

CA NO. 04-99003

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

\* \* \*

TERRY JESS DENNIS, by and  
through KARLA BUTKO, as Next  
Friend,

Petitioner-Appellant,

vs.

MICHAEL BUDGE, Warden, and  
BRIAN SANDOVAL, Attorney  
General of the State of Nevada,

Respondents-Appellees.

D.C. No. CV-S-04-0798-PMP-RJJ  
(Nevada, Las Vegas)

Appeal from the United States District Court  
for the District of Nevada

**APPELLANT'S EXCERPTS OF RECORD**

Volume IX of XI

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INDEX

	<u>Page</u>
1. PETITION FOR THE WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY (CR 1) ..... Dated June 14, 2004	0001
2. PETITIONER'S EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY [VOLUME ONE OF THREE] (CR1) ..... Dated June 14, 2004	0011
3. PETITIONER'S EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY [VOLUME TWO OF THREE] (CR1) ..... Dated June 14, 2004	0637
4. PETITIONER'S EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY [VOLUME THREE OF THREE] (CR1) ..... Dated June 14, 2004	1139
5. APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS (CR 6) ..... Dated June 14, 2004	1726
6. MEMORANDUM WITH RESPECT TO STANDING OF NEXT FRIEND (CR 5) ..... Dated June 14, 2004	1748
7. MOTION FOR STAY OF EXECUTION (CR 8) ..... Dated June 14, 2004	1768

8.	MOTION TO DISMISS (CR 12) .....	1773
	Dated June 28, 2004	
9.	INDEX OF EXHIBITS IN SUPPORT OF MOTION TO DISMISS [COPIES OF EXHIBITS OMITTED] (CR 13) .....	1787
	Dated June 28, 2004	
10.	REPORTER'S TRANSCRIPT OF PETITION FOR WRIT OF HABEAS CORPUS, United States District Court Case No. CV-S-04-798-PMP, dated July 1, 2004 .....	1796
11.	LETTER TO THOMAS E. BITTKER, M.D., Dated June 24, 2004 .....	1876
12.	CURRICULUM VITAE OF THOMAS E. BITTKER, M.D. ....	1878
13.	ORDER IN A DEATH PENALTY CASE (CR 16) .....	1889
	Dated July 6, 2004	
14.	NOTICE OF APPEAL (CR 18) .....	1904
	Dated July 6, 2004	
15.	ORDER (CR 20) .....	1907
	Dated July 7, 2004	
16.	CLERK'S RECORD .....	1908



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10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

11 IN AND FOR THE COUNTY OF WASHOE

12 \* \* \*

13 TERRY JESS DENNIS,

14 Petitioner,

15 vs.

16 Case No. CR99P0611

17 E.K. McDaniel, Warden,  
18 the Nevada State Prison, Ely;  
19 FRANKIE SUE DEL PAPA,  
20 Attorney General of the  
21 State of Nevada,

22 Dept. No. 1

23 Respondents.

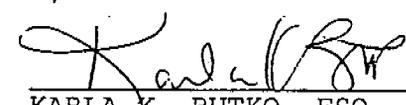
24 OPPOSITION TO STATE'S MOTION TO DISMISS  
25 PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)  
26 DEATH PENALTY CASE

27 COMES NOW the Petitioner, TERRY JESS DENNIS, by and through his  
28 appointed counsel, KARLA K. BUTKO, ESQ., and SCOTT W. EDWARDS, ESQ.,  
and respectfully Opposes the State's Motion to Dismiss his Petition  
for Writ of Habeas Corpus (Post-Conviction) (Death Penalty), and  
requests this Court to enter an Order denying the same.

This Opposition is based upon the Fifth, Sixth, Eighth and  
Fourteenth Amendments to the U.S. Constitution, all papers,  
documents and other evidence on file herein, the following Points &

1 Authorities, and any oral argument which this Court deems  
2 appropriate.

3  
4 DATED this 30<sup>th</sup> day of April, 2002.

5 

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Attorneys for Petitioner,  
TERRY JESS DENNIS

1 POINTS & AUTHORITIES

2 Introduction.

3 By way of introduction, this Honorable Court is reminded that  
4 it sits as a court of appeal in this matter. This Court is free to  
5 review and decide matters presented in the Petition for Writ of  
6 Habeas Corpus as any reviewing court would do. This is particularly  
7 important with regards to all ineffective assistance of counsel  
8 claims, which this Court may review *de novo*. This, as well as the  
9 other standards of review are set forth with particularity in the  
10 Petition. Therefore, this Court is strongly advised to review the  
11 record in this case in its entirety, including factual and legal  
12 matters. "Death is different," and this Court must act accordingly.

13 The Supreme Court has repeatedly held that the death  
14 penalty is qualitatively different from all other  
15 punishments and that the severity of the death sentence  
mandates heightened scrutiny in the review of any  
colorable claim of error.

16 Edlebacher v. Calderon, 160 F.3d 582 (9<sup>th</sup> Cir. 1998) (emphasis added).

17 See also Ford v. Wainwright, 477 U.S. 399, 411, 106 S. Ct.  
18 2595, 2602, 91 L. Ed. 2d 335 (1986) (J. Marshall, plurality) ("In  
19 capital proceedings generally, this Court has demanded that fact-  
20 finding procedures aspire to a heightened standard of reliability...  
21 This special concern is a natural consequence of the knowledge that  
22 execution is the most irremediable and unfathomable of penalties;  
23 that *death is different.*"); accord Zant v. Stephens 462 U.S. 862,  
24 885, 103 S. Ct. 2733, 2747, 77 L. Ed. 2d 235 (1983) (emphasis added);  
25 Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 1204, 51 L.  
26 Ed. 2d 393 (1977).

27 To recap the essential facts:

28 On April 14, 1999, the State filed a Notice of Intent to Seek

1 the Death Penalty against Petitioner.

2 Only two days later, on April 16, 1999, Petitioner pled guilty  
3 to first-degree murder, with the use of a deadly weapon. Petitioner  
4 plead straight-up, without any bargained-for-exchange.<sup>1</sup> On the same  
5 day, the District Court canvassed Petitioner and found that  
6 Petitioner was competent to enter a plea and that his plea was  
7 knowing and voluntary. At that time, Petitioner was not taking his  
8 medications. The Court did not order a review of the mental health  
9 condition of Petitioner for purposes of entry of plea.

10 Despite the presentation of considerable evidence of mental  
11 illness, clinical depression, long-term substance abuse, suicidal  
12 behavior, and his own statements requesting the Death Penalty, the  
13 Three-judge Panel found that Petitioner made a knowing and voluntary  
14 waiver of the right to present further mitigating evidence or make  
15 any further statement in allocution. The Panel found three (3)  
16 aggravating circumstances: two prior felonies for assault<sup>2</sup>, and one  
17 prior felony for arson. (TPH IV, 108).

18 The Panel found two mitigating circumstances: that Petitioner  
19 was under the influence of alcohol when he killed the victim, and  
20 that Petitioner suffers from mental illness. (TPH IV, 108-109).

21 The Nevada Supreme Court recognized that Petitioner's medical  
22 records together with the panel's questioning of Petitioner show  
23 that Petitioner has had a lengthy history of alcohol and substance  
24

---

25 <sup>1</sup>Judge Berry even commented that, "it doesn't appear...that  
26 you're receiving any benefit whatsoever in exchange for your plea  
of guilty." (Plea Canvass Transcript (PCT), 21).

27 <sup>2</sup>One assault conviction was in 1979, the other in 1984 --  
28 twenty (20) and fifteen (15) years old, respectively.

1 abuse as well as suicide attempts.<sup>3</sup>

2       Whatever the State, or this Honorable Court, might think of the  
3 circumstances of this case, whatever prejudices might attach to Mr.  
4 Dennis because of the crime he is alleged to have committed, and  
5 because of his station in life at the time of the alleged crime, the  
6 procedures by which Mr. Dennis was found guilty of first degree  
7 murder and then sentenced to death fail to meet constitutional  
8 muster. The record demonstrates clear violations of the due process  
9 rights of Petitioner and fail to comport to any reasonable sense of  
10 fairness or justice.

11       Allowing a clinically depressed, suicidal, career alcoholic,  
12 war veteran to enter a guilty plea and face the death penalty,  
13 without even bothering to find out if he is taking his medication,  
14 is per se ineffective assistance of counsel. The acceptance of his  
15 plea under the circumstances, with knowledge of his mental  
16 instability, and with the admission on the record that his defense  
17 counsel was still receiving discovery on the day of the plea, was  
18 clear error by the District Court.

19 Standard Applicable to Motions to Dismiss in Capital Cases.

20       In a capital case, a habeas petitioner who asserts a colorable  
21 claim to relief, and who has never been given the opportunity to  
22 develop a factual record on that claim, is entitled to an  
23 evidentiary hearing in federal court. See Siripongs v. Calderon, 35  
24 F.3d 1308, 1310 (9th Cir. 1994).

25       The severity of capital punishment mandates greater scrutiny of  
26 the merits of death row appeals. Since questions of death penalty  
27

---

28       <sup>3</sup>Dennis, 13 P.3d at 437-438.

1 law often involve complex factual and doctrinal inquiries, death  
2 penalty petitions -- unlike many other habeas cases -- are more  
3 likely to survive motions to dismiss or other summary motions.  
4 Coleman v. McCormick, 874 F.2d 1280. 12 94 (9<sup>th</sup> Cir. 1989).

5 Claims asserted in a petition for post-conviction relief must  
6 be supported with specific factual allegations which, if true,  
7 would entitle the petitioner to relief. Hargrove v. State, 100  
8 Nev. 498, 502, 686 P.2d 222, 225 (1984). Petitioner has met that  
9 burden and is entitled to an evidentiary hearing on his claims.

10 Addressing the State's Arguments.

11 ORIGINAL PETITION.

12 The Petitioner's Claims of Error are fully and completely set  
13 forth in the Supplemental Points & Authorities to the Petition.  
14 The Supplemental Points & Authorities are inclusive of the claims  
15 in the Original Petition, and are more fully and completely stated  
16 therein. Therefore, the Oppositions to the State's first three  
17 arguments (Under the State's section labeled "Original Petition")  
18 are more fully addressed and contained below, within the arguments  
19 regarding the Supplemental Petition).

20 A. INEFFECTIVE ASSISTANCE CLAIMS.

21 GROUND ONE:

22 As set forth in the Petition, trial counsel for Petitioner  
23 admitted on the record that she was still receiving discovery at  
24 the time of the plea. (AT 37). Trial counsel spent only two to  
25

1 three hours with the Defendant before allowing the Petitioner to  
2 plea guilty without the benefit of a plea bargain of any type. It  
3 is axiomatic that these circumstances are unacceptable.

4  
5 The plea was entered two days after the State filed the  
6 Notice of Intent to Seek the Death Penalty. This counsel submits  
7 that two days are not a sufficient amount of time to consider the  
8 weight of such a heavy decision. There is no way that counsel  
9 could have spent enough time with the client to make a decision of  
10 this nature. That would leave only one work day to discuss the  
11 ramifications of a guilty plea, the three judge panel and the  
12 death penalty.

13  
14 The Court in Strickland set forth the test to determine  
15 ineffective assistance. That test is based upon the "prevailing  
16 professional norms."

17  
18 The American Bar Association is as good an example of  
19 "prevailing professional norms" as can be found in this country.  
20 The ABA, through its Standards & Guidelines have told us that the  
21 standard for death penalty lawyers is a notch above the norm.  
22 Nevada's own SCR 250 acknowledges an analogous high standard.

23  
24 Counsel in a death penalty case does have a greater duty to  
25 protect her client from violations of his Constitutional rights.  
26 In the instant case, trial counsel's performance was in violation  
27 of the bargained-for-exchange required by the ABA, as well as  
28

1 Alford and its progeny.

2       The State relies heavily upon the Nevada Supreme Court's  
3 finding that Dennis was competent to enter the plea. Dennis v.  
4 State, 116 Nev.\_\_\_\_\_, 13 P.3d 434, 437 (2000). However, the  
5 gravamen of the instant Petition is that the evidence in the  
6 record is overwhelming that Mr. Dennis was not competent to waive  
7 his right to a jury trial. He was not competent to plead guilty  
8 and face the death penalty. The only reason he did so was because  
9 he was suicidal and was not properly medicated to treat his very  
10 real and existing mental illness. It is inexcusable for  
11 experienced trial lawyers and judges to have allowed Mr. Dennis to  
12 seek the State's assistance in accomplishing his suicide.

13  
14  
15       Trial counsel had a duty to protect Mr. Dennis from himself  
16 in his mentally ill state of mind. Defense lawyers always have a  
17 duty to protect laypersons from well-meaning but erroneous actions  
18 with regards to their cases.

19  
20       As set forth in the Petition, in the Commentary to Guideline  
21 1.1, on page 31 of the ABA Guidelines, the United States Supreme  
22 Court, Justice Sutherland, forewarned:

23  
24       The right to be heard would be, in many cases, of little  
25 avail if it did not comprehend the right to be heard by  
26 counsel. Even the intelligent and educated layman has  
27 small and sometimes no skill in the science of the law.  
28 If charged with a crime, he is incapable, generally, of  
determining for himself whether the indictment is good  
or bad. He is unfamiliar with the rules of evidence.

1 Left without the aid of counsel he may be put on trial  
2 without a proper charge, and convicted upon incompetent  
3 evidence, or evidence irrelevant to the issue or  
4 otherwise inadmissible. He lacks both the skill and  
5 knowledge adequately to prepare his defense, even though  
6 he may have a perfect one. He requires the guiding hand  
7 of counsel at every step in the proceedings against him.  
8 Without it, though he be not guilty, he faces the danger  
9 of conviction because he does not know how to establish  
10 his innocence.

11 Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158  
12 (1932) (emphasis added). See also ABA Guideline 1.1, Commentary;  
13 ABA Guideline 11.6.2; and ABA Guidelines, 11.6.2, & Commentary;  
14 ABA Guidelines 11.6.3 & commentary; ABA Guidelines, 11.2, &  
15 Comment's; and Mabry v. Johnson, 467 U.S. 504, 508, 104 S.Ct. 2543,  
16 2547, 81 L.Ed.2d 437 (1984).

17 The number one thing required of a death penalty lawyer in  
18 negotiating a plea on behalf of her client is: "a guarantee that  
19 the death penalty will not be imposed." Trial counsel failed to  
20 secure any bargain. There is no evidence in the record that  
21 counsel ever even asked for a bargain. There is no good reason  
22 for counsel to allow Petitioner to plead guilty without a  
23 guarantee that the death penalty would not be sought. It is clear  
24 from the record, that counsel did not act to protect her mentally  
25 ill client, but instead allowed him to enter a plea against her  
26 advice. (There can be no argument of strategy in such  
27 circumstances).  
28

1 Courts "must strictly scrutinize counsel's conduct" in death  
2 penalty cases. Voyles v. Watkins, 489 F.Supp. 901, 910 (N.D.  
3 Miss. 1980)

4 Moreover, the State failed to address any relevant case law  
5 presented by Petitioner on this Claim.

6  
7 Finally, the State cites Pangallo v. State, 112 Nev. 1533,  
8 1536, 920 P.2d 100, 102 (1996), for the position that "the  
9 defendant is not entitled to an evidentiary hearing if the factual  
10 allegations are belied or repelled by the record." With regards  
11 to this error, there is no question that Petitioner was pled  
12 straight-up to the death penalty without any bargain. The record  
13 is filled with supporting facts on point, including the fact that  
14 the District Court admitted: "it doesn't appear...that you're  
15 receiving any benefit whatsoever in exchange for your plea of  
16 guilty." (Plea Canvass Transcript (PCT), 21). The record also  
17 demonstrates that Petitioner was not taking medications at the  
18 time of entry of plea and that the district court knew that  
19 Petitioner had in the past taken medications for mental health  
20 issues. The term clinically depressed was utilized on the court  
21 record.  
22  
23  
24

25 Even if the decision on how to plead remains that of the  
26 client, that decision must be based upon full disclosure and a  
27 discussion of available defenses. Since discovery was still being  
28

1 obtained, there is no ability to argue that full disclosure or  
2 defense options had been fully explored at the time of the guilty  
3 plea.

4           United State v. Brown, 117 F.3d 471 (11<sup>th</sup> Cir. 1997) held  
5 that misinformation given to a defendant made a plea involuntary.  
6 In this case, there is a complete lack of information given to the  
7 Petitioner. The Court failed to determine whether the defendant  
8 understood the basis for the guilty plea. The Court failed to  
9 insure competence before accepting same. See United States v.  
10 Andrades, 169 F.3d 131 (2<sup>nd</sup> Cir. 1999).

11  
12           Therefore the State's Motion to dismiss this Claim must be  
13 denied.

14  
15 GROUND TWO.

16  
17           Even though these prior crimes occurred 15 and 20 years prior  
18 to the instant murder, involved completely different scenarios,  
19 and completely different victims, the State was able to use each  
20 of them as aggravators without objection by trial counsel. The  
21 question is one of the failure of trial counsel to attack the  
22 prior convictions in any fashion.

23  
24           It is respectfully argued that the lack of relevance is fatal  
25 to their utility herein. Petitioner argues that the reasoning of  
26 Walker v. State, 997 P.2d 803 (2000), is relevant to death penalty  
27 sentencing. If relevance may act as a bar to the determination of  
28

1 guilt, it simply must be relevant when deciding to take a man's  
2 life. Common sense dictates, logic dictates, our inherent sense  
3 of justice dictates the same. There is no material difference  
4 between the instant case and Haynes v. State, 103 Nev. 309. 739  
5 P.2d 497 (1987) or Chambers v. State, 113 Nev. 974, 944 P.2d 805  
6 (1997).  
7

8 The State misstates the law when it argues that the Nevada  
9 Supreme Court's decision regarding the validity of the aggravators  
10 is law of the case, "and cannot be relitigated." (State's  
11 Opposition, p. 13). This is simply not true. The fact is that  
12 the standard of review is simply different. Further, the State  
13 mistakes the nature of the claim. If the claim at issue were only  
14 the validity of the aggravators, the court would review for "clear  
15 error." Service Employees Int'l Union v. Fair Political Practices  
16 Comm'n, 955 F.2d 1312, 1317 n.7 (9th Cir.), cert. denied, 505 U.S.  
17 1230, 120 L. Ed. 2d 922, 112 S. Ct. 3056, 112 S. Ct. 3057 (1992).  
18  
19

20 Also, the Court may reverse any decision which is law of the  
21 case to correct a "manifest injustice," which is clearly present  
22 herein. Dobbs v. Zant. 506 U.S. 357, 113 S.Ct. 835. 122 L.Ed.2d  
23 103 (1993).  
24

25 Moreover, the Nevada courts are less strict in applying  
26 procedural rules to constitutional claims in capital cases than in  
27 non-capital cases. Petrocelli v. Angelone, 248 F.3d 877 (9<sup>th</sup> Cir.  
28

1 2001). See also Paine v. State, 110 Nev. 609, 877 P.2d 1025,  
2 1028-29 (Nev. 1994) (stating that because of "the gravity of [the  
3 petitioner's ] sentence," the court would reach the merits of an  
4 issue despite the fact that the law of the case should have  
5 precluded review).

7 In Smith v. Stewart, 189 F.3d 1004 (9<sup>th</sup> Cir. 1999), the  
8 failure of trial counsel to attack the prior crime aggravator was  
9 found to be ineffective and deficient performance. This Court is  
10 encouraged to read Smith in its entirety, as the mental illness  
11 issues, and other failures of trial counsel to prepare or to put  
12 forth an defense - at guilt or penalty phases - are strikingly  
13 similar.

15 Therefore the State's Motion as to this Claim must be denied.

16 Further, a review of cases involving the use of prior  
17 convictions for enhancement purposes demonstrates that prior  
18 convictions which were part of a single episode could not be  
19 utilized individually for enhancement purposes under the Armed  
20 Career Criminal Act. Why then, when the possible sanction is  
21 death, rather than an increased amount of prison time, can the two  
22 priors which were part of the same episode be counted twice for  
23 purposes of a death sentence? See United States v. Murphy, 107  
24 F.3d 1199 (6<sup>th</sup> Cir. 1997) and United States v. McElvea, 158 F.3d  
25 1016 (9<sup>th</sup> Cir. 1999).

1           Notably, these issues were not raised at the district court  
2 level or at the Nevada Supreme Court on direct appeal. The reason  
3 these claims are properly before this court at this time is that  
4 counsel was ineffective for failing to address said claims at the  
5 trial court level and during the direct appeal. The State's  
6 Motion to Dismiss this Claim should be denied by this Court.  
7

8           GROUND THREE.

9           The gravamen of this claim is that it is not the job of the  
10 court or defense counsel to facilitate petitioner's incompetent  
11 desire to commit suicide.  
12

13           Contrary to the State's argument, the record *does not* "repel  
14 the idea that Petitioner was not competent or that the court erred  
15 in accepting the plea." (State's Opposition, p. 13). In fact,  
16 the record embraces a lack of competence. The Petitioner was  
17 chemically and clinically depressed. The Petitioner was suicidal,  
18 asking the Court to help him take his own life. The Petitioner  
19 was not medicated at the time of the plea nor during the penalty  
20 phase. The Petitioner was not on medication which he needed to  
21 function in a reasonably competent manner. Moreover, trial  
22 counsel did nothing to establish whether he was being provided his  
23 medication.  
24  
25

26           The totality of the circumstances may be relevant to a  
27 discussion of whether a defendant's confession is voluntary under  
28

1 due process standards. See Mincey v. Arizona, 437 U.S. 385, 401,  
2 98 S.Ct. 2408 (1978); Davis v. North Carolina, 384 U.S. 737, 741-  
3 742, 86 S.Ct. 1761 (1966).  
4

5 In addition, this Court must look beyond the ordinary  
6 understanding of competence to reach the true standard required.  
7 In short, there is a difference between being capable of  
8 understanding the proceedings and actually understanding them. As  
9 the Supreme Court of the United States held recently in Godinez v.  
10 Moran, 113 S.Ct. 2680 (1993):  
11

12 A finding that a defendant is competent to stand  
13 trial...is not all that is necessary before he may be  
14 permitted to plead guilty or waive his right to counsel.  
15 In addition to determining that a defendant who seeks to  
16 plead guilty or waive counsel is competent, a trial  
17 court must satisfy itself that the waiver of his  
18 constitutional rights is knowing and voluntary.

19 Id., at 2687.

20 A competency hearing and findings are mandatory when a  
21 defendant attempts to waive the right to appeal in a capital case.  
22 Calambro v. State, 111 Nev. 1015, 900 P.2d 340 (1995); Kirksey v.  
23 State, 107 Nev. 499, 814 P.2d 1008 (1991).

24 Before the district court accepts the waiver, it must  
25 conduct an evidentiary hearing at which the defendant is  
26 present and represented by counsel, and determine  
27 whether the defendant is competent to waive the appeal.  
28 Following the evidentiary hearing, the district court  
must enter in the record formal, written findings  
regarding the defendant's competence to waive the  
appeal. This court can then review those findings when  
it reviews the record to determine the validity of the

1 death sentence.

2 Id., 814 P.2d at 1010.

3  
4 Even a casual review of the record should cast doubts upon  
5 defendant's competence to make any kind of waiver of his  
6 constitutional rights.

7 The state has no legitimate interest in assisting in the  
8 attempted suicide of Mr. Dennis. Indeed, if the State had nothing  
9 to hide, if due process had been given, the State would welcome an  
10 evidentiary hearing in this case to show the same. As it is, "me  
11 thinks, thou dost protest too much." Shakespeare.

12  
13 Therefore the State's Motion as to this Claim must be denied.  
14 The testimony of Martha Mahaffey, Ph.D., will be presented to  
15 demonstrate the mental health issues which were suffered by  
16 Petitioner, the effect of medications upon the mentality of a  
17 person afflicted by such serious diseases, and the past mental  
18 health history will be presented to demonstrate that this was an  
19 ongoing mental health concern that does not just clear up by  
20 failing to take proper medications. A pharmacologist will be  
21 presented to explain the medications that were normally and  
22 routinely taken by Petitioner, as will the care provider from the  
23 VA hospital. This claim cries out for an evidentiary record at  
24 which time Petitioner will demonstrate that he was not competent  
25 at the time of the entry of the guilty plea herein.  
26  
27  
28

1 GROUND FOUR.

2 The record shows that trial counsel deferred critical, and  
3 material decisions regarding his fundamental constitutional rights  
4 -- among others, the rights to a jury trial and to put on  
5 mitigating evidence on his behalf -- to the wishes of Mr. Dennis  
6 while he was unmedicated, clinically depressed, and mentally  
7 unstable.  
8

9 The State's argument regarding Petitioner's competence is  
10 conclusory. The great weight of the evidence is contrary to a  
11 valid waiver of rights. The reason for *de novo* review is to draw  
12 appropriate conclusions from the record, where the previous trier  
13 of fact made manifest error. Norris v. Risley, 878 F.2d 1178 (9<sup>th</sup>  
14 Cir. 1989).<sup>4</sup> In this case, manifest injustice will result if  
15  
16

17 <sup>4</sup>See:

18 [W]hether the rule of law as applied to the established  
19 facts is or is not violated." United States v.  
20 McConney, 728 F.2d 1195, 1200 (9th Cir.) (en banc),  
21 cert. denied, 469 U.S. 824, 83 L. Ed. 2d 46, 105 S. Ct.  
22 101 (1984) (quoting Pullman-Standard v. Swint, 456 U.S.  
23 273, 289 n. 19, 72 L. Ed. 2d 66, 102 S. Ct. 1781  
24 (1982)).

25 "When . . . the application of law to fact requires us  
26 to make value judgments about the law and its policy  
27 underpinnings, and when . . . the application of law to  
28 fact is of clear precedential importance, the policy  
reasons for *de novo* review are satisfied and we should  
not hesitate to review [\*\*8] the judge's determination  
independently." McConney, 728 F.2d at 1205. "The  
concerns of judicial administration will usually favor  
the appellate court, and most mixed questions will be  
reviewed independently. This is particularly true when

1 Petitioner is not given the right to an evidentiary hearing.

2 Death is different.

3         The standard of proof of incompetence is that of a  
4 preponderance of the evidence. Cooper v. Oklahoma, 517 U.S. 348  
5 (1996). Petitioner has already met that burden by the evidence  
6 which was presented to the three judge panel, the report of Dr.  
7 Lynn and the fact that Petitioner was not taking his medication.  
8 Petitioner will provide additional evidence at the hearing on the  
9 merits of this Claim.  
10

11  
12         Therefore the State's Motion as to this Claim must be denied.

13 GROUND FIVE.

14         Under Byford, 994 P.2d 700 (2000), there is no proof of  
15 corroboration of intent in this case, outside of Dennis's own  
16 illegal and incompetent statements. The confession of a  
17 defendant, without more, is insufficient to sustain a conviction  
18 for murder.  
19

20         A confession by a defendant suffering from drug  
21 withdrawal may be involuntary when the withdrawal  
22 results in a confession which is not the product of a  
23 rational intellect and a free will. United States v.  
Harden, 480 F.2d 649 (8th Cir. 1973).

24 Pickworth v. State, 95 Nev. 547, 598 P.2d 626 (1979).

25

26         the mixed question involves constitutional rights." *Id.*  
27 at 1204.

28 Id.

1           It has long been established that the corpus delicti must be  
2 demonstrated by evidence independent of the confessions or  
3 admissions of the defendant. In Re Kelly, 28 Nev. 491, 498, 83 P.  
4 223, 225 (1905). This rule protects against an accused's  
5 conviction being based solely upon an uncorroborated confession.  
6 Dominques v. State, 112 Nev. 683, 692, 917 P.2d 1364, 1371 (1996).  
7 Clearly, much of what Dennis told the police officers was sheer  
8 fantasy and lies. The rest of his bravado was much of the same.  
9 His statements to officers were not reliable due to his mental  
10 health issues and intoxication.

11           Counsel was ineffective for failing to move to suppress the  
12 statements of Petitioner to the police. After said statements are  
13 removed from this case, there is little evidence relating to the  
14 intent required to commit first degree murder.

15           Because Dennis's trial counsel either did not recognize this  
16 fact, or acted contrary to it, her erroneous advice falls below  
17 the standard of effectiveness required by Strickland, supra.  
18 Because trial counsel was ineffective, Dennis was denied his  
19 Fifth, Sixth, Eighth and Fourteenth Amendment rights under the  
20 United States Constitution.

21           Therefore the State's Motion as to this Claim must be denied.  
22  
23 GROUND SIX.

24           United States Supreme Court case law indicates that statutory  
25  
26  
27  
28

1 aggravating circumstances play a constitutionally necessary  
2 function at the stage of legislative definition: they circumscribe  
3 the class of persons eligible for the death penalty. Aggravating  
4 circumstances provide a "meaningful basis for distinguishing the  
5 few cases in which [death] is imposed from the many cases in which  
6 it is not," Gregg v. Georgia, 428 U.S. 153, 188 (1976), quoting  
7 Furman v. Georgia, 408 U.S. 238, 313 (1972) (WHITE, J.,  
8 concurring).

9  
10  
11 Therefore, the "double counting" of one event in aggravating  
12 a murder case to a capital murder case is unconstitutional and  
13 must not be allowed to stand.

14  
15 A number of state courts have invalidated double counting of  
16 aggravating circumstances. See, e.g., Cook v. State, 369 So. 2d  
17 1251, 1256 (Ala. 1979); Provence v. State, 337 So. 2d 783, 786  
18 (Fla. 1976); State v. Rust, 197 Neb. 528, 537, 250 N. W. 2d 867,  
19 873, cert. denied, 434 U.S. 912 (1977); Glidewell v. State, 663 P.  
20 2d 738, 743 (Okla. Crim. App. 1983).

21  
22 The State again argues law of the case. The issue is  
23 counsel's ineffective assistance at the trial court and direct  
24 appeal level for failing to recognize and litigate this critical  
25 issue. See also the reasoning found in Ground Two herein.  
26 Therefore the State's Motion as to this Claim must be denied.  
27  
28

1 GROUND SEVEN.

2 This claim regards trial counsel's and the Court's  
3 consideration of Mr. Dennis's wish to die while he was mentally  
4 unstable. Incredibly, the State argues that there is no evidence  
5 that the "court actually acted consistent with the allegation."  
6 (State's Opposition, p. 16). The record clearly shows that Mr.  
7 Dennis's desire to die was a motivating factor in trial counsel  
8 pleading him straight-up to the death penalty, and the court  
9 accepting his plea. (See plea canvass, generally); (PCT, 21).  
10  
11

12 Further, in a letter from trial counsel, dated December 29,  
13 2000, she told Petitioner, "I won't assist in your suicide..."  
14 Despite her written acknowledgment that Petitioner's actions were  
15 a means of State-assisted suicide, she knowingly assisted him  
16 anyway. Trial counsel knew Petitioner was sick, knew that he was  
17 not of sound mind to be making such crucial decisions, and  
18 facilitated his plea without negotiating any deal. Further, trial  
19 counsel did nothing to stabilize Petitioner with medications.  
20  
21

22 The finality of the death penalty requires "a greater degree  
23 of reliability" when it is imposed. Lockett, supra, at 604.

24 It appears that but for Petitioner's statements that he would  
25 prefer to die rather than spend the rest of his life in prison,  
26 the sentence would have been different. If this is true, the  
27 three judge panel members must speak up for what is right and  
28 agree that the death penalty would not have been invoked if

1 Petitioner had not requested same.

2 Therefore the State's Motion as to this Claim must be denied.

3 GROUND EIGHT & NINE.

4 The facts and legal argument were set forth sufficiently in  
5 the Petition. Further, the Nevada Supreme Court recognized the  
6 following facts in its Opinion:

7  
8 He began strangling Straumanis with a belt. He felt  
9 somewhat aroused by Straumanis's struggling, and as she  
10 was "fading," he engaged in anal intercourse with her.  
11 During the course of the killing, he took the belt off  
and used his hands to choke her, and then suffocated her  
by covering her nose and mouth, making sure that she was  
not breathing and that "it was all done."

12 Dennis v. State, \_\_\_ Nev. \_\_\_, 13 P.3d 434, 436 (2000).

13 The victim was not killed with the belt, the autopsy was not  
14 conclusive that the victim died from the use of the belt. (TPH  
15 II, 147-164). From the beginning, Petitioner told police he  
16 killed the victim with his hands. (TPH I, 14). Later he made  
17 similar statements during interrogation. (TPH I, 66). The deadly  
18 weapon enhancement should be reversed. Since the State believes  
19 that statements of the Petitioner alone can justify a first degree  
20 murder conviction, then statements of Petitioner, supported by the  
21 expert testimony on the cause of death, must demonstrate that the  
22 victim was not killed by the use of a deadly weapon.

23 A belt is not primarily designed or fitted for use as a  
24 weapon. See Knight v. State, 116 Nev. \_\_\_, (Adv. Op. 14, decided  
25 February 3, 2000). In Knight, the Nevada Supreme Court avoided  
26 the subject of whether a steak knife would qualify as a deadly  
27 weapon under NRS 193.165.  
28

1           In Steese v. State, 114 Nev. 479, 960 P.2d 321 (1998), the  
2 Nevada Supreme Court held that a deadly weapon, for purposes of  
3 NRS 193.165, "is any instrumentality which is inherently  
4 dangerous." Zgombic v. State, 106 Nev. 571, 576, 798 P.2d 548,  
5 551 (1990). A weapon is inherently dangerous if the weapon, "when  
6 used in the ordinary manner contemplated by its design and  
7 construction, will, or is likely to, cause a life threatening  
8 injury or death." Id. In Zgombic, the court anticipated three  
9 categories of weapons: ones which were dangerous as a matter of  
10 law, weapons which were not dangerous as a matter of law, and  
11 those for which the question of inherent dangerousness had to be  
12 submitted to the jury. Id. at 577, 798 P.2d at 551-52. This was  
13 clearly a question that the jury should have decided.  
14

15           Additionally, Dennis did not use the deadly weapon to cause  
16 the death of the victim. Moore v. State, 117 Nev. \_\_\_\_ ( Adv. Op.  
17 52, decided July 25, 2001).

18           Statutory construction is a question of law that is reviewed  
19 by the Nevada Supreme Court independently. In construing a  
20 statute, the primary goal is to ascertain the legislature's intent  
21 in enacting it, and the Court presumes that the statute's language  
22 reflects the legislature's intent. Thus, the Court first looks to  
23 the plain language of the statute to decipher the statute's  
24 meaning. But where the language of the statute cannot directly  
25 resolve the issue standing alone, the Court considers the context  
26 and spirit of the statute in question, together with the subject  
27 matter and policy involved. In addition, ambiguities in criminal  
28

1 liability statutes must be liberally construed in favor of the  
2 accused. The verb "use" connotes "to put into action or service"  
3 and "to carry out a purpose or action by means of."

4 See Anthony Lee R., A Minor v. State, 113 Nev. 1406, 1414, 952 P.2d  
5 1, 6 (1997); Gallagher v. City of Las Vegas, 114 Nev. 595, 599, 959  
6 P.2d 519, 521 (1998); see Sessions v. State, 106 Nev. 186, 189, 789  
7 P.2d 1242, 1243 (1990); and Merriam Webster Online Collegiate  
8 Dictionary at <http://www.m-w.com/cgi-bin/dictionary>.

9 "Inherently dangerous," for sentence enhancement purposes,  
10 means that the instrumentality itself, if used in ordinary manner  
11 contemplated by its design and construction, will, or is likely to,  
12 cause life-threatening injury or death. In determining whether  
13 instrumentality is "deadly weapon" for sentence enhancement  
14 purposes, the court may use either "functional test" or "inherently  
15 dangerous test" with respect to crimes committed on or after  
16 effective date of functional test's statutory codification. NRS  
17 193.165(5). NRS 193.165(5)(a). Thomas v. State, 114 Nev. 1127, 967  
18 P.2d 1111 (1998).  
19  
20

21 A belt is not inherently dangerous. This belt was not utilized  
22 to facilitate the death of the victim. A belt is potentially  
23 harmful when misused. If used properly, no harm would result.  
24 Counsel was ineffective for failing to argue the issue of a killing  
25 by the hands of the defendant rather than by a deadly weapon.  
26 Appellate counsel was ineffective for failing to address the deadly  
27  
28

1 weapon issue found in this fact setting.

