is not convicted of any offense greater than a traffic violation within six months after the discharge, he may apply to the Division of Parole and Probation for restoration of civil rights. The Division of Parole and Probation then petitions the court in which the applicant was

convicted for restoration of the convicted person's civil rights. If the Division refuses to petition the court, the convicted person may petition the district court in which the conviction was obtained directly for restoration of his civil rights.

Pursuant to *NRS 213.090*, the Nevada [*3] Board of Pardons Commissioners may restore civil rights of felons at the time a pardon is granted or at a later date. If restoration of civil rights is granted at a date subsequent to the pardon, the applicant shall not have been convicted of any offense greater than a traffic violation within five years after the pardon was granted. If the Board of Pardons Commissioners refuses to restore the applicant's civil rights, the applicant may petition the district court in which the conviction was obtained for an order directing the Board of Pardons to grant such restoration.

The Nevada Parole Board, pursuant to *NRS 213.155*, may restore a paroled prisoner to his civil rights at expiration of his parole. If the convicted person did not receive a restoration upon expiration of his parole, and has not been convicted of an offense greater than a traffic violation within five years after completion of parole, he may apply to the Parole Board for restoration of his civil rights. If the Parole Board refuses to restore the applicant's civil rights, the applicant may petition the district court in which the conviction was obtained for an order directing the Parole Board to grant such restoration. [*4]

The Division of Parole and Probation may restore a convicted person's civil rights after his sentence has been served pursuant to *NRS 213.157*. If the convicted person has not been convicted of any offense greater than a traffic violation within five years of his release, he may apply to the Division for restoration of his civil rights. Upon submission of proof that the convicted person meets the criteria for restoration of his civil rights, the Division of Parole and Probation shall petition the district court in which the conviction was obtained for restoration of the applicant's civil rights. If the Division of Parole and Probation refuses to submit such a petition, the applicant may directly petition the district court in which the conviction was obtained for an order directing the Division of Parole and Probation to grant such restoration.

CONCLUSION TO QUESTION ONE

Depending on the status of the convicted person, restoration of civil rights may be obtained for Nevada felons from the district court in which the felon was convicted, the Board of Pardons or the Parole Board.

QUESTION TWO

Can Nevada restore civil rights of felons who were not convicted in a Nevada district [*5] court?

ANALYSIS

The statutory language referred to in Question One limits authority of the Board of Pardons Commissioners, the Board of Parole Commissioners, and the Nevada district courts to restoring the rights of Nevada felons only. It is almost axiomatic that a state's ability to pardon and restore civil rights is limited to convicted persons over which the state has jurisdiction. This proposition is buttressed by the opinion of the U.S. Supreme Court in *Beecham v. U.S.*, *U.S.*, 114 S. Ct. 1669 (1994). *Beecham* involved federal felons who obtained state restorations of their civil rights and were subsequently convicted of being felons in possession of firearms in violation of 18 U.S.C.A. § 922(h) (1994).

The question before the Supreme Court in *Beecham* was "*Which jurisdiction's law is to be considered in determining whether a felon 'has had civil rights restored.'*" *Beecham*, 114 S. Ct. at 1670 (emphasis added).

The *Beecham* Court went on to hold:

Throughout the statutory scheme, the inquiry is: Does the person have a qualifying conviction on his record? Section 922(g) imposes a disability on people who "have been convicted." The choice-of-law [*6] clause defines the rule for determining "what constitutes a conviction." The exemption clause says that a conviction for which a person has had civil rights restored "shall not be considered a conviction." Asking whether a person has had civil rights restored is thus just one step in determining whether something should "be considered a conviction." By the terms of the choice-of-law clause, *this determination is governed by the law of the convicting jurisdiction.*

This interpretation is supported by the fact that the other three procedures listed in the exemption clause--*pardons, expungements, and set-asides*--are either always or almost always (depending on whether one considers a federal grant of habeas corpus to be a "set aside," a question we do not now decide) *done by*

the jurisdiction of conviction. That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well. *Dole v. Steelworkers*, 494 U.S. 26, 36, 110 S.Ct. 929, 934-935, 108 L.Ed.2d 23 (1990); *Third Nat. Bank in Nashville v. Impac Limited, Inc.*, 432 U.S. 312, 322, 97 S.Ct. 2307, 2313, 53 L.Ed.2d 368 (1977); *Jarecki v. G.D. Searle [*7] & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859 (1961).

Beecham, 114 S. Ct. at 1671 (emphasis added). See also *U.S. v. Jones*, 993 F.2d 1131 (4th Cir. 1993) (state's post-conviction restoration of rights scheme cannot eliminate prior federal conviction as prior conviction for federal offense as being a felon in possession of a firearm); *U.S. v. Dupaquier*, 74 F.3d 615, 617 (5th Cir. 1996) (the federal court looks to state law to determine whether a defendant's civil rights were restored); and *U.S. v. Lowe*, 50 F.3d 604 (8th Cir. 1995) (Minnesota lacks authority to restore civil rights of Minnesota resident convicted in another state).

Beecham involved a violation of federal firearms laws. However, the rationale of *Beecham* and its application to voting rights cases is supported by a lack of authority or rationale for deviating from it.

CONCLUSION TO QUESTION TWO

Because of Nevada's express statutory language and the rationale of the *Beecham* line of cases, Nevada can only restore the civil rights of Nevada felons.

QUESTION THREE

How do federal felons obtain restoration of their civil rights?

ANALYSIS

There does not appear [*8] to be a procedure under federal law for restoring a federal felon's civil rights. See *United States v. Geyler*, 932 F.2d 1330, 1333 (9th Cir. 1991); *Beecham*, at 1671-72. In a footnote, the *Beecham* Court stated:

We express no opinion on whether a federal felon cannot have his civil rights restored under federal law. This is a complicated question, one which involves the interpretation of the federal law relating to federal civil rights, see U.S. Const., Art. I, Sec. 2, cl. 1 (right to vote for Representatives); U.S. Const., Amdt. XVII (right to vote for Senators); 28 U.S.C. Sec. 1865 (right to serve on a jury); consideration of the possible relevance of 18 U.S.C. Sec. 925(c) (1988 ed., Supp. IV), which allows the Secretary of the Treasury to grant relief from the disability imposed by Sec. 922(g); and the determination whether civil rights must be restored by an affirmative act of a government official, see *United States v. Ramos*, 961 F.2d 1003, 1008 (CA1), cert. denied, 506 U.S. , 113 S.Ct. 364, 121 L.Ed.2d 277 (1992), or whether they may be restored automatically by operation of law, see *United States v. Hall*, 20 F.3d 1066 (CA10 1994). We do not [*9] address these matters today.

Id. at 1672, n. 2.

CONCLUSION TO QUESTION THREE

The only method available for a federal felon to obtain restoration of his civil rights appears to be a presidential pardon pursuant to U.S. Const., art II, § 2; authority of the President as Chief Executive, 28 U.S.C. § § 509 and 510 (1993); and 28 C.F.R. 0.35 and 1.1 (1993).

QUESTION FOUR

Is Nevada required to give full faith and credit to restorations of civil rights by other states?

ANALYSIS

The Full Faith and Credit Clause of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1.

The purpose of the Full Faith and Credit Clause is to preserve rights acquired or confirmed under public acts or judicial proceedings of one state by requiring recognition of their validity in other states. *16A Am. Jur. 2d Constitutional Law* § 863 (1995). However, "the Full Faith and Credit Clause does not compel 'a [*10] state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117, 2122 (1988), quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 59 S. Ct. 629, 632 (1939). Nor is a state required to enforce a law obnoxious to its public policy. *Griffin v. McCoach*, 313 U.S. 498 (1941), citing *Bradford Electric Co. v. Clapper*, 286 U.S. 145 (1932); *Hartford Indemnity Co. v. Delta Co.*, 292 U.S. 143 (1934).

A split of authority exists regarding recognition of acts of clemency by sister states. There is authority that, under the Full Faith and Credit Clause, one state need not recognize a pardon issued by a sister state for an offense committed in that sister state. See *Carlesi v. New York*, 233 U.S. 51 (1914) (a presidential pardon operated only with regard to the sovereign that issued it); *Thrall v. Wolfe*, 503 F.2d 313 (7th Cir. 1974), cert. denied, 420 U.S. 972 (1975) (U.S. not required to recognize state pardon); *White v. Thomas*, 660 F.2d 680 (5th Cir. 1981), cert. denied, 455 U.S. 1027 (1982) (Texas sheriff not barred from [*11] firing a deputy who failed to indicate at the time of hire that he had been convicted of a felony in California even though that conviction was later expunged); *Yaconvone v. Bolger*, 645 F.2d 1028, cert. denied, 454 U.S. 844 (1981) (U.S. Postal Service in deciding whether to employ someone convicted of shoplifting in Vermont was not required to recognize Vermont's pardon of the offense); *Groseclose v. Plummer*, 106 F.2d 311 (9th Cir.), cert. denied, 308 U.S. 614 (1939) (California not required to recognize Texas pardon); *Delehant v. Board of Police Standards and Training*, 855 P.2d 1088 (Or. 1993) (Oregon not required to recognize Idaho's expunction of defendant's Idaho conviction); *State v. Edmondson*, 818 P.2d 855, cert. quashed, 818 P.2d 419 (N.M. 1991) (New Mexico not required to recognize Texas expunction of defendant's Texas conviction).

Other courts, however, have ruled that the law of comity requires that states recognize a sister state's restoration of a convicted person's civil rights. See *Wickizer v. Williams*, 173 S.W. 288 (Tex. Ct. App. 1914) (pardon for felony committed in Mississippi by Mississippi authorities removes disability of person [*12] to sit on jury in Texas); *U.S. v. McMurrey*, 827 F.Supp. 424 (S.D. Tex. 1993) (U.S. required to recognize Governor of Oklahoma's pardon of defendant's prior Oklahoma conviction); *People v. Willis*, 435 N.Y.S.2d 655 (N.Y. App. Div. 1982) (New York would not consider a Texas felony conviction for enhancement purposes where Texas would not use the same conviction for enhancement under Texas law).

In determining whether the statute of a state under which foreign rights arose or the law of the forum should control in matters involving policy and conflicting interests, the rule is fairly well settled that different considerations usually apply where the statute creating a foreign right, which it is claimed should be given effect, is set up by way of defense to an asserted liability, from those where merely affirmative rights are claimed under a foreign statute. . . . In both the conflict is to be resolved not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its statutes to those of the other, but by appraising the governmental interests of each jurisdiction and turning the scale of decision according to their weight.

[*13]

16A Am. Jur. 2d Constitutional Law § 867 (1995) (footnotes omitted).

As a general rule, recognition will be required, unless the matter involves local sovereignty over purely local questions, such as criminal or penal laws, or the statute conflicts with a statute or policy of the forum state and the governmental interests of the forum state in the persons, property, or events in the state involved in the litigation outweigh the governmental interests of the foreign state for whose statute recognition is sought.

Id. at § 868 (footnote omitted).

Recognition of restoration of civil rights almost always involves affirmative rights that are claimed under a foreign statute. Therefore, the question of whether Nevada must recognize a sister state's restoration of a convicted person's civil rights is determined by weighing the governmental interests of Nevada and the foreign state. Several factors are relevant to this process including what jurisdiction restored the civil rights, whether the restoration of civil rights was

pursuant to some affirmative act or by operation of law, the interest of the foreign state in having Nevada recognize its restoration, and Nevada's [*14] interest in not recognizing the restoration.

Restoration of civil rights of a felon who was convicted in that state's courts would tend to support extending full faith and credit to that state's restoration. If the restoring state purports to restore the civil rights of a felon who was *not* convicted within that jurisdiction, it would present a strong argument for nonrecognition under the full faith and credit clause. See *Beecham*, 114 S. Ct. at 1671 and Question Two.

Judgments of other states are almost always given recognition under the full faith and credit clause. Under full faith and credit principles, if the court that issued the judgment had jurisdiction to render the judgment, other states are obligated to recognize the judgment. *Underwriters Nat. Assur. Co. v. North Carolina Life & Acc. & Health Ins. Guaranty Assn.*, 102 S. Ct. 1357 (1982). Therefore, if a state restores the civil rights of one of its felons by way of an affirmative act that results in a judgment or a finding by a tribunal, board or commission, rather than by mere operation of law, a stronger argument is presented for recognition.

The jurisdiction that originally imposed the disabilities on the [*15] convicted felon has strong interests in whether those disabilities are removed or remain with the felon. Certainly, there are situations where the convicting jurisdiction would desire to have the disabilities associated with a felony conviction removed. For example, if the convicting state issued the felon a pardon based on information that the convicted person was actually innocent of the crimes he was convicted of, the convicting state would have a strong interest in restoring the convicted person's civil rights and remove any stigma that person might have for the unjust conviction.

A jurisdiction that purports to restore the civil rights of a felon who was not convicted in that jurisdiction and did not impose the disabilities associated with being a convicted felon on that person, has little, if any, governmental interest in removing those disabilities. Likewise, that jurisdiction's governmental interest in having that person vote in Nevada is nonexistent.

Nevada's interest in carefully scrutinizing another state's restoration of civil rights to a convicted felon is founded in Nevada's Constitution. Nevada's constitutional mandate that "no person who has been or may be convicted [*16] of treason or felony in any state or territory of the United States, unless restored to civil rights" may vote, expresses Nevada's very strong interest in keeping convicted felons from voting. Nev. Const. art. 2, § 1. Nevada's interest in not recognizing another state's restoration of civil rights is especially strong where the restoration is relevant only to rights exercised in, and relating to, Nevada, such as voting in state elections.

Although the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-6, prohibits felons from voting, the right to vote is primarily a function of a state's prerogative. Certainly, a state may decide who votes in its own state elections. If one state has the prerogative to allow federal felons to vote in its elections, then Nevada certainly can just as surely prevent federal felons from voting in its elections unless their civil rights have been restored.

When all of the factors mentioned above are weighed and evaluated, the conclusion is that Nevada is not bound to recognize another state's statute authorizing federal felons or out-of-state felons to vote in that state's elections as having restored the convicted felon's constitutional rights [*17] pursuant to the full faith and credit clause for two primary reasons: (1) Pursuant to *Beecham*, states do not have jurisdiction to remove disabilities imposed by the federal government or by other states; and (2) such statutes are not restorations at all. Rather, statutes that merely authorize federal and out-of-state felons to vote do only that. Such statutes clearly do not purport to restore civil rights.

CONCLUSION TO QUESTION FOUR

Nevada should give full faith and credit to restorations of civil rights where certain criteria are met. The restoring jurisdiction must have also been the convicting jurisdiction. The restoration must purport to be just that, a restoration of the convicted person's civil rights, and meet all the constitutional and statutory requirements of the restoring jurisdiction. Nevada must not have any overriding reason, such as a public policy set out in a statute or Nevada's Constitution, for not recognizing the restoration. If all these questions can be answered affirmatively, then Nevada should recognize a restoration of civil rights by a foreign jurisdiction.

QUESTION FIVE

What is the "correct course of action" to take on the request of a [*18] Clark County resident to regain the right to vote who is a federal felon convicted in federal district court?

ANALYSIS

As stated above in Question One, the Nevada Constitution prohibits felons from voting unless they have had their civil rights restored. Nev. Const. art. 2, § 1. The federal felon in question has supplied documentation that on November 16, 1977, he was convicted of a felony in the United States District Court-Southern District of New York. This person served his sentence at the Federal Prison Camp at Lompoc, California, and was released to the Central District of California where he was under special parole supervision with the U.S. Probation Office for the Central District of California. This person has supplied documentation that he was successfully discharged from parole supervision on October 3, 1985.

The federal felon claims that his civil rights have been restored by New York State and relies on a New York statute that states in pertinent part:

No person who has been convicted in a federal court, of a felony, or a crime or offense which would constitute a felony under the laws of this state, shall have the right to register for or to vote at any election [*19] unless he shall have been pardoned or restored to the rights of citizenship by the president of the United States, or his maximum sentence of imprisonment has expired, or he has been discharged from parole.

N.Y. Election Law § 3 (Consol. 1995).

The statutory language quoted above does not purport to restore the civil rights of federal felons as required by the Nevada Constitution. The language of the statute itself contemplates the distinction between a pardon or a restoration of rights and merely expiring a sentence or being discharged from parole. The cited language simply allows federal felons who have been pardoned or restored or who have expired their sentences or who have been discharged from parole to vote in New York. The statute does not purport to confer any rights that would be associated with a restoration of rights.