2 Therefore the State's Motion as to this Claim must be denied.

3 GROUND TEN.

4  
5 For this and all Claims involving trial counsel's failure to  
6 prepare or present a defense, or to uphold the Petitioner's  
7 Constitutional rights, the State's assertion that Petitioner wanted  
8 to plead guilty is not a sufficient answer. The Petitioner was  
9 suffering from extreme mental illness and depression. Petitioner  
10 was not properly medicated and was suicidal. Petitioner was merely  
11 using the legal system as a means to facilitate his own suicide.  
12

13 The gravamen of this Petition rests largely upon the fact that  
14 trial counsel was ineffective for failing to realize this fact,  
15 failing to understand her duty in the face of the same, and failing  
16 to zealously defend her client. Not to mention basic tenets of  
17 criminal defense law, such as do not plead your client to a death  
18 penalty while you are still receiving ongoing discovery from the  
19 State.  
20

21 Additionally, trial counsel and the District Court had  
22 sufficient experience to understand their functions and the  
23 requirements of the Constitution. The procedures in this case are  
24 inexcusable. Terry Dennis deserves his Constitutional right to his  
25 day in court and a trial lawyer who will effectively represent him  
26 under the Constitution of the United States.  
27  
28

1 No matter what the duty, trial counsel had an absolute  
2 obligation to provide advice for her client which was based upon  
3 discovery which had concluded and available defenses to the case.  
4

5 Except for the defendant's exercise of fundamental rights, like  
6 the right to testify, an attorney representing a criminal defendant  
7 has the authority to control the presentation of the defense. This  
8 creates an obligation to conduct the case competently. In another  
9 pertinent case, the California court approved a trial court's denial  
10 of a defendant's request, opposed by counsel, to act as co-counsel.  
11 The court stated that generally an attorney should not be compelled  
12 over his objection to undertake the defense of an accused on terms  
13 which undermine the powers normally ascribed to counsel. Appointed  
14 counsel should not be required to surrender any of the substantial  
15 prerogatives traditionally or by statute attached to his office. See  
16 People v. Alcala, 842 P.2d 1192, 1232 (Cal.1992); People v.  
17 Hamilton, 774 P.2d 730, 740-42 (Cal. 1989); People v. Mattson, 336  
18 P.2d 937, 949 (Cal. 1959); and <sup>12</sup> see Jones v. State, 95 Nev. 613,  
19 617, 600 P.2d 247, 250 (1979) (recognizing that where a defendant  
20 participates in the alleged error, he is estopped from raising any  
21 objection on appeal); Sidote v. State, 94 Nev. 762, 762-63, 587 P.2d  
22 1317, 1318 (1978) (holding that defendant who invites district court  
23 action perceived as favorable to him may not then claim it as error  
24 on appeal).  
25  
26  
27

28 None of these cases stand for a proposition that a client can

1 invite ineffective assistance of counsel and that is the end of the  
2 review. The State's position is without merit. The Claim should  
3 proceed to an evidentiary hearing.  
4

5 GROUND ELEVEN.

6 The State is fond of arguing that Mr. Dennis waived his rights  
7 once, and therefore has no recourse here. Petitioner cannot waive  
8 errors of constitutional magnitude. The Due Process Clause of the  
9 Fourteenth Amendment prohibits the states from trying and convicting  
10 a mentally incompetent defendant. Dusky v. United States, 362 U.S.  
11 402 (1960). See Pate v. Robinson, 383 U.S. 375, 384 (1966)  
12 (Constitutional proscription against waiver of right not to be tried  
13 while incompetent.)  
14

15  
16 The failure of trial counsel to move to suppress the illegally  
17 obtained statements amounts to ineffective assistance of counsel, in  
18 violation of the Fifth, Sixth and Fourteenth Amendments. Prejudice  
19 against Dennis is shown because, but for the existence of the  
20 illegal statement, Dennis would not have entered into the Guilty  
21 Plea Agreement with the State.  
22

23 Had the statement of Dennis been suppressed, even if he  
24 proceeded to enter a guilty plea and the three judge panel  
25 sentencing, the verdict would not have been for a death sentence.  
26 The statements of Dennis were utilized against him by the State in  
27 its argument for imposition of the death sentence. The statements  
28

1 of Dennis were utilized by the Nevada Supreme Court to justify the  
2 imposition of the death sentence. Counsel was ineffective for  
3 failing to move to suppress the statement and protect her client.  
4 Appellate counsel was ineffective for failing to insure that the  
5 issue was properly preserved for appellate review and for failing to  
6 raise this constitutional issue on direct appeal.  
7

8 The fact setting of this police interview is remarkably similar  
9 to the fact setting found in Allan v. State, 118 Nev. Adv. Op. No.  
10 2, decided January 22, 2002. Counsel should have litigated the  
11 question of suppression of the statements of Dennis. After that,  
12 there is very little evidence left concerning the intent to kill and  
13 certainly less egregious evidence left for review of sentencing  
14 options. Dennis did not waive constitutional issues by entry of  
15 plea. The Court retains the right to correct plain error. But,  
16 this error must be pointed out or the review will not occur. That  
17 is the question brought by Claim 11. Counsel should have raised the  
18 suppression issue to the Court. It is believed that trial counsel  
19 will testify that the suppression issue should have been brought.  
20

21 Failure to file a motion to suppress has been held to be proper  
22 grounds for ineffective assistance of counsel. Martin v. Maxey, 98  
23 F. 3d 844 (5<sup>th</sup> Cir. 1996).  
24

25 At no point does the Court have the right to rely upon suspect  
26 evidence at sentencing. The statements made by Dennis to the police  
27  
28

1 were suspect. Both his competence at the time, his waiver of  
2 Miranda rights and the quality of the statements made demonstrate  
3 that his statements were suspect evidence and should not have been  
4 relied upon by the sentencing court. Silks v. State, 92 Nev. 91, 545  
5 P.2d 1159 (1976).  
6

7 No matter what standard of review is applied by this Court,  
8 counsel was ineffective for failing to suppress the statement of  
9 Dennis made to the police and failing to demonstrate that the  
10 statement was highly suspect and unreliable.  
11

12 GROUND TWELVE.

13 NRS 175.552(3) provides:

14 In the hearing, evidence may be presented concerning  
15 aggravating and mitigating circumstances relative to the  
16 offense, defendant or victim and on any other matter which  
17 the court deems relevant to sentence, whether or not the  
18 evidence is ordinarily admissible. Evidence may be offered to  
19 refute hearsay matters. No evidence which was secured in  
20 violation of the Constitution of the United States or the  
21 constitution of the State of Nevada may be introduced. The  
22 state may introduce evidence of additional aggravating  
23 circumstances as set forth in NRS 200.033, other than the  
24 aggravated nature of the offense itself, only if it has been  
25 disclosed to the defendant before the commencement of the  
26 penalty hearing.

27 The State has argued that evidence of a possible spousal  
28 battery conviction and the death of a person at his residence were  
properly admitted during the penalty hearing. The conviction was  
never presented to the Court. This would have been evidence which  
does not meet constitutional muster. Use of a prior misdemeanor

696

1 conviction, without evidence of it meeting constitutional muster,  
2 was inadmissible. See U.S. v. Akins, 276 F.3d 1141 (9<sup>th</sup> Cir.  
3 2002). No evidence was presented to demonstrate that the  
4 conviction met constitutional muster under the requirements of  
5 Akins. Counsel was ineffective for failing to strike such a  
6 prejudicial fact from the three judge panel's consideration.  
7

8 The fact that some person died at the residence of Dennis  
9 leaves a bad taste in the listener's ears for no reason. That  
10 should have been redacted from the statement of Dennis prior to  
11 delivery to the three judge panel. In fact, the entire statement  
12 of Dennis should have been suppressed and not utilized against  
13 him. See argument above. Therefore the State's Motion as to this  
14 Claim must be denied.  
15

16  
17 GROUND THIRTEEN.

18 Once again, the State cites to Hargrove v. State, 100 Nev.  
19 498, 501-02, 686 P.2d 222, 224-25 (1984), for the proposition that  
20 a claim should be dismissed. The claim was not conclusory. Ample  
21 statements were provided in Petitioner's Supplemental Petition to  
22 demonstrate the type of mitigating evidence that will be presented  
23 at a hearing on the merits. Petitioner attempted to provide great  
24 detail to the State in support of each claim, both via the  
25 statement of facts, and by argument. If the State cannot see that  
26 the testimony of Martha Mahaffey (a psychologist), a  
27  
28

1 pharmacologist, jail records concerning health care issues, the  
2 Petitioner, VA records, and the testimony of the VA medical care  
3 providers are thoughts of mitigation, counsel cannot explain  
4 further. There is no obligation upon Petitioner to provide  
5 affidavits of each proposed witness's testimony. These witnesses  
6 will be provided at a hearing on the merits of the habeas claims.  
7 The State's motion to dismiss this Claim should be summarily  
8 denied by this Court.  
9

10  
11 **GROUND FOURTEEN.**

12 The State again misses the point of the argument that has  
13 been made. Once the statement of Dennis is suppressed, there is  
14 very little evidence of the crime itself available for  
15 prosecution. There is no evidence left of the mental state of  
16 Dennis. Confessions may only be utilized to satisfy the corpus  
17 delicti rule if those confessions are admissible evidence. As the  
18 statement was illegally obtained, the State must look for other  
19 evidence to establish the corpus delicti.  
20

21 Noticeably, the State fails to advise this Court that trial  
22 counsel admitted that there was a corpus delicti issue during the  
23 penalty phase of the case. Said issue should have been addressed  
24 during discussions with the defendant on decisions of available  
25 defenses and whether to take the case to a jury trial. Announcing  
26 that issue during the penalty phase demonstrated that trial  
27  
28

1 counsel noted the issue but failed to litigate the issue. This  
2 Claim is tied to the question of the suppression of the statement  
3 of Dennis and must be resolved at an evidentiary hearing. There  
4 was insufficient evidence absent the admission or confession of  
5 Dennis to establish corpus delicti. Middleton v. State, 921 P.2d  
6 at 285; Frutiger v. State, 907 P.2d at 160; Azbill v. State, 440  
7 P.2d 1014, 1017 (1968).  
8

9       The State's motion to dismiss this Claim should be summarily  
10 denied and the issue should proceed to an evidentiary hearing.  
11

12 **GROUND FIFTEEN.**

13       The State argued extensively that Dennis was a violent person  
14 whose crimes of violence had been increasing. This argument was,  
15 unfortunately, utilized by the Nevada Supreme Court in justifying  
16 the death sentence. A review of the "spiraling" violence of  
17 Dennis leaves one to wonder, where and how? The convictions of  
18 December, 1983, have very little to do with the life and times of  
19 Dennis sixteen years later. Counsel failed to demonstrate via  
20 witness Lana Miller that Dennis later married Ms. Miller's mother,  
21 the fact that he left her alone, and the fact that Dennis believed  
22 he was taking action to protect Lana Miller rather than to  
23 directly harm her.  
24

25       While Dennis concedes that he pled guilty to a felony from  
26 this matter, the fact setting is not as described by the Nevada  
27  
28

1 Supreme Court. Counsel was ineffective for failing to demonstrate  
2 the true nature of the 1983 conviction and the fact that Dennis  
3 was not convicted for any other crimes of this nature.  
4

5 Failure to adequately cross-examine a key witness has been  
6 held to constitute ineffective assistance of counsel. Brown v.  
7 State, 110 Nev. 846, 877 P.2d 1071 (1994) At the heart of the  
8 Confrontation Clause is a preference for live testimony and  
9 cross-examination, "the greatest legal engine ever invented for  
10 the discovery of truth." White v. Illinois, 502 U.S. 346, 356  
11 (1992) (quoting California v. Green, 399 U.S. 149, 158 (1970)).  
12 "Our cases construing the [confrontation] clause hold that a  
13 primary interest secured by it is the right of cross-  
14 examination." Davis v. Alaska, 415 U.S. 308, 315 (1974) (quoting  
15 Douglas v. Alabama, 380 U.S. 415, 418 (1965)).  
16  
17

18 The State's Motion to Dismiss this Claim should be summarily  
19 denied and the Claim should proceed to an evidentiary hearing.

20 GROUND SIXTEEN.

21 Once again, the State cites to Hargrove v. State, 100 Nev.  
22 498, 501-02, 686 P.2d 222, 224-25 (1984), for the proposition that  
23 a claim should be dismissed. The claim was not conclusory. Ample  
24 statements were provided in Petitioner's Supplemental Petition to  
25 demonstrate the type of mitigating evidence that will be presented  
26 at a hearing on the merits. Petitioner attempted to provide great  
27  
28

1 detail to the State in support of each claim, both via the  
2 statement of facts, and by argument. The testimony of Martha  
3 Mahaffey (a psychologist), a pharmacologist, jail records  
4 concerning health care issues, the jail expert examining Dennis,  
5 Dr. Lynn, the Petitioner, VA records, an expert in the arena of  
6 blood alcohol retrograde evaluations, and the testimony of the VA  
7 medical care providers are witnesses that will be called to  
8 support Petitioner's claims. There is no obligation for counsel  
9 to provide a witness list attached to the Petition or Supplemental  
10 Petition. Counsel cannot explain further until additional  
11 investigation has been completed. There is no obligation upon  
12 Petitioner to provide affidavits of each proposed witness's  
13 testimony. These witnesses will be provided at a hearing on the  
14 merits of the habeas claims. The State's motion to dismiss this  
15 Claim should be summarily denied by this Court.

16  
17  
18  
19 GROUND SEVENTEEN.

20 Perhaps the conflict is too simple to be cognizable by the  
21 State. Counsel had an ethical obligation to do everything in  
22 their power to protect their client's life. Their client, due to  
23 mental health problems and clinical depression, did not agree with  
24 their tactics to save his life. This conflict required withdrawal  
25 by counsel. A simple presence at the Nevada Death Penalty  
26 training course provides much enlightenment in this arena.  
27  
28

1 Ms. Pusich advised the Court that her client refused to take  
2 her advice. She further stated that she did not agree with his  
3 decision to enter a guilty plea and would not facilitate his  
4 suicide. Yet, Ms. Pusich did not withdraw from representation.  
5 She should have. Had this occurred, Dennis would have been  
6 canvassed by the Court pursuant to Faretta v. California, 422 U.S.  
7 806 (1975). At that point, it would have been apparent to the  
8 Court that Dennis did not know what he was doing by entry of a  
9 guilty plea and that the plea was not knowing.  
10  
11

12 While Ms. Pusich did advise the Court that her client was  
13 refusing her advice, neither the Court nor Ms. Pusich took the  
14 next step to determine if the conflict could be repaired or not.  
15 It was obvious that the entry of plea was not in the best  
16 interests of Dennis. Counsel should have prevented his actions by  
17 calling it as it was, a true-unresolvable conflict.  
18

19 This Claim should proceed to an evidentiary hearing.  
20

21 GROUND EIGHTEEN.

22 Ground Eighteen argues that the cumulative errors of counsel  
23 precluded Petitioner from receiving effective assistance of  
24 counsel. If the cumulative effect of errors committed at trial  
25 denies the appellant his right to a fair trial, this court will  
26 reverse the conviction. Big Pond v. State, 101 Nev. 1, 3, 692 P.2d  
27 1288, 1289 (1985); Homick v. State, 112 Nev. 304, 316, 913 P.2d  
28

1 1280, 1288 (1996).

2 A review of the errors which occurred in the representation  
3 of Dennis, between the failure to litigate key issues and the  
4 failure to present key evidence to the Court, as well as the entry  
5 of a guilty plea to the death penalty demonstrates cumulative  
6 errors which precluded proper representation and protection of the  
7 constitutional rights of Dennis.  
8

9  
10 Ground Eighteen should be resolved by the Court after an  
11 evidentiary hearing. Since it argues the cumulative effect of all  
12 of the errors, how could this claim be dismissed without  
13 conclusion of the evidentiary hearing?

14 GROUND NINETEEN.

15  
16 This claim is currently before the United States Supreme  
17 Court and will possibly be decided prior to the finality of this  
18 post-conviction proceeding. See Ring v. Arizona, 25 F.3d 1139  
19 (2001), cert. granted, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002). The  
20 State cites only to Nevada case authority and the case of  
21 Apprendi. This issue is quite complex. The State may believe the  
22 issue is without merit, but the United States Supreme Court  
23 believes it has enough merit to accept certiorari. Enough said.  
24 Dismissal of this claim without an evidentiary hearing would be  
25 error. For a thorough review of applicable cases, please see the  
26 Supplemental Petition for Writ of Habeas Corpus (post-conviction)  
27  
28

1 on file herein.

2 GROUND TWENTY.

3  
4 This claim is currently before the United States Supreme  
5 Court and will possibly be decided prior to the finality of this  
6 post-conviction proceeding. See Ring v. Arizona, 25 F.3d 1139  
7 (2001), cert. granted, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002). The  
8 State cites only to Nevada case authority and the case of  
9 Apprendi. This issue is quite complex. The State may believe the  
10 issue is without merit, but the United States Supreme Court  
11 believes it has enough merit to have accepted certiorari and Ring  
12 v. Arizona, supra, is pending at the United States Supreme Court.  
13 Enough said. Dismissal of this claim without an evidentiary  
14 hearing would be error. For a thorough review of applicable  
15 cases, please see the Supplemental Petition for Writ of Habeas  
16 Corpus (post-conviction) on file herein. This Court would be  
17 remiss in its obligations to grant a motion to dismiss on these  
18 legal grounds when the issue is of such magnitude as to be pending  
19 at the United States Supreme Court. The State's approach on this  
20 issue is clearly naive. The State's Motion to Dismiss should be  
21 denied and this issue should be carefully and thoughtfully  
22 addressed by this Court.

23  
24  
25  
26 GROUND TWENTY-ONE.

27  
28 Again, the State's position is that in order to obtain an

1 evidentiary hearing, Petitioner must provide complete statements  
2 of potential witnesses to support a claim to get to a hearing.  
3  
4 The reason for the availability of an evidentiary hearing is for  
5 the presentation of evidence. The facts available to the Court  
6 based upon the record demonstrate that Petitioner was not  
7 competent to formulate intent. There is ample evidence to support  
8 the voluntary intoxication of Dennis at the time of the murder.  
9  
10 There is ample evidence that the victims blood alcohol was a .37.  
11 Dennis stated that she and he were drinking together and officers  
12 took into evidence empty alcohol containers. Dennis told officers  
13 when and how he bought the liquor. The taped statement of Dennis  
14 to the officers demonstrated his lack of competence. The Court  
15 only needs to review the tape of the interview to see that he was  
16 incompetent. This, coupled with the expert testimony, medical  
17 records, treatment records, medication records, and lifestyle  
18 evidence relating to Dennis will support the fact that he was  
19 incompetent at the time of the murder. This evidence presented  
20 counsel with a valid defense for Dennis. See Finger v. State, 117  
21 Nev.\_\_\_\_\_, Adv. Op. 48, decided December 44, 2001, (\_\_\_\_ P.3d.  
22 \_\_\_\_\_).  
23  
24

25 The State is placed on notice of the evidence and case  
26 authority that will be presented by Dennis at the evidentiary  
27 hearing in support of this claim. The pleading standards were met  
28

1 by Petitioner and the State's motion to dismiss this Claim should  
2 be dismissed by the Court.

3  
4 GROUND TWENTY-TWO.

5 The State again has misinterpreted the argument of  
6 Petitioner. A review of the comments of the sentencing panel  
7 members demonstrates that the panel was expecting more evidence in  
8 mitigation and was frustrated. Counsel failed to remind the panel  
9 that circumstantial evidence consisting of medical records and  
10 treatment plans constituted evidence. Further, counsel failed to  
11 meet her obligation to protect her client's interests by failing  
12 to present more evidence in mitigation.  
13

14 In Karis v. Calderon, 9<sup>th</sup> Circuit Docket Number 98-99025,  
15 decided March 18, 2002, the 9<sup>th</sup> Circuit held that failure of  
16 counsel to investigate and present evidence of child abuse and  
17 family violence at the penalty stage of a murder case constituted  
18 ineffective assistance of counsel. A new penalty hearing was  
19 mandated by the Court.  
20

21 The sentencer must also be able to consider and give effect  
22 to evidence of the background and character of the defendant in a  
23 capital case to ensure that the sentencer has treated the  
24 defendant as a uniquely individual human being and has made a  
25 reliable determination that death is the appropriate sentence.  
26

27 Penry v. Lynaugh, 492 U.S. 302 (1988).  
28

1           The failure to present important mitigating evidence in the  
2 penalty phase can be as devastating as a failure to present proof  
3 of innocence in the guilty phase. Mak v. Blodgett, 970 F.2d 614  
4 (9<sup>th</sup> Cir. 1992).

6           Evidence about the defendant's background and character is  
7 relevant because of the belief, long held by this society, that  
8 defendants who commit criminal acts that are attributable to a  
9 disadvantaged background, or to emotional and mental problems, may  
10 be less culpable than defendants who have no such excuse.  
11  
12 Boyde v. California, 494 U.S. 370 (1990).

13           Further, counsel's duty to investigate mitigating evidence is  
14 neither entirely removed nor substantially alleviated by his  
15 client's direction not to call particular witnesses to the stand.  
16 Furthermore, a lawyer who abandons investigation into mitigating  
17 evidence in a capital case at the direction of his client must at  
18 least have adequately informed his client of the potential  
19 consequences of that decision and must be assured that his client  
20 has made an informed and knowing judgment. Silva v. Woodward, 279  
21 F.3d 825 (9<sup>th</sup> Cir. 2002).

24           In this case, an evidentiary hearing needs to be held to  
25 determine the length of time spent with Petitioner advising him of  
26 the import of his decision and his competence to make such a  
27 critical decision in the case. The State continues to insist that  
28

1 Petitioner made a decision and counsel merely implemented that  
2 decision. The difficulty with the reasoning of the State is that  
3 Petitioner was not competent to make such a decision.

4 Thus, counsel abandoned their obligation to their client to  
5 continue to investigate mitigating circumstances and provide said  
6 evidence to the Court. The statements made by the sentencers  
7 demonstrate their inability to be adequately informed about the  
8 background and mental health issues surrounding Petitioner.  
9

10  
11 The sentencers had an obligation to ensure that they had  
12 enough information about Petitioner, his family background, mental  
13 health history and life to treat Petitioner as a unique human  
14 being and make a reliable determination that death was the  
15 appropriate sentence. The sentencers failed to do so. Thus, this  
16 Claim should proceed to an evidentiary hearing on the merits.  
17

18 GROUND TWENTY-THREE.

19 The position of the State appears to be that counsel was in a  
20 position to verify the competence of Petitioner. There is nothing  
21 in the record to support the proposition that trial counsel had  
22 any expertise which would qualify them as experts on the issue of  
23 competence. Additionally, counsel did not spend adequate time  
24 with their client prior to entry of plea to be able to state  
25 unequivocally that their client was competent. Counsel did have  
26 one report from one expert which indicated that their client was  
27  
28

1 clinically depressed. No further investigation was conducted by  
2 counsel to determine how that "clinically depressed" status of  
3 their client would affect his mentality.  
4

5 The record does not repel this Claim. The record supports  
6 this Claim. The fact that Petitioner advised the Court that he  
7 had taken medications virtually his entire adult life but had  
8 chosen this critical stage to decline medication should have set  
9 off alarm bells for every person involved in this case. Even the  
10 State should have requested proof that the ceasing of critical  
11 medications did not impair Petitioner's ability to make the  
12 decision to plead guilty to the death penalty.  
13

14 Dennis will testify to the reason that he stopped taking  
15 medications. Dennis will testify to the types of medications that  
16 he routinely took, the length of time that he had been prescribed  
17 said medications and their impact upon him. Expert witnesses will  
18 testify about the medications themselves and their impact upon the  
19 human body and mind. The jail staff will testify as to  
20 medications which were taken by Dennis, the dosage and when the  
21 termination of the medications occurred. Dr. Lynn will testify as  
22 to whether Dennis was under medication when his evaluation was  
23 completed.  
24

25  
26 The record supports this Claim, as will evidence to be  
27 presented at an evidentiary hearing. The motion to dismiss this  
28

1 Claim should be summarily dismissed by this Court.

2 GROUND TWENTY-FOUR.

3  
4 The Order Dismissing Appeal states as follows:

5 "The evidence shows that in December, 1983, Dennis had a  
6 personal relationship with a woman, "Bonnie," whose daughter,  
7 "Lana," was sixteen years old. Lana and Dennis had been  
8 involved in a dispute stemming from an incident when Dennis  
9 went on a "rampage" and kicked in the door of Bonnie's home  
10 while Lana and her siblings were present. A couple of days  
11 after this incident, Lana was at the home of a family friend.  
12 As the two were watching television and eating dinner, Dennis  
13 lit the home on fire. When Lana became aware of the fire,  
14 she contacted the police."

15 A review of the Order Dismissing Appeal demonstrates that the  
16 Nevada Supreme Court did not correctly interpret the testimony of  
17 Lana Miller in light of the trial court's ruling that a portion of  
18 the testimony had not been disclosed to the defense and could not  
19 be utilized against Petitioner. The Nevada Supreme Court must not  
20 rely upon suspect evidence or evidence that was not admitted at  
21 the trial stage. Dennis did not light the home on fire. Dennis  
22 lit the grass at the rear of the residence on fire. The home  
23 suffered minor charring as a result. There was very little  
24 damage. Dennis will testify that his motivation in doing such an  
25 act was to get Lana Miller out of the home of this person as he  
26 was not a "family friend." He was a predator. Since the only  
27 aggravators that were found by the panel included the prior felony  
28 convictions relating to this incident, it is critical that the

1 decision on death be made with a full understanding of the  
2 incident.

3 Counsel was ineffective for failing to bring forth the true  
4 fact setting and cross-examine this witness as to the lack of  
5 structural damage, the nature of this family friend and the  
6 motivation of Dennis. Counsel was ineffective for failing to  
7 present evidence to the Court to support both the mental state of  
8 Dennis at the time of this incident and his testimony regarding  
9 motivation. Silva v. Woodward, 279 F.3d 825 (9<sup>th</sup> Cir. 2002).

10 This Claim should proceed to an evidentiary hearing where said  
11 mitigating evidence may be properly presented to the Court. The  
12 State's motion to dismiss this Claim should be denied by the  
13 Court.  
14

15 GROUND TWENTY-FIVE  
16

17 The opposition to this Claim is supported by the legal  
18 authority found in Claim Three herein, as well as the Supplemental  
19 Petition. Thoroughly canvassing a person who is clinically  
20 depressed, deprived of proper medications, and operating with a  
21 death wish is not protection of that person's constitutional  
22 rights. There was no possible benefit in pleading guilty to the  
23 charge and facing the death penalty. This argument has been  
24 adequately covered in both this Opposition and the Supplement.  
25 The State's motion to dismiss this Claim should be summarily  
26  
27  
28

1 denied so that Petitioner may provide evidence to support his  
2 mental health problems, medication records, and lack of competence  
3 at the time of the entry of the guilty plea to this Court.  
4

5 In United States v. Brown, 117 F.3d 471 (1997), the Eleventh  
6 Circuit Court determined that misinformation given to a defendant  
7 made his guilty plea involuntary. This case is quite similar.  
8 Had Dennis been provided with proper medications, not been  
9 suffering from clinical depression, and been able to fully  
10 comprehend his legal position, he would not have pled guilty. His  
11 lack of ability to comprehend created a setting with  
12 misinformation and the subsequent guilty plea is involuntary.  
13

14 GROUND TWENTY-SIX.

15 As was seen by the Nevada Supreme Court, they conducted a  
16 partial proportionality review of the case. Unfortunately, due to  
17 the ineffective assistance of appellate counsel in the presented  
18 Opening Brief, the Nevada Supreme Court was not able to conduct an  
19 appropriate proportionality review with the true factors found in  
20 the case. Due to the limited statement of facts found in the  
21 Opening Brief in this case, the Nevada Supreme Court based its  
22 attempted proportionality review upon a lack of evidence.  
23 Appellate counsel admitted same when he petitioned the Nevada  
24 Supreme Court to reconsider its decision and stated that he had  
25 not provided an adequate statement of facts.  
26  
27  
28

1           The State summarily states that the Nevada Supreme Court does  
2 not hold proportionality review of death sentences, yet, just  
3 after the Dennis decision by the Nevada Supreme Court, the Court  
4 conducted a proportionality review in Servin v. State, 117 Nev.  
5 Adv. Op. No. 65, decided October 17, 2001, (\_\_\_ P.3d \_\_\_). Since  
6 the key contention in the Opening Brief is that the Court should  
7 conduct a proportionality review, failure to submit an appropriate  
8 statement of facts to facilitate the requested relief, constituted  
9 ineffective assistance of appellate counsel.  
10

11           The Claim should proceed to an evidentiary hearing.  
12 Appellate counsel should testify concerning his tactic in  
13 requesting a proportionality review and then failing to provide an  
14 adequate basis for the Nevada Supreme Court to strike the death  
15 penalty during such a review. There are ample facts which  
16 demonstrate this case is not a death penalty case. The State's  
17 Motion to Dismiss should be dismissed.  
18

19           Additionally, failure to conduct a proportionality review  
20 renders the death penalty unconstitutional. Petitioner believes  
21 that as death row inmates continue to be proven innocent by DNA  
22 evidence and other evidentiary mechanisms, the death penalty will  
23 be found to constitute cruel and unusual punishment due to the  
24 possibility of executing an innocent person. This will be an  
25 issue to watch in the next ten years!  
26  
27  
28

1 GROUND TWENTY-SEVEN.

2 The argument that Dennis was a serial killer was intended to  
3 incite the Court and was not a proper comment upon the evidence.  
4 This case involves cumulative acts of prosecutorial misconduct.  
5 It was misconduct, at its finest, for the prosecutor to argue to  
6 the three judge panel that Dennis was a serial killer. There was  
7 no evidence to support such a bald faced lie. United States v.  
8 Francis, 170 F.3d 546 (6<sup>th</sup> Cir. 1999). The actions of the  
9 district attorney before the three judge panel so infected the  
10 process with unfairness as to make the death determination of the  
11 panel suspect. Darden v. Wainwright, 477 U.S. 168, 181 (1986).  
12

13 For trial counsel and appellate counsel to fail to object and  
14 fail to litigate the serious issue of prosecutorial misconduct  
15 which they witnessed, both in the direct appeal and at the trial  
16 stage, constituted ineffective assistance of counsel. Dennis was  
17 deprived of his 6<sup>th</sup> and 14<sup>th</sup> Amendment rights to counsel.  
18

19 There was no evidence available to support an allegation that  
20 Dennis would kill again in prison. One of the key questions in a  
21 death penalty setting is whether imprisonment is appropriate as  
22 lesser but equally secure option. In this case, the three judge  
23 panel improperly gave weight to the comments of Dennis that he  
24 would rather die than be in prison for the rest of his life. The  
25 true issue was, is death necessary? The answer to that is simple.  
26  
27  
28

1 No.

2           Dennis made no threats to state witnesses, no threats to kill  
3 cops, no threats to escape, and no threats to others. Dennis  
4 clearly wanted himself to die in a state imposed suicide. Castillo  
5 v. State, 114 Nev. 271, 280, 956 P.2d 103, 109 (1998); Biondi v.  
6 State, 101 Nev. 252, 257, 699 P.2d 1062, 1065 (1985); Witter v.  
7 State, 112 Nev. 908, 921, 921 P.2d 886, 895 (1996). The statement  
8 to Dennis that he enjoyed killing was made during an illegally  
9 obtained statement to the police and should have been suppressed.  
10 Thus, the only proper evidence before the sentencers was that  
11 Dennis had thrived in the prison setting in the past (albeit many  
12 years ago), Dennis was not an escape risk and Dennis followed the  
13 rules of the prison system. There was no evidence to support the  
14 future dangerousness argument of labeling Dennis as a serial  
15 killer.  
16  
17  
18

19           In this case, the question of life imprisonment versus the  
20 death penalty was close. The only aggravators included felony  
21 convictions which were remote in time. The mitigators were  
22 serious. The actions of the State caused prejudice to Dennis in  
23 front of the three judge panel. There was not overwhelming  
24 evidence to support the return of a death verdict. Garner v.  
25 State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962). Thus, the  
26 prosecutorial misconduct issue is not harmless error and should  
27  
28

1 have been properly objected to and then argued on direct appeal.

2       The actions of the State constituted prosecutorial misconduct  
3 and should have been litigated properly by trial and appellate  
4 counsel. This Claim should proceed to an evidentiary hearing and  
5 the State's motion to dismiss should be denied. Appellate counsel  
6 had every right to raise this issue in spite of trial counsel's  
7 failure to object. The Nevada Supreme Court has held that where a  
8 life is at stake, the Court will consider the allegations of  
9 misconduct as if there had been compliance with the  
10 contemporaneous objection rule. Flanagan v. State, 104 Nev. 105,  
11 108, 754 P.2d 836, 837 (1988) overruled on other grounds by Moore  
12 v. Nevada, 503 U.S. 930 (1992) and Emmons v. State, 107 Nev. 53,  
13 61, 807 P.2d 718, 723 (1991). Thus, this matter is appropriately  
14 before the Court on this Petition.

15  
16  
17  
18 GROUND TWENTY-EIGHT.

19       The apparent reason that NRS 200.033(2) has been held to be  
20 constitutional is that it is an attempt by the judicial system to  
21 state that a person who has been convicted of a felony involving a  
22 threat of force or force upon another evinces a propensity toward  
23 violence and is relevant to determination of the appropriate  
24 sentence. Riley v. State, 107 Nev. 205, 808 P.2d 551, (1991).  
25 Yet, just as the proof of conviction is relevant, the staleness of  
26 the convictions utilized under NRS 200.033(2) should be relevant.  
27  
28

1 proportionality review. At the evidentiary hearing, it is the  
2 intention of Petitioner to have John Petty testify on this issue.  
3 Petitioner explained that the Opening Brief of this case,  
4 involving a death sentence, consisted of sixteen pages in length,  
5 five of which were argument.  
6

7 The State's Motion to Dismiss this Claim should be summarily  
8 dismissed by this Court and the Claim should proceed to an  
9 evidentiary hearing.  
10

11 SUMMARY

12 This is a case involving the ultimate sanction, death to Mr.  
13 Dennis. At this Court knows, DEATH IS DIFFERENT. The State's  
14 Motion to Dismiss should be dismissed by this Court in its  
15 entirety. Mr. Dennis is entitled to support all issues raised in  
16 his Petition and Supplemental Petition for Writ of Habeas Corpus  
17 (Post-Conviction) with competent evidence and is entitled to  
18 relief. It is the evidentiary hearing where Mr. Dennis is obliged  
19 to bring forth competent evidence to support his claims. He  
20 intends to do so. At this stage of the proceedings, Mr. Dennis  
21 has only the obligation of bringing forth his claims with  
22 particularity. Every attempt was made in the initial documents,  
23 which were lengthy and cited ample authority for each legal  
24 position, to insure that Mr. Dennis is able to exhaust each of his  
25 State habeas claims in a competent and professional manner. The  
26  
27  
28





FILED

02 MAY 29 PM 2:39

RONALD A. BRIGHT, JR.

P. Meacham

BY \_\_\_\_\_  
DEPUTY

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
7 IN AND FOR THE COUNTY OF WASHOE

8

\* \* \*

9

TERRY JESS DENNIS,

10

Petitioner,

11

v.

Case No. CR99P0611

12

THE STATE OF NEVADA,

Dept. No. 1

13

Respondent.

14

15

REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS  
PETITION FOR WRIT OF HABEAS CORPUS  
(POST-CONVICTION)

16

17

COMES NOW, the Respondent, by and through counsel, and  
18 hereby replies to petitioner's opposition to motion to dismiss  
19 petition for writ of habeas corpus (post-conviction) as follows:

20

Initially, petitioner observes that this Court "sits as  
21 a court of appeal in this matter." (Opposition, 3). Petitioner  
22 suggests this "Court is free to review and decide matters  
23 presented in the Petition for Writ of Habeas Corpus as any  
24 reviewing court would do." Id. Petitioner is wrong. This Court  
25 acts like any other trial court: it determines facts in the  
26 first instance. A reviewing court determines whether the facts

1 found by a trial court are supported by substantial evidence.  
2 See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994)  
3 ("Purely factual findings of an inferior tribunal regarding a  
4 claim of ineffective assistance are entitled to deference on  
5 subsequent review of that tribunal's decision."). This, of  
6 course, is to petitioner's advantage. If this Court were to  
7 review petitioner's claims as a reviewing court, then petitioner  
8 would be bound by the record as it now exists, and, as a matter  
9 of law, there would be no evidentiary hearing. Id.

10 The State only brings this out because petitioner is  
11 entitled to the effective assistance of counsel in his first  
12 habeas petition. See Crump v. Warden, 113 Nev. 293, 934 P.2d 247  
13 (1997). The State desires to ensure counsel is aware of certain  
14 first principles of habeas litigation.

15 ORIGINAL PETITION

16 Petitioner does not address the State's motion to  
17 dismiss the claims in the original petition. Accordingly, the  
18 court should dismiss them.

19 SUPPLEMENTAL PETITION

20 GROUND ONE

21 In response to the State's motion to dismiss,  
22 petitioner merely repeats his first claim that his counsel was  
23 ineffective by allowing petitioner to plead guilty. Petitioner  
24 fails to address the State's argument that counsel cannot force a  
25 client to enter a specific plea. See Jones v. State, 110 Nev.  
26 730, 737, 877 P.2d 1052, 1056 (1994). It is the defendant's

1 right to decide how he will plead. Since the record demonstrates  
2 that petitioner was competent to plead guilty, this claim should  
3 be dismissed.

4 GROUND TWO

5 Here, petitioner claims his counsel should have  
6 challenged petitioner's prior felonies that the three-judge panel  
7 used as aggravators in imposing a sentence of death. Although  
8 the Nevada Supreme Court ruled that the prior convictions were  
9 valid aggravators, petitioner now argues that the law of the case  
10 doctrine is not applicable because "the standard of review is  
11 simply different." (Opposition, 12). Petitioner, however, does  
12 not explain why there is a different standard of review, what  
13 that standard is, and why the law of the case doctrine does not  
14 apply. To the extent petitioner suggests the Nevada Supreme  
15 Court reviewed petitioner's case for clear error, he is mistaken.  
16 See NRS 177.055(2) (Supreme Court conducts independent review of  
17 death sentences.)

18 Petitioner does argue that "manifest injustice" may  
19 overcome the law of the case. Petitioner fails to show any  
20 manifest injustice. He merely argues that the aggravators are  
21 invalid under Haynes v. State, 103 Nev. 309, 739 P.2d 497 (1987),  
22 and Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997).  
23 However, petitioner advanced the exact same argument on direct  
24 appeal, which the Nevada Supreme Court rejected. See Dennis v.  
25 State, 116 Nev. \_\_\_, \_\_\_, 13 P.3d 434, 442 (2000).

26 Petitioner also argues, citing Petrocelli v. Angelone,

1 248 F.3d 877 (9th Cir. 2001), that "Nevada courts are less strict  
2 in applying procedural rules to constitutional claims in capital  
3 cases than in non-capital cases." (Opposition, 12). The Nevada  
4 Supreme Court recently rejected this very argument. See  
5 Pellegrini v. State, 117 Nev. Adv. Op. No. 71 (Nov. 15, 2001)  
6 (rejecting the Ninth Circuit's assertion that Nevada has not been  
7 consistent in applying procedural bars). It is clear that the  
8 law of the case forecloses petitioner from rearguing whether his  
9 prior convictions were valid aggravators when he does not allege  
10 any different facts. This claim must be dismissed.