The federal felon argues that his rights were restored by the State of New York even though he was convicted in federal court. Pursuant to the rationale of *Beecham*, New York was without jurisdiction or authority to restore his civil rights. Hence, recognition of his "restoration" is not required. *See* Question Two. Moreover, since the language [*20] of the New York Statute does not even purport to constitute a restoration of the convicted person's civil rights, a full faith and credit issue is not presented. There is no restoration of civil rights to recognize or not recognize.

In order for this person to vote in Nevada, he must obtain a restoration of his civil rights from the jurisdiction that convicted him--federal authorities. He will need to seek a presidential pardon, which is admittedly an exacting and time-consuming process. Nevada could allow this person, and others similarly situated, to vote if the language in Nevada's Constitution were modified and Nevada enacted statutory language similar to that found in the New York statute relied on by the federal felon. However, at present, this person is not qualified to vote in Nevada.

CONCLUSION TO QUESTION FIVE

The proper course of action in this person's case is to direct him to the United States Pardon Office. The Clark County Registrar of Voters should not allow him to register to vote until he has obtained restoration of his civil rights from federal authorities.

EXHIBIT G

1 AFFIDAVIT OF MIKE PFRIENDER IN SUPPORT OF REPLY
2 TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL

3 STATE OF NEVADA)
4) ss:
5 COUNTY OF CLARK)

6 MIKE PFRIENDER, being first duly sworn, deposes and says:

7 1. That affiant is the Las Vegas Branch Manager of Frasco Investigative
8 Services and a private investigator duly licensed by the State of Nevada, and has
9 personal knowledge of all matters set forth herein except for those stated upon
10 information and belief and is competent to testify thereon.

11 2. That at the request of defense counsel, affiant has engaged in the post-
12 trial investigation into various matters relating to the instant case including the
13 backgrounds of several jurors.

14 3. That on June 23, 2004, affiant conducted the second interview, this time
15 by telephone, with former juror Josh Wheeler.

16 4. That Mr. Wheeler would not consent to this interview being tape recorded
17 and therefore it was not.

18 5. That affiant asked Mr. Wheeler why he went shooting during the trial
19 and he stated the following:

20 My dad had the gun out cleaning it and I asked him how long it
21 would take him to empty it and he said 5 seconds.

22 I didn't tell him what kind of gun was involved, but we both said let's
23 go try it and that's how it happened. It was purely coincidental. I
24 mean my dad knew what was going on and I really didn't talk to him
25 about the case. I may have mentioned 2.3 seconds to him, but I don't
26 really remember.

27 6. That the above is what Josh Wheeler told affiant and from the tone of his

28 / / / / /

 / / / / /

 / / / / /

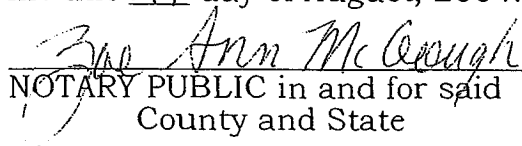
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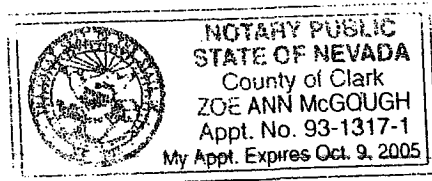
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1 conversation it was apparent to affiant that he had conducted his own test despite
2 using a different firearm to do so.

3
4 
MIKE PFRIENDER

5 SUBSCRIBED and SWORN to before
6 me this 24 day of August, 2004.

7 
8 NOTARY PUBLIC in and for said
9 County and State



1 ERR
2 CARMINE J. COLUCCI, ESQ.
3 CARMINE J. COLUCCI, CHTD.
4 Nevada Bar #000881
5 629 South Sixth Street
6 Las Vegas, Nevada 89101
7 (702) 384-1274
8 Attorney for Defendant,
9 ALFRED P. CENTOFANTI III

FILED

AUG 24 4 31 PM '04

Shirley S. Pangione
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

10 STATE OF NEVADA,

11 Plaintiff,

12 vs.

13 ALFRED P. CENTOFANTI III,

14 Defendant.
15

CASE NO. C172534

DEPT NO. XIV

Date of Hearing: 8/26/04
Time of Hearing: 9:00 a.m.

16 NOTICE OF CLERICAL ERROR AND/OR ERRATA

17 PLEASE TAKE NOTICE that the Restoration of Civil Rights Application was
18 inadvertently omitted from Exhibit B to Defendant's Reply to State's Opposition
19 to Defendant's Motion for New Trial. Said application is attached hereto.

20 DATED this 24th day of August, 2004.


21 CARMINE J. COLUCCI, CHTD.

22 *Carmine J. Colucci*
23 CARMINE J. COLUCCI, ESQ.
24 Nevada Bar No. 000881
25 629 South Sixth Street
26 Las Vegas, NV 89101
27 Attorney for Defendant
28

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing NOTICE OF CLERICAL
ERROR AND/OR ERRATA is hereby acknowledged this 24 day of August, 2004.

DAVID ROGER
CLARK COUNTY DISTRICT ATTORNEY



BECKY GOETTSCH
Nevada Bar No. 6316
Deputy District Attorney
200 South Third Street
Las Vegas, NV 89155
Attorney for Plaintiff

RESTORATION OF CIVIL RIGHTS APPLICATION

Restoration of Civil Rights restores the right to vote, serve on a jury, hold public office.
(Certain types of employment may require restoration of civil rights prior to application in compliance with Florida Statutes)

(Please check the box that applies)

- ☐ Restoration of Civil Rights for Florida Conviction
- ☐ Restoration of Civil Rights in Florida for Federal, Military or Out-of State Conviction

Please Print or Type.

Name When Convicted: _____

Current Name: _____

Other Names Used: _____

Date of Birth: _____ Race: _____ Sex: _____

Social Security No.: _____ Driver License No.: _____

Prison or Probation No. (if known): _____

Home Address: _____
(Street) (City) (State) (Zip)

Mailing Address: _____
(Street) (City) (State) (Zip)

Home Telephone No.: _____ Daytime Telephone No.: _____

E-mail Address: _____

What was the crime for which you were sentenced or placed on probation? _____

(Signature) (Date)

Attorney Name, Address & Telephone Number: (NOTE: You do not need an attorney for this process.)

NOTE: This application form is available on the internet at www.state.fl.us/fpc/exclem.html.
If seeking other forms of clemency, please use form 1501.

Mailing address: Office of Executive Clemency
2601 Blairstone Road, C-229
Tallahassee, FL 32399-2450

Form ADM 1501A (3/02)

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED
1-21 12:00 PM
CLERK

* * * *

STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
ALFRED P. CENTOFANTI III,)
)
Defendant.)

Case No. C172534
Dept. XIV

REPORTER'S TRANSCRIPT
OF
STATE'S MOTION TO COMPEL AUDIO TAPED INTERVIEW/
DEFENDANT'S MOTION FOR A NEW TRIAL

BEFORE THE HONORABLE DONALD M. MOSLEY

DISTRICT JUDGE

Taken on Thursday, August 26, 2004

At 9:00 a.m.

APPEARANCES:

For the State: CLARK PETERSON, ESQ.
Deputy District Attorney

For the Defendant: CARMINE J. COLUCCI, ESQ.

Reported by: Maureen Schorn, CCR No. 496, RPR

1 LAS VEGAS, NEVADA. THURSDAY, AUGUST 26, 2004, 9:00 A.M.

2 * * * *

3
4 THE COURT: C172534, State
5 versus Alfred P. Centofanti, III. The record will reflect
6 the presence of the defendant custody. Mr. Colucci is
7 Defense counsel, Mr. Peterson is here for the State.

8 This matter is on for a motion to compel
9 audio taped interview, and for motion for a new trial.

10 As to the former, I understand that there
11 was some sort of a taped interview by your investigator,
12 Mr. Colucci?

13 MR. COLUCCI: Your Honor, the tape and
14 the transcript of that interview have been previously
15 supplied to the District Attorney's office.

16 THE COURT: In their entirety?

17 MR. COLUCCI: In their entirety.

18 MR. PETERSON: Judge, that's correct.
19 We're in receipt of that. I should probably file a copy
20 of it with the Court. I had a copy made.

21 Our motion is mute since it's been provided.
22 The reason it was requested is, we had concerns about the
23 investigation into the juror.

24 As the Court may recall, starting back after
25 trial I received a phone call from an alternate juror, the

1 male alternate juror who indicated to me someone contacted
2 him representing himself as a member of the District
3 Attorney's office, an affiliate.

4 I indicated there's no such person. I
5 subsequently contacted this investigator and he mentioned
6 Mr. Colucci had substituted in. I contacted Mr. Colucci
7 and we were able to sort of resolve any potential problems
8 that there may have been.

9 I should note in subsequently investigating
10 this motion, at least two other jurors who actually served
11 as jurors felt that they were somewhat misled by this
12 individual as to who he worked for until the
13 actual -- either the tape started rolling, or the
14 questioning began.

15 And the reason we requested this taped
16 statement is because in interviewing one of the jurors,
17 Joshua Wheeler, he's telling me: Look, I never said any
18 of those things that is in that investigator's affidavit.

19 We requested the taped statement, and the
20 taped statement certainly does not back up the allegations
21 that are made in the investigator's statement. The
22 investigator then has an affidavit indicating, yeah, those
23 tapes were made in a later untaped statement with this
24 juror, which the juror has denied by affidavit.

25 And, in fact, the comments that are referred

1 to in that taped statement by the investigator, sort of an
2 interesting spin on what's actually said in the taped
3 transcript.

4 But as far as our motion to compel those,
5 Mr. Colucci was kind enough to provide them and we
6 certainly appreciate that.

7 THE COURT: Is this investigator
8 present?

9 MR. COLUCCI: He is.

10 THE COURT: Well, so far I've heard
11 three allegations. One is, he's representing himself to
12 be a District Attorney representative. Then he's
13 represented himself falsely as to what was said on the
14 tape. And then he's putting his own spin on the tape.

15 Are those the three things you're
16 suggesting?

17 MR. PETERSON: Yes; with the second one
18 not quite as strongly as the Court has just put it. |

19 THE COURT: Well, that doesn't please
20 me, particularly. Now, I realize I've heard one side of
21 the thing.

22 MR. COLUCCI: If the Court will look at
23 the transcript provided to you, you'll see that the first
24 thing the investigator does is clearly say who he works
25 for, and what his purpose is in conducting the

1 investigation.

2 THE COURT: Mr. Peterson said that this
3 was divulged, but prior to that, as I understood it.

4 MR. PETERSON: That's correct, Judge.

5 The male alternate indicated that this person represented
6 himself on the phone as working with the office of the DA.

7 Two of the other jurors who actually served,
8 both Josh Wheeler and Matt -- his last name escapes me.
9 Josh Wheeler is certainly a younger juror, and I
10 understand mistakes are made there.

11 But Matt was the individual who worked with
12 the camera crew with one of the local news agencies, is
13 certainly not a neophyte to the Court process. He
14 indicated that he felt similarly, that he had not had full
15 disclosure.

16 He was told before being interviewed by this
17 investigator that he did work with the Defense, but he
18 felt like it had been certainly kept purposely vague prior
19 to their meeting together.

20 And that's the information I learned from
21 that juror. We subsequently interviewed them after this
22 motion was brought forward. But that's the situation as
23 it stands today.

24 The Court may recall that I was at a point
25 of -- which I did not do after I spoke with Mr. Colucci.

1 He said he would talk to his investigator and the matter
2 will be handled.

3 But it was my intention to request the Court
4 to actually send out a neutral letter to the jurors saying
5 there's no one from the DA's office that's trying to
6 contact you, and to instruct them that you can speak or
7 not speak with anyone as you wish.

8 Because it was my concern that improper
9 contact was maybe being made based on the phone call I got
10 from an alternate juror saying someone was representing
11 they were from the District Attorney's office.

12 THE COURT: Let's put that issue aside
13 for just a moment here. Before we go into the merits of
14 the matters, there's an argument that it's not timely.
15 That seems to be straightforward.

16 Mr. Colucci, what's your view of this?

17 MR. COLUCCI: Your Honor, I have two
18 problems with that argument. The first problem is, that
19 in order for a juror to sit as a juror, the juror must be
20 qualified as a juror.

21 Now, one of the qualifications for being a
22 juror is that you don't have any felony conviction, or if
23 you do, your civil rights have been restored. That is
24 prior to being put on the jury panel.

25 So in order to qualify to sit on the jury in

1 the first instance, you have to be a qualified juror. I
2 think, clearly, we have shown that she's not a qualified
3 juror.

4 Now, you can't fix that. That happened
5 before. I don't know that 176.515 even applies. Because
6 before you get to 176.515, you have to get to the
7 qualification for sitting as a juror, and she doesn't
8 qualify as a juror.

9 The second problem I have is, that this
10 conviction and nonrestoration of civil rights was
11 concealed from everyone. Now, whether it was concealed
12 intentionally or not intentionally, it doesn't matter. It
13 was concealed.

14 How can someone be required to show
15 something or prove something within a seven-day time
16 period when it's been intentionally concealed, or even
17 mistakably concealed, which I'm not ready to concede at
18 this point.

19 If the Court has gone through the motion,
20 you know the reasons why I'm saying that. So we've had an
21 impediment placed in front of us. The Court has had an
22 impediment placed in front of it because you asked: Has
23 anyone in your family, have you or anyone in your family
24 ever been involved in the criminal justice process as a
25 defendant or as a witness.

1 She had no problem disclosing her son's
2 problem, but she hesitated and she did not, quote, offer
3 the information in response to your question.

4 So for us to be held to a standard where we
5 have to find out this information within that seven-day
6 time period, I don't think the Legislature intended to
7 reward somebody for lying to the Court, not being
8 forthcoming with the Jury Commissioner, not being
9 forthcoming with the District Attorney, and then
10 subsequent to all of that, file an affidavit saying her
11 civil rights have been restored when, in fact, they
12 absolutely have not, according to the records that we were
13 provided from the State of Florida.

14 THE COURT: Well, the problem,
15 Mr. Colucci, is that simply stated, and I'll grant you
16 what I'm about to say is rather simplistic, but simply
17 stated, the law clearly indicates a motion for a new trial
18 absent new evidence, and that's a different situation, has
19 to be within seven days of the finding of guilt.

20 This has been over two months and seven
21 days. And, again, simply stated, if we're not going -- if
22 we are going to ignore a rule, why do we have it?

23 It doesn't say seven days unless there's
24 something wrong with the jury, or seven days unless, as
25 you know, in the law oftentimes there is where you knew or

1 should have known, such as defrauding or someone secreting
2 a situation, and all those kinds of provisions, and we're
3 aware of that.

4 There's nothing like that written in the law
5 here. And, obviously, this is so you can't four years
6 from now have a new trial and everybody is gone, the
7 witnesses, and it's just over. So that's the problem.

8 Go ahead.

9 MR. COLUCCI: If there's some
10 irregularity with the jury proceeding or system, or
11 irregularity in the court proceedings, then discovery
12 within the seven days, I think, falls within that statute.

13 But before we get to 176.515, you've got
14 206.010, the qualification.

15 THE COURT: Are you saying there was no
16 trial because the juror was not properly impaneled?

17 MR. COLUCCI: Judge, let me ask you a
18 question hypothetically. If you try to run for office and
19 were convicted of a felony and you were elected to the
20 office, and subsequently they found out that you were
21 convicted a felony and did not have your civil rights
22 restored, would all of your judgements be valid if you
23 were not qualified to sit in that position in the first
24 instance?

25 And that's what I'm saying about the juror.

1 The juror was not entitled to be on the panel; therefore,
2 only 11 people, 11 qualified jurors heard this case.

3 THE COURT: All right. Well, I
4 understand your argument. I understand that that goes to
5 the merits, primarily. But how does it relate back to
6 ignoring the time division?

7 MR. COLUCCI: Isn't there also a
8 statute that says he's entitled to be tried by 12 jurors,
9 and the jury verdict has to be unanimous? And that would
10 be 12 people. Neither of those occurred.

11 She wasn't a juror. She shouldn't have been
12 sitting.

13 THE COURT: Let's assume that. What
14 does that do to the time constraints that would militate
15 against the requirement that something of this nature
16 should have been brought within seven days?

17 MR. COLUCCI: Because that, I think,
18 violates the spirit of the Constitution of the United
19 States and the Constitution of this state. I think it
20 takes precedent over a seven-day time period.

21 Is it more important we do the seven-day
22 thing, or is it more important that we give people in this
23 country a fair trial with qualified jurors?

24 Otherwise, we could have a jury panel full
25 of ex-felons who have not had their civil rights restored,

1 and they could sit in there and make a decision. And
2 because I don't question the jurors and nobody questions
3 the panel, you did, but nobody really thinks the Jury
4 Commissioner is going to send a person, an ex-felon
5 without their civil rights restored to sit as a member.