11 GROUND THREE

12 Petitioner asserts in this claim he was not competent  
13 to plead guilty. The record repels this claim. In response,  
14 petitioner merely argues "the record embraces a lack of  
15 competence." (Opposition 14). Thus, petitioner has conceded  
16 that the issue may be entirely resolved by reference to the  
17 record. In that regard, the plea canvass (covering some 55  
18 pages) demonstrates that petitioner understood the charge against  
19 him and was capable of assisting counsel. See NRS 178.400(2)  
20 (defendant is incompetent when he does not understand the  
21 nature of the charge against him and as a result is unable to  
22 assist counsel in defense of the charges). This Court also noted  
23 petitioner's competency at the penalty hearing (Penalty Hearing  
24 Transcript, 56). A physician had also found petitioner  
25 competent.

26 Significantly, petitioner does not specifically

1 identify any expert who will testify that petitioner did not  
2 understand the charges against him, and that as a result of such  
3 inability, he was unable to assist his counsel in defense of the  
4 charges. This pleading defect is fatal to petitioner's claim of  
5 incompetence. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d  
6 222, 225 (1984) (post-conviction motion to withdraw guilty plea  
7 dismissed without evidentiary hearing because appellant's claim  
8 that certain witnesses could establish his innocence "was not  
9 accompanied by the witness' names or descriptions of their  
10 intended testimony."). Petitioner's conclusory allegation that  
11 he was not competent is insufficient. Pangallo, supra. Thus,  
12 for this additional reason, this claim should be dismissed.

13 GROUND FOUR

14 If the court concludes that the record demonstrates  
15 petitioner was competent when he pled guilty and that petitioner  
16 has not pled specific facts, instead of conclusory allegations,  
17 that petitioner did not understand the nature of the charge and  
18 was unable to aid his counsel, to which a specific expert will  
19 testify, then this ground--that counsel permitted petitioner to  
20 make certain critical decisions--should be dismissed as well.

21 GROUND FIVE

22 In this claim, petitioner originally asserted he did  
23 not premeditate or deliberate the killing of the victim in this  
24 case. The three-judge panel and the Supreme Court declared  
25 otherwise, which is the law of the case. Now, petitioner changes  
26 the claim, and asserts that had counsel moved to suppress

1 petitioner's statements, there would have been no remaining  
2 evidence of premeditation or deliberation.

3           Once petitioner pled guilty, however, he waived all  
4 defenses to the charges. See Warden v. Lyons, 100 Nev. 430, 683  
5 P.2d 504 (1984) (no contest plea waives constitutional errors  
6 occurring before entry of plea); cf. United States v. Broce, 488  
7 U.S. 563, 569 (1989) ("A plea of guilty and the ensuing conviction  
8 comprehend all of the factual and legal elements necessary to  
9 sustain a binding, final judgment of guilt and a lawful  
10 sentence."); Giese v. Chief of Police, 87 Nev. 522, 525, 489 P.2d  
11 1163, 1164 (1971) ("The effect of the plea of guilty, generally  
12 speaking, is a record admission of whatever, is well charged in  
13 an indictment." (quoting Ex parte Dickson, 36 Nev. 94, 101, 133  
14 P.393, 396 (1913))). Thus, since petitioner entered a valid  
15 guilty plea, counsel, as a matter of law, thereafter acted  
16 reasonably in not pursuing defenses on behalf of petitioner.

17 GROUND SIX

18           Petitioner submits his prior felony convictions cannot  
19 be used as separate aggravators. The Nevada Supreme Court ruled  
20 otherwise. That ruling is now the law of the case. The court  
21 ruled the convictions were proper aggravators after the court  
22 performed its independent review of the death sentence. See NRS  
23 177.055(2). Moreover, petitioner cites no legal authority that  
24 the convictions were not properly used as aggravators. Thus, any  
25 argument by trial or appellate counsel to the contrary would have  
26 been ineffectual. This claim must be dismissed.

1 GROUND SEVEN

2           Petitioner asserts his counsel assisted him in his  
3 desire to die. If that were true, there still is no legal error:  
4 given that petitioner was competent it was his decision whether  
5 to plead guilty or to go to trial. Counsel had no duty to block  
6 the doors of the courtroom to prevent petitioner from deciding  
7 his own fate.

8           In any event, the record clearly shows that both  
9 counsel and the court tried to dissuade petitioner from purposely  
10 seeking the death penalty. Petitioner cannot claim otherwise.  
11 He merely asserts in conclusory fashion that because he pled  
12 guilty without the benefit of a plea bargain and the court  
13 accepted the plea, both counsel and the court improperly  
14 considered petitioner's plea to die. The court should reject  
15 this argument for several reasons. First, petitioner's argument  
16 is a non sequitur. Merely because petitioner pled guilty  
17 pursuant to his own rational choice does not mean that the court  
18 or counsel improperly used petitioner's wish to die against him.  
19 If that were true, then every guilty plea would be defective,  
20 where a defendant is represented by counsel and a court accepts a  
21 plea. Second, the record clearly repels the idea that either the  
22 court or counsel improperly considered petitioner's desire to  
23 die. The record shows both the court and counsel did not agree  
24 with petitioner's strategy and told petitioner exactly that.  
25 Finally, petitioner does not provide any specific assertions,  
26 beyond the record, to support his otherwise conclusory assertion.

1 This claim must be dismissed.

2 GROUNDS EIGHT AND NINE

3 Here, petitioner argues that the belt was not a deadly  
4 weapon. The State has proved that pursuant to NRS 193.165 a belt  
5 can be used as a deadly weapon. Petitioner does not traverse the  
6 State's authority but merely repeats his position. He claims  
7 that a belt is not a deadly weapon under the "inherently  
8 dangerous" test. As the State has explained, that test is no  
9 longer applicable. Counsel has a duty of candor to recognize  
10 controlling authority. SCR 170.172. This claim must be  
11 dismissed.

12 GROUND TEN

13 In this claim, petitioner asserts his counsel failed to  
14 properly investigate and prepare for trial. Of course, counsel  
15 attempted to do more for petitioner, but he refused. The record  
16 is uncontradicted in this respect. Further, petitioner fails to  
17 specifically assert what counsel should have done that would have  
18 led to a different result. The claim must be dismissed.

19 GROUND ELEVEN

20 Petitioner claims his counsel should have suppressed  
21 the statements he made to police officers. However, once  
22 petitioner entered a valid guilty plea, he waived any challenge  
23 to alleged constitutional errors. See Webb v. State, 91 Nev.  
24 469, 470, 538 P.2d 164, 165 (1975). In addition, even if  
25 petitioner's statement was taken in violation of Miranda, the  
26 statement would still be admissible at sentencing. See Del

1 Vecchio v. Illinois Dept. of Corrections, 31 F.3d 1363, 1388 (7th  
2 Cir. 1994). Petitioner does not dispute the State's authority.  
3 Accordingly, this claim must be dismissed.

4 GROUND TWELVE

5 Petitioner asserts counsel should have moved to redact  
6 his admission that he served six months in jail for a spousal  
7 battery conviction. He asserts that under United States v.  
8 Akins, 276 F.3d 1141 (9th Cir. 2002), the State should have  
9 produced evidence of the conviction. Petitioner is wrong. Under  
10 Akins, proof of the constitutionality of a prior conviction was  
11 discussed because the federal statute at issue made a prior  
12 conviction an element of the crime and the lack of a proper  
13 conviction a defense. This is clearly not the case here. The  
14 evidence of the spousal battery in this case was admissible under  
15 NRS 175.552(3) as "any other matter which the court deems  
16 relevant to sentence, whether or not the evidence is ordinarily  
17 admissible." In any event, petitioner does not have to worry  
18 about the reliability of the conviction because he was the one  
19 who raised the issue of the conviction.

20 As to whether some other person died in petitioner's  
21 residence, petitioner suffered no harm from the evidence. This  
22 claim must be dismissed.

23 GROUND THIRTEEN

24 Petitioner claims his counsel should have presented  
25 mitigating evidence. As the State has proved, petitioner waived  
26 his right to present such evidence. In addition, petitioner has

1 never detailed the nature of such evidence. Accordingly, this  
2 claim should be dismissed.

3 GROUND FOURTEEN

4 In this claim, petitioner claims the State could not  
5 have proved the corpus delicti of the crime i.e., that a person  
6 had been murdered. Instead of responding to the State's response  
7 that there was legal evidence of the corpus delicti, petitioner  
8 merely repeats his position and claims that the State has missed  
9 the point of the argument. Apparently, petitioner either did not  
10 read the State's response or failed to understand it.

11 As the State explained, there was evidence from the  
12 coroner that the victim "had died between three and seven days  
13 earlier as a result of asphyxia due to neck compression, most  
14 likely by strangulation." Dennis, 13 P.2d at 436. This is  
15 sufficient evidence, without reference to petitioner's  
16 statements, by which one could easily conclude that the victim  
17 had died as a result of first degree murder. Such evidence  
18 therefore satisfies the corpus delicti rule. This claim must be  
19 dismissed.

20 GROUND FIFTEEN

21 In this claim, petitioner asserts his counsel should  
22 have cross-examined Lana Miller about the fire petitioner set to  
23 the home Ms. Miller was in. The State explained that this  
24 assertion should be dismissed because it failed to reveal any  
25 prejudice. In other words, petitioner never asserted that Ms.  
26 Miller, under cross-examination, would have testified that

1 petitioner burned the house to protect Ms. Miller. The failure  
2 of a habeas claim to demonstrate prejudice justifies the  
3 dismissal of the claim. See Hill v. Lockhart, supra. Notably,  
4 petitioner does not address the State's contention. Accordingly,  
5 the claim should be dismissed.

6 GROUND SIXTEEN

7 In this claim, petitioner asserts his counsel should  
8 have hired various experts. The State objects because petitioner  
9 has never revealed the testimony that the alleged experts would  
10 have provided. Petitioner basically responds by asserting that  
11 he is not required to outline such testimony. He is wrong. See  
12 Hargrove, supra. A habeas petition must set forth facts that, if  
13 true, state a claim for relief. Here, petitioner has made  
14 conclusory assertions that experts would provide testimony  
15 relative to petitioner's mental health. However, petitioner  
16 cannot name one expert who will testify that petitioner was not  
17 competent, i.e., he did not understand the nature of the charge,  
18 and as a result of that inability, he was unable to assist  
19 counsel. This claim must be dismissed.

20 GROUND SEVENTEEN

21 This is a curious claim. Petitioner alleges a conflict  
22 because of the "appearance that the client was actually following  
23 the advice of counsel in seeking a death sentence." This  
24 assertion is frivolous. The record is clear. No reasonable  
25 person can misunderstand the record: there was no question  
26 whether petitioner was following, either expressly or by

1 appearance, his counsel. He was not. To suggest otherwise is to  
2 deceive the court, ignore reality, and simply argue for the sake  
3 of achieving a certain result. It is curious to suggest on the  
4 one hand that counsel should do everything to save her client's  
5 life, and then, on the other hand, when she actually does that,  
6 and the client then refuses counsel's help, to argue that counsel  
7 has then prejudiced her client. This claim is frivolous and must  
8 be dismissed. It is apparent that petitioner still labors under  
9 a misconception about the nature of the attorney/client  
10 relationship, by believing that counsel has complete control  
11 about how to resolve a case. This is not the law; this claim  
12 must be dismissed.

13 GROUND EIGHTEEN

14 Petitioner argues the collective failures of counsel  
15 deprived him of the effective assistance of counsel. Since  
16 petitioner has failed to assert any claim worthy of a hearing,  
17 this claim must be dismissed as well.

18 GROUND NINETEEN

19 Petitioner asserts three-judge panels are unconsti-  
20 tutional. The law in Nevada is otherwise. Petitioner does not  
21 dispute this, but argues the issue is under consideration by the  
22 U.S. Supreme Court. That may be true, but the law currently  
23 rejects petitioner's position as it existed at trial and on  
24 appeal; accordingly, the claim should be dismissed. If the law  
25 changes in the future, petitioner can address the change at that  
26 time.

1 GROUND TWENTY

2           Petitioner asserts that because the issue of whether  
3 Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) applies to this  
4 case is before the United States Supreme Court, the claim should  
5 go forward. The law, however, as it currently stands, is against  
6 petitioner. This claim must be dismissed. If a court waited to  
7 see if the law might change in the future, then no court would be  
8 able to resolve any of the cases before it.

9 GROUND TWENTY-ONE

10           Petitioner claims he was not competent when he murdered  
11 the victim. He alleges the record clearly shows this. However,  
12 if the record clearly shows this, then there is no need for an  
13 evidentiary hearing: the court can decide the issue now on the  
14 record before it.

15           Petitioner also fails to identify his experts and their  
16 intended testimony. He argues he is not required to provide  
17 witness statements. He is wrong. See Hargrove. The reason a  
18 habeas petitioner must provide the intended testimony of his  
19 witnesses is that he must demonstrate prejudice, i.e., that he is  
20 entitled to relief from the face of his petition, if one assumes  
21 the truth of his assertions. See Lockhart. A petitioner cannot  
22 demonstrate such prejudice without specifically detailing the  
23 evidence he will present. Otherwise, there is no need for an  
24 evidentiary hearing. Because petitioner obstinately refuses to  
25 abide by Hargrove, this claim must be dismissed.

26 / / /

1 GROUND TWENTY-TWO

2           Petitioner makes various assertions in this claim. The  
3 State responded to the claim, but petitioner completely abandons  
4 his original assertion. Petitioner now asserts his counsel  
5 failed to produce other mitigating evidence. Petitioner does not  
6 identify this evidence. Accordingly, this claim must be  
7 dismissed.

8 GROUND TWENTY-THREE

9           Petitioner argues the record supports his claim that he  
10 was deprived of medication and that he was therefore unable to  
11 assist counsel. If this is true, then the court should  
12 immediately grant relief to petitioner. However, as the State  
13 has demonstrated, the record repels this claim. Moreover,  
14 petitioner still fails, as he has throughout his entire petition,  
15 to specify the testimony he will produce at a hearing to prove  
16 his claim.

17 GROUND TWENTY-FOUR

18           In this claim, petitioner asserts the Nevada Supreme  
19 Court improperly relied on evidence that the three-judge panel  
20 excluded. The State has proved that the claim is utterly  
21 frivolous. Petitioner does not dispute the State's position, but  
22 instead now alleges a completely new theory. Petitioner's  
23 pleading practice should not detain the court from summarily  
24 dismissing this baseless allegation.

25 GROUND TWENTY-FIVE

26           This claim involved an allegation that the Nevada

1 Supreme Court failed to review petitioner's waiver of his right  
2 to trial. The State has proved that this assertion is frivolous.  
3 Petitioner offers no response and has thus abandoned the  
4 argument.

5           Petitioner also asserts there was no adequate  
6 competency hearing. The record repels this assertion. A  
7 physician found petitioner competent. Notably, petitioner has  
8 never pleaded he will be able to prove through the testimony of  
9 specifically identified experts that he did not understand the  
10 nature of the charges and was unable to assist counsel. This  
11 claim must be dismissed.

12 GROUND TWENTY-SIX

13           Petitioner claims the Supreme Court must conduct  
14 proportionality review. This is an erroneous statement of law.  
15 See Dennis, 13 P.3d at 440 ("We have recognized that pursuant to  
16 the 1985 amendment to NRS 177.055(2)(d), this court no longer  
17 conducts proportionality review of death sentences.").  
18 Petitioner misrepresents that the Supreme Court conducted a  
19 proportionality review in Servin v. State, 117 Nev. Adv. Op. No.  
20 65 (Oct. 17, 2001). This is a false statement. The court in  
21 Servin held just the opposite: "NRS 177.055(2)(d) no longer  
22 requires proportionality review as part of the excessiveness  
23 analysis. Furthermore, this court has specifically declined to  
24 engage in a proportionality review of death sentences." Id.  
25 Counsel for petitioner has a duty of candor to the court in  
26 referencing the law in the State of Nevada.

1 GROUND TWENTY-SEVEN

2           Petitioner continues to assert that the prosecutor  
3 submitted "a bald face lie" when he told the three-judge panel  
4 that petitioner was a serial killer. The State has shown that  
5 the prosecutor never made such a statement. Accordingly, the  
6 only lie is counsel's continued persistence in asserting things  
7 that she should know are false. Petitioner also raises other  
8 comments outside the scope of his petition that are irrelevant to  
9 the present motion to dismiss. This claim must be dismissed.

10 GROUND TWENTY-EIGHT

11           Petitioner asserts that NRS 200.033(2) is  
12 unconstitutional. The Nevada Supreme Court has declared  
13 otherwise. See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503,  
14 509 (1985). This claim must be dismissed.

15 GROUND TWENTY-NINE

16           Petitioner asserts his appellate counsel failed to  
17 recite to the record to adequately support proportionality  
18 review. There is no right to proportionality review. This claim  
19 must be dismissed.

20           For the foregoing reasons, the State respectfully

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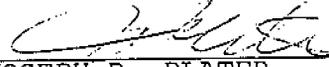
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26 / / /

1 requests the court to dismiss the petition for writ of habeas  
2 corpus (post-conviction) without an evidentiary hearing.

3 DATED: May 29, 2002.

4 RICHARD A. GAMMICK  
5 District Attorney

6 By   
7 JOSEPH R. PLATER  
8 Appellate Deputy

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CERTIFICATE OF MAILING

Pursuant to NRCF 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Karla K. Butko, Esq.  
1030 Holcomb Ave.  
Reno, NV 89502

DATED: May 29, 2002

*Shelly Huchel*



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6 (775) 786-7118  
7 Attorney for Petitioner

25 11:52  
TALOR  
M. Lopez

8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
9 IN AND FOR THE COUNTY OF WASHOE

10 TERRY JESS DENNIS,

11 Petitioner,

12 vs.

Case No. CR99-P-0611

13 E.K. McDANIEL, Warden,  
14 Nevada State Prison, Ely;  
15 FRANKIE SUE DEL PAPA,  
16 Attorney General of the  
17 State of Nevada,

Dept. No. 1

18 Respondents.

19 NOTICE OF UNITED STATES SUPREME COURT DECISION ON CASE CITED IN  
20 SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS  
21 (POST-CONVICTION)

22 This update is filed herein to advise this Court of the  
23 decision of the United States Supreme Court on the Case entitled,  
24 "Ring v. Arizona". A copy of said decision is attached hereto  
25 for the Court's review in this matter.

26 Dated this 26<sup>th</sup> day of July, 2002.

27 LAW OFFICES OF KARLA K. BUTKO  
28 1030 Holcomb Avenue  
Reno, Nevada, 89502  
(775) 786-7118  
State Bar No. 3307

By: Karla K. Butko

KARLA K. BUTKO  
COUNSEL FOR PETITIONER

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# RING v. ARIZONA

certiorari to the supreme court of arizona

No. 01488. Argued April 22, 2002 Decided June 24, 2002

At petitioner Rings Arizona trial for murder and related offenses, the jury deadlocked on premeditated murder, but found Ring guilty of felony murder occurring in the course of armed robbery. Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made by a judge conducting a separate sentencing hearing. The judge at that stage must determine the existence or nonexistence of statutorily enumerated aggravating circumstances and any mitigating circumstances. The death sentence may be imposed only if the judge finds at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. Following such a hearing, Rings trial judge sentenced him to death. Because the jury had convicted Ring of felony murder, not premeditated murder, Ring would be eligible for the death penalty only if he was, *inter alia*, the victims actual killer. See *Enmund v. Florida*, 458 U.S. 782. Citing accomplice testimony at the sentencing hearing, the judge found that Ring was the killer. The judge then found two aggravating factors, one of them, that the offense was committed for pecuniary gain, as well as one mitigating factor, Rings minimal criminal record, and ruled that the latter did not call for leniency.

On appeal, Ring argued that Arizonas capital sentencing scheme violates the Sixth Amendments jury trial guarantee by entrusting to a judge the finding of a fact raising the defendants maximum penalty. See *Jones v. United States*, 526 U.S. 227; *Apprendi v. New Jersey*, 530 U.S. 466. The State responded that this Court had upheld Arizonas system in *Walton v. Arizona*, 497 U.S. 639, 649, and had stated in *Apprendi* that *Walton* remained good law. The Arizona Supreme Court observed that *Apprendi* and *Jones* cast doubt on *Waltons* continued viability and found that the *Apprendi* majoritys interpretation of Arizona law, 530 U.S., at 496497, was wanting. Justice OConnors *Apprendi* dissent, *id.*, at 538, the Arizona court noted, correctly described how capital sentencing works in that State: A defendant cannot receive a death sentence unless the judge makes the factual determination that a statutory aggravating factor exists. Nevertheless, recognizing that it was bound by the Supremacy Clause to apply *Walton*, a decision this Court had not overruled, the Arizona court rejected Rings

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*Walton*, in relevant part, cannot survive *Apprendis* reasoning. In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's ruling that, because Arizona law specifies death or life imprisonment as the only sentencing options for the first-degree murder of which Ring was convicted, he was sentenced within the range of punishment authorized by the jury verdict. This argument overlooks *Apprendis* instruction that the relevant inquiry is one of effect, not form. 530 U.S., at 494. In effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the guilty verdict. *Ibid*. The Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense, *id.*, at 541 (*O'Connor, J.*, dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a meaningless and formalistic rule of statutory drafting. See *id.*, at 541. Arizona's argument based on the *Walton* distinction between an offenses elements and sentencing factors is rendered untenable by *Apprendis* repeated instruction that the characterization of a fact or circumstance as an element or a sentencing factor is not determinative of the question who decides, judge or jury. See, e.g., 530 U.S., at 492. Arizona further urges that aggravating circumstances necessary to trigger a death sentence may nonetheless be reserved for judicial determination because death is different: States have constructed elaborate sentencing procedures in death cases because of constraints this Court has said the Eighth Amendment places on capital sentencing, see, e.g., *id.*, at 522-523 (*Thomas, J.*, concurring). Apart from the Eighth Amendment provenance of aggravating factors, however, Arizona presents no specific reason for excepting capital defendants from the constitutional protections extended to defendants generally, and none is readily apparent. *Id.*, at 539 (*O'Connor, J.*, dissenting). In various settings, the Court has interpreted the Constitution to require the addition of an element or elements to the definition of a crime in order to narrow its scope. See, e.g., *United States v. Lopez*, 514 U.S. 549, 561-562. If a legislature responded to such a decision by adding the element the Court held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. There is no reason to differentiate capital crimes from all others in this regard. Arizona's suggestion that judicial authority over the finding of aggravating factors may be a better way to guarantee against the arbitrary imposition of the death penalty is unpersuasive. The Sixth Amendment jury trial right does not turn on the relative rationality, fairness, or efficiency of potential factfinders. *Apprendi*, 530 U.S., at 498 (*Scalia, J.*, concurring). In any event, the superiority of judicial factfinding in capital cases is far from evident, given that the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury. Although *stare decisis* is of fundamental importance to the rule of law, this Court has overruled prior decisions where, as here, the necessity and propriety of doing so has been established. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172. Pp.1723.

200 Ariz. 267, 25 P.3d 1139, reversed and remanded.

*Ginsburg, J.*, delivered the opinion of the Court, in which *Stevens, Scalia, Kennedy, Souter*, and *Thomas, JJ.*, joined. *Scalia, J.*, filed a concurring opinion, in which *Thomas, J.*, joined. *Kennedy, J.*, filed a concurring opinion. *Breyer, J.*, filed an opinion concurring in the judgment. *O'Connor, J.*, filed a dissenting opinion, in which *Rehnquist, C.J.*, joined.

---

## TIMOTHY STUART RING, PETITIONER v. ARIZONA

on writ of certiorari to the supreme court  
of arizona

[June 24, 2002]

*Justice Ginsburg* delivered the opinion of the Court.

This case concerns the Sixth Amendment right to a jury trial in capital prosecutions. In Arizona, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty.

In *Walton v. Arizona*, 497 U.S. 639 (1990), this Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as element[s] of the offense of capital murder. *Id.*, at 649. Ten years later, however, we decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that the Sixth Amendment does not permit a defendant to be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. *Id.*, at 483. This prescription governs, *Apprendi* determined, even if the State characterizes the additional findings made by the judge as sentencing factor[s]. *Id.*, at 492.

*Apprendi's* reasoning is irreconcilable with *Walton's* holding in this regard, and today we overrule *Walton* in relevant part. Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

## I

At the trial of petitioner Timothy Ring for murder, armed robbery, and related charges, the prosecutor presented evidence sufficient to permit the jury to find the facts here recounted. On November 28, 1994, a Wells Fargo armored van pulled up to the Dillard's department store at Arrowhead Mall in Glendale, Arizona. Tr. 57, 6061 (Nov. 14, 1996). Courier Dave Moss left the van to pick up money inside the store. *Id.*, at 61, 7374. When he returned, the van, and its driver, John Magoch, were gone. *Id.*, at 6162.

Later that day, Maricopa County Sheriff's Deputies found the van's doors locked and its engine running in the parking lot of a church in Sun City, Arizona. *Id.*, at 99100 (Nov. 13, 1996). Inside the vehicle they found Magoch, dead from a single gunshot to the head. *Id.*, at 101. According to Wells Fargo records, more than \$562,000 in cash and \$271,000 in checks were missing from the van. *Id.*, at 10 (Nov. 18, 1996).

Prompted by an informant's tip, Glendale police sought to determine whether Ring and his friend James Greenham were involved in the robbery. The police investigation revealed that the two had made several expensive cash purchases in December 1994 and early 1995. *E.g., id.*, at 153156 (Nov. 14, 1996); *id.*, at 9094 (Nov. 21, 1996). Wiretaps were then placed on the telephones of Ring, Greenham, and a third suspect, William Ferguson. *Id.*, at 1921 (Nov. 18, 1996).

ER 1419

In one recorded phone conversation, Ring told Ferguson that Ring might cu[t] off Greenham because [h]es too much of a risk: Greenham had indiscreetly flaunted a new truck in front of his ex-wife. States Exh. 49A, pp. 1112. Ring said he could cut off his associate because he held both [Greenhams] and mine. *Id.*, at 11. The police engineered a local news broadcast about the robbery investigation; they included in the account several intentional inaccuracies. Tr. 35, 1314 (Nov. 19, 1996). On hearing the broadcast report, Ring left a message on Greenhams answering machine to remind me to talk to you tomorrow and tell you about what was on the news tonight. Very important, and also fairly good. States Exh. 55A, p. 2.

After a detective left a note on Greenhams door asking him to call, Tr. 115118 (Nov. 18, 1996), Ring told Ferguson that he was puzzled by the attention the police trained on Greenham. [H]is house is clean, Ring said; [m]ine, on the other hand, contains a very large bag. States Exh. 70A, p. 7.

On February 14, 1995, police furnished a staged reenactment of the robbery to the local news, and again included deliberate inaccuracies. Tr. 5 (Nov. 19, 1996). Ferguson told Ring that he laughed when he saw the broadcast, and Ring called it humorous. States Exh. 80A, p. 3. Ferguson said he was not real worried at all now; Ring, however, said he was slightly concern[ed] about the possibility that the police might eventually ask for hair samples. *Id.*, at 34.

Two days later, the police executed a search warrant at Rings house, discovering a duffel bag in his garage containing more than \$271,000 in cash. Tr. 107108, 111, 125 (Nov. 20, 1996). They also found a note with the number 575,995 on it, followed by the word splits and the letters F, Y, and T. *Id.*, at 127130. The prosecution asserted that F was Ferguson, Y was Yoda (Greenhams nickname), and T was Timothy Ring. *Id.*, at 42 (Dec. 5, 1996).

Testifying in his own defense, Ring said the money seized at his house was startup capital for a construction company he and Greenham were planning to form. *Id.*, at 1011 (Dec. 3, 1996). Ring testified that he made his share of the money as a confidential informant for the Federal Bureau of Investigation and as a bail bondsman and gunsmith. *Id.*, at 162, 166167, 180 (Dec. 2, 1996). But an FBI agent testified that Ring had been paid only \$458, *id.*, at 47 (Nov. 20, 1996), and other evidence showed that Ring had made no more than \$8,800 as a bail bondsman, *id.*, at 4851 (Nov. 21, 1996); *id.*, at 21 (Nov. 25, 1996).

The trial judge instructed the jury on alternative charges of premeditated murder and felony murder. The jury deadlocked on premeditated murder, with 6 of 12 jurors voting to acquit, but convicted Ring of of felony murder occurring in the course of armed robbery. See Ariz. Rev. Stat. Ann. 131105(A) and (B) (West 2001) (A person commits first degree murder if [a]cting either alone or with one or more other persons the person commits or attempts to commit [one of several enumerated felonies] and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person. Homicide, as prescribed in [this provision] requires no specific mental state other than what is required for the commission of any of the enumerated felonies.).

As later summed up by the Arizona Supreme Court, the evidence admitted at trial failed to prove, beyond a reasonable doubt, that [Ring] was a major participant in the armed robbery or that he actually murdered Magoch. 200 Ariz. 267, 280, 25 P.3d 1139, 1152 (2001). Although clear evidence connected Ring to the robbery's proceeds, nothing submitted at trial put him at the scene of the robbery. See *ibid.* Furthermore, [f]or all we know from the trial evidence, the Arizona court stated, [Ring] did not participate in, plan, or even expect the killing. This lack of evidence no doubt explains why the jury found [Ring] guilty of felony, but not premeditated, murder. *Ibid.*

744

Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made. The States first-degree murder statute prescribes that the offense is punishable by death or life imprisonment as provided by 13703. Ariz. Rev. Stat. Ann. 131105(C) (West 2001). The cross-referenced section, 13703, directs the judge who presided at trial to conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances for the purpose of determining the sentence to be imposed. 13703(C) (West Supp. 2001). The statute further instructs: The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state. *Ibid.*

At the conclusion of the sentencing hearing, the judge is to determine the presence or absence of the enumerated aggravating circumstances<sup>1</sup> and any mitigating circumstances.<sup>2</sup> The States law authorizes the judge to sentence the defendant to death only if there is at least one aggravating circumstance and there are no mitigating circumstances sufficiently substantial to call for leniency. 13703(F).

Between Rings trial and sentencing hearing, Greenham pleaded guilty to second-degree murder and armed robbery. He stipulated to a 27 year sentence and agreed to cooperate with the prosecution in the cases against Ring and Ferguson. Tr. 3537 (Oct. 9, 1997).

Called by the prosecution at Rings sentencing hearing, Greenham testified that he, Ring, and Ferguson had been planning the robbery for several weeks before it occurred. According to Greenham, Ring had I guess taken the role as leader because he laid out all the tactics. *Id.*, at 39. On the day of the robbery, Greenham said, the three watched the armored van pull up to the mall. *Id.*, at 45. When Magoch opened the door to smoke a cigarette, Ring shot him with a rifle equipped with a homemade silencer. *Id.*, at 42, 44-45. Greenham then pushed Magochs body aside and drove the van away. *Id.*, at 45. At Rings direction, Greenham drove to the church parking lot, where he and Ring transferred the money to Rings truck. *Id.*, at 46, 48. Later, Greenham recalled, as the three robbers were dividing up the money, Ring upbraided him and Ferguson for forgetting to congratulate [Ring] on [his] shot. *Id.*, at 60.

On cross-examination, Greenham acknowledged having previously told Rings counsel that Ring had nothing to do with the planning or execution of the robbery. *Id.*, at 85-87. Greenham explained that he had made that prior statement only because Ring had threatened his life. *Id.*, at 87. Greenham also acknowledged that he was now testifying against Ring as pay back for the threats and for Rings interference in Greenhams relationship with Greenhams ex-wife. *Id.*, at 90-92.

On October 29, 1997, the trial judge entered his Special Verdict sentencing Ring to death. Because Ring was convicted of felony murder, not premeditated murder, the judge recognized that Ring was eligible for the death penalty only if he was Magochs actual killer or if he was a major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life. App. to Pet. for Cert. 46a47a; see *Enmund v. Florida*, 458 U.S. 782 (1982) (Eighth Amendment requires finding that felony-murder defendant killed or attempted to kill); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (qualifying *Enmund*, and holding that Eighth Amendment permits execution of felony-murder defendant, who did not kill or attempt to kill, but who was a major participa[nt] in the felony committed and who demonstrated reckless indifference to human life).

Citing Greenhams testimony at the sentencing hearing, the judge concluded that Ring is the one who shot and killed Mr. Magoch. App. to Pet. for Cert. 47a. The judge also found that Ring was a major participant in the robbery and that armed robbery is unquestionably a crime which carries with it a grave risk of death. *Ibid.*

The judge then turned to the determination of aggravating and mitigating circumstances. See 13703. He found two aggravating factors. First, the judge determined that Ring committed the offense in expectation of receiving something of pecuniary value, as described in 13703; [t]aking the cash from the armored car was the motive and reason for Mr. Magochs murder and not just the result. App. to Pet. for Cert. 49a. Second, the judge found that the offense was committed in an especially heinous, cruel or depraved manner. *Ibid*. In support of this finding, he cited Rings comment, as reported by Greenham at the sentencing hearing, expressing pride in his marksmanship. *Id.*, at 49a50a. The judge found one nonstatutory mitigating factor: Rings minimal criminal record. *Id.*, at 52a. In his judgment, that mitigating circumstance did not call for leniency; he therefore sentenced Ring to death. *Id.*, at 53a.

On appeal, Ring argued that Arizonas capital sentencing scheme violates the Sixth and Fourteenth Amendments to the U.S. Constitution because it entrusts to a judge the finding of a fact raising the defendants maximum penalty. See *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The State, in response, noted that this Court had upheld Arizonas system in *Walton v. Arizona*, 497 U.S. 639 (1990), and had stated in *Apprendi* that *Walton* remained good law.

Reviewing the death sentence, the Arizona Supreme Court made two preliminary observations. *Apprendi* and *Jones*, the Arizona high court said, raise some question about the continued viability of *Walton*. 200 Ariz., at 278, 25 P.3d, at 1150. The court then examined the *Apprendi* majoritys interpretation of Arizona law and found it wanting. *Apprendi*, the Arizona court noted, described Arizonas sentencing system as one that requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death, and not as a system that permits a judge to determine the existence of a factor which makes a crime a capital offense. 200 Ariz., at 279, 25 P.3d, at 1151 (quoting *Apprendi*, 530 U.S., at 496497). Justice OConnors *Apprendi* dissent, the Arizona court noted, squarely rejected the *Apprendi* majoritys characterization of the Arizona sentencing scheme: A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. 200 Ariz., at 279, 25 P.3d, at 1151 (quoting *Apprendi*, 530 U.S., at 538).

After reciting this Courts divergent constructions of Arizona law in *Apprendi*, the Arizona Supreme Court described how capital sentencing in fact works in the State. The Arizona high court concluded that the present case is precisely as described in Justice OConnors dissent [in *Apprendi*] Defendants death sentence required the judges factual findings. 200 Ariz., at 279, 25 P.3d, at 1151. Although it agreed with the *Apprendi* dissents reading of Arizona law, the Arizona court understood that it was bound by the Supremacy Clause to apply *Walton*, which this Court had not overruled. It therefore rejected Rings constitutional attack on the States capital murder judicial sentencing system. 200 Ariz., at 280, 25 P.3d, at 1152.

The court agreed with Ring that the evidence was insufficient to support the aggravating circumstance of depravity, *id.*, at 281282, 25 P.3d, at 11531154, but it upheld the trial courts finding on the aggravating factor of pecuniary gain. The Arizona Supreme Court then reweighed that remaining factor against the sole mitigating circumstance (Rings lack of a serious criminal record), and affirmed the death sentence. *Id.*, at 282284, 25 P.3d, at 11541156.

We granted Rings petition for a writ of certiorari, 534 U.S. 1103 (2002), to allay uncertainty in the lower courts caused by the manifest tension between *Walton* and the reasoning of *Apprendi*. See, e.g., *United States v. Promise*, 255 F.3d 150, 159160 (CA4 2001) (en banc) (calling the continued authority of *Walton* in light of *Apprendi* perplexing); *Hoffman v. Arave*, 236 F.3d 523, 542 (CA9 2001)

(*Apprendi* may raise some doubt about *Walton*.); *People v. Kaczmarek*, 318 Ill. App. 3d 340, 351352, 741 N. E. 2d 1131, 1142 (2000) ([W]hile it appears *Apprendi* extends greater constitutional protections to noncapital, rather than capital, defendants, the Court has endorsed this precise principle, and we are in no position to secondguess that decision here.). We now reverse the judgment of the Arizona Supreme Court.

## II

Based solely on the jurys verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. See 200 Ariz., at 279, 25 P.3d, at 1151 (citing Ariz. Rev. Stat. 13703). This was so because, in Arizona, a death sentence may not legally be imposed unless at least one aggravating factor is found to exist beyond a reasonable doubt. 200 Ariz., at 279, 25 P.3d, at 1151 (citing 13703). The question presented is whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendments jury trial guarantee,<sup>3</sup> made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.<sup>4</sup>

As earlier indicated, see *supra*, at 1, 89, this is not the first time we have considered the constitutionality of Arizonas capital sentencing system. In *Walton v. Arizona*, 497 U.S. 639 (1990), we upheld Arizonas scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Floridas capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury. *Id.*, at 648 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640641 (1989) (*per curiam*)). *Walton* found unavailing the attempts by the defendant-petitioner in that case to distinguish Floridas capital sentencing system from Arizonas. In neither State, according to *Walton*, were the aggravating factors elements of the offense; in both States, they ranked as sentencing considerations guiding the choice between life and death. 497 U.S., at 648 (internal quotation marks omitted).