6 This is effectively what you could have, is
7 12 people without their civil rights restored. They come
8 from other jurisdictions where I don't have access to
9 NCIC. I don't know what the records are. I can't get
10 them that fast. I can't get them with a push of a button
11 like the District Attorney's office.

12 I have to go through all the investigative
13 procedures to get the information, and seven days is not
14 reasonable. We need to have 12 qualified jurors because
15 that's what the law is.

16 There are three or four statutes covering
17 this that I think supersedes the seven-day rule, which I'm
18 not conceding even applies in this case because she is not
19 a juror.

20 THE COURT: You gave me an example of a
21 situation. Let me give you one. Is there any rule that
22 years later can you come in and say: Yes, this juror
23 wasn't qualified, he lied or she lied or whatever, and
24 let's invalidate the trial and try to go over it, and it
25 would be impossible.

1 So where is the limit?

2 MR. COLUCCI: I don't know. But what
3 if six months after the Court enters a judgment they find
4 that the Judge shouldn't be sitting as a Judge. He didn't
5 go to law school and he has a felony conviction.

6 Would they set aside those judgements?
7 Would he be qualified to make those judgements in the
8 first instance?

9 This juror was not qualified to make the
10 judgement that she made and, therefore, there were not 12
11 jurors in the box. There were only 11; 11 and a person
12 who did not have their civil rights restored.

13 THE COURT: Mr. Peterson, anything
14 further?

15 MR. PETERSON: Judge, just as a
16 predicate, Your Honor, it's an out-and-out incorrect
17 assertion to say she did not have her civil rights
18 restored. The felony is from 20 years ago in Florida.
19 Certainly, none of the parties knew about it.

20 By operation of Florida law passed in 1975,
21 when a person completes their probationary sentence, their
22 civil rights, other than possessing a gun, shall be
23 automatically reinstated. Automatically reinstated.

24 When Mr. Colucci says the documents we have
25 show she's not reinstated, it's because there's no

1 petition for reinstatement filed. None of those things
2 were done in her case, because she's automatically
3 reinstated. She votes. She has a nursing license.

4 So when we pose these hypotheticals about a
5 jury with a person who wasn't qualified to sit, that's
6 just, frankly, it's not true. Karen Barrs was qualified
7 to sit as a juror.

8 But beyond that, the Court hit on the matter
9 that's the most important, the inquiry into new trial
10 motions. And that's the vehicle that's been brought by
11 the defendant. It's his only vehicle for a new trial is
12 by statute by 176.515, strictly construes the seven-day
13 time bar.

14 A death penalty case, the guy files one
15 eight days after the verdict. The Court said, no, that's
16 not good enough.

17 THE COURT: Excuse me. Are you
18 referring to a case?

19 MR. PETERSON: Yes, sir. It's in our
20 moving papers.

21 MR. COLUCCI: Your Honor, I am going to
22 concede that. That's exactly right.

23 THE COURT: Is that a Nevada case?

24 MR. PETERSON: Yes, sir.

25 MR. COLUCCI: Yes.

1 MR. PETERSON: Depasquale,
2 D-e-p-a-s-q-u-a-l-e versus State, 106 Nevada 843.

3 Essentially, this Court loses jurisdiction
4 to even consider a motion for a new trial that is filed
5 outside of that seven days. It is a strictly construed
6 rule.

7 The concern that the Court has is stated
8 somewhat succinctly in the various case law when they talk
9 about the problem of going years later, or other time
10 later to look back on trials and cast aspersions on jury
11 selections, et cetera.

12 "Let it once be established that jurors
13 would be harassed and beset by the defeated party in an
14 effort to secure from them evidence of the facts which
15 might establish misconduct sufficient to set aside a
16 verdict. If evidence thus secured can be thus used, the
17 result would be to make what was intended to be a private
18 deliberation, the constant subject of public investigation
19 to the destruction of all frankness and freedom of
20 discussion in confidence."

21 That's the United States Supreme Court in
22 McDonald versus Plets (phonetic.) There are statutory
23 time limits. He hasn't met them and, essentially, that's
24 a threshold showing.

25 I am perfectly comfortable that we win on

1 the merits of this as well, given the response that the
2 State has filed. But as a threshold matter, this motion
3 is outside of this Court's jurisdictional ability to even
4 consider it.

5 THE COURT: Now, you've alluded to a
6 Nevada case.

7 MR. PETERSON: Yes.

8 THE COURT: That was after this case?

9 MR. PETERSON: Let me double-check.

10 No. Depasquale is a 1990 case. It's a
11 first degree murder death-sentence case. Eight days after
12 the final verdict the defendant filed a motion for a new
13 trial.

14 "The District Court declined to hear it for
15 untimeliness, and the Nevada Supreme Court held that the
16 defendant missed the seven-day deadline by filing it one
17 day late, and it was not error to refuse to consider it."

18 THE COURT: And this was the basis for
19 the new trial, was the jury misconduct?

20 MR. COLUCCI: Yes.

21 MR. PETERSON: I don't recall what the
22 basis was in Depasquale. I believe it was one of the
23 bases.

24 MR. COLUCCI: Yes. And what happened
25 in that case is, one of the jurors was not truthful during

1 the voir dire. But the distinguishing thing about that
2 case is, that juror was qualified in the first instance to
3 sit there, and that's what made it juror misconduct.

4 In this case --

5 THE COURT: Excuse me. What's the
6 distinction in that case?

7 MR. COLUCCI: Ms. Barrs wasn't
8 qualified to sit as a juror.

9 THE COURT: In that case you say the
10 juror was qualified?

11 MR. COLUCCI: Was qualified.

12 THE COURT: What was the factual
13 situation?

14 MR. COLUCCI: He did not disclose to
15 the parties that someone in his family had been murdered
16 and he had a prejudice against people that commit murders,
17 and so he wasn't a fair juror.

18 THE COURT: That would seem to be much
19 more damning than a person who had a felony 20 years ago
20 which was very likely absolved.

21 MR. COLUCCI: Well, it wasn't very
22 likely resolved, because Mr. Peterson said the right
23 thing. She had to apply. There's a procedure to follow
24 in Florida.

25 MR. PETERSON: That's not what I said.

1 MR. COLUCCI: He mentioned the word
2 "application."

3 THE COURT: I thought it was automatic.

4 MR. PETERSON: It is automatic. She
5 doesn't have to apply after 1975. What I said is,
6 Mr. Colucci said there is no application. Correct,
7 because it's unneeded.

8 By executive clemency rules promulgated
9 in Florida in 1975, upon the completion of your
10 probationary period you automatically have your civil
11 rights restored, other than the right to own a firearm.
12 That would require application.

13 Ms. Barrs' conviction was in 1980. By
14 executive clemency rules in Florida, her civil rights are
15 restored. She is not a felon.

16 MR. COLUCCI: Her civil rights are not
17 restored. Exhibit A to our opposition is a certificate
18 from the Department of Clemency, or the Department of
19 Parole and Probation in the State of Florida. It clearly
20 says her civil rights have not been restored in the State
21 of Florida.

22 Now, let me tell you why the automatic
23 restoration would occur if it she followed the correct
24 procedure. One, apply; two, be qualified. If you apply
25 and you're qualified, then after a short determination

1 without a hearing they are automatically restored.

2 If you would look at our Exhibit A to our
3 latest opposition, it clearly shows that what I've just
4 told you is absolutely correct. That's Exhibit A to our
5 opposition, our reply to the State's opposition to the
6 defendant's motion for a new trial.

7 And it says at the bottom of the certificate
8 that, "I certify that the civil rights of Karen Barrs have
9 not been restored. In addition, there is no application
10 pending for clemency at this time for the above-named
11 person."

12 Now, if it could be any more clear than
13 that, I don't know how it could be. And I also submitted
14 to the Court as Exhibit B, the instructions for an
15 application to have your civil rights restored.

16 And we submitted a separate document which
17 was the truthful application. Both of those are presently
18 in use in the State of Florida. If it was an automatic
19 restoration, they don't need instructions, and they don't
20 need the application.

21 And Karen Barrs could not sit in a jury in
22 the State of Florida. She's not qualified. And if she's
23 not qualified in Florida, she's not qualified in the State
24 of Nevada.

25 THE COURT: All right. What do you say

1 to that, Mr. Peterson?

2 MR. PETERSON: Judge, again, that's not
3 entirely correct. There are no documents of a restoration
4 because they are automatic. She doesn't have to apply.

5 There are persons in the State of Florida
6 who would have to apply for restoration of civil rights.
7 For example, felons who go to prison. You need an
8 application process for those persons.

9 However, persons who serve the sentence
10 imposed by them, or are granted final release or receive
11 pardons, et cetera, these persons are automatically
12 restored. And the case statute from Florida Statutes
13 940.05, and there's a case interpreting it that says:

14 "Civil rights shall be automatically
15 reinstated, except the right to possess or own a firearm
16 which shall be specifically withheld. Under that
17 provision of the clemency rules, restoration of civil
18 rights would be automatic following completion of service
19 of sentence by one who so completed sentence on or after
20 November 1, 1975."

21 THE COURT: How do we explain this Jeanette
22 Cools, the coordinator of the Office of Clemency in
23 Florida saying Ms. Barrs' rights have not been restored?

24 MR. PETERSON: I don't know because I
25 haven't spoken with this person. My understanding is,

1 she's a records custodian. I assume she checked her
2 records and saw there were no documents saying that, and
3 reported back saying there are no documents restoring
4 that.

5 But in the case of an automatic restoration
6 of rights, what documents would there be to find?

7 MR. COLUCCI: If she went to vote in
8 the State of Florida, Your Honor, they have a computer
9 system. They could check to see if her civil rights have
10 been restored, provided she disclosed she was a convicted
11 felon. And they would know that she's not entitled to
12 vote. They would also know that she's not entitled to
13 carry a firearm.

14 THE COURT: Now, there's two different
15 things. Specifically, they take exception to firearms,
16 right?

17 MR. COLUCCI: That's right. But I'm
18 going to direct the Court to Page 7 of our brief.

19 MR. PETERSON: We're still past the
20 part of the seven-day issue. None of this goes to the
21 seven-day issue.

22 THE COURT: Page 7?

23 MR. COLUCCI: Page 7. In the middle of
24 that Page at Line 14, if the Court is on the same page, it
25 shows a Florida statute with a 2004 date.

1 And it says, "Any person who has been
2 convicted of a felony may be entitled to the restoration
3 of all rights of citizenship enjoyed by him or her prior
4 to the conviction if the person has -- and then those are
5 the things that apply, which would apply to Karen Barrs.

6 The problem is, she hasn't gone through the
7 procedure of the application process.

8 And as far as the Clerk -- if the issue is
9 if Exhibit A, the questioning of Exhibit A is the
10 dispositive issue for this motion, I would invite
11 Mr. Peterson to call the State of Florida and to provide
12 us with proof that her civil rights under any scenario
13 have been restored.

14 Certainly, there has to be some document
15 somewhere. She went to jail. She did jail time. She was
16 convicted of a felony. I provided all those records to
17 the Court. If her civil rights were restored anywhere,
18 then Mr. Peterson can find those and provide those to the
19 Court.

20 I contacted the State of Florida and I'm
21 telling you, as far as we know her civil rights have not
22 been restored.

23 If I could address the voting issue, just
24 like the Jury Commissioner issue, they rely on the
25 representations of the person applying or registering to

1 vote. I've provided you with the voter registration
2 application in my paperwork as well.

3 THE COURT: Where are you referring to?

4 MR. COLUCCI: I'm going to look for it,
5 Your Honor. It is Exhibit E. And in Exhibit E -- if you
6 found it?

7 THE COURT: Yes.

8 MR. COLUCCI: In the lower right-hand
9 box as you're looking at the document it says, "I declare
10 under penalty of perjury that the foregoing is true and
11 correct."

12 And above that it says, "I am not laboring
13 under any felony conviction or other loss of civil rights
14 which would make it unlawful for me to vote."

15 They rely on her representation. They
16 don't check. The same with the Jury Commissioner. The
17 Jury Commissioner relied on her representations she was
18 not a convicted felon.

19 When they send out the jury summons -- and
20 I'm sorry to jump around. Slow me down if you feel it
21 necessary. When they send out the jury summons they say
22 if you've been convicted of a felony, it's one of the
23 problems you have with your qualifications.

24 You can telephonically respond to the Jury
25 Commissioner and let her know whether or not you've been

1 convicted of a felony. I did a check, and you have an
2 affidavit. She did not respond telephonically that she
3 had been convicted of a felony, even though in her
4 affidavit she said that she did.

5 Secondly, she said she filled out a jury
6 questionnaire indicating she was an ex-felon. She did
7 not. She did not disclose it in a jury information sheet.

8 And what's really interesting is, that we
9 have three documents, four documents attached to the
10 affidavit from the Jury Commissioner where Ms. Barrs did
11 call in. And she called to continue her jury service
12 date. And she never once mentioned during that time that
13 she was a convicted felon or had a problem with a felony
14 conviction.

15 THE COURT: All right. Well, let me
16 inquire. And you're correct that she has, in fact, in
17 Florida maintained that she was not a felon for the
18 purpose of acquiring her registration as a voter.

19 In her affidavit -- did she file an
20 affidavit?

21 MR. PETERSON: She did, Judge. I
22 actually spoke with her.

23 THE COURT: Does it indicate that she
24 was under the belief that she was absolved of this by
25 virtue of what she read?

1 MR. PETERSON: Absolutely. In fact, it
2 was a great shock to her to hear these allegations made.
3 She's a registered nurse. She's voted for some time. She
4 obviously is not an expert in the legal field.

5 Nevertheless, she indicated to me that she
6 called in to the Jury Commissioner and she spoke with a
7 person on the phone. She indicated to them she had
8 something, that it was 20 years old. They said: Was it
9 in Nevada? She said: No. And they said: Come on down
10 and report for service.

11 She also says she filled out a jury
12 questionnaire. I and Mr. Colucci, both parties have
13 subpoenaed, and there are no, apparently, written
14 questionnaires for any of the jurors.

15 So to say that it's not present, I don't
16 think it means it wasn't filled out. We don't have those
17 documents from the Jury Commissioner in whatever state
18 they may be.

19 Nevertheless, we're still getting past this
20 seven-day issue. There's nothing that we've heard about
21 this that gets us past the statutory seven-day prohibition
22 against a motion for a new trial.

23 Because if we're going to talk about the
24 question of her being a proper juror, now the question
25 becomes, once we get past that seven-day issue to talk

1 about the merits, clearly, this is not an intentional
2 concealment on her part.

3 She was very willing to talk about her son
4 who is in custody in the State Prison, and had been for a
5 long period of time. She believed that the Judge knew
6 about anything she had in her past. That's what she
7 related to me.

8 And, in addition, it certainly is unique to
9 me to hear the Defense claim that there's a person on the
10 jury with a prior felony. That's normally the State's
11 concerns. We don't want persons who have criminal records
12 on the jury. It's certainly a unique position for me to
13 be in that situation.

14 In any event, it's not intentional
15 concealment, and I don't believe there's anything here
16 that shows there's any prejudice to the verdict that was
17 rendered at all.

18 So I think we still have the seven-day
19 issue, Judge. You know my position regarding this juror,
20 and submit it to the Court on that.

21 THE COURT: Well, Mr. Colucci, let me
22 ask you a question as a general proposition. I know you
23 have a function here to defend your client, and I respect
24 that. Maybe this is a rhetorical question.

25 But as I understand what's being requested

1 here, you're asking me to overturn the Supreme Court of
2 the State of Nevada when they made the determination that
3 in a situation very similar to this, although more severe,
4 in my judgement, and a juror lies about a relative being
5 murdered, that to me suggests more of a bent one way or
6 the other than having suffered a --

7 MR. COLUCCI: He just didn't disclose
8 it.

9 THE COURT: Well, he failed to disclose
10 that. I misspoke. That to me is a more severe abrogation
11 of their responsibility, than someone who is convicted 20
12 years ago of a bad check or something. I believe it
13 wasn't a violent offense.

14 But the Supreme Court says eight days
15 doesn't matter. And then they set the reasoning behind it
16 which is legitimate, in my view, and if I might be so bold
17 as to agree with the Supreme Court and give my stamp of
18 approval.

19 You can't work these things to death with
20 these jurors indeterminately. I mean, jurors get berated
21 enough by the time they have rendered verdicts, and then
22 they go out in the hall and they go through another trial,
23 essentially, something we don't encourage.

24 But aside from my view one way or the other,
25 the Supreme Court has addressed this issue, I think. What

1 am I supposed to say? They didn't mean that, we're going
2 to make it two months and eight days, whatever, and keep
3 going?