*Walton* drew support from *Cabana v. Bullock*, 474 U.S. 376 (1986), in which the Court held there was no constitutional bar to an appellate courts finding that a defendant killed, attempted to kill, or intended to kill, as *Enmund v. Florida*, 458 U.S. 782 (1982), required for imposition of the death penalty in felony-murder cases. The *Enmund* finding could be made by a court, *Walton* maintained, because it entailed no element of the crime of capital murder; it only place[d] a substantive limitation on sentencing. 497 U.S., at 649 (quoting *Cabana*, 474 U.S., at 385386). If the Constitution does not require that the *Enmund* finding be proved as an element of the offense of capital murder, and does not require a jury to make that finding, *Walton* stated, we cannot conclude that a State is required to denominate aggravating circumstances elements of the offense or permit only a jury to determine the existence of such circumstances. 497 U.S., at 649.

In dissent in *Walton*, Justice Stevens urged that the Sixth Amendment requires a jury determination of facts that must be established before the death penalty may be imposed. *Id.*, at 709. Aggravators operate as statutory elements of capital murder under Arizona law, he reasoned, because in their absence, [the death] sentence is unavailable. *Id.*, at 709, n.1. If th[e] question had been posed in 1791, when the Sixth Amendment became law, Justice Stevens said, the answer would have been clear, for [b] y that time,

the English jurys role in determining critical facts in homicide cases was entrenched. As fact-finder, the

jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, *the jurys role in finding facts that would determine a homicide defendants eligibility for capital punishment was particularly well established*. Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendants state of mind. By the time the Bill of Rights was adopted, the jurys right to make these determinations was unquestioned. *Id.*, at 710711 (quoting White, Fact-Finding and the Death Penalty: The Scope of a Capital Defendants Right to Jury Trial, 65 Notre Dame L.Rev. 1, 1011 (1989)).

*Walton* was revisited in *Jones v. United States*, 526 U.S. 227 (1999). In that case, we construed the federal carjacking statute, 18 U.S.C. 2119 (1994 ed. and Supp. V), which, at the time of the criminal conduct at issue, provided that a person possessing a firearm who takes a motor vehicle from the person or presence of another by force and violence or by intimidation shall (1) be imprisoned not more than 15 years, (2) if serious bodily injury results, be imprisoned not more than 25 years, and (3) if death results, be imprisoned for any number of years up to life. The question presented in *Jones* was whether the statute defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict. 526 U.S., at 229.

The carjacking statute, we recognized, was susceptible of [both] constructions; we adopted the one that avoided grave and doubtful constitutional questions. *Id.*, at 239 (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). Section 2119, we held, established three separate offenses. Therefore, the factscausation of serious bodily injury or death necessary to trigger the escalating maximum penalties fell within the jurys province to decide. See *Jones*, 526 U.S., at 251252. Responding to the dissenting opinion, the *Jones* Court restated succinctly the principle animating its view that the carjacking statute, if read to define a single crime, might violate the Constitution: [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Id.*, at 243, n.6.

*Jones* endeavored to distinguish certain capital sentencing decisions, including *Walton*. Advancing a careful reading of *Waltons* rationale, the *Jones* Court said: *Walton* characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available. 526 U.S., at 251.

Dissenting in *Jones*, *Justice Kennedy* questioned the Courts account of *Walton*. The aggravating factors at issue in *Walton*, he suggested, were not merely circumstances for consideration by the trial judge in exercising sentencing discretion within a statutory range of penalties. Under the relevant Arizona statute, *Justice Kennedy* observed, *Walton* could not have been sentenced to death unless the trial judge found at least one of the enumerated aggravating factors. Absent such a finding, the maximum potential punishment provided by law was a term of imprisonment. 526 U.S., at 272 (citation omitted). *Jones*, *Justice Kennedy* concluded, cast doubt needlessly in his view on the vitality of *Walton*:

If it is constitutionally impermissible to allow a judges finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judges finding may increase the maximum punishment for murder from imprisonment to death. In fact, *Walton* would appear to have been a better candidate for the Courts new approach than is the instant case. 526 U.S., at 272.

One year after *Jones*, the Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The defendant-petitioner in that case was convicted of, *inter alia*, second-degree possession of a firearm, an offense carrying a maximum penalty of ten years under New Jersey law. See *id.*, at 469-470. On the prosecutors motion, the sentencing judge found by a preponderance of the evidence that Apprendis crime had been motivated by racial animus. That finding triggered application of New Jerseys hate crime enhancement, which doubled Apprendis maximum authorized sentence. The judge sentenced Apprendi to 12 years in prison, 2 years over the maximum that would have applied but for the enhancement.

We held that Apprendis sentence violated his right to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Id.*, at 477 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). That right attached not only to Apprendis weapons offense but also to the hate crime aggravating circumstance. New Jersey, the Court observed, threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. *Apprendi*, 530 U.S., at 476. Merely using the label sentence enhancement to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently. *Ibid.*

The dispositive question, we said, is one not of form, but of effect. *Id.*, at 494. If a State makes an increase in a defendants authorized punishment contingent on the finding of a fact, that fact no matter how the State labels it must be found by a jury beyond a reasonable doubt. See *id.*, at 482-483. A defendant may not be expose[d] to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. *Id.*, at 483; see also *id.*, at 499 (Scalia, J., concurring) ([A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.).

*Walton* could be reconciled with *Apprendi*, the Court finally asserted. The key distinction, according to the *Apprendi* Court, was that a conviction of first-degree murder in Arizona carried a maximum sentence of death. [O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. 530 U.S., at 497 (emphasis deleted) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257, n. 2 (1998) (Scalia, J., dissenting)).

The *Apprendi* dissenters called the Courts distinction of *Walton* baffling. 530 U.S., at 538 (opinion of O'Connor, J.). The Court claimed that the jury makes all of the findings necessary to expose the defendant to a death sentence. *Ibid.* That, the dissent said, was demonstrably untrue, for a defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. *Ibid.* *Walton*, the *Apprendi* dissenters insisted, if properly followed, would have required the Court to uphold Apprendis sentence. If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed. 530 U.S., at 537 (opinion of O'Connor, J.).

The Arizona Supreme Court, as we earlier recounted, see *supra*, at 89, found the *Apprendi* majoritys portrayal of Arizonas capital sentencing law incorrect, and the description in Justice OConnors dissent precisely right: Defendants death sentence required the judges factual findings. 200 Ariz., at 279, 25 P.3d, at 1151. Recognizing that the Arizona courts construction of the States own law is authoritative,

see *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), we are persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*.

In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies death or life imprisonment as the only sentencing options, see Ariz. Rev. Stat. Ann. 131105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. See Brief for Respondent 919. This argument overlooks *Apprendi*'s instruction that the relevant inquiry is one not of form, but of effect. 530 U.S., at 494. In effect, the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict. *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. The Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense, *Apprendi*, 530 U.S., at 541 (*O'Connor*, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. See 131105(C) (First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by 13703. (emphasis added)). If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a meaningless and formalistic rule of statutory drafting. See 530 U.S., at 541 (*O'Connor*, J., dissenting).

Arizona also supports the distinction relied upon in *Walton* between elements of an offense and sentencing factors. See *supra*, at 1112; Tr. of Oral Arg. 2829. As to elevation of the maximum punishment, however, *Apprendi* renders the argument untenable;<sup>5</sup> *Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an element or a sentencing factor is not determinative of the question who decides, judge or jury. See, e.g., 530 U.S., at 492 (noting New Jersey's contention that [t]he required finding of biased purpose is not an element of a distinct hate crime offense, but rather the traditional sentencing factor of motive, and calling this argument nothing more than a disagreement with the rule we apply today); *id.*, at 494, n.19 ([W]hen the term sentence enhancement is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.); *id.*, at 495 ([M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense. (internal quotation marks omitted)); see also *id.*, at 501 (*Thomas*, J., concurring) ([I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.).

Even if facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone ordinarily must be found by a jury, Arizona further urges, aggravating circumstances necessary to trigger a death sentence may nonetheless be reserved for judicial determination. As Arizona's counsel maintained at oral argument, there is no doubt that [d]eath is different. Tr. of Oral Arg. 43. States have constructed elaborate sentencing procedures in death cases, Arizona emphasizes, because of constraints we have said the Eighth Amendment places on capital sentencing. Brief for Respondent 2125 (citing *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*)); see also *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) (Since *Furman*, our cases have insisted that the channeling and limiting of the sentencers' discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.); *Apprendi*, 530 U.S., at 522-523 (*Thomas*, J., concurring) ([I]n the area of capital punishment, unlike any other area, we have imposed special

ER 1426

constraints on a legislatures ability to determine what facts shall lead to what punishmentwe have restricted the legislatures ability to define crimes.).

Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents no specific reason for excepting capital defendants from the constitutional protections extend[ed] to defendants generally, and none is readily apparent. *Id.*, at 539 (*O'Connor*, J., dissenting). The notion that the Eighth Amendments restriction on a state legislatures ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence is without precedent in our constitutional jurisprudence. *Ibid.*

In various settings, we have interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope. See, e.g., *United States v. Lopez*, 514 U.S. 549, 561-562 (1995) (suggesting that addition to federal gun possession statute of express jurisdictional element requiring connection between weapon and interstate commerce would render statute constitutional under Commerce Clause); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*) (First Amendment prohibits States from proscrib[ing] advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action); *Lambert v. California*, 355 U.S. 225, 229 (1957) (Due Process Clause of Fourteenth Amendment requires actual knowledge of the duty to register or proof of the probability of such knowledge before ex-felon may be convicted of failing to register presence in municipality). If a legislature responded to one of these decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. We see no reason to differentiate capital crimes from all others in this regard.

Arizona suggests that judicial authority over the finding of aggravating factors may be a better way to guarantee against the arbitrary imposition of the death penalty. Tr. of Oral Arg. 32. The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be

an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free. *Apprendi*, 530 U.S., at 498 (*Scalia*, J., concurring).

In any event, the superiority of judicial factfinding in capital cases is far from evident. Unlike Arizona, the great majority of States responded to this Courts Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury.<sup>6</sup>

Although the doctrine of *stare decisis* is of fundamental importance to the rule of law[,] [o]ur precedents are not sacrosanct. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 494 (1987)). [W]e have overruled prior decisions where the necessity and propriety of doing so has been established. 491 U.S., at 172. We are satisfied that this is such a case.

For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of

the death penalty. See 497 U.S., at 647649. Because Arizonas enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, *Apprendi*, 530 U.S., at 494, n.19, the Sixth Amendment requires that they be found by a jury.

\* \* \*

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendants sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both. The judgment of the Arizona Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.<sup>7</sup>

It is so ordered.

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## TIMOTHY STUART RING, PETITIONER v. ARIZONA

on writ of certiorari to the supreme court  
of arizona

[June 24, 2002]

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*Justice Scalia*, with whom *Justice Thomas* joins, concurring.

The question whether *Walton v. Arizona*, 497 U.S. 639 (1990), survives our decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), confronts me with a difficult choice. What compelled Arizona (and many other States) to specify particular aggravating factors that must be found before the death penalty can be imposed, see 1973 Ariz. Sess. Laws ch. 138, 5 (originally codified as Ariz. Rev. Stat. 13454), was the line of this Courts cases beginning with *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*). See *Walton*, 497 U.S., at 659660 (*Scalia, J.*, concurring in part and concurring in judgment). In my view, that line of decisions had no proper foundation in the Constitution. *Id.*, at 670 ([T]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed (quoting *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (*Rehnquist, J.*, dissenting))). I am therefore reluctant to magnify the burdens that our *Furman* jurisprudence imposes on the States. Better for the Court to have invented an evidentiary requirement that a judge can find by a preponderance of the evidence, than to invent one that a unanimous jury must find beyond a reasonable doubt.

On the other hand, as I wrote in my dissent in *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1998), and as I reaffirmed by joining the opinion for the Court in *Apprendi*, I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives whether the statute calls them elements of the offense, sentencing factors, or Mary Janemust be found by the jury beyond a reasonable doubt.

The quandary is apparent: Should I continue to apply the last-stated principle when I know that the only reason the fact *is* essential is that this Court has mistakenly said that the Constitution *requires* state law to impose such aggravating factors? In *Walton*, to tell the truth, the Sixth Amendment claim was not put with the clarity it obtained in *Almendarez-Torres* and *Apprendi*. There what the appellant argued had to be found by the jury was not all facts essential to imposition of the death penalty, but rather *every* finding of fact underlying the sentencing decision, including not only the aggravating factors without which the penalty could not be imposed, but also the *mitigating* factors that might induce a sentencer to give a lesser punishment. 497 U.S., at 647 (emphasis added). But even if the point had been put with greater clarity in *Walton*, I think I still would have approved the Arizona scheme I would have favored the States freedom to develop their own capital sentencing procedures (already erroneously abridged by *Furman*) over the logic of the *Apprendi* principle.

Since *Walton*, I have acquired new wisdom that consists of two realizations or, to put it more critically, have discarded old ignorance that consisted of the failure to realize two things: First, that it is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by *Furman*, as opposed to those that the State would have adopted in any event. Some States, for example, already had aggravating-factor requirements for capital murder (e.g., murder of a peace officer, see 1965 N.Y. Laws p.1022 (originally codified at N.Y. Penal Law 1045)) when *Furman* was decided. When such a State has added aggravating factors, are the new ones the *Apprendi*-exempt product of *Furman*, and the old ones not? And even as to those States that did not previously have aggravating-factor requirements, who is to say that their adoption of a new one today or, for that matter, even their retention of old ones adopted immediately post-*Furman* is still the product of that case, and not of a changed social belief that murder *simpliciter* does not deserve death?

Second, and more important, my observing over the past 12 years the accelerating propensity of both state and federal legislatures to adopt sentencing factors determined by judges that increase punishment beyond what is authorized by the jury's verdict, and my witnessing the belief of a near majority of my colleagues that this novel practice is perfectly OK, see *Apprendi, supra*, at 523 (O'Connor, J., dissenting), cause me to believe that our people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man going to his death because a judge found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

Accordingly, *whether or not* the States have been erroneously coerced into the adoption of aggravating factors, wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.

I add one further point, lest the holding of today's decision be confused by the separate concurrence. Justice Breyer, who refuses to accept *Apprendi*, see 530 U.S., at 555 (Breyer, J., dissenting); see also *Harris v. United States, ante*, p. \_\_\_ (Breyer, J., concurring in part and concurring in judgment), nonetheless concurs in today's judgment because he believe[s] that jury sentencing in capital cases is mandated by the Eighth Amendment. *Post*, at 1 (opinion concurring in judgment). While I am, as

ER 1429

always, pleased to travel in *Justice Breyers* company, the unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase. There is really no way in which *Justice Breyer* can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, *Justice Breyer* is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi-land*.

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## TIMOTHY STUART RING, PETITIONER v. ARIZONA

on writ of certiorari to the supreme court  
of arizona

[June 24, 2002]

---

*Justice Kennedy*, concurring.

Though it is still my view that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was wrongly decided, *Apprendi* is now the law, and its holding must be implemented in a principled way. As the Court suggests, no principled reading of *Apprendi* would allow *Walton v. Arizona*, 497 U.S. 639 (1990), to stand. It is beyond question that during the penalty phase of a first-degree murder prosecution in Arizona, the finding of an aggravating circumstance exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict. *Apprendi, supra*, at 494. When a finding has this effect, *Apprendi* makes clear, it cannot be reserved for the judge.

This is not to say *Apprendi* should be extended without caution, for the States' settled expectations deserve our respect. A sound understanding of the Sixth Amendment will allow States to respond to the needs and realities of criminal justice administration, and *Apprendi* can be read as leaving in place many reforms designed to reduce unfairness in sentencing. I agree with the Court, however, that *Apprendi* and *Walton* cannot stand together as the law.

With these observations I join the opinion of the Court.

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## TIMOTHY STUART RING, PETITIONER v. ARIZONA

on writ of certiorari to the supreme court  
of arizona

ER 1430

[June 24, 2002]

*Justice Breyer*, concurring in the judgment.

## I

Given my views in *Apprendi v. New Jersey*, 530 U.S. 466, 555 (2000) (dissenting opinion), and *Harris v. United States*, *ante*, at \_\_\_ (*Breyer, J.*, concurring in part and concurring in judgment), I cannot join the Courts opinion. I concur in the judgment, however, because I believe that jury sentencing in capital cases is mandated by the Eighth Amendment.

## II

This Court has held that the Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976). Otherwise, the constitutional prohibition against cruel and unusual punishments would forbid its use. *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*). *Justice Stevens* has written that those safeguards include a requirement that a jury impose any sentence of death. *Harris v. Alabama*, 513 U.S. 504, 515-526 (1995) (dissenting opinion); *Spaziano v. Florida*, 468 U.S. 447, 467-490 (1984) (*Stevens, J.*, joined by Brennan and Marshall, JJ., concurring in part and dissenting in part). Although I joined the majority in *Harris v. Alabama*, I have come to agree with the dissenting view, and with the related views of others upon which it in part relies, see *Gregg, supra*, at 190 (opinion of Stewart, Powell, and Stevens, JJ.). Cf. *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (*Frankfurter, J.*, dissenting) (Wisdom too often never comes, and so one ought not to reject it merely because it comes late). I therefore conclude that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.

I am convinced by the reasons that *Justice Stevens* has given. These include (1) his belief that retribution provides the main justification for capital punishment, and (2) his assessment of the jurys comparative advantage in determining, in a particular case, whether capital punishment will serve that end.

As to the first, I note the continued difficulty of justifying capital punishment in terms of its ability to deter crime, to incapacitate offenders, or to rehabilitate criminals. Studies of deterrence are, at most, inconclusive. See, e.g., Sorenson, Wrinkle, Brewer, & Marquart, Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 *Crime & Delinquency* 481 (1999) (no evidence of a deterrent effect); Bonner & Fessenden, Absence of Executions: A special report, States With No Death Penalty Share Lower Homicide Rates, *N.Y. Times*, Sept. 22, 2000, p.A1 (during last 20 years, homicide rate in death penalty States has been 48% to 101% higher than in non-death-penalty States); see also Radelet & Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 *J. Crim. L. & C.* 1, 8 (1996) (over 80% of criminologists believe existing research fails to support deterrence justification).

As to incapacitation, few offenders sentenced to life without parole (as an alternative to death) commit further crimes. See, e.g., Sorensen & Pilgrim, An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants, 90 *J. Crim. L. & C.* 1251, 1256 (2000) (studies find average repeat

murder rate of .002% among murderers whose death sentences were commuted); Marquart & Sorensen, A National Study of the *Furman*-Commuted Inmates: Assessing the Threat to Society from Capital Offenders, 23 Loyola (LA) L. Rev. 5, 26 (1989) (98% did not kill again either in prison or in free society). But see *Roberts v. Louisiana*, 428 U.S. 325, 354 (1976) (White, J., dissenting) ([D]eath finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not). And rehabilitation, obviously, is beside the point.

In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to the community's moral sensibility, *Spaziano*, 468 U.S., at 481 (Stevens, J., concurring in part and dissenting in part), because they reflect more accurately the composition and experiences of the community as a whole, *id.*, at 486. Hence they are more likely to express the conscience of the community on the ultimate question of life or death, *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), and better able to determine in the particular case the need for retribution, namely, an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death. *Gregg*, *supra*, at 184 (joint opinion of Stewart, Powell, and Stevens, JJ.).

Nor is the fact that some judges are democratically elected likely to change the jury's comparative advantage in this respect. Even in jurisdictions where judges are selected directly by the people, the jury remains uniquely capable of determining whether, given the community's views, capital punishment is appropriate in the particular case at hand. See *Harris*, *supra*, at 518519 (Stevens, J., dissenting); see also J. Liebman et al., A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It 405406 (Feb. 11, 2002) (hereinafter A Broken System) (finding that judges who override jury verdicts for life are especially likely to commit serious errors); cf. Epstein & King, The Rules of Inference, 69 U. Chi. L.Rev. 1 (2002) (noting dangers in much scholarly research but generally approving of Liebman).

The importance of trying to translate a community's sense of capital punishment's appropriateness in a particular case is underscored by the continued division of opinion as to whether capital punishment is in all circumstances, as currently administered, cruel and unusual. Those who make this claim point, among other things, to the fact that death is not reversible, and to death sentences imposed upon those whose convictions proved unreliable. See, e.g., Weinstein, The Nations Death Penalty Foes Mark a Milestone Crime: Arizona convict freed on DNA tests is said to be the 100th known condemned U.S. prisoner to be exonerated since executions resumed, Los Angeles Times, Apr. 10, 2002, p.A16; G. Ryan, Governor of Illinois, Report of Governors Commission on Capital Punishment 710 (Apr. 15, 2002) (imposing moratorium on Illinois executions because, post-*Furman*, 13 people have been exonerated and 12 executed); see generally Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 27 (1987).

They point to the potentially arbitrary application of the death penalty, adding that the race of the victim and socio-economic factors seem to matter. See, e.g., U.S. General Accounting Office, Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing 5 (Feb. 1990) (synthesis of 28 studies shows pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty); Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia, 83 Cornell L.Rev. 1638, 1661 (1998) (evidence of race-of-victim disparities in 90% of States studied and of race-of-defendant disparities in 55%); *McCleskey v. Kemp*, 481 U.S. 279, 320345 (1987) (Brennan, J., dissenting); see also, e.g., D. Baldus, G. Woodworth, G. Young, & A. Christ, The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis 95100

(Oct. 10, 2001) (death sentences almost five times more likely when victim is of a high socio-economic status).

They argue that the delays that increasingly accompany sentences of death make those sentences unconstitutional because of the suffering inherent in a prolonged wait for execution. *Knight v. Florida*, 528 U.S. 990, 994 (1999) (*Breyer*, J., dissenting from denial of certiorari) (arguing that the Court should consider the question); see, e.g., *Lackey v. Texas*, 514 U.S. 1045 (1995) (*Stevens*, J., respecting denial of certiorari); Bureau of Justice Statistics, Capital Punishment 2000, pp.12, 14 (rev. 2002) (average delay is 12 years, with 52 people waiting more than 20 years and some more than 25).

They point to the inadequacy of representation in capital cases, a fact that aggravates the other failings. See, e.g., Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835 (1994) (describing many studies discussing deficient capital representation).

And they note that other nations have increasingly abandoned capital punishment. See, e.g., San Martin, U.S. Taken to Task Over Death Penalty, Miami Herald, May 31, 2001, p.1 (United States is only Western industrialized Nation that authorizes the death penalty); Amnesty International Website Against the Death Penalty, Facts and Figures on the Death Penalty, (2002) <http://www.web.amnesty.org/rmp/dplibrary.nsf> (since *Gregg*, 111 countries have either abandoned the penalty altogether, reserved it, only for exceptional crimes like wartime crimes, or have not carried out executions for at least the past 10 years); DeYoung, Group Criticizes U.S. on Detainee Policy; Amnesty Warns of Human Rights Fallout, Washington Post, May 28, 2002, p.A4 (the United States rates fourth in number of executions, after China, Iran, and Saudi Arabia).

Many communities may have accepted some or all of these claims, for they do not impose capital sentences. See A Broken System, App. B, Table 11A (more than two-thirds of American counties have never imposed the death penalty since *Gregg* (2,064 out of 3,066), and only 3% of the Nations counties account for 50% of the Nations death sentences (92 out of 3,066)). Leaving questions of arbitrariness aside, this diversity argues strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate, not cruel, unusual, or otherwise unwarranted.

For these reasons, the danger of unwarranted imposition of the penalty cannot be avoided unless the decision to impose the death penalty is made by a jury rather than by a single governmental official. *Spaziano*, 468 U.S., at 469 (*Stevens*, J., concurring in part and dissenting in part); see *Solem v. Helm*, 463 U.S. 277, 284 (1983) (Eighth Amendment prohibits excessive or disproportionate punishment). And I conclude that the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death.

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## TIMOTHY STUART RING, PETITIONER v. ARIZONA

on writ of certiorari to the supreme court  
of arizona

ER 1433

[June 24, 2002]

*Justice O'Connor*, with whom the *Chief Justice* joins, dissenting.

I understand why the Court holds that the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is irreconcilable with *Walton v. Arizona*, 497 U.S. 639 (1990). Yet in choosing which to overrule, I would choose *Apprendi*, not *Walton*.

I continue to believe, for the reasons I articulated in my dissent in *Apprendi*, that the decision in *Apprendi* was a serious mistake. As I argued in that dissent, *Apprendi*'s rule that any fact that increases the maximum penalty must be treated as an element of the crime is not required by the Constitution, by history, or by our prior cases. See 530 U.S., at 524-552. Indeed, the rule directly contradicts several of our prior cases. See *id.*, at 531-539 (explaining that the rule conflicts with *Patterson v. New York*, 432 U.S. 197 (1977), *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and *Walton*, *supra*). And it ignores the significant history in this country of discretionary sentencing by judges. 530 U.S., at 544 (*O'Connor*, J., dissenting). The Court has failed, both in *Apprendi* and in the decision announced today, to offer any meaningful justification for deviating from years of cases both suggesting and holding that application of the increase in the maximum penalty rule is not required by the Constitution. *Id.*, at 539.

Not only was the decision in *Apprendi* unjustified in my view, but it has also had a severely destabilizing effect on our criminal justice system. I predicted in my dissent that the decision would unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of [*Apprendi*]. *Id.*, at 551. As of May 31, 2002, less than two years after *Apprendi* was announced, the United States Courts of Appeals had decided approximately 1,802 criminal appeals in which defendants challenged their sentences, and in some cases even their convictions, under *Apprendi*.<sup>1</sup> These federal appeals are likely only the tip of the iceberg, as federal criminal prosecutions represent a tiny fraction of the total number of criminal prosecutions nationwide. See *ibid.* (*O'Connor*, J., dissenting) (In 1998 federal criminal prosecutions represented only about 0.4% of the total number of criminal prosecutions in federal and state courts). The number of second or successive habeas corpus petitions filed in the federal courts also increased by 77% in 2001, a phenomenon the Administrative Office of the United States Courts attributes to prisoners bringing *Apprendi* claims. Administrative Office of the U.S. Courts, 2001 Judicial Business 17. This Court has been similarly overwhelmed by the aftershocks of *Apprendi*. A survey of the petitions for certiorari we received in the past year indicates that 18% raised *Apprendi*-related claims.<sup>2</sup> It is simply beyond dispute that *Apprendi* threw countless criminal sentences into doubt and thereby caused an enormous increase in the workload of an already overburdened judiciary.

The decision today is only going to add to these already serious effects. The Court effectively declares five States' capital sentencing schemes unconstitutional. See *ante*, at 21, n.5 (identifying Colorado, Idaho, Montana, and Nebraska as having sentencing schemes like Arizona's). There are 168 prisoners on death row in these States, Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc., Death Row U.S.A. (Spring 2002), each of whom is now likely to challenge his or her death sentence. I believe many of these challenges will ultimately be unsuccessful, either because the prisoners will be unable to satisfy the standards of harmless error or plain error review, or because, having completed their direct appeals, they will be barred from taking advantage of today's holding on federal collateral review. See 28 U.S.C. 2244(b)(2)(A), 2254(d)(1); *Teague v. Lane*, 489 U.S. 288 (1989). Nonetheless, the need to evaluate these claims will greatly burden the courts in these five States.

In addition, I fear that the prisoners on death row in Alabama, Delaware, Florida, and Indiana, which the Court identifies as having hybrid sentencing schemes in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determination, see *ante*, at 21, n.6, may also seize on today's decision to challenge their sentences. There are 529 prisoners on death row in these States. Criminal Justice Project, *supra*.

By expanding on *Apprendi*, the Court today exacerbates the harm done in that case. Consistent with my dissent, I would overrule *Apprendi* rather than *Walton*.

---

## FOOTNOTES

### Footnote 1

The aggravating circumstances, enumerated in Ariz. Rev. Stat. Ann. 13703(G) (West Supp. 2001), are:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant was previously convicted of a serious offense, whether prepatory or completed.
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.
4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
6. The defendant committed the offense in an especially heinous, cruel or depraved manner.
7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.
8. The defendant has been convicted of one or more other homicides, as defined in 131101, which were committed during the commission of the offense.
9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.
10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

## Footnote 2

The statute enumerates certain mitigating circumstances, but the enumeration is not exclusive. The court shall consider as mitigating circumstances any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death . 13703(H).

## Footnote 3

In all criminal prosecutions, the accused shall enjoy the right to a trial, by an impartial jury .

## Footnote 4

Rings claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. See *Apprendi v. New Jersey*, 530 U.S. 466, 490491, n.16 (2000) (noting the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. See *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion) ([I]t has never [been] suggested that jury sentencing is constitutionally required.). He does not question the Arizona Supreme Courts authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. See *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. See *Apprendi*, 530 U.S., at 477, n.3 (Fourteenth Amendment has not been construed to include the Fifth Amendment right to presentment or indictment of a Grand Jury).

## Footnote 5

In *Harris v. United States*, *ante*, p. \_\_\_, a majority of the Court concludes that the distinction between elements and sentencing factors continues to be meaningful as to facts increasing the minimum sentence. See *ante*, at 20 (plurality opinion) (The factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury. [A] finding [that triggers a mandatory minimum sentence] restrain[s] the judges power, limiting his or her choices within the authorized range. It is quite consistent to maintain that the former type of fact must be submitted to the jury while the latter need not be.); *ante*, at 1 (*Breyer, J.*, concurring in part and concurring in judgment) ([T]he Sixth Amendment permits judges to apply sentencing factors whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application of a mandatory minimum (as here).).

## Footnote 6

Of the 38 States with capital punishment, 29 generally commit sentencing decisions to juries. See Ark. Code Ann. 54602 (1993); Cal. Penal Code Ann. 190.3 (West 1999); Conn. Gen. Stat. 53a46a (2001); Ga. Code Ann. 171031.1 (Supp. 1996); Ill. Comp. Stat. Ann., ch. 720, 5/91(d) (West 1993); Kan. Stat.

Ann. 214624(b) (1995); Ky. Rev. Stat. Ann. 532.025(1)(b) (1993); La. Code Crim. Proc. Ann., Art. 905.1 (West 1997); Md. Ann. Code, Art. 27, 413(b) (1996); Miss. Code Ann. 9919101 (19732000); Mo. Rev. Stat. 565.030, 565.032 (1999 and Supp. 2002); Nev. Rev. Stat. Ann. 175.552 (Michie 2001); N.H. Rev. Stat. Ann. 630:5 (II) (1996); N.J. Stat. Ann. 2C:113(c) (Supp. 2001); N.M. Stat. Ann. 3120A1 (2000); N.Y. Crim. Proc. Law 400.27 (McKinney Supp. 20012002); N.C. Gen. Stat. 15A2000 (1999); Ohio Rev. Code Ann. 2929.03 (West 1997); Okla. Stat., Tit. 21, 701.10(A) (Supp. 2001); Ore. Rev. Stat. Ann. 163.150 (1997); 42 Pa. Cons. Stat. 9711 (Supp. 2001); S.C. Code Ann. 16320(B) (1985); S.D. Codified Laws 23A27A2 (1998); Tenn. Code Ann. 3913204 (Supp. 2000); Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp. 2001); Utah Code Ann. 763207 (Supp. 2001); Va. Code Ann. 19.2264.3 (2000); Wash. Rev. Code 10.95.050 (1990); Wyo. Stat. Ann. 62102 (2001).

Other than Arizona, only four States commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges. See Colo. Rev. Stat. 1611103 (2001) (three-judge panel); Idaho Code 192515 (Supp. 2001); Mont. Code Ann. 4618301 (1997); Neb. Rev. Stat. 292520 (1995).

Four States have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. See Ala. Code 13A546, 13A547 (1994); Del. Code Ann., Tit. 11, 4209 (1995); Fla. Stat. Ann. 921.141 (West 2001); Ind. Code Ann. 355029 (Supp. 2001).

#### Footnote 7

We do not reach the States assertion that any error was harmless because a pecuniary gain finding was implicit in the jurys guilty verdict. See *Neder v. United States*, 527 U.S. 1, 25 (1999) (this Court ordinarily leaves it to lower courts to pass on the harmlessess of error in the first instance).

## FOOTNOTES

#### Footnote 1

This data was obtained from a Westlaw search conducted May 31, 2002, in the United States Courts of Appeals database using the following search terms: Apprendi v. New Jersey & Title[U.S. or United States].

#### Footnote 2

Specific counts are on file with the Clerk of the Court.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, I certify that I am an employee of Karla K. Butko, 1030 Holcomb Avenue, Reno, NV 89502, and that on this date I caused the foregoing document to be delivered to all parties to this action by

\_\_\_\_\_ placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

\_\_\_\_\_ personal delivery

\_\_\_\_\_ Facsimile (FAX)

\_\_\_\_\_ Federal Express or other overnight delivery

X \_\_\_\_\_ Reno/Carson Messenger Service

addressed as follows:

RICHARD GAMMICK  
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75 Court Street  
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Reno, NV 89501  
ATTN: Joseph Plater, Esq.  
Via Reno Carson Messenger

DATED this 26<sup>th</sup> day of July, 2002.

  
\_\_\_\_\_  
KARLA K. BUTKO

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AUG 20 2002

RONALD A. LONGTIN, JR., CLERK  
By: [Signature]  
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

TERRY JESS DENNIS,

Petitioner,

VS.

Case No. CR99-P-0611

E.K. McDANIEL, Warden,  
Nevada State Prison, Ely;  
FRANKIE SUE DEL PAPA,  
Attorney General of the  
State of Nevada,

Dept. No. 1

Respondents.

ORDER

Respondent, THE STATE OF NEVADA, filed a *Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction)*. Petitioner, TERRY JESS DENNIS (hereinafter, "Dennis"), by and through counsel, filed an *Opposition*, to which the State of Nevada *Replied*.

Dennis filed a *Notice of United States Supreme Court Decision* on July 26, 2002. The Court has reviewed the pleadings and the recent decision of the United States Supreme Court. The Court requests the parties file supplemental briefs addressing the decision in Ring v. Arizona, decided by the United States Supreme Court on June 24, 2002.

DATED: This 19<sup>th</sup> day of August, 2002.

[Signature]  
DISTRICT JUDGE

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**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the \_\_\_\_\_ day of August, 2002, I deposited for mailing a copy of the foregoing document addressed to:

Karla K. Butko, Esq.  
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Reno, NV 89502

Joseph R. Plater  
Appellate Deputy  
P.O. Box 30083  
Reno, NV 89520

DATED this \_\_\_\_\_ day of August, 2002.

\_\_\_\_\_  
HEIDI HOWDEN  
Administrative Assistant

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FILED

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RONALD L. LONGSTIN, JR.

BY P. Cronney  
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8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
9 IN AND FOR THE COUNTY OF WASHOE

10 \* \* \*

11 TERRY JESS DENNIS,  
12 Petitioner,

13 v.

Case No. CR99P0611

14 THE STATE OF NEVADA,  
15 Respondent.

Dept. No. 1

16  
17 SUPPLEMENTAL BRIEF

18 The court has requested the parties to provide  
19 supplemental briefing regarding the effect of the United States  
20 Supreme Court's decision in Ring v. Arizona, 122 S. Ct. 2428  
21 (2002) in relation to the present post-conviction habeas  
22 petition. Accordingly, the State offers the following for the  
23 court's consideration.

24 In the first ground of the original petition and the  
25 nineteenth ground of the supplemental petition, petitioner  
26 alleges that the use of three-judge panels is unconstitutional.

1 He alleges in the first ground of the original petition and the  
2 twentieth ground of the supplemental petition that his sentence  
3 is unconstitutional under the authority of Apprendi v. New  
4 Jersey, 120 S. Ct. 2348 (2000). Apparently, petitioner submits  
5 that the recent decision in Ring supports his claims. The State  
6 submits Ring is not applicable because (1) the decision does not  
7 address the issue of whether a judge may impose a death sentence;  
8 (2) petitioner waived his right to have a jury determine whether  
9 there were aggravators that would render him eligible for a death  
10 sentence; and (2) Ring is not retroactive to the present case.

11 In Ring, the issue was whether a Arizona statute that  
12 requires the trial judge, sitting alone, to determine the  
13 presence or absence of aggravating factors required by Arizona  
14 law for imposition of the death penalty, following a jury  
15 adjudication of guilt for first degree murder, violated the Sixth  
16 Amendment right to a jury trial. Indeed, the first sentence of  
17 the opinion explains that the "case concerns the Sixth Amendment  
18 right to a jury trial in capital prosecutions." Ring, 122 S.Ct.  
19 at 2432. The Court ultimately held that because Arizona's  
20 enumerated aggravating factors operate as "the functional  
21 equivalent of an element of a greater offense" the Sixth  
22 Amendment requires that they be found by a jury. Id. at 2443,  
23 quoting Apprendi, 530 U.S. at 494, n.19. Here, however,  
24 petitioner's sentence was not determined after a jury's  
25 adjudication of guilt for first degree murder. Of course,  
26 petitioner certainly had the right to have a jury determine his

1 guilt and sentence. Petitioner, however, expressly waived that  
2 right (Arraignment Transcript, 27). Thus, the primary concern of  
3 Ring--ensuring that defendants have the option of juries, rather  
4 than judges, decide their fate--was respected here where  
5 petitioner intentionally decided not to have a jury decide his  
6 sentence.

7           The Court in Ring also explained that the defendant was  
8 not arguing "that the Sixth Amendment required the jury to make  
9 the ultimate determination whether to impose the death penalty.  
10 Id. at 2437 n.4, citing Proffitt v. Florida, 428 U.S. 242, 252  
11 (1976) (plurality opinion) ("It has never [been] suggested that  
12 jury sentencing is constitutionally required."). Thus,  
13 petitioner's implied assertion that Ring declares three-judge  
14 panels unconstitutional is simply misplaced.