4 MR. COLUCCI: No. I don't believe the
5 Supreme Court has addressed this issue. The Supreme Court
6 addressed an issue where a qualified juror had a bias that
7 was not disclosed. But that juror had qualified as a
8 juror. That person was in the box legitimately.

9 Ms. Barrs was not in the box legitimately,
10 before you even get to the bias, or the prejudice, or the
11 nondisclosure, or the misconduct, or the standards that go
12 with all of that.

13 You have to determine was this a valid
14 verdict? Was this a jury? The Constitution of the United
15 States and the Constitution of Nevada, this man is
16 entitled to a jury of 12 people, not 11. She was not
17 before 176.515 even kicks in, she was not.

18 And let me say something if I could, Judge,
19 and I don't mean to hold you up. If I could just say one
20 more thing. If the Court would look at -- you know, we're
21 taking her word that this wasn't intentional concealment.

22 But if you look at the affidavit of the Jury
23 Commissioner which is very, very clear, and we have
24 exhibits. We have three or four people that she's
25 supposedly had contact with. We have documented the

1 contact with people in the Jury Commissioner's office.

2 She didn't tell anybody, and nobody
3 remembers her telling anybody that she had a felony
4 conviction. She's the only one that remembers talking to
5 three or four people that don't remember talking to her.

6 And they take notes on why she couldn't
7 come. Her mother had Alzheimer's disease, was busy at
8 work, had another problem. They document that. If she
9 said: I have a felony conviction, which is so important
10 to them, that would have been documented in their notes.

11 THE COURT: Well, did she say she told
12 them?

13 MR. PETERSON: She says on the
14 Centofanti matter she informed them: Yes, I have a felony
15 that's 20 years old. Because, apparently, you have to
16 push a button when you phone in on the phone-in system.
17 And they asked her: Is it in Nevada? No.

18 Did you go to prison for it? No.

19 Have you had anything else?

20 And she said no.

21 I, mean, the funny thing that I guess
22 what Mr. Colucci is alleging by this, that there are other
23 times that she's called in and had her jury service
24 rescheduled. To my mind, that shows she believes she is
25 eligible for jury service.

1 Because if you want an easy way out of jury
2 service, just admit you're a felon, for goodness sake.
3 She obviously believes she has the right to do this. She
4 votes. I mean, we're talking about intentional
5 concealment, or Mr. Colucci is.

6 She's rescheduling jury service and willing
7 to show up and serve. I mean, in my experience persons
8 who want out of jury service, that's a substantial portion
9 of the population that don't want to serve and find it an
10 announce.

11 Here she is willing to serve. That
12 indicates in my mind that she believes she has the right
13 to serve, and I believe that goes to the intention of the
14 concealment issue.

15 THE COURT: Now, there is, I think,
16 something to be said about an indication at one point that
17 she told these people that she had this problem 20 years
18 ago, and then perhaps a record showing the absence of
19 such. That's something worth discussing, I guess.

20 I'm not particularly taken aback by the fact
21 that she was consistent in her denial of her criminal
22 record. If she firmly believed it was absolved, that she
23 had no duty to divulge, it would be consistent.

24 And I'm not so sure, candidly, how many
25 people really understand what a pardon or what a

1 restoration of civil rights or some of those things really
2 means. Can you go to an employer and fill out an
3 application that says you've been arrested of a felony,
4 and you say no?

5 Can you go and buy a gun and say no? Can
6 you go to vote? I don't know if a lot of people
7 understand that, even lawyers, frankly, because it varies
8 so much among the states. But that doesn't surprise me
9 that she was consistent in that.

10 Now, if there's some argument that she did
11 divulge that and then somebody said she didn't, then that
12 goes to veracity.

13 MR. COLUCCI: That's different. See,
14 she wasn't consistent, because supposedly she told the
15 Jury Commissioner and told members of the Jury
16 Commissioner's office that she did have a felony
17 conviction. Nobody seems to remember it.

18 And as far as telephonically, they keep a
19 record if there's a telephonic -- if they push the button
20 and indicate they're a convicted felon, then there's a
21 record of that.

22 Judge, just read the Jury Commissioner's
23 affidavit and compare it to the affidavit of Karen Barrs.
24 You're going to see that she just is not being truthful
25 and candid.

1 Even in the voir dire Mr. Peterson picked up
2 on her hesitation in response to your question, has any
3 member of your family, you or any member of your family
4 ever had contact with the criminal justice system.

5 Even Mr. Peterson himself picked up on her
6 hesitation. And then she gave him some story: I was
7 hesitating because I know I could be a good juror. I
8 don't have the record in here, Judge, but I'll make one
9 other representation to you, and that's this.

10 She had to apply for a nursing license, and
11 because of all of the laws protecting confidentiality in
12 the medical profession, we were unable to get her
13 application for her nursing license. But she did disclose
14 the felony conviction on the nursing license.

15 And one other thing.

16 THE COURT: How do you know that?

17 MR. COLUCCI: Because I talked to the
18 attorney for the Nursing Board, and he refused to give me
19 the license. But I sent up a subpoena to ask for the
20 information, and the best he would do for me is tell me on
21 that one issue, yes or no, had she applied, had she
22 disclosed a felony conviction? Yes, she did.

23 And I did put in the opposition, not that,
24 but I did put in the opposition that she in 1998 had
25 applied for records from her criminal case. And I don't

1 know why, but I have a certified document that's not
2 attached to our motion, I have it in my file. She did
3 apply for the record of her criminal case.

4 THE COURT: In Florida?

5 MR. COLUCCI: In Florida in 1998. So
6 she knew she had a felony conviction.

7 THE COURT: Did she acquire it; do you
8 know?

9 MR. COLUCCI: That I don't know. The
10 only notes that the Clerk has is a letter requesting
11 copies for that particular case, the criminal case, the
12 same copies that I provided to the Court.

13 MR. PETERSON: And I can give you some
14 information on that, Judge. In speaking with her I said:
15 Did this matter come up at your nurse licensure?

16 And she said: Yeah. And, frankly, that's
17 one of the reasons why I thought this was all put to bed,
18 is because I told the licensing board about that. It
19 didn't become a problem. I was able to get my nursing
20 license.

21 To her that process was another reason why
22 she thought she didn't have problems as a result of what
23 happened 20 year ago in Florida for a bad check.

24 THE COURT: Now, Mr. Colucci, arguendo,
25 let's assume that she is not legally impaneled as a juror,

1 what does that mean?

2 MR. COLUCCI: I think you just resolved
3 the case, Judge. If she was not legally impaneled, then
4 only 11 people sat on that jury. And my client is
5 entitled to have 12 qualified jurors to make a decision,
6 not in a robbery case, not in a dope case, but in a first
7 degree murder case.

8 He's facing life without the possibility of
9 parole. I think the case is serious. I think he's
10 entitled to the full benefit of the law. I think he has a
11 constitutional right to have 12 qualified jurors.

12 And, frankly, I have to take exception. If
13 she was consistent in denying that she had a felony
14 conviction because she felt it had been sealed, expunged
15 or restored, then why did she have to tell it to the Jury
16 Commissioner?

17 If you take what she said as true, she
18 disclosed it because she knew she had the conviction. If
19 you take what the Jury Commissioner says is true, she
20 never disclosed anything on the four occasions she had
21 contact with their office.

22 MR. PETERSON: Judge, their vehicle is
23 a motion for a new trial, and there's no other vehicle for
24 it. The vehicle for a motion for a new trial indicates
25 what the time limits are. And Mr. Colucci wants to make

1 show of it's not a drug case, it's not a burglary case,
2 it's a murder case.

3 Well, the Depasquale case I mentioned to the
4 Court is a capital case. And that motion was one day
5 late, and the Court upheld the District Court's denial of
6 it because it's outside the time period.

7 Submit it to the Court.

8 THE COURT: Well, in my view, frankly,
9 in that case there is a much more serious misstatement or
10 omission. Here the defendant is being found guilty of a
11 capital murder by a juror whose family member has been
12 murdered which, obviously, if it goes against anyone, goes
13 against the defendant.

14 Here we have a felony that I'm not sure
15 prejudices anybody, a paper crime 20 years old.

16 How does that prejudice you, counsel?

17 MR. COLUCCI: I don't have to show
18 prejudice.

19 THE COURT: Well, I'm asking you.

20 MR. COLUCCI: How does it prejudice?

21 Well, if you take that together with the
22 fact that she didn't disclose the truth to the Jury
23 Commissioner, that she came into this Court and didn't
24 disclose it to this Court.