15           Finally, Ring is not applicable because it is a new  
16 rule of criminal procedure. New rules of constitutional criminal  
17 procedure "are generally not applied retroactively on collateral  
18 review." United States v. Mandanici, 205 F.3d 519, 527 (2d Cir.  
19 2000); see also Teague v. Lane, 489 U.S. 288, 310 ("Unless they  
20 fall within an exception to the general rule, new constitutional  
21 rules of criminal procedure will not be applicable to those cases  
22 which have become final before the new rules are announced.").  
23 Under Teague, new rules of criminal procedure are to be applied  
24 retroactively on collateral review only if they fall within one  
25 of two narrow exceptions. Id. at 311-12. The first exception  
26 applies to new rules that place an entire category of conduct

1 beyond the reach of the criminal law. Id. The second applies to  
2 watershed rules of criminal procedure that implicate the  
3 fundamental fairness and accuracy of the criminal proceeding.  
4 Neither exception applies in this case. Id.

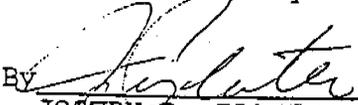
5 The federal circuit courts of appeal that have ruled on  
6 the issue have held that Apprendi, and thus by implication Ring,  
7 does not apply retroactively on collateral review. See Curtis v.  
8 United States, 294 F.3d 841 (7th Cir.2002) ("Apprendi . . . does  
9 not disturb sentences that became final before June 26, 2000, the  
10 date of [the decision's] release."); McCoy v. United States, 266  
11 F.3d 1245, 1257 (11th Cir.2001) ("Apprendi does not fall within  
12 either exception to Teague's, non-retroactivity standard.  
13 Therefore . . . Apprendi does not apply retroactively on  
14 collateral review."); United States v. Moss, 252 F.3d 993 (8th  
15 Cir.2001) ("[W]e hold . . . that Apprendi is not of watershed  
16 magnitude and that Teague bars petitioners from raising Apprendi  
17 claims on collateral review."); Jones v. Smith, 231 F.3d 1227,  
18 1236 (9th Cir.2000) ("[T]he non-retroactivity principle pronounced  
19 in Teague prevents Petitioner from benefitting from Apprendi's  
20 new rule on collateral review."); United States v. Sanders, 247  
21 F.3d 139, 148 (4th Cir.2001) ("[T]he new rule announced Apprendi  
22 does not rise to the level of a watershed rule of criminal  
23 procedure which 'alters our understanding of the bedrock elements  
24 essential to the fairness of a proceeding.'" (quoting Sawyer, 497  
25 U.S. at 242, 110 S.Ct. 2822); In re Turner, 267 F.3d 225, 231 (3d  
26 Cir.2001) (holding that, until the Supreme Court rules otherwise,

1 Apprendi is not "a new rule of constitutional law, made  
2 retroactive to cases on collateral review . . . , that was  
3 previously unavailable"). Cf. Ring v. Arizona, 536 U.S. \_\_\_\_, 122  
4 S.Ct. 2428, 2449, \_\_ L.Ed.2d \_\_\_\_ (2002) (O'Connor, J.,  
5 dissenting) (noting that the majority's new rule of constitutional  
6 criminal procedure, requiring a jury, and not a judge, to find  
7 aggravating circumstances required by statute to impose the death  
8 penalty, would not benefit the majority of prisoners already on  
9 death row because they would be barred from raising the issue on  
10 federal collateral review) (citing 28 U.S.C. § § 2244(b)(2)(A),  
11 2254(d)(1) and Teague, 489 U.S. 288, 109 S.Ct. 1060).

12 Thus, for the foregoing reasons, the State respectfully  
13 requests the court to dismiss the first ground of the original  
14 petition and the nineteenth and twentieth grounds of the  
15 supplemental petition for writ of habeas corpus (post-  
16 conviction).

17 DATED: September 6, 2002.

18 RICHARD A. GAMMICK  
19 District Attorney

20 BY   
21 JOSEPH R. PLATER  
22 Appellate Deputy  
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11 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
12 IN AND FOR THE COUNTY OF WASHOE

13 \* \* \*

14 TERRY JESS DENNIS,

15 Petitioner,

16 vs:

Case No. CR99P0611

17 E.K. McDaniel, Warden,  
18 the Nevada State Prison, Ely;  
19 FRANKIE SUE DEL PAPA,  
20 Attorney General of the  
21 State of Nevada,

Dept. No. 1

22 Respondents.

23 SUPPLEMENTAL BRIEF RE: APPLICATION OF RING V. ARIZONA

24 COMES NOW the Petitioner, TERRY JESS DENNIS, by and through his appointed counsel,  
25 KARLA K. BUTKO, ESQ., and SCOTT W. EDWARDS, ESQ., and respectfully files this  
26 Supplemental Brief regarding the application of Ring v. Arizona, 536 U.S. \_\_, 122 S. Ct. 2428 (June  
27 24, 2002).

28 This Brief as well as the Petition for Writ of Habeas Corpus (Post-Conviction; Death Penalty)  
is based upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, all papers,  
documents and other evidence on file herein, the following Points & Authorities, and any oral  
argument which this Court deems appropriate.

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1 POINTS & AUTHORITIES

2 Introduction.

3 By way of introduction, this Honorable Court requested that the parties provide the Court with  
4 supplemental argument concerning the proper application of *Ring v. Arizona*, 536 U.S. \_\_, 122 S. Ct.  
5 2428 (June 24, 2002) to this case. The Brief is submitted in response to that request.

6 **I. OVERVIEW OF *RING* AND ITS EFFECT ON PENDING CASE**

7 *Ring v. Arizona* clearly establishes that petitioner's death sentence is unconstitutional. *Ring*  
8 *v. Arizona*, 536 U.S. \_\_, 122 S. Ct. 2428 (June 24, 2002). In *Ring*, the Supreme Court of the United  
9 States held that "[c]apital defendants, no less than non-capital defendants ... are entitled to a jury  
10 determination of any fact on which the legislature conditions an increase in their maximum  
11 punishment." 122 S. Ct. at 2432. In *Ring*, the Court held that the fundamental constitutional principle  
12 it had made clear three years earlier, in *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999), applies  
13 to capital cases. *Ring*, 122 S. Ct. at 2438-43. That constitutional principle is this: "under the Due  
14 Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth  
15 Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime  
16 must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*,  
17 526 U.S. at 243 n.6, *quoted in, Ring*, 122 S. Ct. at 2438-39.

18 The immediate effect of *Ring v. Arizona, supra*, should be to invalidate Nevada's death penalty  
19 scheme. If this court properly applies *Ring* to this instant case, Petitioner's writ of habeas corpus  
20 would have to be granted, his guilty plea be withdrawn and the matter set for trial by jury, consistent  
21 with constitutional mandates.

22 The principles of retroactivity announced and applied in *Bousley v. United States*, 523 U.S. 614  
23 (1998), and *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, make clear that Petitioner is entitled  
24 to the full benefit of *Ring v. Arizona*. The fundamental rule applied in *Ring*, was announced in *Jones*  
25 *v. United States*, 526 U.S. 227 (1999), is substantive, not procedural, and thus outside the range of  
26 *Teague*. The criminal procedure implications of the rule recognized in *Ring* and *Apprendi v. New*  
27 *Jersey*, 530 U.S. 566 (2000), are not new but ancient; if it were new, it would comfortably fit within  
28 both exceptions to the non-retroactivity principle of *Teague*. Because the *Ring* error is structural in

1 nature, it is not subject to the harmless error doctrine and in any event could not be found harmless in  
2 Petitioner's case.

## 3 2. RING DID NOT ANNOUNCE A NEW RULE

4 In Teague v. Lane, 489 U.S. at 310, the Supreme Court stated that, as a general rule, "new  
5 constitutional rules of criminal procedure will not be applicable to those cases which have become  
6 final before the new rules are announced." The Court established a three-step inquiry to determine  
7 when new rules of criminal procedure apply retroactively on collateral review. Teague, 489 U.S. at  
8 311-16. First, a court must determine the date on which the defendant's conviction became final.  
9 O'Dell v. Netherland, 521 U.S. 151, 156 (1997). Second, it must decide whether the Supreme Court's  
10 ruling constitutes a new rule of constitutional criminal procedure because Teague is inapplicable unless  
11 the court finds both that the rule is new and that it involves a procedural rather than a substantive  
12 change. Bousley v. United States, 523 U.S. 614 (1998). Third, even if new and procedural, the rule  
13 may nonetheless apply in federal habeas proceedings if it falls within one of two narrow exceptions  
14 to Teague's general rule barring retroactivity. Both narrow exceptions, that a new rule should be  
15 applied retroactively if it places "certain kinds of primary, private individual conduct beyond the  
16 power of the criminal law-making authority to proscribe," Teague, 489 U.S. at 311, and that a new rule  
17 should be applied retroactively if it requires the observance of procedures that are "implicit in the  
18 concept of ordered liberty," *id.*, are relied upon by Petitioner in his case.

19 Once the state raises the Teague defense, a court is compelled to address whether Teague  
20 applies before determining the merits of the claim. See Caspari v. Bohlen, 510 U.S. 383, 389, (1994).  
21 The Court must make a determination whether the conviction is final. For purposes of this argument  
22 only, the issue of the finality of the conviction is left to the Court's review.

23 Teague's second step asks whether the rule is "new" and whether the rule is properly  
24 characterized as substantive or procedural. The first part of that inquiry is whether Ring involves a  
25 matter of substantive law or whether it announces a new rule of criminal procedure. Teague, 489 U.S.  
26 at 311. In Bousley v. United States, the United States Supreme Court was asked to determine whether  
27 to apply the rule of Bailey v. United States, 516 U.S. 137, 144 (1995) (holding that 18 U.S.C. §  
28 924(c)(1)'s "use" prong requires the Government to show "active employment of the firearm in the

1 perpetration of the underlying offense") to cases in collateral proceedings. *Bousley*, 523 U.S. at 618.  
2 Rejecting an argument that *Teague* precluded the retroactive application to post-*Bailey* cases, the Court  
3 found that the rule sought to be applied was new and that *Teague* "by its terms applies only to  
4 procedural rules, [and] is inapplicable to the situation in which this Court decides the meaning of a  
5 criminal statute enacted by Congress." *Bousley*, 523 U.S. at 620. The Court noted that its decisions  
6 "holding that a substantive federal criminal statute does not reach certain conduct ... necessarily carry  
7 a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.' "  
8 *Id.* (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

9         The rule gleaned from *Ring* under the *Jones* jurisprudence must be read to refine the definition  
10 of an element of a capital offense, which is unquestionably a substantive decision governed by *Davis*  
11 *v. United States*, 417 U.S. at 346-47 (holding that a defendant may assert in a 28 U.S.C. §2255 post-  
12 conviction habeas corpus proceeding a claim based on an intervening substantive change in the  
13 interpretation of a federal criminal statute). Under *Bousley*, *Ring* is not a new rule of criminal  
14 procedure, but a rule of substantive criminal law, and thus is automatically retroactive.

15         The essence of criminal law is the definition of elements of the offense. *Jones* clarified that  
16 maximum punishment-increasing facts are elements. *Apprendi* applied to that definition the well-  
17 established rule that elements must be found by a jury, and *Ring* confirmed and extends that rule to  
18 the capital arena. The "new" rule in this sequence was *Jones*, and it is one of criminal law, not  
19 procedure. All the other procedural benefits that inure as a result of the definition of the offense of  
20 capital murder, i.e., jury decision, unanimity, notice by indictment or information follow as a result  
21 of the determination that the statutory aggravating factor is an element of the substantive offense under  
22 long-established law. A decision announces a "new rule" if it "breaks new ground or imposes a new  
23 obligation." *Teague*, 489 U.S. at 301. "To determine what counts as a new rule, *Teague* requires  
24 courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that  
25 established by binding precedent at the time his state court conviction became final." *Wright v. West*,  
26 505 U.S. 277, 304 (1992) (O'Connor, J., concurring). On the question of whether *Ring* announced a  
27 "new" rule, the court must "survey the legal landscape as it then existed, and determine whether a [  
28 ] court considering [the defendant's] claim at the time his conviction became final would have felt

1 compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution."

2 Lambrix v. Singletary, 520 U.S. 518, 526 (1997).

3 *Ring's* requirement that juries, not judges, find the elements of the charge is derived from  
4 ancient principles of law. Adamson v. Ricketts, 865 F. 2d 1011 (9<sup>th</sup> Cir. 1988) *cert. denied*, 97 U.S.  
5 1031 (1990) correctly found the Arizona death penalty statute to be irreconcilable with the Sixth and  
6 Fourteenth Amendments' jury trial guarantee -- the same rule upon which *Ring* relies. The Court in  
7 *Adamson* correctly emphasized the historical, longstanding basis for its decision:

8 The historic roots of the right to jury trial provide an essential backdrop to this  
9 discussion. The Framers of the Bill of Rights included the Sixth Amendment's  
10 guarantee of a right to jury trial as an essential protection against government  
11 oppression. "Fear of unchecked power, so typical of our State and Federal  
12 Governments in other respects, found expression in the criminal law in this insistence  
13 upon community participation in the determination of guilt or innocence." Duncan v.  
14 Louisiana, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968). The  
15 cornerstone of this protection is the right to have the jury determine the existence of the  
16 facts necessary to determine guilt or innocence of a given crime. Only by maintaining  
17 the integrity of the factfinding function does the jury "stand between the accused and  
18 a potentially arbitrary or abusive Government that is in command of the criminal  
19 sanction." United States v. Martin Linen Supply Co., 430 U.S. 564, 572, 97 S.Ct. 1349,  
20 1355, 51 L.Ed.2d 642 (1977).

21 The Court has recognized that the defendant's right to a jury trial and the concomitant  
22 factfinding responsibilities of the jury merit greater protection as the potential  
23 punishment increases. *See, e.g., Duncan*, 391 U.S. at 160-61, 88 S.Ct. at 1453 (jury  
24 trial not constitutionally mandated for petty offenses; seriousness of punishment  
25 determines when right attaches). As we have previously stated, the Supreme Court has  
26 repeatedly held that the death penalty is qualitatively different from all other  
27 punishments and that heightened scrutiny of death sentencing decisions is required.  
28 Thus, when the death penalty is implicated courts must be particularly careful to  
prevent the infringement of Sixth Amendment rights.

To avoid the dangers of government oppression recognized in *Duncan* and reaffirmed  
in later cases, there must be strict separation of determinations of guilt or innocence  
(factfinding) and determinations of the appropriate punishment (sentencing). To  
otherwise blur the distinctions between those concepts would result in the ultimate  
tyranny feared by the Founders and condemned by *Duncan*: the unchecked power of  
the government to execute at will.

23 Adamson v. Ricketts, 865 F. 2d at 1023. The Supreme Court went on to note further attributes of the  
24 legal landscape in effect at the time:

25 The Constitution requires that the state prove beyond a reasonable doubt all elements  
26 of the offense with which the defendant is charged. In re Winship, 397 U.S. 358, 361,  
27 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368 (1970). Yet the parameters of what constitutes  
28 an "element"--so as to fall within the jury's factfinding responsibility--remain elusive.  
A line of due process cases considering such contours has failed to produce concrete  
guidelines. *Cf. McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 2417, 91

1 L.Ed.2d 67 (1986) (Court has "never attempted to define precisely the constitutional  
2 limits [of] the extent to which due process forbids the reallocation or reduction of  
3 burdens of proof in criminal cases, and do[es] not do so today...."); *see also Patterson*  
4 *v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur*,  
5 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship*, 397 U.S. 358, 90  
6 S.Ct. 1068, 25 L.Ed.2d 368 (1969). We find, however, that a framework for analysis  
7 emerges from these cases. Thus, in assessing Adamson's claim, we examine (1) the  
8 legislative history of Arizona's death penalty statutes; (2) the actual role played by  
9 aggravating circumstances under Arizona's revised statute § 13- 703; and (3) the  
10 application of *McMillan v. Pennsylvania*, the Supreme Court's most recent  
11 pronouncement on the distinction between elements and sentencing factors, to this  
12 case.

13 *Adamson*, 865 F.2d at 1024.

### 14 3. Even If *Teague* Applies, *Ring* Should Be Applied Retroactively.

#### 15 A. *Ring* Satisfies the "Private Conduct Beyond the Power to Proscribe" 16 Exception to the *Teague* Doctrine.

17 Even if *Ring* were a new rule of criminal procedure, it must be applied retroactively because  
18 "it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-  
19 making authority to proscribe.'" *Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S.  
20 667, 693 (1971)(Harlan, J. concurring in part and dissenting in part)). This exception arises from  
21 *Teague's* adoption of Justice Harlan's views on non-retroactivity in which he noted that "[t]here is  
22 little societal interest in permitting the criminal process to rest at a point where it ought properly never  
23 to repose." *Mackey*, 401 U.S. at 692-93 (Harlan, J., concurring in part and dissenting in part.) Thus  
24 Justice Harlan concluded and the United States Supreme Court ultimately accepted that "[n]ew  
25 'substantive due process' rules that ... free[] individuals from punishment for conduct that is  
26 constitutionally protected" ought to be retroactive. *Mackey*, 401 U.S. at 692-93; accord *Bousley v.*  
27 *United States*, 523 U.S. at 620.

28 In *Penry v. Lynaugh*, 492 U.S. 303, 330 (1989) the Court recognized that the exception  
extended to capital cases in a unique way, noting that a "new rule placing a certain class of individuals  
beyond the state's power to punish by death is analogous to a new rule placing certain conduct beyond  
the State's power to punish at all." A constitutional rule barring execution of the retarded would fall  
outside *Teague v. Lane's* ban on retroactive application of new constitutional rules because it placed  
the ability to execute the retarded "beyond the State's power." *Id.* (discussing *Teague*, 489 U.S. at 301-

1 02).

2 Unlike any other class of proscribed criminal conduct, before a government may sentence a  
3 person to death, it must adhere to stringent jurisprudential requirements under the Eighth and  
4 Fourteenth Amendments. *Ring v. Arizona*, 122 S. Ct at 2442 (quoting *Apprendi*, 530 U.S. at 522-23  
5 (Thomas, J., concurring)) ("[I]n the area of capital punishment, unlike any other area, we have imposed  
6 special constraints on a legislature's ability to determine what facts shall lead to what punishment--we  
7 have restricted the legislature's ability to define crimes."). The first *Teague* exception permits a rule  
8 to be raised collaterally if it prevents lawmaking authority from criminalizing or punishing in a certain  
9 manner certain kinds of conduct. *Teague*, 489 U.S. at 311; *Penry*, 492 U.S. at 330. *Ring* prohibits  
10 the state from imposing the death penalty upon those who have been convicted by jury only of the  
11 lesser included offense of murder and are not eligible for death absent additional jury fact finding  
12 which never took place. *Ring* clearly comes within the ambit of the exception compelling application  
13 of its constitutional principles to the Dennis fact setting. The jury never evaluated or found facts  
14 which aggravated this case to a death penalty setting.

15 **B. *Ring* Satisfies The "Watershed" Exception to the *Teague***  
16 **Doctrine.**

17 Assuming arguendo that *Ring* announced a new rule of criminal procedure, the final step in the  
18 *Teague* analysis, is to ascertain whether the constitutional principle announced in *Jones*, applied in  
19 *Apprendi*, affirmed and extended in *Ring* is a watershed rule of criminal procedure, implicating both  
20 the accuracy and fundamental fairness of criminal proceedings. *Teague*, 489 U.S. at 312. Justice  
21 O'Connor has certainly answered that question in the affirmative when she wrote in her dissent in  
22 *Apprendi*: "Today, in what will surely be remembered as a watershed change in constitutional law,  
23 the Court imposes as a constitutional rule the principle it first identified in *Jones*." *Apprendi v. New*  
24 *Jersey*, 530 U.S. at 524 (O'Connor, J., dissenting). *But see Ring*, 122 S.Ct. at 2449-50 (O'Connor, J.  
25 dissenting) (noting that claimants may be "barred from taking advantage" of *Ring* "on federal collateral  
26 review"). *Ring v. Arizona*, which extended *Apprendi* to capital case sentencing proceedings, requires  
27 jury findings on, and pre-trial notice of aggravating circumstances -- concepts which are "implicit in  
28

1 the concept of ordered liberty" under *Teague's* second exception. See *Teague*, 489 U.S. at 311.<sup>1</sup>  
2 A rule that qualifies under this exception "must not only improve accuracy [of the trial and  
3 conviction], but also alter our understanding of the bedrock procedural elements essential to the  
4 fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (internal quotation marks and  
5 quoted cases omitted). *Ring* applies the principles of *Jones* and *Apprendi* in the capital context and  
6 is a sweeping rule of criminal law. *Ring* applies to every capital defendant in Nevada and in every  
7 other death penalty jurisdiction whose judge sentencing scheme usurped the jury's fact-finding  
8 function and stripped the accused of his or her right to notice, jury trial and due process.<sup>2</sup>

9 *Ring's* requirement that a jury, not a judge, find beyond a reasonable doubt the factual elements  
10 necessary for a conviction of capital murder meets the second *Teague* exception's qualifications.  
11 Applying *Jones* and *Apprendi* to the capital context, *Ring* raises the standard for determining factors  
12 that may subject a criminal defendant to a possible sentence of death from a preponderance of the  
13 evidence to beyond a reasonable doubt, thereby increasing accuracy. Similarly, *Ring's* requirement,  
14 that every element of a crime – defined as every fact that increases the statutory maximum – be

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18 The Supreme Court has described the "watershed" exception as encompassing only  
19 a "small core of rules requiring observance of those procedures that ... are implicit in the concept  
20 of ordered liberty." *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997) (quoting *Graham v. Collins*,  
21 506 U.S. 461, 478 (1993)). According to the Court, the "sweeping rule" announced in *Gideon v.*  
22 *Wainwright*, 372 U.S. 335 (1963), that counsel shall be provided in all criminal trials for serious  
23 offenses, is the prototypical example of a watershed ruling. See *O'Dell*, 521 U.S. at 167; *Gray v.*  
24 *Netherland*, 518 U.S. 152, 170 (1996). *Gideon* announced a rule that contains the "primacy and  
25 centrality" necessary to place it within *Teague's* watershed exception. *Saffle v. Parks*, 494 U.S.  
26 484, 495 (1990).

27  
28 <sup>2</sup> See *Ring v. Arizona*, 122 S. Ct. at 2442 n.6 ("[o]ther than Arizona [Ariz. Rev. Stat.  
§13-501(C)], only four States commit both capital sentencing factfinding and the ultimate  
sentencing decision entirely to judges. See Colo. Rev. Stat. § 16-11-103 (2001) (three-judge  
panel); Idaho Code § 19-2515 (Supp.2001); Mont. Code Ann. § 46-18-301 (1997); Neb. Rev.  
Stat. § 29-2520 (1995). . . Four States have hybrid systems, in which the jury renders an advisory  
verdict but the judge makes the ultimate sentencing determinations. See Ala. Code §§ 13A-5-46,  
13A-5-47 (1994); Del. Code Ann., Tit. 11, § 4209 (1995); Fla. Stat. Ann. § 921.141 (West 2001);  
Ind. Code Ann. § 35-50-2-9 (Supp.2001)).

1 charged in the indictment,<sup>3</sup> improves the accuracy of the fact-finding process because it reduces the  
2 risk that an innocent person might be convicted of a more serious crime, or that a guilty person might  
3 be punished more severely than the law allows. In *Ring*, the Court explicitly declined to accept  
4 Arizona's argument that judicial factfinding is superior in capital cases. The Court found that  
5 argument "far from evident," noting that "the great majority of States ... entrust[] those determinations  
6 to the jury." *Ring*, 122 S.Ct. at 2442.

7 In *Apprendi*, the Court stated: "At stake in this case are constitutional protections of surpassing  
8 importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and  
9 the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and  
10 public trial, by an impartial jury.' Amdt. 6." *Apprendi*, 530 U.S. at 476-77. The Court described the  
11 state procedure before it, wherein a factor that increased the statutory maximum of an offense was  
12 decided by the judge, as "an unacceptable departure from the jury tradition that is an indispensable part  
13 of our criminal justice system." *Id.* at 497. The Court further recognized that the reasonable-doubt  
14 standard was at stake. *Id.* at 483-85.

15 As stated in *In re Winship*, 397 U.S. 358 (1970), the reasonable-doubt standard  
16 ... plays a vital role in the American scheme of criminal procedure. It is a prime instrument  
17 for reducing the risk of convictions resting on factual error. The standard provides concrete  
18 substance for the presumption of innocence -- that bedrock axiomatic and elementary principle  
19 whose enforcement lies at the foundation of the administration of our criminal law.  
20 *Id.* at 363 (quoted case omitted). See *Apprendi*, 530 U.S. at 483-85.

21 In light of the fundamental nature of the right to pre-trial notice of every element of the offense  
22 and findings by the jury beyond a reasonable doubt on every element of the offense, the holding in  
23 *Ring* must meet the *Teague* exception for a watershed rule affecting bedrock procedural requirements

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24 <sup>3</sup> "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury  
25 trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the  
26 maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven  
27 beyond a reasonable doubt." *Ring*, 122 S.Ct. at 2439 (quoting *Jones v. United States*, 526 U.S. at  
28 243 n.6). "Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting  
without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.  
[citation omitted]. Because Arizona's enumerated aggravating factors operate as 'the functional  
equivalent of an element of a greater offense,' [citation omitted], the Sixth Amendment requires  
that they be found by a jury." *Ring*, 122 S. Ct. at 2443 (quoting *Apprendi*, 530 U.S. at 494).

1 implicit in ordered liberty and necessary to a fair trial. A comparison to other rules, held to meet  
2 *Teague*'s watershed rule exception, forces the conclusion that *Ring* necessarily falls within its purview.

3  
4 [C]ourts have applied the second exception of *Teague* to a range of constitutional  
5 rules of criminal procedure. See, e.g., *Ostrosky v. Alaska*, 913 F.2d 590, 594-95 (9<sup>th</sup>  
6 Cir.1990) (announcing a new due process rule concerning mistake of law defenses  
7 and finding that the rule falls within the *Teague* exception for "procedures implicit  
8 in the concept of ordered liberty" ); *Hall v. Kelso*, 892 F.2d 1541, 1543 n. 1 (11<sup>th</sup>  
9 Cir.1990) (finding as an exception the rule announced in *Sandstrom v. Montana*  
10 regarding burden shifting instructions); *Graham v. Hoke*, 946 F.2d 982, 994 (2d Cir.  
11 1991) (finding as an exception the rule announced in *Cruz*, that non testifying  
12 codefendant's confession may not be admitted); *Williams v. Dixon*, 961 F.2d 448,  
13 454-56 (4<sup>th</sup> Cir. 1992) (finding as an exception the *Mills* rule striking the unanimity  
14 requirement in jury findings of mitigating evidence); *Gaines [v. Kelly]*, 202 F.3d  
15 [598,] 604 [(2d Cir. 2000)] (finding as an exception the *Cage* rule that describing  
16 reasonable doubt in terms of grave or substantial uncertainty and requiring a "moral  
17 certainty" violates due process).

18 *Hoffman v. Arave*, 236 F.3d 523, 547-48 (9<sup>th</sup> Cir. 2001) (Pregerson, J., dissenting).

19 In the most basic sense, *Ring* remedies a "structural defect[ ] in the constitution of the trial  
20 mechanism." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). For the Court in *Sullivan*, Justice  
21 Scalia recognized not only that the right to trial by jury is "fundamental to the American scheme  
22 of justice," *id.* at 277 (quoting *Duncan v. Louisiana*, 391 U.S. at 149), but also that its "most  
23 important element" is "the right to have the jury, rather than the judge, reach the requisite finding  
24 of 'guilty.'" *Sullivan*, 508 U.S. at 277 (citing *Sparf v. United States*, 156 U.S. 51, 105-06 (1895)).

25 In *Johnson v. Zerbst*, 304 U.S. 458 (1938) – which, of course, was the taproot of *Gideon v.*  
26 *Wainwright*, this Court's model of the case for retroactive application of constitutional change – the  
27 Supreme Court held that a denial of the right to counsel could be vindicated in postconviction  
28 proceedings because the Sixth Amendment required a lawyer's participation in a criminal trial to  
"complete the court." *Johnson v. Zerbst*, 304 U.S. at 468. A judgment rendered by an incomplete  
court was subject to collateral attack. *Id.* What was a mere imaginative metaphor in *Johnson* is  
*literally* true of a capital sentencing proceeding in which the jury has not participated in the life-or-  
death factfinding role that the Sixth Amendment reserves to a jury under *Apprendi* and *Ring*: the  
constitutionally requisite tribunal was simply *not there* for the critical finding of aggravating  
circumstances; and such a radical defect necessarily "cast[s] serious doubt on the veracity or integrity

1 of the . . . trial proceeding,” *Witt v. State*, 387 So.2d 922, 929 (Fla. 1980).

2 “[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental  
3 decision about the exercise of official power – a reluctance to entrust plenary powers over the life  
4 and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found  
5 expression . . . in this insistence upon community participation in the determination of guilt or  
6 innocence.” *Duncan v. Louisiana*, 391 U.S. at 156. These same principles require jury participation  
7 in the determination of guilt or innocence of the factual accusations “necessary for imposition of the  
8 death penalty.” *Ring*, 122 U.S. at 2443. *See Apprendi*, 530 U.S. at 494-495. The right to a jury  
9 determination of factual accusations of this sort has long been the central bastion of the Anglo-  
10 American legal system’s defenses against injustice and oppression.<sup>4</sup> As former Justice Lewis F.  
11 Powell, Jr. wrote: “jury trial has been a principal element in maintaining individual freedom among  
12 English speaking peoples for the longest span in the history of man.” Powell, *Jury Trial of Crimes*,  
13 23 Washington & Lee L. Rev. 1, 11 (1966).

14 Justice Powell also quotes de Tocqueville as observing:

15 that the jury “places the real direction of society in the hands of the governed. . . . and  
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17 <sup>4</sup> *See* Blackstone’s Commentaries, §§ 349-350 (Lewis ed. 1897):

18 [T]he founders of the English law have with excellent forecast contrived . . . that the truth  
19 of every accusation . . . should afterwards be confirmed by the unanimous suffrage of  
20 twelve of his equals and neighbors. . . . So that the liberties of England cannot but subsist,  
21 so long as this *palladium* remains sacred and inviolate; not only from all open attacks,  
22 (which none will be so hardy as to make) but also from all secret machinations, which may  
sap and undermine it. . . .

23 *Id. See also Rex v. Poole*, Cases Tempore Hardwicke 23, 27 (1734), quoted in *Sparf v. United*  
24 *States*, 156 U.S. 51, 94 (1895):

25 [I]t is of the greatest consequence to the law of England, and to the subject, that these  
26 powers of the judge and the jury are kept distinct; that the judge determines the law, and  
27 the jury the fact; and, if ever they come to be confounded, it will prove the confusion and  
destruction of the law of England.

28 *Id.*

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not in . . . the government. . . He who punishes the criminal . . . is the real master of society. All the sovereigns who have chosen to govern by their own authority, and to direct society, instead of obeying its direction, have destroyed or enfeebled the institution of the jury.”

*Id.* at 5 (quoting 1 Alexis de Tocqueville, *Democracy in America* 282 (Henry Reeve trans., 1948).

In summary, it is clear that *Ring* was intended to be applied retroactively and that Petitioner, Terry Jess Dennis is entitled to relief.

**4. UNDER THE PROVISIONS OF RING, THE THREE JUDGE PANEL SYSTEM IS UNCONSTITUTIONAL.**

The goal of the State appears to be one of judicial legislation. Creating new law is within the province of the legislature, not the court system. It is not the function of the court system to change the statutory scheme. These types of changes must come from the legislative branch of the government.

In *Ring v. Arizona*, \_\_\_ U.S. \_\_\_, 122 S.Ct. 2428 (2002), the Supreme Court held that the sixth and fourteenth amendment right to jury trial requires that a jury find all of the factual elements which are required to make a defendant eligible to receive the death penalty under state law. Nevada law provides that, in addition to the conviction of first degree murder, the sentencer must make findings of two additional factual elements to make a defendant eligible for the death penalty: that one or more aggravating circumstances are proved beyond a reasonable doubt; and that the mitigating circumstances do not outweigh the aggravating circumstances. Nev. Rev. Stat. § 200.030(4); see e.g., *Gallego v. State*, 101 Nev. 782, 790-791, 711 P.2d 856 (1985). Under *Ring*, those findings must be made by a jury, and the Nevada statutes that allow a three-judge panel to make them, Nev. Rev. Stat. §§ 175.552(1), 175.554(2,3,4), 175.556(1), 175.558, 175.562, are therefore unconstitutional.

Under current law, the statutes that provide for convening a three-judge panel are the only provisions for imposing sentence when a jury cannot agree on a sentence, a defendant pleads guilty, or a defendant is tried by the court, but while the panel can constitutionally impose a sentence less than death, it cannot constitutionally impose a death sentence under *Ring*. Any change in the statutory scheme to alter or remove the provisions for three-judge panel sentencing must come from

1 the legislature. The courts cannot attempt to formulate a procedure for imposition of a death  
2 sentence by a three-judge panel on an ad hoc basis – in effect, by rewriting the statutory provisions  
3 – without running afoul of both the separation of powers doctrine and the federal constitutional  
4 guarantees of due process and equal protection of the laws.

5 The federal courts have faced similar issues. In United States v. Jackson, 390 U.S. 570  
6 (1968), the Supreme Court considered the constitutionality of the Federal Kidnaping Act, which  
7 allowed imposition of a death sentence by a jury but “sets forth no procedure for imposing the death  
8 penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty.” Id. at  
9 571. The Court held that the death penalty provision was unconstitutional as a burden on the  
10 defendant’s right to jury trial, and it rejected the government’s attempt to save the constitutionality  
11 of the provision by interpolating a non-statutory procedure to empanel a jury in cases where the  
12 defendant pleaded guilty or was tried by the court.

13 Equally untenable is the Government’s argument that the Kidnaping  
14 Act authorizes a procedure unique in the federal system– that of  
15 convening a special jury, without the defendant’s consent, for the sole  
16 purpose of deciding whether he should be put to death. We are told  
17 initially that the Federal Kidnaping Act authorizes this procedure by  
18 implication. The Government’s reasoning runs as follows: The  
19 Kidnaping Act permits the infliction of capital punishment whenever  
20 a jury so recommends. The Act does not state in so many words that  
21 the jury recommending capital punishment must be a jury impaneled  
22 to determine guilt as well. Therefore the Act authorizes infliction of  
23 the death penalty on the recommendation of a jury specially convened  
24 to determine punishment.

25 . . . .

26 The Government would have us give the statute this strangely  
27 bifurcated meaning without the slightest indication that Congress  
28 contemplated any such scheme. Not a word in the legislative history  
so much as hints that conviction on a plea of guilty or a conviction by  
a court sitting without a jury might be followed by a separate  
sentencing proceedings before a penalty jury. If the power to impanel  
such a jury had been recognized elsewhere in the federal system when  
Congress enacted the Federal Kidnaping Act, perhaps Congress’ total  
silence on the subject could be viewed as a tacit incorporation of this  
sentencing practice into the new law. But the background against  
which Congress legislated was barren of any precedent for the sort of  
sentencing procedure we are told Congress impliedly authorized.

Id. at 576-578.

The Court concluded that “it would hardly be the province of the courts to fashion a remedy”

1 for the absence of any such statutory procedure, id. at 579, because:

2           It is one thing to fill a minor gap in a statute – to extrapolate from its  
3           general design details that were inadvertently omitted. It is quite  
4           another thing to create from whole cloth a complex and completely  
5           novel procedure and to thrust it upon unwilling defendants for the  
6           sole purpose of rescuing a statute from a charge of  
7           unconstitutionality. We recognize that trial judges sitting in federal  
8           kidnaping cases have on occasion chosen the latter course, attempting  
9           to fashion on an ad hoc basis the ground rules for penalty proceedings  
10          before a jury. We do not know what kinds of rules particular federal  
11          judges have adopted, how widely such rules have varied, or how  
12          fairly they have been applied. But one thing at least is clear:  
13          Individuals forced to defend their lives in proceedings tailor-made for  
14          the occasion must do so without the guidance that defendants  
15          ordinarily find in a body of procedural and evidentiary rules spelled  
16          out in advance of trial. The Government notes with approval ‘the  
17          decisional trend which has sought \* \* \* to place the most humane  
18          construction on capital legislation.’ Yet it asks us to extend the  
19          capital punishment provision of the Federal Kidnaping Act in a new  
20          and uncharted direction, without the compulsion of a legislative  
21          mandate and without the benefit of legislative guidance. That we  
22          decline to do.

23          Id. at 580-581 (footnotes omitted). The situation is the same in this case. The Nevada courts cannot  
24          create a new, extra-statutory procedure for imposing a death sentence “for the sole purpose of  
25          rescuing [the three-judge panel] statute from a charge of unconstitutionality without the benefit of  
26          legislative guidance.”

27          The federal courts faced a similar problem when Furman v. Georgia, 408 U.S. 238 (1972)  
28          invalidated existing federal death penalty statutes which included unfettered jury discretion to  
29          impose the death penalty. In the wake of Furman, the United States Department of Justice concluded  
30          that the existing federal death penalty statutes were unconstitutional and could not be salvaged by  
31          ad hoc judicial action to create a constitutional sentencing procedure. In an opinion written by the  
32          current Solicitor General of the United States, the Department of Justice, relying on Jackson,  
33          concluded that “we do not believe that the courts would be permitted to ‘rescue’ that provision  
34          through their own creativity even if the establishment of a separate [sentencing] proceeding would  
35          be permissible under standards laid down by Congress,” and that the existing substantive death  
36          penalty provision did not authorize a district court to undertake the essentially legislative task of  
37          composing its own procedure safeguards in order to comply with the requirements of Gregg v.  
38          Georgia, 428 U.S. 153 (1976). See 5 U.S. Op. Off. Legal Counsel 224, 227-228 (1981).