25 THE COURT: And would your position be,

1 again, this is just hypothetically, if a juror is found to
2 have honestly made a mistake in evaluating whether or not
3 their record had been expunged; in other words, they
4 wouldn't have to disclose under these circumstances, and
5 it's later found that, in fact, they are wrong, does that
6 mean that it invalidates the entire proceeding?

7 MR. COLUCCI: Well, let me just -- I'm
8 trying to think of a really good example.

9 THE COURT: Mine is pretty good.

10 MR. COLUCCI: Well, if I tell you the
11 top of your water thing is white and I truly believe it's
12 white, does that make it white? It's still black.

13 THE COURT: You've read prophecies.
14 You're answering a question with a question.

15 MR. COLUCCI: I'm sorry about that. If
16 she's not qualified in the first instance, she's not
17 qualified all the way down the road. That's our position.

18 THE COURT: So there's a glitch in the
19 proceedings, and someone that answers their questions
20 under the mistaken belief that they are no longer a felon
21 or whatever might be the circumstance, then all that goes
22 on, the weeks, maybe months that goes on in trial can all
23 be set aside, and many thousands and thousands of dollars
24 of tax-payers' money is all just pooped away because there
25 was this omission.

1 Is that your position?

2 MR. COLUCCI: We call that the
3 appellate process, Judge.

4 THE COURT: I have several other things
5 that I could call it, but I'll tell you this. I am not
6 convinced that there was, number one, anything that even
7 remotely approaches an inequity or injustice by virtue of
8 this scenario that I'm being presented with having to do
9 with this jury.

10 And I don't fault you for bringing it up,
11 certainly. But we are working this to death. We have
12 gone all over these jurors and we're just taking a little
13 piece here, and a little piece there, and on total it
14 doesn't amount to much at all, in my view. But that's on the
15 merits.

16 I don't think that we have jurisdiction, and
17 I am so finding. So we have those two things to pose to
18 whatever appellate proceedings you might want to take it
19 to.

20 Now, what else do we have? Do we have a
21 sentencing date?

22 MR. COLUCCI: We have sentencing date
23 which is tomorrow. And if the Court -- if I could just be
24 heard on that for one moment.

25 Based on the Court's decision, I am planning

1 on filing a writ with the Supreme Court, and they may
2 decide to rule on the merits, or they may not. And I
3 would ask that the sentencing date be put off for a week
4 so I can get the writ up to the Supreme Court.

5 THE COURT: Well, there's no way the
6 Supreme Court is going to answer it in time.

7 MR. COLUCCI: They may issue a stay,
8 they may not.

9 MR. PETERSON: Judge, I think the
10 matter should move forward, in all honesty. Sentencing
11 the defendant after the denial of the motion for a new
12 trial certainly doesn't interfere with whatever appellate
13 rights he might feel he has on this particular motion.

14 If he's sentenced and somehow Mr. Colucci
15 persuades them that a new trial motion should have been
16 granted, it's all undone and we go back to the beginning.
17 There's no need to delay.

18 All that does is, in the event Mr. Colucci
19 loses his motion, we just sort of sat around for a long
20 time not doing anything. There's no legal impediment
21 going forward with the sentencing.

22 It doesn't change his posture at all. All
23 it does is, in the event his writ for a petition is
24 denied, now the defendant has been sentenced and his
25 appellate rights begin to run.

1 THE COURT: Well, one way or the other
2 it doesn't make any difference to me. I don't know.

3 Is it going to serve a purpose?

4 MR. COLUCCI: Your Honor, I would like
5 to get this Court's findings on the motion for a new
6 trial, including a ruling on the other issues we've raised
7 about the T-shirt, and the sleeping juror, and the other
8 issues, and the gun experiment that we put forth.

9 THE COURT: I'm finding that you don't
10 have standing, and so that's the primary ruling of the
11 Court.

12 I mean, I'm not going to say you don't have
13 a right to any hearing and, by the way, let's have a
14 hearing. Because, candidly, if you have a right to a
15 hearing based on what you're suggesting here, I'd have to
16 have all those people in here and we'd have to have a
17 hearing because there's so many factual contentions here.

18 And I would concede that readily. And if
19 the Supreme Court says a hearing is needed, that's what
20 we'll do, in my view.

21 But as I look at some of those things,
22 again, I don't mean to be unpleasant about it, but
23 nothing -- what was it Justice Mulder used to say? And I
24 don't mean to be trite, but he would say this on the
25 record. He would say, "Counsel, you're fly-specking."

1 And what he was meaning is, you take a
2 little here and little there and you try to make this big
3 thing out of it. And that's what we're doing here, it
4 looks like, because here's a little something on a
5 T-shirt. Here's a guy that dozes off a little bit.

6 Now, granted, that's not something we want
7 to see. But let's face it, five weeks of trial, people
8 are human. We don't expect -- I think there was some
9 suggestion the guy was tapping him on occasion. I don't
10 know what the facts are.

11 But one juror that perhaps is inattentive a
12 total of maybe two minutes in five weeks, whatever we're
13 talking about, is not a major thing. Now, granted, it's
14 important, but you have to balance these things.

15 And when I looked at all this, I was not
16 taken ~~apack~~ by this terrible specter of some injustice
17 being done.

18 MR. COLUCCI: Judge, just as a side
19 note with respect to the T-shirt issue, the fact that
20 somebody comes in and wears a T-shirt in the courtroom
21 that says, "What does a murderer look like," and is
22 sitting as a juror is not a small matter. That's not
23 fly-specking.

24 THE COURT: I don't think anybody saw
25 that.

1 MR. PETERSON: No one saw it. It's a
2 T-shirt, it's a name of a song of a local band. This kid
3 was wearing the band's T-shirt, it said on the back near
4 the belt. Apparently some other juror saw it and said:
5 You know what, Chris, that's a silly thing to wear given
6 the trial we're in, cover it up. No one noticed it.

7 The sleeping issue is something that neither
8 Mr. Bloom, who was sitting where Mr. Colucci is, nor
9 myself, nor Ms. Goettsch, nor the other Defense trial
10 counsel from the Special Public Defender's office,
11 Ms. Navarro.

12 Mr. Centofanti apparently never noticed it,
13 and the Court never saw it, the Court's staff never
14 noticed it. No one ever made any objection or record
15 about any of that. I never saw it.

16 The jurors when we talked to them said:
17 Yeah, Chris nodded, but Matthew sat next to him and nudged
18 him and woke him up, and it was apparently immediate.

19 THE COURT: All right. So Friday the
20 10th is out next date.

21 MR. COLUCCI: Your Honor, may I submit
22 an order? I'll pass it by Mr. Peterson, but I'd like to
23 get to the Court as soon as possible on the denial of the
24 motion.

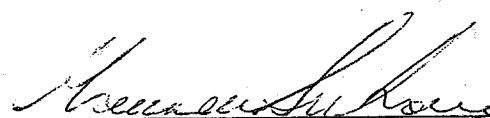
25 THE COURT: You may.

1 MR. COLUCCI: Thank you very much.

2 THE COURT: Sorry you had to wait.

3 Court's adjourned.

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5
6 ATTEST: Full, true and accurate transcript of
7 proceedings.

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9
10 
11 MAUREEN SCHORN, CCR NO. 496, RPR

6

ORDR

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Shirley S. Peterson
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

ALFRED P. CENTOFANTI, III,
#1730535

Defendant.

Case No. C172534
Dept No. XIV

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

DATE OF HEARING: 8/26/04
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 26th day of August, 2004, the Defendant not being present, represented by CARMINE COLLUCCI, Esq., the Plaintiff being represented by DAVID ROGER, District Attorney, through CLARK PETERSON, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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COUNTY CLERK

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1 IT IS HEREBY ORDERED that the Defendant's Motion for New Trial, shall be, and
2 it is denied, on jurisdictional grounds because it does not allege newly discovered evidence
3 regarding the Defendant and was filed more than seven (7) days after the verdict in this case.
4 NRS 176.515(4).

5 DATED this 1st September
6 day of ~~August~~, 2004.

7 
8 DISTRICT JUDGE

9
10 DAVID ROGER
11 DISTRICT ATTORNEY
12 Nevada Bar #002781

13 

14 BECKY GOETTSCH
15 Deputy District Attorney
16 Nevada Bar #006316
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