1 Later, in United States v. Woolard, 981 F.2d 756 (5<sup>th</sup> Cir. 1993), the government changed  
2 its position and attempted to have a district court create and follow a sentencing procedure to impose  
3 the death penalty that would pass constitutional muster. The district court declined to do so, and the  
4 Court of Appeals rejected the government's position on appeal:

5 This brings us to the question whether the trial judge can by invention  
6 supply the required procedures at the sentencing hearing, indeed  
7 supply a sentence hearing. The government contends that the district  
8 court has inherent power to conduct those hearings necessary to meet  
9 constitutional requirements such as evidentiary hearings on the  
10 admissibility of evidence. We agree that a district judge has inherent  
11 power essential to his task. There are, however, many different ways  
12 of constructing a constitutionally adequate scheme. The Supreme  
13 Court has left states free to proceed in ways that are in practice quite  
14 different. There is simply not "any one right way . . . to set up [a]  
15 capital sentencing scheme." Spaziano v. Florida, 468 U.S. 447, 464,  
16 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984).

17 The Federal Kidnaping Act was struck down because it made  
18 kidnaping punishable by death only on a plea of not guilty and hence  
19 penalized a defendant's right to put the government to its proof.  
20 United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d  
21 138 (1968). The Court in Jackson rejected the effort to save the  
22 statute with the argument that a district judge could conduct a  
23 sentencing hearing on a plea of guilty by exercise of its inherent  
24 power. It pointed out that there are a number of policy decisions not  
25 addressed by Congress that would need be made, asking:

26 If a special jury were convened to recommend a  
27 sentence, how would the penalty hearing proceed?  
28 What would each side be required to show? What  
standard of proof would govern? To what extent  
would conventional rules of evidence be abrogated?  
What privileges would the accused enjoy? Congress  
. . . has addressed itself to none of these questions . . .

Id. at 579, 88 S.Ct. at 1215. The Court then explained that these  
choices were for Congress not federal judges acting ad hoc across the  
country. Id. at 580-81, 88 S.Ct. at 1215-16.

It is one thing to fill a minor gap in a statute . . . It is  
quite another thing to create from whole cloth a  
complex and completely novel procedure and to thrust  
it upon unwilling defendants for the sole purpose of  
rescuing a statute from a charge of unconstitutionality.

Id. at 580, 88 S.Ct. at 1215. The choices are for the Congress and it  
has not acted. We agree with the district court on this point and  
affirm.

Id. at 759; accord United States v. Burke, 1992 WL 333578 \* 8, 17 (E.D. Pa. 1992) ("the Court  
could fashion a sentencing procedure that would meet minimal constitutional requirements, but it

1 should not. This is a legislative function.”). In the same way here, the choices of what procedures  
2 to adopt to conform Nevada’s death penalty statutes to comply with Ring are for the legislature, not  
3 the courts, to make.

4 Any attempt by the Nevada courts “to undertake the essentially legislative task” of creating  
5 a new three-judge panel procedure would violate Nevada’s strong separation of powers doctrine.  
6 Nev. Const. Art. 3 § 1; e.g., Galloway v. Truesdell, 83 Nev. 13, 19-20, 23.1 422 P.2d 237 (1967).  
7 There can be no serious dispute that the choice of how to adapt Nevada law to the requirements of  
8 Ring poses quintessentially legislative judgments among a variety of options, such as eliminating  
9 the panels altogether, eliminating their ability to impose the death penalty, providing for an  
10 automatic default to a penalty less than death in situations where a panel would previously have been  
11 used, or providing for jury sentencing in all cases. Those choices cannot be made by a court without  
12 usurping legislative power.

13 Any such action would also violate federal due process standards, since judicial adoption of  
14 an extra-statutory ad hoc procedure would deprive the defendant of any adequate notice of what  
15 procedure would be followed. The creation of such a procedure in a particular case would amount  
16 to a judicial version of a bill of attainder. Nev. Const. Art. 1 § 15; U.S. Const. Art. 1 § 9; see Bouie  
17 v. City of Columbia, 378 U.S. 347, 361 (1964) (due process prohibits judicial as well as legislative  
18 action in violation of ex post facto clause); see also Carmel v. Texas, 529 U.S. 513, 527-530 (2000)  
19 (discussing parallels between ex post facto and bill of attainder prohibition). Adopting a special  
20 procedure solely for the purpose of making a defendant eligible for the death penalty, when the  
21 statutes in effect cannot constitutionally be applied to authorize that result, would have the same  
22 effect of singling out an individual for extra-statutory punishment as a legislative bill of attainder.  
23 In addition, a defendant so singled out would be deprived of adequate (indeed, any) review of the  
24 constitutionality of the court’s action in adopting that procedure, because no court could be impartial  
25 with respect to reviewing the procedure it had adopted in the same case. See Rust v. Hopkins, 984  
26 F.2d 1486, 1493-1494 (8<sup>th</sup> Cir. 1993) (where state supreme court attempted to cure invalid sentence  
27 by essentially resentencing defendant on appeal, defendant was deprived of federal due process  
28 because state supreme court could not validly conduct mandatory review of sentence, required by

1 state statute, that it had itself imposed). That due process violation would amount to an equal  
2 protection violation as well, since it would deprive the singled-out defendant of rights to notice of  
3 the applicable statutory procedures and adequate review that are available to all other defendants.

4 In short, the Nevada statutes currently in effect do not prescribe a constitutional procedure  
5 for a three-judge panel to impose a death sentence. Only the legislature, not the courts, can  
6 determine how a new sentencing procedure should be formulated in light of Ring. Accordingly,  
7 while a three-judge panel must be convened in the circumstances prescribed by the statutes, Nev.  
8 Rev. Stat. §§ 175.552(1)(b), 175.556(1), 175.558, the judiciary cannot create a procedure that would  
9 validly allow such a panel to impose a death sentence under Ring.

10 The Nevada Supreme Court's previous decisions upholding the three-judge panel procedure  
11 do not control this Court's resolution of this issue. Those decisions did not address or resolve the  
12 issue decided in Apprendi or Ring. See, e.g., Williams v. State, 113 Nev. 1008, 1017-1018 and nn.  
13 5, 6 (1997); Kirksev v. State, 112 Nev. 980, 1001, 923 P.2d 1102 (1996); Paine v. State, 110 Nev.  
14 609, 617 877 P.2d 1025 (1994); Redmen v. State, 108 Nev. 227, 235-236, 828 P.2d 395 (1992).  
15 Since the Nevada Supreme Court's decisions relating to the three-judge panel issue did not address  
16 the issue decided in Apprendi or Ring they do not control this Court's resolution of the issue here

17 There appears to be no doubt that the aggravating circumstances prescribed by Nev. Rev.  
18 Stat. § 200.033 are "elements" of capital murder. Nev. Rev. Stat. § 200.030 defines the degrees of  
19 murder and prescribes the maximum punishments allowed.<sup>5</sup> First degree murder is punishable by  
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21 <sup>5</sup> Nev. Rev. Stat. § 200.030(4) provides:

22 A person convicted of murder of the first degree is guilty of a category A felony  
23 and shall be punished:

24 (a) By death, only if one or more aggravating circumstances are found and  
25 any mitigating circumstance or circumstances which are found do not outweigh the aggravating  
26 circumstance or circumstances; or

27 (b) By imprisonment in the state prison;

28 (1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole  
beginning when a maximum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole  
beginning when a minimum of 20 years has been served.

1 various terms of imprisonment, § 200.030(4)(b), but it is punishable by death “only if one or more  
2 aggravating circumstances are found and any mitigating circumstance or circumstances which are  
3 found do not outweigh the aggravating circumstance or circumstances....” § 200.030(4)(a) (emphasis  
4 supplied). The crucial role of aggravating circumstances as elements of capital-eligible first degree  
5 murder is further demonstrated by the last sentence of § 200.030(4): “A determination of whether  
6 aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or  
7 without the possibility of parole.”

8         Thus, under state law both the existence of aggravating factors, and the determination that  
9 the aggravating factors are not outweighed by the mitigating factors, are necessary elements of death  
10 eligibility and are necessary to increase the maximum punishment provided for first degree murder  
11 from the various possible sentences of imprisonment to death. Under *Ring*, this determination must  
12 be found by a jury, whether or not the defendant entered a plea of guilty to the underlying charge.

13         The Sixth Amendment right to a jury trial precludes procedure whereby a sentencing judge,  
14 sitting without a jury, finds an aggravating circumstance necessary for imposition of the death  
15 penalty. *Ring v. Arizona*, 536 U.S. \_\_\_, 122 S.Ct. 2428 (2002). As a direct result of the application  
16 of *Ring*, there is no question that the Nevada three judge panel death penalty statutory provisions are  
17 unconstitutional. The Court held that, “[b]ecause Arizona’s enumerated aggravating factors operate  
18 as ‘the functional equivalent of an element of a greater offense,’ the Sixth Amendment requires that  
19 the aggravating factors be found by a jury.” *Ring*, 536 U.S. at \_\_\_, 122 S. Ct. at 2443. The Court  
20 expressly overruled its earlier holding in *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990),  
21 noting that its “Sixth Amendment jurisprudence cannot be home to both” that case and *Apprendi*.  
22 *Id.* The Court emphatically reaffirmed that “[c]apital defendants, no less than non-capital defendants,  
23 ... are entitled to a jury determination of any fact on which the legislature conditions an increase  
24 in their maximum punishment.”

25         The mitigating factors and aggravating factors required by *Enmund v. Florida*, 458 U.S. 782,  
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27         A determination of whether aggravating circumstances exist is not necessary to fix the  
28 penalty at imprisonment for life with or without the possibility of parole.

1 102 S.Ct. 3368 (1982), and Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676 (1987), cannot be made  
2 by the three judge sentencing panel and must be found by the jury under the Sixth, Eighth, and  
3 Fourteenth Amendments. These factual findings are necessary before imposition of a death  
4 sentence and are no different than the finding of the existence of an aggravating circumstance as  
5 required by *Ring*. The State's argument that issues relating to *Ring* have been resolved is without  
6 merit. There are no cases interpreting *Ring* which are on point with this fact setting. Contrary to the  
7 petitioners mentioned by Justice O'Connor dissent in *Ring*, Mr. Dennis would not be barred from  
8 raising this issue on federal review. He is not procedurally barred from raising issues of  
9 constitutional magnitude in his first habeas petition in state court.

10 The State's argument rests upon case authority which is ancient in the scheme of death  
11 penalty litigation. This is a field in the practice of law which is ever changing. Cases which may  
12 have been cutting edge law in 1976 are dated in both theory and application of the law in the death  
13 penalty arena. Petitioner has attempted to direct this Court to the latest available legal authority so  
14 that this Court may determine this issue in the proper context of the law as it stands in 2002. The  
15 summary of this matter is that "death is different".

16 The State argues that Terry Jess Dennis waived the right to jury sentencing and jury weighing  
17 of the aggravating and mitigating sentence on his case. As has been raised extensively in the Petition  
18 for Writ of Habeas Corpus and Supplemental Petition for Writ of Habeas Corpus (post-conviction),  
19 Mr. Dennis did not knowingly and voluntarily waive any constitutional rights due to his mental  
20 health issues and lack of proper medications which would have been needed to stabilize his mental  
21 health status during the proceedings. Based upon the evidence before the Court, it is impossible to  
22 grant the State's request that the actions of Mr. Dennis constitute a knowing and voluntary waiver  
23 of his constitutional rights without an evidentiary hearing on the issues of competence.

24 Based upon the unconstitutionality of Nevada's death penalty statutes alone, Mr. Dennis is  
25 entitled to withdraw his previously entered guilty plea and proceed anew on his case. The case  
26 should be set for jury trial.

27 ////

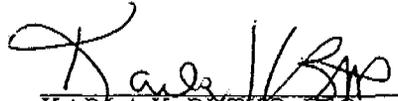
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CONCLUSION

After a thorough review of the applicable law, this Court will determine that the death sentence of Terry Jess Dennis must be vacated. The three judge panel system is unconstitutional. The case must start anew.

DATED this 25<sup>th</sup> day September, 2002.

  
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, I certify that I am an employee of Karla K. Butko, Ltd., 1030 Holcomb Avenue, Reno, NV 89502, and that on this date I caused the foregoing document to be delivered to all parties to this action by

\_\_\_\_\_ placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

\_\_\_\_\_ personal delivery

\_\_\_\_\_ Facsimile (FAX)

\_\_\_\_\_ Federal Express or other overnight delivery

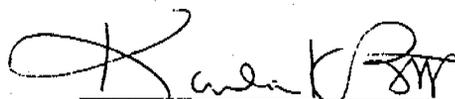
Reno/Carson Messenger Service

addressed as follows:

Joseph Plater  
Washoe County District Attorney's Office  
Appellate Division  
P. O. Box 11130  
75 Court St.  
Reno, NV 89520

Frankie Sue Del Papa  
Nevada Attorney General  
100 N. Carson Street  
Carson City, Nevada 89701-4717

DATED this 26th day of September, 2002.

  
\_\_\_\_\_  
KARLA K. BUTKO



1 CODE: 3347

FILED

RONALD A. LONGTIN, JR., Clerk

By L. Quilici

20 Nov 2002 Deputy Clerk

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE

8  
9 TERRY JESS DENNIS,

10 Petitioner,

11 VS.

Case No. CR99P0611

12 THE STATE OF NEVADA,

Dept. No. 1

13 Respondent.

14  
15 ORDER

16 Respondent, THE STATE OF NEVADA, by and through counsel, filed a *Motion to Dismiss*  
17 *Petition for Writ of Habeas Corpus (Post-Conviction)*. Petitioner, TERRY JESS DENNIS, by and  
18 through counsel, filed an *Opposition* to which the State *Replied*. This Court entered an Order  
19 requesting the parties file supplemental briefs addressing the recent United State Supreme Court  
20 decision, Ring v. Arizona.

21 On April 16, 1999, Dennis plead guilty to first-degree murder, with the use of a deadly  
22 weapon. A penalty hearing was held before a Three-Judge Panel consisting of the Honorable Janet  
23 J. Berry, the Honorable Michael Cherry, and the Honorable Michael Memeo. The Three-Judge  
24 Panel found three aggravating circumstances: two prior felonies for assault, and one prior felony for  
25 arson. The Panel found two mitigating circumstances: that Dennis was under the influence of  
26 alcohol when he killed the victim, and that Dennis suffers from mental illness. However, the Panel  
27 found that the mitigating circumstances did not outweigh the aggravating circumstances and  
28

1 sentenced Dennis to death. Subsequently, Dennis appealed the Sentence of Death to the Nevada  
2 Supreme Court, which affirmed the decision of the Three-Judge Panel on December 4, 2000.

3 On April 9, 2001, Dennis filed this Petition for Writ of Habeas Corpus (Post-Conviction).  
4 On February 14, 2002, Dennis filed Supplemental claims in support of the petition. This Court  
5 ordered a response from the State and it filed a Motion to Dismiss Dennis' Petition for Writ of  
6 Habeas Corpus. Subsequently, this Court ordered the parties to file Supplemental briefs concerning  
7 the proper application of Ring v. Arizona, 536 U.S. \_\_\_, 122 S. Ct. 2428 (June 24, 2002).

8 The Court has read and considered the arguments of counsel and finds an evidentiary hearing  
9 may assist the Court in considering Dennis' claims. Accordingly, and good cause appearing, the  
10 parties herein are HEREBY ORDERED to set this matter for an evidentiary hearing within 20 days  
11 of receipt of this Order.

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14 DATED: This 20<sup>th</sup> day of November, 2002.

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18 DISTRICT JUDGE

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CERTIFICATE OF MAILING

Pursuant to NRCPC 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 20<sup>th</sup> day of November, 2002, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Karla Butko, Esq.  
1030 Holcomb Avenue  
Reno, NV 89502

Joseph Plater, Esq.  
District Attorney's Office  
Via Interoffice Mail

  
\_\_\_\_\_  
Leona Quilici

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1 CODE #2300  
2 RICHARD A. GAMMICK  
3 #001510  
4 P. O. Box 30083  
5 Reno, Nevada 89520-3083  
6 (775)328-3200  
7 Attorney for Respondent

8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
9 IN AND FOR THE COUNTY OF WASHOE

10 TERRY JESS DENNIS,

11 Petitioner,

12 v.

13 THE STATE OF NEVADA,

14 Respondent.

15 Case No. CR99P0611

16 Dept. No. 1

17 MOTION TO RECONSIDER MOTION TO DISMISS PETITION  
18 FOR WRIT OF HABEAS CORPUS  
19 (POST-CONVICTION)

20 COMES NOW, the Respondent, by and through counsel, and  
21 respectfully requests this Court to enter an Order dismissing  
22 petitioner's Petition for Writ of Habeas Corpus (Post-  
23 Conviction). This Motion is predicated on the accompanying  
24 Points and Authorities.

25 POINTS AND AUTHORITIES

26 The first claim of the original petition and claims  
nineteen and twenty of the supplemental petition allege that  
petitioner had the right to have his sentence determined by a  
jury. In response to the United States Supreme Court's decision

1 in Ring v. Arizona, 536 U.S. \_\_\_\_\_, 122 S. Ct. 2428 (2002), this  
2 Court ordered the parties to provide additional briefing as to  
3 those claims. After the parties submitted their briefs, this  
4 Court ordered petitioner's claims to be set for an evidentiary  
5 hearing. The State now seeks this Court to reconsider its order  
6 setting this case for an evidentiary hearing.

7           The State previously argued that Ring does not apply  
8 retroactively to collateral review of final judgments. On  
9 December 18, 2002, the Nevada Supreme Court agreed. In Colwell  
10 v. State, 118 Nev. Adv. Op. No. 80 (December 18, 2002), the  
11 defendant pleaded guilty to first degree murder, burglary, and  
12 robbery of a victim 65 years of age or older. A three-judge  
13 panel imposed a sentence of death. On appeal from the district  
14 court order denying a post-conviction petition for a writ of  
15 habeas corpus, the Nevada Supreme Court affirmed and ruled that  
16 "retroactive application of Ring on collateral review is not  
17 warranted." Id. The Nevada Supreme Court also ruled that the  
18 defendant waived his right to have his sentence determined by a  
19 jury when he pleaded guilty and waived his right to a jury trial.  
20 Id.

21           Colwell applies here. The judgment in this case became  
22 final in 2000, when the Nevada Supreme Court affirmed peti-  
23 tioner's conviction and sentence, and the Supreme Court issued  
24 its remittitur. Dennis v. State, 116 Nev. 1075, 13 P.3d 434  
25 (2002); Colwell, supra, ("A conviction becomes final when  
26 judgment has been entered, the availability or appeal has been

1 exhausted, and a petition for certiorari to the Supreme Court has  
2 been denied or the time for such a petition has expired."). Ring  
3 was decided this year. Accordingly, we now know that petitioner  
4 has no claim under Ring.<sup>1</sup>

5 The rest of petitioner's claims should also be  
6 dismissed because they are either barred by the law of case, fail  
7 to state a claim for relief, or are repelled by the record.  
8 Accordingly, the State respectfully requests this Court to  
9 dismiss the petition for writ of habeas corpus.

10 DATED: December 23, 2002.

11 RICHARD A. GAMMICK  
12 District Attorney

13 By   
14 JOSEPH R. PLATER  
15 Appellate Deputy  
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24  
25 <sup>1</sup>As in Colwell, the record in this case also demonstrates that  
26 petitioner waived his right to have a jury determine his sentence  
when he pleaded guilty. For this additional reason, the three-  
judge panel's decision in this case must be upheld.

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Karla K. Butko, Esq.  
1030 Holcomb Avenue  
Reno, NV 89502

DATED: December 23, 2002

  
\_\_\_\_\_



1 CODE: 4100  
2 KARLA K. BUTKO, ESQ.  
3 State Bar No. 3307  
4 SCOTT W. EDWARDS, ESQ.  
5 State Bar No. 3400  
6 1030 Holcomb Ave.  
7 Reno, Nevada 89502  
8 (775) 786-7118  
9 Attorneys for Petitioner, TERRY JESS DENNIS

FILED  
2003 JAN -9 PM 1:34  
RONALD A. L. STAN, JR.  
BY W. W. W.

10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
11 IN AND FOR THE COUNTY OF WASHOE

12 \* \* \*

13 TERRY JESS DENNIS,

14 Petitioner,

15 vs:

Case No. CR99P0611

16 E.K. McDaniel, Warden,  
17 the Nevada State Prison, Ely;  
18 FRANKIE SUE DEL PAPA,  
19 Attorney General of the  
20 State of Nevada,

Dept. No. 1

21 Respondents.

22 OPPOSITION TO MOTION TO RECONSIDER MOTION TO DISMISS  
23 PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

24 COMES NOW, Petitioner, TERRY JESS DENNIS, by and through  
25 counsel, and respectfully requests this Court deny the Motion to  
26 Reconsider the Motion to Dismiss the Petition for Writ of Habeas  
27 Corpus (Post-Conviction). This Motion is based upon the pleadings  
28 and papers on file herein, including the two prior opposition to  
the motion to dismiss and the Supplemental Brief filed regarding  
the application of Ring v. Arizona, supra, any evidence which may  
be submitted at a hearing on the motion and the arguments of  
counsel which may occur as a result of this matter.

1 POINTS AND AUTHORITIES

2 DEATH IS DIFFERENT.

3 One comment has been repeated by every court that is critical to the review of this matter:  
4 Death is Different.

5 While Petitioner has read the case of Colwell v. State, 118 Nev. Adv. Op. No. 80, Decided  
6 on December 18, 2002, Petitioner remains adamant that the constitutionality of the three judge  
7 panel system as applied in this case will reach an ending which is in Petitioner's favor. The  
8 Colwell case is significantly different. Colwell and his girlfriend planned a murder and conducted  
9 that murder which involved killing a 76 year old man. They then left the State of Nevada and went  
10 to Oregon. Colwell represented himself with standby counsel. Since he represented himself, he  
11 would basically have been arguing that he, himself was ineffective. Clearly, that is not on point  
12 with the case at hand. In this case, Terry Dennis ("Dennis") was represented by counsel through  
13 all stages of the proceeding. Colwell's proper person petition was vague and lacked specific  
14 factual allegations which would entitle him to relief. That is not the case at hand. The  
15 Supplemental Petition on file on behalf of Mr. Dennis makes specific allegations, declares  
16 potential witnesses and states areas where, if Petitioner meets his burden of proof he is entitled to  
17 relief.

18 Also critically different in this case is that the three judge panel in Colwell found no  
19 evidence of mitigation. In this case, the three judge panel found three aggravating factors which  
20 consisted of dated prior felony convictions. The three judge panel found two mitigating factors,  
21 that Dennis was under the influence of alcohol at the time of the incident and that Dennis suffered  
22 from mental illness. Colwell pled guilty to first degree murder, burglary and robbery of a victim  
23 of 65 years or older. Dennis did not. There was no robbery. There was no burglary. The victim  
24 was not over 65 years old. The facts are disparate. Colwell presented no mitigating evidence and  
25 did not object to the State's argument that there were seven aggravating factors presented. The  
26 three judge panel in Colwell found four aggravating factors and no mitigating factors.

27 In deciding the Ring v. Arizona issue, the Nevada Supreme Court held that Ring was not  
28 retroactive and that Colwell had waived his right to a jury trial. To the contrary, Dennis has

1 alleged that he was not competent to waive the right to a jury decision on the question of death.  
2 The Nevada Supreme Court entered into a discussion regarding the application of Teague v. Lane  
3 and decided to create its own standard of adoption of the approach set forth in Teague. Dennis  
4 believes the Nevada Supreme Court was erroneous in this partial application of the Teague  
5 principles and that the Colwell decision will not withstand further scrutiny. Petitioner stands on  
6 the legal argument that was made in the Supplemental Brief filed on September 26, 2002, herein.

7 The State does not refer the Court to Johnson v. State, 118 Nev. Adv. Op. No. 79, decided  
8 December 18, 2002. Donte Johnson proceeded to jury trial on his case. The jury could not  
9 reach a unanimous decision on the proper sentence. A second penalty hearing was conducted  
10 before a three-judge panel. The panel found two aggravating circumstances and two mitigating  
11 circumstances and imposed a sentence of death on Johnson. The Nevada Supreme Court vacated  
12 Johnson's death penalty and he was granted a new penalty hearing before a jury. Under this fact  
13 setting, the Nevada Supreme Court enforced the ruling of Ring v. Arizona. To attempt to  
14 demonstrate a difference in application of Ring under the Johnson case and the refusal to apply  
15 Ring under the Colwell case, the Nevada Supreme Court relied upon the fact that Johnson's direct  
16 appeal had not been finalized. Petitioner believes that this ad hoc recognition of the law of the  
17 United States Supreme Court will not be upheld.

18 I. Courts Are Questioning of the Constitutionality of the Death Penalty.

19 Two years ago, the Republican Governor of Illinois enacted a moratorium on  
20 executions in his state after 13 people who had been sentenced to death were released after review  
21 of their cases. In an April 15, 2002 announcement, the State Commission that he empaneled issued  
22 a report calling for 85 reforms for the administration of the death penalty. Among its many  
23 suggestions, the Commission--that was comprised of both opponents and advocates of the death  
24 penalty-- called for sweeping changes that include, banning the execution of people with mental  
25 retardation, reducing the number of crimes eligible for the death penalty and improving the  
26 mechanism for appointing competent attorneys in death penalty cases.

27 Nationwide, events over the past year demonstrate that our system of capital  
28 punishment has fundamental flaws that must be addressed. For example, a week prior to the

1 Illinois report, the 100th innocent person sentenced to death was released. Dozens of death  
2 sentences in Oklahoma based on the false testimony of a state expert are now under federal  
3 investigation and the questionable racial practices by prosecutors are casting shadows of doubt  
4 over death sentences in Pennsylvania, Ohio and Texas.

5 A federal judge has recently joined in these collective doubts. In the decision of  
6 U.S. v. Quinones, 2002 Dist.Ct. LEXIS 7320 (S.D.N.Y. April 25, 2002)(Quinones I), Judge Jed S.  
7 Rakoff recognized:

8 [Legislatures and courts have always been queasy about the possibility that an  
9 innocent person, mistakenly convicted and sentenced to death under such a statute,  
10 might be executed before he could vindicate his innocence -- an event difficult to  
11 square with basic constitutional guarantees, let alone simple justice. As Justice  
12 O'Connor, concurring along with Justice Kennedy in Herrera v. Collins, 506 U.S.  
13 390, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993), stated: "I cannot disagree with the  
14 **fundamental legal principle that executing the innocent is inconsistent with the**  
15 **Constitution.** Regardless of the verbal formula employed - 'contrary to  
16 contemporary standards of decency,' 'shocking to the conscience,' or offensive to a  
17 'principle of justice so rooted in the traditions and conscience of our people as to be  
18 ranked as fundamental' - the execution of a legally and factually innocent person  
19 would be a constitutionally intolerable event." 113 S. Ct. at 870 (citations omitted).

20 Id., at 1-2 (emphasis added).

21 Judge Rakoff went on to explain that the execution of the innocent once seemed a  
22 speculative concern, but has recently been shown to be an undeniable fact:

23 **To the majority in Herrera, however, as to most judges and legislators at the**  
24 **time (1993), the possibility that an innocent person might be executed pursuant**  
25 **to a death penalty statute seemed remote.** Thus, Chief Justice Rehnquist, writing  
26 for the Court in Herrera, discounted as potentially unreliable a study that had  
27 concluded that 23 innocent persons were executed in the United States between  
28 1900 and 1987. See Herrera, 506 U.S. 390, 113 S. Ct. at 868, n.15. While

1 recognizing that no system of justice is infallible, the majority in Herrera implicitly  
2 assumed that the high standard of proof and numerous procedural protections  
3 required in criminal cases, coupled with judicial review, post-conviction remedies,  
4 and, when all else failed, the possibility of executive clemency, rendered it highly  
5 unlikely that an executed person would subsequently be discovered to be innocent.  
6

7 **That assumption no longer seems tenable.** In just the few years since Herrera,  
8 evidence has emerged that clearly indicates that, despite all the aforementioned  
9 safeguards, innocent people -- mostly of color -- are convicted of capital crimes they  
10 never committed, their convictions affirmed, and their collateral remedies denied,  
11 with a frequency far greater than previously supposed.

12 Id., 2-3 (emphasis added).

13 Judge Rakoff cited a 68% failure rate in the death penalty system as being  
14 completely unacceptable. Further, the Court reasoned that if there is no statute of limitations for  
15 murder, then likewise, there should be no limitation on the proof of innocence. The Death Penalty  
16 obviously takes such possibility away:

17 Moreover, even the frequency of these recent exonerations resulting from DNA  
18 testing and from fresh attention to neglected cases hardly captures either the  
19 magnitude of the problem or how little it was recognized until recently. It was not  
20 until the year 2000, for example, that Professor James S. Liebman and his  
21 colleagues at Columbia Law School released the results of the first comprehensive  
22 study ever undertaken of modern American capital appeals (4,578 appeals between  
23 1973 and 1995). That study, though based only on those errors judicially  
24 identified on appeal, concluded that "the overall rate of prejudicial error in  
25 the American capital punishment system" is a remarkable 68%. James S.  
26 Liebman, et al., A Broken System: Error Rates in Capital Cases (2000) at ii. No  
27 system so "persistently and systematically fraught with error," id., can  
28 warrant the kind of reliance that would justify removing the possibility of

1 future exoneration by imposing death.

2 Just as there is typically no statute of limitations for first-degree murder -- for the  
3 obvious reason that it would be intolerable to let a cold-blooded murderer escape  
4 justice through the mere passage of time -- so too one may ask whether it is  
5 tolerable to put a time limit on when someone wrongly convicted of murder must  
6 prove his innocence or face extinction. In constitutional terms, the issue is  
7 whether -- now that we know the fallibility of our system in capital cases --  
8 capital punishment is unconstitutional because it creates an undue risk that a  
9 meaningful number of innocent persons, by being put to death before the emergence  
10 of the techniques or evidence that will establish their innocence, are thereby  
11 effectively deprived of the opportunity to prove their innocence -- and thus  
12 deprived of the process that is reasonably due them in these circumstances  
13 under the Fifth Amendment.

14 Id., at 6-7 (emphasis added).

15 Judge Rakoff concluded the opinion in Quinones I by reasoning that the  
16 Government had not persuaded the Court that the federal death penalty was constitutional:

17 The issue -- not addressed by Herrera or, so far as appears, anywhere else -- boils  
18 down to this. We now know, in a way almost unthinkable even a decade ago,  
19 that our system of criminal justice, for all its protections, is sufficiently fallible  
20 that innocent people are convicted of capital crimes with some frequency.

21 Fortunately, as DNA testing illustrates, scientific developments and other  
22 innovative measures (including some not yet even known) may enable us not only  
23 to prevent future mistakes but also to rectify past ones by releasing wrongfully-  
24 convicted persons -- but only if such persons are still alive to be released. If,  
25 instead, we sanction execution, with full recognition that the probable result  
26 will be the state-sponsored death of a meaningful number of innocent people,  
27 have we not thereby deprived these people of the process that is their due?

28 Unless we accept -- as seemingly a majority of the Supreme Court in Herrera was

1 unwilling to accept -- that considerations of deterrence and retribution can  
2 constitutionally justify the knowing execution of innocent persons, the answer must  
3 be that the federal death penalty statute is unconstitutional.

4 **Consequently, if the Court were compelled to decide the issue today, it would,**  
5 **for the foregoing reasons, grant the defendants' motion to dismiss all death**  
6 **penalty aspects of this case on the ground that the federal death penalty statute**  
7 **is unconstitutional.**

8 Id., at 12-13 (emphasis added).

9 However, the Court gave the Government one more chance to file authorities which  
10 would show otherwise. The State failed to convince the Court that the Death Penalty was not  
11 unconstitutional. In United States v. Quinones, 205 F.Supp.2d 256 (S.D.N.Y. 2002)(Quinones II),  
12 filed July 1, 2002, Judge Rakoff affirmed his earlier opinions. The Court concluded:

13 ...[A]fter careful consideration, the Court adheres to its prior view and declares the  
14 Federal Death Penalty Act unconstitutional.

15 The basic reasons for the Court's decision are stated in the Court's Opinion of April  
16 25, 2002, a copy of which is annexed hereto for ready reference; the findings and  
17 conclusions set out there are deemed here incorporated and will not be repeated at  
18 any length.

19 Quinones II, 205 F.Supp.2d at 257.

20 In short, the Court addressed the Governments three objections to his proposed  
21 findings of unconstitutionality. First, the Government argued that a finding of unconstitutionality  
22 in the Quinones case was unripe, as neither of the defendants had been convicted, let alone  
23 sentenced to death. In response, Judge Rakoff explained the need to reach the issue before trial  
24 was necessary because, "the pendency of the death penalty has immediate practical and legal  
25 consequences in this case that cannot be postponed." Quinones II, 205 F.Supp.2d at 257-258.

26 Among these consequences, the Court explained that under "prevailing Supreme  
27 Court precedent, any prospective juror strongly opposed to capital punishment must be excused for  
28

1 cause from sitting on such a jury.” Quinones II, 205 F.Supp.2d at 258, *citing* Lockhart v. McCree,  
2 476 U.S. 162, 170, n. 7, 90 L. Ed. 2d 137, 106 S. Ct. 1758 (1986).

3 The problem with the juror situation, the Court explained, is that:  
4 The result is to exclude from the jury a significant class of people who would be  
5 perfectly fit to serve if the death penalty were absent from the case.

6 Quinones II, 205 F.Supp.2d at 258.

7 On this ripeness issue, the Court concluded:  
8 In short, the constitutionality of the death penalty on the ground here under  
9 consideration is not only "ripe" for adjudication at this time, it cannot be postponed  
10 without material prejudice to the defendants.

11 Quinones II, 205 F.Supp.2d at 258.

12 The Government’s second argument is as follows:  
13 ...[I]n the Government's view, the Framers of the Constitution, the Congress that  
14 enacted the Federal Death Penalty Act, and the Supreme Court that addressed that  
15 Act in *Herrera v. Collins*, 506 U.S. 390, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993),  
16 all accepted the constitutionality of administering capital punishment despite the  
17 inherent fallibility of the judicial system, even the likelihood that innocent people  
18 may mistakenly be executed does not mean that they did not receive the process that  
19 was their due or that the statute is inherently flawed.

20 Quinones II, 205 F.Supp.2d at 259.

21 Judge Rakoff found that, “Each component of this argument deserves attention, but  
22 each is ultimately unpersuasive.” Id. Rakoff went on to explain that even if the unsupported  
23 assumptions which the Government made about the Framers were true, the Fifth Amendment’s  
24 Due Process rights and the Eighth Amendment’s prohibition against cruel and unusual punishment  
25 “must be interpreted in light of ‘evolving standards of decency.’” Id.

26 As to the Government’s second argument, Judge Rakoff further explained:  
27 If protection of innocent people from state-sponsored execution is a protected  
28 liberty, and if such protected liberty includes the right of an innocent person not to

1 be deprived, by execution, of the opportunity to demonstrate his innocence, then  
2 Congress may not override such liberty absent a far more clear and compelling need  
3 than any presented here.

4 Quinones II, 205 F.Supp.2d at 261.

5 Indeed, Judge Rakoff explains that his decision is supported by the fact that it is  
6 undisputed within the U.S. Supreme Court that the execution of an innocent person is  
7 constitutionally impermissible. Quinones II, 205 F.Supp.2d at 263-64.

8 Finally, in its third argument, the Government argues that even though DNA testing  
9 has exonerated at least 12 death row inmates since 1993, such testing is now available and  
10 therefore, there is no danger of future convictions of innocents. As Judge Rakoff explains, "This  
11 completely misses the point." Quinones II, 205 F.Supp.2d at 264. The Court continues:

12 DNA testing may help prevent some such near-tragedies in the future; but it can  
13 only be used in that minority of cases involving recoverable, and relevant, DNA  
14 samples. Other scientific techniques may also emerge in the future that will likewise  
15 expose past mistakes and help prevent future ones...But there is no way to know  
16 whether such exoneration will come prior to (or during) trial or, conversely, long  
17 after conviction. What is certain is that, for the foreseeable future, traditional trial  
18 methods and appellate review will not prevent the conviction of numerous innocent  
19 people.

20 Quinones II, 205 F.Supp.2d at 264.

21 Further, the Court reveals that, "The Government does not deny that an increasing  
22 number of death row defendants have been released from prison in recent years for reasons other  
23 than DNA testing." Quinones II, 205 F.Supp.2d at 265.

24 Also the Court explains that the protections involved are the same in the state and  
25 federal systems:

26 More fundamentally, there is no logical reason to suppose that practices and  
27 procedures under the Federal Death Penalty Act will be materially more successful  
28 in preventing mistaken convictions than the deficient state procedures that have

1 already been shown to be wanting. By virtue of the Fourteenth Amendment, all the  
2 primary protections are the same in both systems: proof beyond a reasonable doubt,  
3 trial by jury, right to effective assistance of counsel, right of confrontation, etc.  
4 Quinones II, 205 F.Supp.2d at 266.

5 Lastly, the Government attacked Professor Liebman's study, which was cited and  
6 relied upon in Quinones I. To this attack, Judge Rakoff countered:

7 [T]he Government launches an extended, and remarkably personal attack on  
8 Liebman and his study, annexing critical press releases from elected officials such  
9 as the Attorney General of Montana and the Governor of Florida, and even arguing  
10 that the study is suspect because Liebman (though only one of the six authors of the  
11 study) is, allegedly, an avowed opponent of the death penalty. Govt Mem. 30-31. As  
12 convincingly shown, however, in the Brief Amicus Curiae Of 42 Social Scientists  
13 filed in response, the Liebman study, commissioned at the behest of the Chairman  
14 of the U.S. Senate Judiciary Committee, is by far the most careful and  
15 comprehensive study in this area, and one based, moreover, exclusively on public  
16 records and court decisions.

17 When it comes to something as fundamental as protecting the innocent,  
18 press releases and ad hominem attacks are no substitute for reasoned discourse, and  
19 the fatuity of the Government's attacks on Liebman's study only serves to highlight  
20 the poverty of the Government's position.

21 Quinones II, 205 F.Supp.2d at 268.

22 **II. Examples of Prisoners Released from Death Row, Probable or Possible Innocence.**

23 **A. Probable Innocence**

24 Other defendants, though not exonerated completely, were released from death row  
25 with substantial evidence of their innocence. Generally, the defendant's conviction was overturned  
26 and then he or she reluctantly entered a guilty plea to a lesser charge because of the threat of  
27 possibly receiving another death sentence. In most of these cases, no responsible person would find  
28 them guilty. Nevertheless, unlike those enumerated above, they are technically guilty of some

1 degree of murder. This list is not necessarily inclusive of all such cases.

2 Larry Dean Smith - Oklahoma - Conviction 1978 - Released 1984.

3 Smith was convicted of the murder of a man who burned to death in a camper pick-up truck.  
4 Although he at first admitted his involvement in the related robbery, he maintained he had nothing  
5 to do with the murder. The U.S. Supreme Court vacated his death sentence, and the Oklahoma  
6 Attorney General recommended that the murder conviction be set aside. On remand, the Oklahoma  
7 Court of Criminal Appeals refused to uphold Smith's conviction for the robbery.

8 Sonia Jacobs - Florida - Conviction - 1976 - Released 1992.

9 Jacobs and her companion, Jesse Tafero, were sentenced to death for the murder of two policemen  
10 at a highway rest stop in 1976. A third co-defendant received a life sentence after pleading guilty  
11 and testifying against Jacobs and Tafero. The jury recommended a life sentence for Jacobs, but the  
12 judge overruled the jury and imposed death. A childhood friend and film maker, Micki Dickoff,  
13 then became interested in her case. Jacobs's conviction was overturned on a federal writ of habeas  
14 corpus in 1992. Following the discovery that the chief prosecution witness had given contradictory  
15 statements, the prosecutor accepted a plea in which Jacobs did not admit guilt, and she was  
16 immediately released. Jesse Tafero, whose conviction was based on much of the same highly  
17 questionable evidence, had been executed in 1990 before the evidence of innocence had been  
18 uncovered.

19 Mitchell Blazak - Arizona - Conviction 1974 - Released 1994.

20 Blazak was originally convicted of a murder in which a ski-masked gunman killed a bartender and  
21 a customer at a bar in Tucson in 1973. The conviction was based largely on the testimony of a  
22 small time con man, Kenneth Pease, who was arrested for a number of felonies in New Mexico and  
23 Arizona. Pease testified after being granted immunity. A federal court in 1991 termed Pease's  
24 testimony to be "a mass of contradictions." The court also ruled that the trial judge had failed to  
25 ensure that Blazak was competent to stand trial. Rather than pursue a new trial, the prosecutor  
26 offered a no contest plea in September, 1994, which allowed Blazak to be released before the end  
27 of the year. There was some evidence that a deputy sheriff named Michael Tucker planted hair  
28 evidence in the case. Three days after Blazak walked out of prison, Tucker was arrested for car

1 theft.

2 Anthony Scire - Louisiana - Conviction 1985 - Released 1994.

3 Scire was sentenced to death for hiring Clarence Smith to murder a police informant. The chief  
4 witnesses at the trial were members of a motorcycle gang given immunity for this and other crimes  
5 in exchange for their testimony. The convictions of both Scire and Smith were overturned. At  
6 retrial, Smith was acquitted. Scire pleaded guilty to manslaughter, while maintaining his  
7 innocence. He was immediately released in exchange for time served.

8 Victor Jimenez - Nevada - Conviction 1987 - Scheduled release: Dec. 1, 1999.

9 Jimenez's first trial in 1987 ended in a hung jury. A second trial convicted him and sentenced him  
10 to death for the stabbing death of two men in a North Las Vegas bar. The Nevada Supreme Court  
11 unanimously granted him a new trial in 1996 because of police misconduct including false  
12 testimony bordering on perjury. Rather than face the risk of a new trial, Jimenez reluctantly entered  
13 a special plea, without admitting his guilt, on June 9, 1998 to 2d degree murder. He will be  
14 required to serve an additional 18 months in prison and has agreed not to sue those responsible for  
15 putting him on death row.

16 Joseph Spaziano - Florida - Conviction 1976 - Not Released.

17 Spaziano was tried for the murder of a young woman which had occurred two years earlier. No  
18 physical evidence linked him to the crime. He was convicted primarily on the testimony of a drug-  
19 addicted teenager who, after hypnosis and "refreshed-memory" interrogation, thought he recalled  
20 Spaziano describing the murder. This witness has recently said that his testimony was totally  
21 unreliable and not true. Hypnotically induced testimony is no longer admissible in Florida. Death  
22 warrants have been repeatedly signed for Spaziano, even though the jury in his case had  
23 recommended a life sentence. In January, 1996, Florida Circuit Court Judge O.H. Eaton granted  
24 Spaziano a new trial, and this decision was upheld by the Florida Supreme Court on April 17,  
25 1997. In November, 1998, Spaziano pleaded no contest to second degree murder and was  
26 sentenced to time served. He remains incarcerated on another charge.

27 Paris Carriger - Arizona - Conviction 1978 - Released 1999.

28 Carriger was scheduled to die on December 6, 1995 for a murder he steadfastly maintains he did

1 not commit. Another man, Robert Dunbar, twice confessed that he lied at Carriger's trial, and that  
2 it was he who committed the murder. As a result of his original trial testimony against Carriger,  
3 Dunbar was given immunity for other charges. Dunbar has since died. A three judge panel of the  
4 9th Circuit U.S. Court of Appeals upheld Carriger's death sentence, noting that while his case  
5 raised doubts, he must prove by clear and convincing evidence that "he is unquestionably  
6 innocent." Review of the case by the entire 9th Circuit was granted in February, 1997. Carriger was  
7 granted a new trial by the 9th Circuit in December, 1997 because of the new evidence. In January,  
8 1999, he accepted a plea to a lesser offense and was immediately released from prison.

9 Andrew Mitchell - Texas - Conviction 1981 - Released 1993; returned to prison  
10 and then re-released 1999.

11 Mitchell was awarded \$40,000 from Smith County, Texas for withholding evidence at his trial  
12 which led to his death sentence in 1981. He spent 13 years on death row before the Texas Court of  
13 Criminal Appeals threw out his conviction. Mitchell pleaded guilty to conspiracy to commit  
14 murder and was given a 31 year sentence. (Dallas Morning News, 1/ 19/99) He was then released  
15 to a halfway house in early 1999 after being given credit for time served.

16 Lee Perry Farmer - California - Conviction 1992 - Release 1999.

17 Farmer was acquitted at a re-trial in California of capital murder. He had spent 9 years on death  
18 row. He was, however, convicted of burglary and being an accessory to murder. He was credited  
19 with time already served and will be released. A federal court had overturned his first conviction  
20 because of incompetent counsel. Another man confessed to the murder. (Sacramento Bee, 1/18/99)

21 Kerry Max Cook - Texas - Conviction 1978 - Released Nov. 1997 - Concluded  
22 1999.

23 Cook was originally convicted of killing Linda Jo Edwards in 1978. In 1988, he came within 11  
24 days of execution, when the U.S. Supreme Court ordered the Texas Court to review its decision.  
25 Cook's conviction was overturned in 1991. He was re-tried in 1992, but the trial ended in a hung  
26 jury. In 1993, a state district judge ruled that prosecutors had engaged in systematic misconduct,  
27 suppressing key evidence. In 1994, Cook was tried again, and this time found guilty and again  
28 sentenced to death. On Nov. 6, 1996, the Texas Court of Criminal Appeals reversed his conviction,

1 saying that "prosecutorial and police misconduct has tainted this entire matter from the outset." The  
2 court ruled that key testimony from the 1994 trial could not be used in any further prosecution.  
3 Prior to the start of his fourth trial in February, 1999, Cook pleaded no contest to a reduced murder  
4 charge and was released. He continued to maintain his complete innocence, but accepted the deal  
5 to avoid the possibility of another wrongful conviction. Recent DNA tests from the victim matched  
6 that of an ex-boyfriend, and not that of Cook. This tended to contradict testimony from the ex-  
7 boyfriend.

8 Lloyd Schlup - Missouri - Conviction 1985 - Not Released.

9 Schlup was convicted in 1985 of a murder while in prison. However, a prison videotape shows him  
10 to be in the cafeteria around the time of the murder at a different location. One prison guard has  
11 testified that the tape, along with his observation of Schlup just before he went to the cafeteria,  
12 prove he could not have been present at the murder. Twenty other witnesses also swear that he was  
13 not at the scene of the crime. The U.S. Supreme Court gave Schlup the opportunity for a hearing  
14 concerning his new evidence, despite the fact that he had exhausted his ordinary appeals.  
15 Following the hearing in federal District Court in December 1995, the court held that no reasonable  
16 juror would have found Schlup guilty. On May 2, 1996, Schlup was granted a writ of habeas  
17 corpus on the ground that his original trial attorney failed to adequately represent him. The State of  
18 Missouri unsuccessfully attempted to apply the new federal habeas corpus law which was signed  
19 on April 24, 1996 to Schlup's case. Under the new law, Schlup probably would have been  
20 executed. On the second day of his re-trial, Mar. 23, 1999, Schlup agreed to plead guilty to second  
21 degree murder to avoid the danger of another death sentence. Schlup's appellate lawyer, Sean  
22 O'Brien, said he remained convinced of Schlup's innocence.

23 Donald Paradis - Idaho - Conviction 1981 - Released 2001.

24 After spending 14 years on death row, Donald Paradis was released from prison when his 1981  
25 murder conviction was overturned. Judge Gary Haman, who originally sentenced Paradis to death,  
26 came out of retirement to accept Paradis' plea to moving the body after the murder. Paradis, who  
27 always maintained that he was not involved in the slaying of Kimberly Anne Palmer, was  
28 sentenced to 5 years and released for time already served.

1           The deal came after a federal court of appeals ruling that Paradis was denied a fair  
2 trial because prosecutors withheld potentially exculpatory evidence. Paradis was scheduled for  
3 execution three times before his sentence was commuted to life imprisonment in 1996 by then-  
4 Governor Phil Blatt who had doubts about Paradis' guilt.

5           Paradis' trial lawyer, William Brown, never studied criminal law, never tried a  
6 felony case, and never tried a case before a jury. While representing Paradis, Brown also worked as  
7 a police officer. His defense lasted only three hours. In addition, Dr. Brady, the pathologist who  
8 performed the autopsy of Ms. Palmer, testified that Palmer had been killed in Idaho, not in  
9 Washington where Paradis had already been acquitted of the murder. Dr. Brady was fired as a  
10 medical examiner soon after the Paradis trial when it was discovered that he had sold human tissue  
11 for profit and saved human blood, collected during autopsies, for use in his garden. (Associated  
12 Press, 4/11/01 and New York Times, 4/12/01).

13           Charles Munsey - North Carolina - Conviction 1996 - Died in prison.

14 In May, 1999, Superior Court Judge Thomas Ross threw out Munsey's murder conviction and  
15 ordered a new trial for the 1993 beating death of Shirley Weaver. The judge cited evidence that the  
16 state's key witness had lied, that prosecutors had withheld exculpatory evidence, and that another  
17 man's confession to the crime was probably true. The state decided not to appeal Judge Ross's  
18 ruling and plans to indict the man who confessed to the murder. Munsey may have been re-tried,  
19 perhaps for a lesser charge involving the sale of the gun used in the murder. Munsey died in prison  
20 before an official decision was made on dropping the charges against him or retrying his case.

21 **B. Possible Innocence - Sentence Commuted.**

22           The following former death row inmates had their death sentences commuted to life  
23 in prison because of doubts about their guilt.

24           Ronald S. Monroe - Louisiana - Conviction Commuted to Life 1989.

25 Monroe had been convicted of murdering his next-door neighbor, based mainly on the testimony of  
26 the woman's children. Later, the victim's husband was convicted of killing his new wife in a  
27 manner similar to the way in which the first woman was killed. While in prison, the husband all  
28 but admitted killing his first wife. Governor Buddy Roemer commuted Monroe's death sentence to

1 life because of doubts about his guilt.

2 Joseph Giarratano - Virginia - Convicted 1979 - Commuted to Life 1991.

3 In 1979, Joseph Giarratano awoke from a drug-induced sleep and found that his roommate Barbara  
4 Kline and her daughter had been murdered. With no memory of the previous night, Giarratano  
5 assumed he had killed the two. He turned himself into the police and confessed. New evidence,  
6 however, suggests that Giarratano is innocent. His confessions contradict themselves, and physical  
7 evidence suggests Giarratano was not the murderer. Footprints and pubic hairs found at the scene  
8 did not match Giarratano's and experts assert Kline was stabbed by a right-handed assailant;  
9 Giarratano is left-handed. Three days before his scheduled execution in 1991, Governor Douglas  
10 Wilder commuted Giarratano's death sentence to life imprisonment and left open the possibility of  
11 a new trial. Virginia's attorney general, however, has stated she will not re-try the case.

12 Herbert Bassette - Virginia - Conviction 1979 - Commuted to Life 1992.

13 Bassette was convicted of murdering a gas station attendant in 1979. Doubt later arose about the  
14 testimony presented at trial, and a police statement indicated that one of the witnesses had  
15 implicated another person in the killing. Governor Douglas Wilder commuted Bassette's sentence  
16 to life without parole after expressing doubts about the conviction.

17 Joseph Payne - Virginia - Conviction 1986 - Commuted to Life 1996.

18 Although the defense knew of 17 witnesses willing to testify on Payne's behalf, they only used one,  
19 and Payne was convicted of murder by arson of another inmate at the Powhatan Correctional  
20 Center in Virginia. While the jury was deliberating, the prosecution offered Payne a plea whereby  
21 he would receive a sentence to run concurrently with the sentence he already was serving, but the  
22 offer was refused because his lawyers thought an acquittal was likely. Instead, he was sentenced to  
23 death and was scheduled to be executed on Nov. 7, 1996. The chief witness against Payne, Robert  
24 Smith, received a 15 year reduction in sentence. At one point, Smith admitted that he had  
25 lied at Payne's trial. Three hours before his execution, and after Payne agreed not to appeal, Payne's  
26 sentence was reduced to life without parole by Governor George Allen.

27 Henry Lee Lucas - Texas - Conviction 1984 - Commuted to Life 1998.

28 Lucas originally confessed to the murder of an unnamed hitchhiker in Texas in 1979. He also

1 confessed to hundreds of other murders including the murder of Jimmy Hoffa and his fourth grade  
2 teacher, who is still alive. Most of his confessions have proved false. Two investigations by  
3 successive Attorneys General in Texas have concluded that he almost certainly did not commit the  
4 murder for which he faced an execution date of June 30, 1998. Gov. George Bush commuted his  
5 sentence to life upon recommendation of the Board of Pardons and Paroles in June, 1998.

6 **C. Executed Despite Doubts About Guilt.**

7 There is no way to tell how many of the over 500 people executed since 1976 may  
8 also have been innocent. Courts do not generally entertain claims of innocence when the defendant  
9 is dead. Defense attorneys move on to other cases where clients' lives can still be saved. Some of  
10 those with strong claims include:

11 **Roger Keith Coleman - Virginia Conviction 1982 - Executed 1992.**

12 Coleman was convicted of raping and murdering his sister-in-law in 1981, but both his trial and  
13 appeal were plagued by errors made by his attorneys. The U.S. Supreme Court refused to consider  
14 the merits of his petition because his state appeal had been filed one day late. Considerable  
15 evidence was developed after the trial to refute the state's evidence, and that evidence might well  
16 have produced a different result at a re-trial. Governor Wilder considered a commutation for  
17 Coleman, but allowed him to be executed when Coleman failed a lie detector test on the day of his  
18 execution.

19 **Joseph O'Dell - Virginia - Conviction 1986 - Executed 1997.**

20 New DNA blood evidence has thrown considerable doubt on the murder and rape conviction of  
21 O'Dell. In reviewing his case in 1991, three Supreme Court Justices, said they had doubts about  
22 O'Dell's guilt and whether he should have been allowed to represent himself. Without the blood  
23 evidence, there is little linking O'Dell to the crime. In September, 1996, the 4th Circuit of the U.S.  
24 Court of Appeals reinstated his death sentence and upheld his conviction. The U.S. Supreme Court  
25 refused to review O'Dell's claims of innocence and held that its decision regarding juries being told  
26 about the alternative sentence of life-without-parole was not retroactive to his case. O'Dell asked  
27 the state to conduct DNA tests on other pieces of evidence to demonstrate his innocence but was  
28 refused. He was executed on July 23rd.

1                    David Spence - Texas - Conviction 1983 - Executed 1997.

2 Spence was charged with murdering three teenagers in 1982. He was allegedly hired by a  
3 convenience store owner to kill another girl, and killed these victims by mistake. The convenience  
4 store owner, Muneer Deeb, was originally convicted and sentenced to death, but then was acquitted  
5 at a re-trial. The police lieutenant who supervised the investigation of Spence, Marvin Horton, later  
6 concluded: "I do not think David Spence committed this crime." Ramon Salinas, the homicide  
7 detective who actually conducted the investigation, said: "My opinion is that David Spence was  
8 innocent. Nothing from the investigation ever led us to any evidence that he was involved." No  
9 physical evidence connected Spence to the crime. The case against Spence was pursued by a  
10 zealous narcotics cop who relied on testimony of prison inmates who were granted favors in return  
11 for testimony.

12                    Leo Jones - Florida - Convicted 1981 - Executed 1998.

13 Jones was convicted of murdering a police officer in Jacksonville, Florida. Jones signed a  
14 confession after several hours of police interrogation, but he later claimed the confession was  
15 coerced. In the mid-1980s, the policeman who arrested Jones and the detective who took his  
16 confession were forced out of uniform for ethical violations. The policeman was later identified by  
17 a fellow officer as an "enforcer" who had used torture. Many witnesses came forward pointing to  
18 another suspect in the case.

19                    Gary Graham, Texas, Convicted 1981, Executed 2000.

20 On June 23, 2000, Gary Graham was executed in Texas, despite claims that he was innocent.  
21 Graham was 17 when he was charged with the 1981 robbery and shooting of Bobby Lambert  
22 outside a Houston supermarket. He was convicted primarily on the testimony of one witness,  
23 Bernadine Skillern, who said she saw the killer's face for a few seconds through her car windshield,  
24 from a distance of 30 -40 feet away. Two other witnesses, both who worked at the grocery store  
25 and said they got a good look at the assailant, said Graham was not the killer but were never  
26 interviewed by Graham's court appointed attorney, Ronald Mock, and were not called to testify at  
27 trial. Three of the jurors who voted to convict Graham signed affidavits saying they would have  
28 voted differently had all of the evidence been available.

1 **III. The U.S. Congress Moves Towards a Moratorium on the Death Penalty.**

2 Due to the growing concern over the constitutionality of the Death Penalty in the  
3 current state and federal legal systems -- Nevada not being excepted -- and because the Courts have  
4 so far failed to resolve the problem of the unconstitutionality of the death penalty, the U.S.  
5 Congress this session, has taken upon itself to find a solution.

6 Senator Russell Feingold (D-WI) and Representative Jesse Jackson Jr. (D-IL) have  
7 introduced the "National Death Penalty Moratorium Act of 2001" (S. 233, H.R. 1038). This  
8 legislation would establish a National Commission on the Death Penalty to review fairness in the  
9 administration of capital punishment at both the state and federal level as well as impose a  
10 moratorium on federal executions. Clearly, given the serious concerns about fairness and accuracy  
11 in the imposition of the death penalty, there should be a moratorium and a thorough study of its  
12 use. In addition to the National Death Penalty Moratorium Act of 2001, a number of bills  
13 regarding the inherent problems with the Death Penalty are currently in Congress, including:  
14 Death Penalty Integrity Act of 2002, S.2739; Confidence in Criminal Justice Act of 2002, S.2446;  
15 Capital Defense Counsel Standards Act of 2002, S.2442; Criminal Justice Integrity and Innocence  
16 Protection Act of 2001, S. 800; Federal Death Penalty Abolition Act of 2001, S.191; Innocence  
17 Protection Act of 2001, S.486; Innocence Protection Act of 2001, H.R. 912; and Accuracy in  
18 Judicial Administration Act of 2001, H.R. 321. With all this national attention suddenly directed  
19 at the widely publicized problems with the Death Penalty, a national moratorium is almost certain.

20 **IV. If The Punishment Of Death Is Not Cruel & Unusual, Then What Is?**

21 *"An eye for an eye makes the whole world blind."* Ghandi.

22 Without answering a single tenet of the reasoned argument against the *death penalty*  
23 respectfully presented in the defendant's Motion, the State simply turned a blind eye toward past  
24 and recent history, current events, logic, reason, compassion and humanity. While the State's  
25 approach is disappointing, it is not unexpected. However, the fact that it is not unexpected is the  
26 troubling thing. If we expect no less of our State government; if we demand no less of our leaders  
27 -- indeed, of ourselves -- then those expectations will be confirmed.

28 Each of us involved in this profession understands the way the law works. We

1 understand and acknowledge the concept of *stare decisis*. This Court is not being asked to  
2 abandon such concepts. This Court is only being asked to use its common sense. To dig into the  
3 vast resources of wisdom at its disposal and dispel the incredible myth that a punishment of *death*  
4 can somehow *not* be cruel and unusual.

5       **We hold these truths to be sacred and undeniable; that all men are created**  
6       **equal and independent, that from that equal creation they derive rights**  
7       **inherent and inalienable, among which are *the preservation of life, and liberty,***  
8       **and the pursuit of happiness.**

9 Thomas Jefferson (1743–1826), Third President of the United States, Original draft of the  
10 Declaration of Independence (emphasis added).

11               What purpose can the Eighth Amendment possibly have if it cannot prevent the  
12 State from taking the very lives of its own citizens. If killing people -- yes, taking away all the rest  
13 of their days and nights, putting an end to their very lives, depriving them of the chance to become  
14 anything more than they are -- is not a violation of the Eighth Amendment, then what could the  
15 State ever do that was a violation of that protection? If *death* is not a violation of the Eighth  
16 Amendment then the Eighth Amendment does not exist.

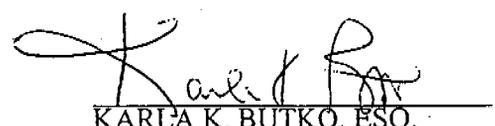
17               And if the Eighth Amendment can be tossed aside so easily, then we have created a  
18 slippery situation in which any of the Constitutional protections, The Bill of Rights, any of the  
19 Amendments, and our fundamental rights which they guarantee may also be discarded at will. If  
20 that is the case, then our profession is worth nothing. Our legal system is worth nothing. Legal  
21 precedent means nothing. Everything upon which the State bases its argument means nothing.  
22 And if all these are so, then our country is worth nothing. For we no longer have any meaningful  
23 foundations upon which to build a better society. A society which upholds the inherent and  
24 inalienable right of the individual to *life*.

25               To say that the Petition and Supplemental Petition filed by Dennis should be summarily  
26 dismissed without an evidentiary hearing simply demonstrates that the State is willing to continue  
27 to seek mistakes in the arena of the final punishment, death, continue. The interests of justice  
28 demand more. Death is different.

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WHEREFORE, the Petitioner, TERRY JESS DENNIS, respectfully asserts that he is entitled to an evidentiary hearing on all issues found in his Petition and Supplemental Petition.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of January, 2003.



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CERTIFICATE OF SERVICE

Pursuant to NRC P 5, I certify that I am an employee of Karla K. Butko, Ltd., 1030 Holcomb Avenue, Reno, NV 89502, and that on this date I caused the foregoing document to be delivered to all parties to this action by:

- placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.
- personal delivery
- Facsimile (FAX)
- Federal Express or other overnight delivery
- Reno/Carson Messenger Service

addressed as follows:

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DATED this 8th day of January, 2003.

  
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827



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5

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
7 IN AND FOR THE COUNTY OF WASHOE

8

\* \* \*

9 TERRY JESS DENNIS,

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Petitioner,

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v.

Case No. CR99P0611

12

THE STATE OF NEVADA,

Dept. No. 1

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Respondent.

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15

REPLY TO PETITIONER'S OPPOSITION TO MOTION TO RECONSIDER  
MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS  
(POST-CONVICTION)

16

17

COMES NOW, Respondent, by and through counsel, and

18

hereby replies to Petitioner's opposition to the motion to

19

reconsider motion to dismiss petition for writ of habeas corpus

20

(post-conviction) as follows:

21

The State has moved this Court to reconsider its ruling

22

granting petitioner an evidentiary hearing. Specifically, the

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State has pointed out the Nevada Supreme Court has ruled, as the

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State argued previously, that Ring does not apply retroactively

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on collateral review. See Colwell v. State, 118 Nev. Adv. Op.

26

No. 80 (December 18, 2002).

JAN 15 2002

1           Petitioner does not dispute that Colwell controls this  
2 case. Instead, he now argues that Colwell is wrong. This Court,  
3 of course, has no authority to overturn the Nevada Supreme Court.  
4 Accordingly, this Court must dismiss petitioner's claim regarding  
5 the three-judge panel.

6           This Court should dismiss the three-judge claim for a  
7 second reason as well: petitioner waived his right to have a  
8 jury sentence him when he pled guilty. See Colwell, supra, (Ring  
9 not applicable where defendant waived his right to jury trial by  
10 pleading guilty). While petitioner asserts that he was not  
11 competent to enter a guilty plea, the record clearly repels this  
12 idea. A review of the plea canvass reveals that this Court  
13 exhaustively canvassed petitioner. In fact, this Court found  
14 petitioner competent before he pled guilty based on Dr. Lynn's  
15 examination of petitioner (Arraignment Transcript, 55).

16 According to the Nevada Supreme Court, Dr. Lynn found that  
17 "although Dennis was clinically depressed, he was competent to  
18 stand trial and assist in his defense." Dennis v. State, 116  
19 Nev. 1075, 1079, 13 P.3d 434, 437 (2000). This Court also found  
20 petitioner entered a voluntary, knowing, and intelligent plea  
21 (Arraignment Transcript, 55). Indeed, this Court's canvass of  
22 petitioner's guilty plea spans 55 pages. Id. This Court also  
23 noted petitioner's competency at the penalty hearing (Penalty  
24 Hearing Transcript, July 20, 1999, 56). Accordingly, the record  
25 repels the idea petitioner was not competent when he pled guilty  
26 or that the court erred in accepting the plea. This claim must

1 be dismissed. See Pangallo v. State, 112 Nev. 1533, 1536, 930  
2 P.2d 100, 102 (1996) ("the defendant is not entitled to an  
3 evidentiary hearing if the factual allegations are belied or  
4 repelled by the record.").

5           Furthermore, petitioner has never alleged specific  
6 allegations that would lead this Court to believe he was  
7 incompetent, if the court were to assume the truthfulness of the  
8 allegations. Petitioner merely alleges he was depressed, not  
9 taking his medication, and unstable. This, even if assumed to be  
10 true, does not equate to incompetence. For this additional  
11 reason, the claim must be dismissed. See Pangallo, supra, ("a  
12 defendant seeking post-conviction relief must raise more than  
13 conclusory claims for relief; a defendant must support any claims  
14 with specific factual allegations that if true would entitle him  
15 or her to relief.").

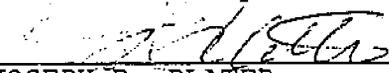
16           Petitioner also argues that courts are questioning the  
17 constitutionality of the death penalty. However, the cases he  
18 cites are ones where the defendant was found to be innocent.  
19 That is not the case here. Petitioner admitted he was guilty,  
20 that he enjoyed killing his victim, that he had tried to do it  
21 previously to another victim, and that he would do it again.  
22 Furthermore, the Nevada Supreme Court, as the State pointed out  
23 in its original motion to dismiss, holds that the death penalty  
24 is constitutional. Accordingly, petitioner's comments about the  
25 death penalty and other cases are irrelevant.

26           An evidentiary hearing is not warranted in this case.

1 If the court disagrees, the State would respectfully request the  
2 court to identify the claims on which the court will conduct a  
3 hearing.

4 DATED: January 13, 2003.

5 RICHARD A. GAMMICK  
6 District Attorney

7 By 

8 JOSEPH R. PLATER  
9 Appellate Deputy  
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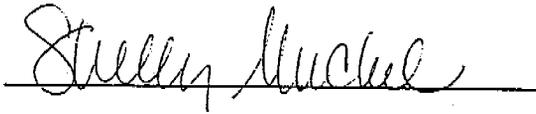
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Karla K. Butko, Esq.  
1030 Holcomb Avenue  
Reno, NV 89502

DATED: January 13, 2003





1 CODE 2540  
2 RICHARD A. GAMMICK  
3 #001510  
4 P. O. Box 30083  
5 Reno, Nevada 89520-3083  
6 (775)328-3200  
7 Attorney for Respondent

8  
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
10  
11 IN AND FOR THE COUNTY OF WASHOE

12 \* \* \*

13 TERRY JESS DENNIS,

14 Petitioner,

15 v.

16 Case No. CR99P0611

17 THE STATE OF NEVADA,

18 Dept. No. 1

19 Respondent.  
20

21 NOTICE OF ENTRY OF ORDER

22 PLEASE TAKE NOTICE that on June 4, 2003, the Court  
23 entered an order in the above-entitled matter. A copy of the  
24 same is attached hereto and incorporated herein by reference.

25 DATED: June 6, 2003.

26 RICHARD A. GAMMICK  
District Attorney

By Joseph R. Plater

JOSEPH R. PLATER  
Appellate Deputy

JA  
Plater

FILED

1 CODE: 3370

RONALD A. LONGTIN, JR., Clerk  
By L. Quilici  
04 Jun 2003 Deputy Clerk

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

TERRY JESS DENNIS,

Petitioner,

VS.

Case No. CR99P0611

THE STATE OF NEVADA,

Dept. No. 1

Respondent.

ORDER

Respondent, THE STATE OF NEVADA ("the State"), by and through counsel, Joseph R. Plater, Appellate Deputy District Attorney, filed a *Motion to Reconsider Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction)*. Petitioner, TERRY JESS DENNIS ("Dennis"), by and through counsel, Karla K. Butko, Esq., filed an *Opposition* to which the State *Replied*.

The State moves this Court to reconsider its ruling granting Dennis an evidentiary hearing. The State argues a three-judge panel in this case is constitutional pursuant to recent Nevada authority, Colwell v. State, 118 Nev. Adv. Op. No. 80 (December 18, 2002), which governs the authority relied on by Dennis. The State also argued that the case should be dismissed because Dennis' arguments are either barred by case law, fail to state a claim for relief, or are repelled by the record.

Dennis relies on Ring v. Arizona, 536 US 584 (2002), which states that capital defendants, no less than non-capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. The constitutional principle is this:

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"under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged by indictment, submitted to the jury and proven beyond a reasonable doubt. Id.

The Court has determined that Colwell applies in this case. The Nevada Supreme Court addressed the issue of a three-judge panel on a death penalty case in Collwell, holding that Ring v. Arizona does not retroactively apply to collateral review of final judgments. Therefore, Dennis has no claim under Ring. Additionally, Dennis voluntarily waived his right to have his sentence determined by a jury when he pleaded guilty and waived his right to a jury trial.

Accordingly, and good cause appearing, the State's *Motion to Reconsider Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction)* is GRANTED.

DATED: This 3rd day of June, 2003.

Janet Berry  
DISTRICT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCF 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 4<sup>th</sup> day of June, 2003, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Joseph Plater, DDA  
Via Interoffice Mail

Karla Butko, Esq.  
1030 Holcomb Ave  
Reno, NV 89502

  
Leona Quilici

BP

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CERTIFICATE OF MAILING

Pursuant to NRC 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Karla K. Butko, Esq.  
1030 Holcomb Avenue  
Reno, NV 89502

Terry Jess Dennis #62144  
Ely State Prison  
P.O. Box 1989  
Ely, NV 89301

DATED: June 6, 2003

*Sherry Michael*





KARLA K. BUTKO, LTD., A Professional Corporation  
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(775) 786-7118

1 Code: 2515  
2 KARLA K. BUTKO, ESQ.  
3 State Bar No. 3307  
4 1030 Holcomb Ave.  
5 Reno, Nevada 89502  
6 (775) 786-7118  
7 Attorney for Petitioner

FILED

2003 JUN 25 PM 1:01

RONALD A. LONGTIN, JR.  
BY C. Patterson  
DEPUTY

8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
9 IN AND FOR THE COUNTY OF WASHOE

10 TERRY JESS DENNIS,  
11 Petitioner,

12 vs.

Case No. CR99P0611

13 THE STATE OF NEVADA,

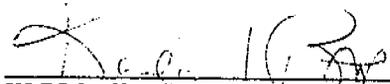
Dept. No. 1

14 Respondent.

15 NOTICE OF APPEAL

16 NOTICE IS HEREBY GIVEN that TERRY JESS DENNIS, the  
17 Appellant above-named, by and through his counsel, KARLA K.  
18 BUTKO, ESQ., hereby appeals to the Supreme Court of Nevada,  
19 from the Order dismissing his Petition for Post-Conviction  
20 Relief (Habeas Corpus) dated June 4, 2003, and Notice of Entry  
21 of Order dated June 6, 2003.

22 DATED this 25th day of June, 2003.

23   
24 KARLA K. BUTKO  
25 1030 Holcomb Avenue  
26 Reno, Nevada 89502  
27 (775) 786-7118  
28 Attorney for Appellant  
State Bar No. 3307

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CERTIFICATE OF SERVICE

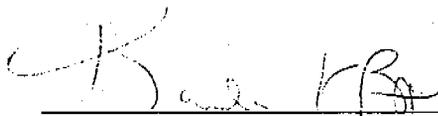
1  
2 I, KARLA K. BUTKO, hereby certify that I am an employee of  
3 KARLA K. BUTKO, LTD., and that on this date I deposited for  
4 mailing, the foregoing document, addressed to the following:

5 TERRY JESS DENNIS  
6 Inmate 62144  
7 Nevada State Prison-Ely  
8 P.O. Box 1989  
9 Ely, NV 89301

10 and that on this date I personally served the foregoing  
11 document on the parties listed below by delivering a true and  
12 correct copy, in a sealed envelope, via Reno Carson Messenger  
13 Service, addressed to the following:

14 Richard A. Gammick  
15 Washoe County District Attorney  
16 50 W. Liberty Street, Third Floor  
17 Reno, NV 89520  
18 ATTN: Appellate Division

19 DATED this 25th day of June, 2003.

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KARLA K. BUTKO

KARLA K. BUTKO, LTD., A Professional Corporation  
1030 Holcomb Avenue, Reno, NV 89502  
(775) 786-7118



1 CODE: 1930

2 ORIGINAL

FILED

RONALD A. LONGTIN, JR., Clerk

By Deona Quilici  
15 Sep 2003 Deputy Clerk

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE

8  
9 STATE OF NEVADA

10 Plaintiff,

11 VS.

Case No. CR99P0611

12 TERRY JESS DENNIS,

Dept. No. 1

13 Defendant.

14  
15 LETTER FROM DEFENDANT

16 SEE ATTACHED DOCUMENT:  
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ER 1520

C. 299-P 0611

Your Honor,

9-9-03

My name is Terry Jess Dennis DOC #62144.

You were a member of the three judge panel before which I appeared on the charge of 1<sup>o</sup> murder w/ deadly weapon in July, 1999. I was found guilty and sentenced to death.

Karla K. Butko has been handling my appeal. Last Thursday, 9-4-03, I met with Ms. Butko and informed her that I no longer wish to pursue any appeals and want my sentence to be carried out.

I'm currently at U.S.P. having been transported from Ely due to someone's still thinking that I was still going to have the evidentiary hearing that you shot down in April or May.

Under the circumstances I'd like to ask if there's any way you could see to it that I remain here at U.S.P. rather than my having to be returned to Ely only to have to turn right around and be sent back here again in a very short time. I very much hope that you don't find this request untoward and I would appreciate your consideration and help very much.

Respectfully,

Terry J. Dennis

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 15<sup>th</sup> day of September, 2003, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Karla Butko, Esq.  
1030 Holcomb Avenue  
Reno, NV 89502

Gary Hatlestad  
Deputy District Attorney  
Via Interoffice Mail

  
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Leona Quilici

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FEDERAL PUBLIC DEFENDER  
RENO, NEVADA

IN THE SUPREME COURT OF THE STATE OF NEVADA

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TERRY JESS DENNIS,

Case No. 41664

Appellant,

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vs.

SEP 16 2003

THE STATE OF NEVADA,

JANETTE H. BLOOM  
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BY \_\_\_\_\_  
DEPUTY CLERK

Respondent.

APPEAL FROM JUDGMENT OF THE HONORABLE JANET J. BERRY

SECOND JUDICIAL DISTRICT COURT

APPELLANT'S OPENING BRIEF

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BRIAN SANDOVAL  
Nevada Attorney General  
State of Nevada  
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IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY JESS DENNIS,

Case No. 41664

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

---

APPEAL FROM JUDGMENT OF THE HONORABLE JANET J. BERRY  
SECOND JUDICIAL DISTRICT COURT

---

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

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Table of Authorities ..... i-iii

Statement of the Issues ..... 1

Statement of the Case ..... 1-2

Statement of Facts ..... 2-14

Argument

1. THE THREE JUDGE PANEL SYSTEM UTILIZED TO SENTENCE DENNIS TO DEATH IS UNCONSTITUTIONAL. 14-23

2. THE DISTRICT COURT COMMITTED ERROR WHEN IT DISMISSED APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION). 23-27

Conclusion ..... 27-28

Certificate of Compliance ..... 29

Certificate of Service ..... 30

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TABLE OF AUTHORITIES

1	CASE NAME	PAGE(S)
2		
3	<u>Atkins v. Virginia</u> , ..... 122 S. Ct. 2242 (2002)	16
4	<u>Bousley v. United States</u> , ..... 523 U.S. 614, 620 (1998)	15
5		
6	<u>Burke v. State</u> , ..... 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994)	27
7	<u>Cannon v. Mullin</u> , ..... 297 F.3d 989, 994 (10thCir. 2002)	22
8		
9	<u>Caspari v. Bohlen</u> , ..... 510 U.S. 383, 389 (1994)	20
10	<u>Colwell v. State</u> , ..... 118 Nev. Adv. Op. 80, decided December 18, 2002	2,13,14,20,21,24
11		
12	<u>Dennis v. State</u> , ..... 116 Nev. 575, 13 P.3d 434 (2000)—(Adv. Op. 113)	6,7,8,9,11,16
13	<u>Doggett v. State</u> , ..... 91 Nev. 768, 771, 542 P.2d 1066, 1068 (1975)	25
14		
15	<u>Drake v. State</u> , ..... 108 Nev. 523, 836 P.2d 52 (1992)	26
16	<u>Enmund v. Florida</u> , ..... 458 U.S. 782, 800-01 (1982)	18
17		
18	<u>Fine v. Warden</u> , ..... 90 Nev. 166, 521 P.2d 374 (1974)	25
19	<u>Graham v. Collins</u> , ..... 506 U.S. 461, 467 (1993)	16
20		
21	<u>Grondin v. State</u> , ..... 94 Nev. 454, 634 P.2d 456 (1981)	26, 27
22	<u>Hall v. State</u> , ..... 91 Nev. 314, 315, 535 P.2d 797, 798 (1975)	26
23		
24	<u>Hargrove v. State</u> , ..... 100 Nev. 498, 686 P.2d 222 (1984)	25, 26
25	<u>Harris v. Alabama</u> , ..... 513 U.S. 504, at 521 (1995)	19
26		
27	<u>Horn v. Banks</u> , ..... 536 U.S. 266, 272 (2002)	14
28		

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TABLE OF AUTHORITIES, CONTINUED

1		
2	<u>Kirksey v. State</u> , ..... 112 Nev. 980, 923 P.2d 1102 (Nev. 1996)	27
3	<u>Lozada v. State</u> , ..... 110 Nev. 349, 871 P.2d 944 (1994)	27
4		
5	<u>Mack v. State</u> , ..... 119 Nev. Adv. Op. 50, decided September 8, 2003	21, 22
6		
7	<u>Nguyen v. United States</u> , ..... 123 S. Ct. 2130 (2003)	20
8	<u>Pangallo v. State</u> , ..... 112 Nev. 1533, 930 P.2d. 100 (1996)	26
9		
10	<u>Penry v. Lynaugh</u> , ..... 492 U.S. 302, 330 (1989)	16
11	<u>Pertgen v. State</u> , ..... 110 Nev. 554, 557-58, 875 P.2d 361, 363 (1994)	26
12	<u>Ring v. Arizona</u> , ..... 536 U.S. 584 (2002)	2, 14, 15, 16, 20, 21, 22, 23
13		
14	<u>Santana-Madera v. United States</u> , ..... 260 F.3d 133, 138 (2d Cir. 2001)	16
15		
16	<u>Sawyer v. Smith</u> , ..... 497 U.S. 227, 242 (1990)	17
17	<u>Schiro v. Indiana</u> , ..... 475 U.S. 1036, 1038 (1986)	18
18		
19	<u>Strickland v. Washington</u> , ..... 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	27
20	<u>Summerlin v. Stewart</u> , ..... Ninth Circuit Docket Number 98-99002, decided September 2, 2003.	14, 15, 22
21	<u>Teague v. Lane</u> , ..... 489 U.S. 288 (1989)	14, 22
22		
23	<u>Turner v. Crosby</u> , ..... ___ F.3d ___, No. 02-14941, 2003 WL 21739734 (11th Cir. July 29, 2003)	22, 23
24	<u>United States v. Fine</u> , ..... 975 F.2d 596, 603 (9 <sup>th</sup> Cir. 1992)	17
25		
26	<u>United States v. Frushon</u> , ..... 10 F.3d 663, 666 (9th Cir. 1993)	17
27		
28	<u>United States v. Mandanici</u> , ..... 205 F.3d 519, 525 (2d Cir. 2000)), <i>cert. denied</i> , 534 U.S. 1083 (2002)	16

TABLE OF AUTHORITIES, CONTINUED

1  
2  
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7  
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<u>United States v. Matta-Ballesteros</u> , .....	18
71 F.3d 754, 767 (9th Cir. 1995), <i>as amended by</i> 98 F.3d 1100 (9th Cir.1996)	
<u>Valerio v. State</u> , .....	26
112 Nev. 383, 915 P.2d 874 (1996)	
<u>Vaillancourt v. Warden</u> , .....	25
90 Nev. 431, 529 P.2d 204 (1974)	
<u>Walker v. State</u> , .....	13
116 Nev. 442, 997 P.2d 803 (2000).	
<u>Witherspoon v. Illinois</u> , .....	18
391 U.S. 510, 520 n.15 (1968)	
<u>Wright v. State</u> , .....	25
619 P.2d 155, 158 (Kan.Ct.App. 1980)	
 <u>NEVADA REVISED STATUTES</u>	
NRS 34.830(1) .....	23
NRS 175.556 .....	4, 16
NRS 193.165 .....	12
NRS 200.033(2) .....	13
 <u>NEVADA RULES OF APPELLANT PROCEDURES</u>	
N.R.A.P. 28(e) .....	29
 <u>OTHER AUTHORITIES</u>	
Fifth Amendment to the U.S. Constitution .....	12
Sixth Amendment to the U.S. Constitution .....	10, 19, 25
Eighth Amendment to the U.S. Constitution .....	12
Fourteenth Amendment to the U.S. Constitution .....	12

KARLA K. BUTKO, LTD., A Professional Corporation  
1030 Holcomb Avenue, Reno, NV 89502  
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1 On November 20, 2002 , the District Court entered an Order that indicated that  
2 counsel was to set the matter for an evidentiary hearing. (AA4: 800). The parties complied  
3 with that Order and set a hearing date. After that Order, the State moved to reconsider the  
4 motion to dismiss the petition for writ of habeas corpus arguing that under *Ring* and Colwell v.  
5 State, 118 Nev. Adv. Op. 80, (December 18, 2002), the Petition should be denied. The State  
6 again moved to dismiss the remainder of the claims found in the Petition arguing that they  
7 were "either barred by the law of the case, failed to state a claim for relief, or are repelled by  
8 the record." (AA 4: 802-804).

10 Dennis opposed the motion to reconsider filed by the State. (AA 4: 806-827). On June  
11 4, 2003, the district court entered an Order which granted the State's Motion to Reconsider the  
12 Motion to Dismiss the Petition for Writ of Habeas Corpus (Post-Conviction), thus dismissing  
13 Dennis's writ in its entirety without an evidentiary hearing. This Order was entered on June 6,  
14 2003. (AA 4:833-837). On June 25, 2003, Dennis filed a timely notice of appeal. (AA 4: 840-  
15 841).

#### 17 STATEMENT OF FACTS

18 On March 29, 1999, the State filed an Information charging TERRY JESS DENNIS  
19 with one count of first-degree murder with the use of a deadly weapon alleging that Dennis  
20 killed Ilona Straumanis, by strangulation with a belt. (AA 1: 1-3).

22 On April 14, 1999, the State filed a Notice of Intent to Seek the Death Penalty against  
23 Dennis. (AA 1: 4-8). Only two days later, on April 16, 1999, Dennis pled guilty to first-  
24 degree murder, with the use of a deadly weapon. Dennis pled to the maximum charge  
25 available and the maximum sanction available without the benefit of a plea bargain of any  
26 type. Dennis was canvassed by the District Court, the Honorable Janet J. Berry, District Judge

1 Presiding, regarding the voluntariness of his plea, after which the District Court accepted his  
2 plea. (AA 1: 15-70).

3 During the plea canvass, Dennis admitted that he was not taking prescribed  
4 medications and that he had not taken necessary medications for twelve days. (AA 1: 21).  
5 Dennis indicated that he had been prescribed Depakote and Cenion for a bipolar two disorder.  
6 Dennis admitted that he stopped taking the medications without a doctor's order or  
7 consultation. (AA 1: 22). Dennis advised the district court that he suffered from severe chronic  
8 depression, bipolar, posttraumatic stress disorder and was diagnosed with those mental health  
9 issues in 1995. (AA 1: 23). Dennis stated that he was placed on suicide watch at some point at  
10 the jail. He advised the court that he was suffering from mental illness on the day of the plea  
11 as "they just don't go away," but that he declined treatment. (AA 1: 24).

12 During the plea colloquy, the Court referred to the report of Dr. Lynn. Dennis advised  
13 the Court that he had not seen the report of Dr. Lynn. The Court asked defense counsel to let  
14 Dennis take a "quick look at it" and summarized the conclusion that Dennis was competent yet  
15 clinically depressed. (AA 1: 25). The Court deferred to Dennis to ask if he wanted another  
16 psychiatric opinion or further evaluation. The Court asked defense counsel for her opinion of  
17 her client's mental state. (AA 1: 26). Maizie Pusich, Chief Trial Attorney for the Washoe  
18 County Public Defender's Office replied that the psychological report of Dr. Lynn was  
19 consistent with her impressions of her client's mental state. (AA 1: 26).

20 Dennis advised the Court that he tried to commit suicide when he was in military  
21 service and hadn't received any treatment until he came to Nevada three and one-half years  
22 earlier. (AA 1: 28). When asked if mental health issues ran in his family, Dennis commented  
23 to the Court that his mother used to escape from the sanitarium, pick up sailors and get drunk.  
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1 Dennis stated that potential witnesses in the mental health field would assist in the defense.  
2 (AA 1: 32-33; 47). When pressed about giving the court more information, Dennis stated,  
3 "Not at this time. We keep pushing on in, I might. Let's just see. Let's see how it goes."  
4 (AA 1: 49).

5 At the time of the entry of plea, Dennis stated that he had only been able to spend  
6 about two and one-half to three hours going over the case with his counsel. He further relayed  
7 that he and counsel had not discussed pretrial motion work at all. Dennis indicated that he had  
8 been pushing hard to plead guilty and get to the death sentence. (AA 1: 52). Counsel  
9 admitted that as of the date of the plea, she was still receiving discovery. (AA 1: 65). Counsel  
10 admitted that she did not recommend the guilty plea and that the plea was entered against  
11 advice of counsel. (AA 1: 60, 65). Nonetheless, Judge Berry accepted the guilty plea as  
12 knowingly and voluntarily entered.  
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14

15 The Guilty Plea Memorandum executed by Dennis on April 14, 1999, indicated: "I  
16 waive my right to trial by jury, at which trial the State would have to prove my guilt of all  
17 elements of the offense beyond a reasonable doubt." (AA 1: 10). The Guilty Plea  
18 Memorandum does not place Dennis on notice of a constitutional right to be sentenced by a  
19 jury after entry of a guilty plea nor does it explain the three judge panel system and gain  
20 Dennis's signature agreeing to that procedure. (AA 1: 9-14). The Information charged only  
21 one count of First Degree Murder with the Use of a Deadly Weapon, a violation of NRS  
22 1931165, 200.010 and NRS 200.030. NRS 175.556 was not discussed or noticed at all. (AA  
23 1: 1-3). The Notice of Intent to Seek Death Penalty filed by the State on April 14, 1999  
24 advised that the evidence regarding the death enhancement would be presented to the jury of  
25 twelve or a three judge panel seeking a death verdict. (AA 1: 4-5).  
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1           During the plea canvas, Dennis was advised that he had a right to jury trial. (AA 1:  
2 30).

3           The Court advised Dennis that if he entered a guilty plea on the guilty issue that he would be  
4 sentenced by a three-judge panel. Dennis was not asked if he agreed with that procedure or  
5 waived the right to be sentenced by a jury on the death question. (AA 1: 31). While Dennis  
6 was advised what a three judge panel was and how it operated, Dennis was never advised that  
7 he could plead guilty on the crime issue and receive a jury sentencing on the death question.  
8 Defense counsel Pusich indicated that she had not discussed jury selection at length because  
9 the client did not wish to proceed to jury trial. (AA 1: 45). The district court explained the  
10 jury's obligation to review evidence, demeanor of witnesses and determine if the State proved  
11 each and every element of the crime beyond a reasonable doubt and that the jury would  
12 deliberate on whether to find Dennis guilty or not guilty.. (AA 1: 45-46).

13           The State advised Dennis only that the State would have to prove beyond a reasonable  
14 doubt the elements of first degree murder with the use of a deadly weapon, the definition of  
15 malice and the definition of premeditation. (AA 1: 54-55). The district court did not make a  
16 finding that Dennis knowingly and voluntarily waived his right to sentencing before a jury,  
17 rather the court only made a finding that Dennis waived his right to jury trial. (AA 1: 68).

18           A penalty hearing was held before a three-judge panel consisting of the Honorable  
19 Janet J. Berry, the Honorable Michael Cherry, and the Honorable Michael Memeo,  
20 commencing on July 19, 1999. The penalty hearing lasted two days. At the conclusion of the  
21 hearing, the three-judge panel sentenced Dennis to death. (AA 2: 462-467). The Panel found  
22 three (3) aggravating circumstances: two prior felonies for assault in 1979, and one prior  
23 felony for arson in 1984. (AA 2: 462). The Panel found two mitigating circumstances: that  
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1 Dennis was under the influence of alcohol when he killed the victim, and that Dennis suffers  
2 from mental illness. (AA 2: 462-463). However, the Panel found that the mitigating  
3 circumstances did not outweigh the aggravating circumstances and therefore Dennis should  
4 forfeit his life. (AA 2: 463).

5  
6 Dennis appealed the sentence of death. The Nevada Supreme Court affirmed the  
7 decision of the three-judge panel on December 4, 2000: Dennis v. State, 116 Nev. 575, 13  
8 P.3d 434 (2000), Ad v. Op. 113 . Appellate counsel argued only that a penalty of death was  
9 excessive.

10 On April 25, 2001, the Second Judicial District Court appointed Karla K. Butko, Esq.,  
11 to represent Dennis on his post-conviction proceedings. Scott W. Edwards, Esq., agreed to be  
12 and was appointed as co-counsel for the habeas of the proceedings.

13  
14 Factually, this case arose when Dennis, age 52, called the Reno Police Department  
15 ("RPD") Dispatch, and told a dispatcher that he had killed a woman and that her body was in  
16 his room at a local motel. Dennis said that he was in the same room watching television and  
17 would wait for police to arrive. Dennis commented that they should send a coroner, as "[t]he  
18 bitch ha[d] been dead for three or four days." He advised that he did not have a weapon.  
19 When police arrived and again asked if he had a weapon, Dennis again expressed the fact that  
20 he had killed the victim with his hands. Dennis v. State, 116 Nev. 575 , 13 P.3d 434 (2000).  
21

22 At the police department, detectives advised Dennis of his rights under Miranda v.  
23 Arizona, 384 U.S. 436 (1966). Dennis allegedly waived his rights and agreed to be  
24 interviewed. (AA 1: 201-204). When questioned about the murder, Dennis stated that his  
25 memory was unclear on certain details because he had consumed about a fifth of vodka a day  
26 for the past week. Dennis v. State, 116 Nev. 575 , 13 P.3d 434 (2000).  
27

1 Dennis allegedly voluntarily agreed to be transported to RPD for an interview and  
2 during the interview reported the following facts to police. At the time of the interview, his  
3 blood alcohol was .112 and descending. Dennis related he had been staying at the motel  
4 where the murder occurred, since March 3, 1999. Two or three nights into his stay, he left his  
5 room to go to a local bar. On his way to the bar, he met the victim, who was later identified  
6 as Ilona Straumanis, age 56. Straumanis had bruises about her eyes and told Dennis that she  
7 had been beaten by another man. Straumanis accompanied Dennis to the bar, and later, to  
8 Dennis's motel room. Thereafter and until the murder, both Dennis and Straumanis remained  
9 in an intoxicated state, engaged in consensual sex, staying in his room, except for a shared  
10 meal out and his outings to get more alcohol. (AA 1: 215, 221, 230, 231, 236). Dennis v. State,  
11 116 Nev. 575 , 13 P.3d 434 (2000).  
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14 On the day of her alleged murder, Dennis and Straumanis engaged in a conversation  
15 about whether he had ever killed anyone. Straumanis accused Dennis of being too kind to be  
16 capable of killing. Dennis and Straumanis then began "sort of" "making love." During this  
17 encounter, Dennis stated that he ended up killing the victim. (AA 1: 217-219).  
18

19 Dennis made a statement to the effect that during their love-making he began  
20 strangling Straumanis with a belt. He felt somewhat aroused by Straumanis's struggling.  
21 Dennis made a statement that "as she was fading," he began to engage in anal intercourse with  
22 her. He then took the belt off and used his hands to choke her, and then suffocated her by  
23 covering her nose and mouth, making sure that she was not breathing and that "it was all  
24 done." (AA 1: 217, 237-238).  
25

26 Dennis said that after the murder, he covered Straumanis's body and slept in the other  
27 bed. Prior to contacting police, Dennis left the room at times to go to a local casino or the  
28

1 store for more liquor. Dennis v. State, 116 Nev. 575 , 13 P.3d 434 (2000).

2 Dennis made statements at the time and after his arrest that he did not care about  
3 anybody, including himself. He knew murder was wrong and did not care. Dennis told  
4 detectives, "[I]f I didn't get stopped this would not be the last time that I would do something  
5 like this, because I found it exciting. I actually enjoyed it." Many of the statements to the  
6 police appear insincere and are bravado to invoke the passions of the police and assist in his  
7 wish to die. At the conclusion of the interview, detectives formally placed Dennis under  
8 arrest. (AA 1: 235); Dennis v. State, 116 Nev. 575 , 13 P.3d 434 (2000).

9  
10 Meanwhile, another RPD detective searched the motel room pursuant to a search  
11 warrant and discovered Straumanis's nude dead body underneath a blanket on one of the two  
12 beds in the room. Also discovered were numerous empty beer and vodka containers in the  
13 room. An autopsy performed on Straumanis's body on March 10, 1999, showed that she died  
14 between three and seven days earlier as a result of asphyxia due to neck compression, most  
15 likely by strangulation. The State's expert could not conclude that she was strangled to death  
16 by a belt. (AA 2: 307). Other injuries were determined to have occurred sometime within the  
17 few days prior to her death, including a small abrasion on the forehead, a bruise on the back of  
18 one thigh, and a fractured sternum. Changes caused by decomposition of Straumanis's body  
19 made determination of the existence of any sexual assault difficult. Testing revealed that  
20 Straumanis had a blood alcohol content of 0.37 at the time of death, an amount that is almost  
21 five times the legal limit for intoxication. (AA 2: 309-312; 314).

22  
23  
24 The State charged Dennis by Information with one count of first-degree murder with  
25 the use of a deadly weapon and filed a notice of intent to seek the death penalty, alleging four  
26 aggravating circumstances: (1) that Dennis subjected Straumanis to nonconsensual sexual  
27

1 penetration immediately before, during or immediately after the commission of the murder,  
2 and (2) a 1979 felony conviction for second-degree assault; (3) a 1984 felony conviction for  
3 second-degree assault; and (4) a 1984 felony conviction for second-degree arson. The three  
4 judge panel did not find that the State proved aggravator number one. The panel determined  
5 that a deadly weapon had been used to commit the murder and thus enhanced the sentence.

6  
7 Prior to this incident, Dennis was admitted to the VA Hospital in Reno where he had  
8 reported to medical staff that he was trying to drink himself to death, had stopped taking his  
9 medications, had picked up a girl, took the girl to a motel and had thoughts of killing her.  
10 Dennis exhibited bizarre behavior, talking and answering to himself but was still discharged  
11 from the hospital. Dennis v. State, 116 Nev. 575 , 13 P.3d 434 (2000).

12  
13 Prior to the guilty plea, Dr. Lynn conducted a competency evaluation and concluded  
14 that, although Dennis was "clinically depressed," he was competent to stand trial and assist in  
15 his defense. (AA 1: 90). On April 16, 1999, Dennis was allowed to enter a guilty plea to  
16 first-degree murder with the use of a deadly weapon pursuant to a written plea agreement.  
17 There was no bargained-for-exchange. Dennis pled guilty against advice of counsel, straight-  
18 up without a deal. Defense counsel facilitated this plea even though Dennis was facing the  
19 death penalty. Moreover, defense counsel facilitated this plea only two days following the  
20 State's Notice of Intent to Seek the Death Penalty, even though all discovery had not been  
21 reviewed.

22  
23 The District Court canvassed Dennis, whose statements throughout the plea canvass  
24 were those of a "clinically depressed" man who was seeking the State's assistance in  
25 committing suicide. Dennis explained that he did not want to "waste away" in prison for the  
26 remainder of his life, and would rather "get it over faster than that." Ultimately, the Court

1 accepted his guilty plea, finding that Dennis was competent to enter a plea and that his plea  
2 was knowing and voluntary. The District Court acknowledged that "it doesn't appear...that  
3 you're receiving any benefit whatsoever in exchange for your plea of guilty." (AA 1: 35).

4 In a communication dated December 5, 2000, defense trial counsel Maizie Pusich  
5 admitted that her biggest mistakes on this case were not getting additional professional  
6 information about the competence of Dennis and failing to move to suppress the statements  
7 Dennis made to police officers. Pusich admitted that she should not have let a person with a  
8 death wish who was mentally ill plead guilty. Pusich stated that she let the intelligence of  
9 Dennis affect her judgment. This was alleged by Dennis in his Supplemental Petition and  
10 would have been admitted at the evidentiary hearing. (AA 3: 509).

11 On July 21, 1999, Maizie Pusich authored a note to John Petty, Chief Appellate  
12 Deputy for the Washoe County Public Defender's Office, indicating that based upon the  
13 questions of Judge Cherry and a conversation that she had with Michael Peschetta, (Federal  
14 Death Penalty Counsel), she didn't believe that she should have deferred any decisions to a  
15 mentally ill person. Pusich indicated that she did not have Dennis re-evaluated after Dennis  
16 stopped taking the medications because she didn't want to harm her mental health issues.  
17 Again, this fact was alleged in the Supplemental Petition and would have been proven at the  
18 evidentiary hearing. (AA 509-510).

19 On July 19 and 20, 1999, a penalty hearing was conducted before a three-judge panel  
20 of the district court. The State presented evidence relating to the facts and circumstances of  
21 Straumanis's death, including the police interview of Dennis. These statements were heavily  
22 relied upon by the Nevada Supreme Court in upholding the sentence of death. (AA 1: 188-  
23 239; V 2: 243-331).

1 As the Nevada Supreme Court indicated, Dennis "agreed to permit" counsel to argue  
2 for a sentence less than death and submit a sentencing memorandum along with medical,  
3 psychiatric and jail records. However, he expressed to the panel that he did not want to live in  
4 prison for the rest of his life, and he declined to present any additional evidence in mitigation  
5 or make any further statement in allocution. (AA 2: 425); Dennis v. State, 116 Nev. 575 , 13  
6 P.3d 434 (2000).  
7

8 The Nevada Supreme Court recognized that the medical records of Dennis, together  
9 with the panel's questioning of Dennis, demonstrate that Dennis has had a lengthy history of  
10 alcohol and substance abuse as well as suicide attempts. In spite of the serious history of  
11 mental illness, clinical depression, suicidal behavior, and his own statements requesting the  
12 death penalty, a finding entered that Dennis made a knowing and voluntary waiver of the right  
13 to present further mitigating evidence or make any further statement in allocution. The panel  
14 entered a sentence of death against Dennis.  
15

16 In his Petition for Writ of Habeas Corpus (Post-Conviction), Dennis raised issues as  
17 follows:

- 18 1) The sentence of death is invalid under state and federal constitutional guarantees of  
19 due process, equal protection and the right to a reliable sentence due to imposition of  
20 sentence by the three judge panel system.  
21 2) Petitioner's conviction and sentence are invalid because he was tried and sentenced  
22 by a tribunal that does not satisfy constitutional standards of impartiality.  
23 3) Petitioner's conviction and death sentence are invalid due to the violation of his state  
24 and federal constitutional right to counsel (arguing that trial counsel abdicated the  
25 responsibility to provide effective assistance by allowing the defendant to make tactical  
26 and strategic choices as to the conduct of the litigation which are committed to  
27 counsel's professional judgment).  
28 (AA 2: 479-500).

In the Supplemental Petition filed on February 14, 2002, Dennis raised the following  
issues claiming ineffective assistance of counsel:

- 1) The Straight Up Guilty Plea without benefit of bargain was ill-advised.
- 2) Failure to object to and move to strike the aggravating circumstances (prior convictions) as not relevant to the current crime and remote in time.
- 3) Dennis was incompetent to waive his rights to jury trial and incompetent to enter a guilty plea.
- 4) Counsel was ineffective for deferring material tactical decisions to an incompetent client, including the plea of guilty and waiver of right to jury verdict.
- 5) Counsel was ineffective for advising a guilty plea to first degree murder when the fact as admitted by Dennis do not amount to First Degree Murder under Byford.
- 6) Counsel was ineffective for allowing the Three Judge Panel to consider the three prior felonies as separate aggravators without objection, as two of the prior convictions were concurrent sentences and cannot apply separately for purposes of aggravation.
- 7) Reliance upon Dennis's statements and wishes that he wanted to die were improper for the trial court, the three judge panel and counsel.
- 8) Enhancement for a deadly weapon for use of the belt was applied in violation of the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 14<sup>th</sup> Amendments.
- 9) A belt is not a deadly weapon, as such NRS 193.165 is unconstitutional.
- 10) Counsel failed to adequately investigate.
- 11) Counsel was ineffective for failing to move to suppress the statement made by Dennis to RPD, in violation of the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments.
- 12) Alternatively, counsel was ineffective for failing to redact portions of the statement made by Dennis to RPD, regarding to use of a prior domestic violence conviction which was not supported by any credible evidence.
- 13) Counsel failed to investigate mitigation evidence and provide witnesses in support of mitigation at the penalty hearing.
- 14) The corpus delicti problem should have been raised by counsel as the cause of death was only indicated to be "most likely by strangulation".
- 15) Violation of right to confrontation for counsel's failure to adequately cross-examine witness Lana Miller constituted ineffective assistance of counsel.
- 16) Counsel's failure to defend the case with expert witness testimony on issues of cause of death (0.37 BA for victim) ; alcohol abuse, and mental health issues.
- 17) Counsel's failure to withdraw from representation due to an irreconcilable conflict between counsel's obligation to represent the client to the best ability possible and the client's instructions herein.
- 18) Cumulative errors of counsel prevented the client from making a competent decision on entry of plea and sentencing matters.
- 19) The three judge panel system is unconstitutional based upon the separation of powers doctrine.
- 20) Imposition of a sentence of death by the three judge panel system is unconstitutional under the due process provisions of the Constitution.
- 21) Dennis could have defended this case based upon a not guilty by reason of insanity plea and was deprived of that right by the legislature's ban in violation of Finger v. State, 117 Nev. \_\_\_, 27 P.3d 66 (2001)—(Adv. Op. 48).
- 22) The State shifted the burden of proof to the Defendant.

1 23) Dennis was deprived of medical care due to his indigency, in violation of the  
equal protection clause.

2 24) The Nevada Supreme Court erred in relying upon the testimony of Lana Miller in  
ruling on the direct appeal, when said testimony was excluded by the three judge panel.

3 25) The Nevada Supreme Court failed to conduct an adequate constitutional review of  
4 the waiver of Dennis's right to jury trial.

5 26) The Nevada Supreme Court failed to conduct an adequate proportionality review  
on whether this case was appropriate for the death penalty sanction.

6 27) Counsel failed to object to blatant prosecutorial misconduct sought to prejudice  
and inflame the sentencing panel by the unsubstantiated labeling of Dennis as a serial  
7 killer by the prosecutor.

8 28). NRS 200.033(2) is unconstitutionally vague and/or overbroad, appellate counsel  
was ineffective for failing to litigate NRS 200.033(2) under Walker v. State, 116  
9 Nev. 442, 997 P.2d 803 (2000).

10 29) Appellate counsel was ineffective for failing to address all of the legal issues  
described previously.

11 30) Appellate counsel was ineffective for arguments about Dennis being a serial killer,  
in contradiction to the record which fails to demonstrate that Dennis had ever  
previously killed a human being.

12 (AA 3: 501-635).

13 Each of the aforementioned claims was supported by recitation to the record and an  
14 explanation of the law on point as well as the facts that would be presented at an evidentiary  
15 hearing on the subject.

16 In addition, Dennis filed a detailed opposition to the motion to dismiss the petition  
17 which was filed by the State, and supported each of the arguments with further detail both  
18 legally and factually. (AA 3: 668-720).

19 The Order granting the State's Motion to Reconsider Motion to Dismiss Petition for  
20 Writ of Habeas Corpus (Post-Conviction) cites to the *Colwell* decision of the Nevada Supreme  
21 Court and then merely states: "Accordingly, and good cause appearing, the State's Motion to  
22 Reconsider Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction) is  
23 GRANTED." Since the State's Motion to Reconsider specifically sought dismissal of all  
24 claims in the Petition, and the Order makes reference to that fact, the interpretation of the  
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1 Order must be that the Petition has been dismissed by the district court without an evidentiary  
2 hearing. This appeal follows that dismissal. (AA 4: 834-835; 840).

3 ARGUMENT

4 1. THE THREE JUDGE PANEL SYSTEM UTILIZED TO SENTENCE DENNIS  
5 TO DEATH IS UNCONSTITUTIONAL.

6 Dennis was entitled to be sentenced to death, if at all, by jury verdict. The three judge  
7 panel system used to issue a death sentence against Dennis was unconstitutional. The Ninth  
8 Circuit Court of Appeals has held that the decision found by the United States Supreme Court  
9 in Ring v. Arizona, 536 U.S. 584 (2002), applies retroactively so as to require that the penalty  
10 of death in this case be vacated. See Summerlin v. Stewart, Ninth Circuit Docket Number 98-  
11 99002, decided September 2, 2003.

12 A detailed reading of Summerlin, supra, demonstrates that the Nevada Supreme Court.  
13 should overrule its holding in Colwell v. State, 118 Nev. Adv. Op. 80, decided December 18,  
14 2002. The logic and rationale held by the Ninth Circuit Court in Summerlin applies directly  
15 to the fact setting found herein. Dennis has preserved this issue for review at every step of the  
16 post-conviction proceedings. Appellate counsel was ineffective for failing to address this  
17 issue of constitutionality on direct appeal.

18 In Summerlin, supra, the Warden argued that Ring was not retroactive under Teague v.  
19 Lane, 489 U.S. 288 (1989), and that Teague barred relief on the constitutionality of the  
20 Arizona sentencing scheme for application of the death penalty. The Ninth Circuit held that it  
21 must decide whether Ring has retroactive application to cases on federal habeas review. Horn  
22 v. Banks, 536 U.S. 266, 272 (2002)(holding that the court of appeals erred by not performing a  
23 Teague analysis when the issue was "properly raised by the state") (citing Caspari v. Bohlen,

1 510 U.S. 383, 389 (1994) (“[I]f the State does argue that the defendant seeks the benefit of a  
2 new rule of constitutional law, the court *must* apply *Teague* before considering the merits of  
3 the claim.”).

4 The Ninth Circuit's holding was that on both substantive and procedural grounds, the  
5 United States Supreme Court's decision in *Ring* has retroactive application to cases on federal  
6 habeas review. The threshold question in a *Teague* analysis is whether the rule the petitioner  
7 seeks to apply is a substantive rule or a procedural rule, because “*Teague* by its terms only  
8 applies to procedural rules.” *Bousley v. United States*, 523 U.S. 614, 620 (1998).

9 The Ninth Circuit held that *Ring* did more than answer a strictly procedural question.  
10 The substantive basis for Arizona's capital sentencing scheme was at issue in *Ring*. and  
11 Arizona's substantive capital murder statute was rendered unconstitutional. More than a  
12 procedural holding, *Ring* effected a redefinition of Arizona capital murder law, restoring, as a  
13 matter of substantive law, an earlier Arizona legal paradigm in which murder and capital  
14 murder are separate substantive offenses with different essential elements and different forms  
15 of potential punishment. The Ninth Circuit held that analyzed under *Teague*, the rule  
16 announced by the Supreme Court in *Ring*, with its restructuring of Arizona murder law and its  
17 redefinition of the separate crime of capital murder, is necessarily a “substantive” rule. *See*  
18 *Bousley*, 523 U.S. at 620. Thus, *Teague* did not bar its application in *Summerlin*.

19 The arguments made in *Summerlin* are akin to the evaluation necessary in reviewing  
20 the Nevada capital punishment statutes. *Ring* altered the capital punishment scheme in  
21 Nevada because *Ring* held that jury verdicts are mandatory for imposition of death. As such,  
22 *Ring* redefined, as a matter of substantive law, that murder and capital murder are separate  
23 substantive offenses (murder plus) with different essential elements and different forms of  
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1 potential punishment.

2 Demonstration of the fact that *Ring* altered the capital punishment scheme in Nevada is  
3 found by the Nevada Legislature's approach in 2003 when it passed AB 13, restructuring NRS  
4 175.556, by eliminating the three judge panel and requiring that a sentence of death be  
5 imposed by jury verdict. This change to the statute occurred after this Court's decision in  
6 *Colwell*, supra. New rules of substantive criminal law are presumptively retroactive. See,  
7 e.g., *Santana-Madera v. United States*, 260 F.3d 133, 138 (2d Cir. 2001) (citing *United States*  
8 *v. Mandanici*, 205 F.3d 519, 525 (2d Cir. 2000)), cert. denied, 534 U.S. 1083 (2002).  
9

10 Even if this Court were to determine that *Ring* was not a substantive law decision, the  
11 Ninth Circuit Court held that a full procedural analysis under *Teague* provided an independent  
12 basis upon which to apply *Ring* retroactively to cases on collateral review. The same is visible  
13 in this case. Dennis's conviction became final after the Nevada Supreme Court denied  
14 rehearing of its opinion affirming his conviction and death sentence in *Dennis v. State*, 116  
15 Nev. 575, 13 P.3d 434 (2000)—(Adv. Op. 113), See Remittitur issued on February 8, 2001.  
16

17 Further, "there can be no dispute that a decision announces a new rule if it expressly  
18 overrules a prior decision," *Graham v. Collins*, 506 U.S. 461, 467 (1993), which *Ring*  
19 indisputably did. *Ring*, 536 U.S. at 608-609. The presumption against retroactivity is  
20 overcome only if the new rule prohibits "a certain category of punishment for a class of  
21 defendants because of their status or offense," *Penry v. Lynaugh*, 492 U.S. 302,  
22 330 (1989), abrogated on other grounds by *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), or  
23 presents a new "watershed rule of criminal procedure" that enhances accuracy and alters our  
24 understanding of bedrock procedural elements essential to the fairness of a particular  
25 conviction. *Teague*, 489 U.S. at 311.  
26

1 To fall within the second *Teague* exception, a new rule must: (1) seriously enhance the  
2 accuracy of the proceeding and (2) alter our understanding of bedrock procedural elements  
3 essential to the fairness of the proceeding. Sawyer v. Smith, 497 U.S. 227, 242 (1990). In the  
4 capital context, that implies accuracy in both the guilt and penalty phases of the case.  
5 Reformation of capital sentencing procedures has been presumed to meet the first  
6 requirement that the new rule substantially enhance the accuracy of the legal proceeding at  
7 issue. The Supreme Court recently observed that, in light of the past thirty years of actual  
8 experience, "the superiority of judicial fact-finding in capital cases is far from evident." *Ring*,  
9 536 U.S. at 607. An examination of the procedure at issue makes apparent several reasons why  
10 fact-finding by a jury, rather than by a judge, is more likely to heighten the accuracy of  
11 capital sentencing proceedings. Thus, the second prong of the test has been met.

12  
13 In addition, because penalty-phase presentations to judges tend to resemble non-capital  
14 sentencing proceedings, the sentencing judge receives an inordinate amount of inadmissible  
15 evidence, which he or she is expected to ignore. Such was the case at Dennis's sentencing  
16 before the three judge panel. The Court heard evidence which it later excluded from the  
17 record. In spite of that, the language of the excluded testimony of Lana Miller was recited by  
18 the Nevada Supreme Court in upholding the sentence of death.  
19

20 Much of the information in the presentence report was admitted without correction or  
21 objection. Dennis refused to make a statement to the Department during its preparation of the  
22 report. Although presentence reports are an extremely useful sentencing tool, by their nature  
23 the information they contain is "generally hearsay, even remote hearsay at the second and third  
24 remove." United States v. Frushon, 10 F.3d 663, 666 (9th Cir.1993) (quoting United States v.  
25 Fine, 975 F.2d 596, 603 (9<sup>th</sup> Cir. 1992)). As a result, presentence reports are generally  
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1 inadmissible at trial to prove any of the hearsay reports they contain. See United States v.  
2 Matta-Ballesteros, 71 F.3d 754, 767 (9th Cir. 1995), as amended by 98 F.3d 1100 (9th Cir.  
3 1996). Because they are not subject to evidentiary standards, presentence reports may also  
4 contain factual errors.

5           The statement of Dennis to the police department while he was under the influence and  
6 clearly acting bizarre making bravado statements which have never been substantiated as true  
7 was admitted without defense objection and utilized to justify a sentence of death. Had  
8 counsel been effective, Dennis's statement to the police would have been suppressed and  
9 inadmissible at the penalty phase of the case.

10           The Supreme Court "has emphasized that a sentence of death must reflect an ethical  
11 judgment about the 'moral guilt' of the defendant." Schiro v. Indiana, 475 U.S. 1036, 1038  
12 (1986) (Marshall, J., dissenting from the denial of certiorari) (citing Enmund v. Florida, 458  
13 U.S. 782, 800-01 (1982)). One of the critical functions of a jury in a capital case is to  
14 "maintain a link between contemporary community values and the penal system."  
15 Witherspoon v. Illinois, 391 U.S. 510, 520 n.15 (1968).

16           In Nevada, the district court judges are elected officials. As such, they have a goal for  
17 re-election purposes, not to appear soft on crime. The jury, as average members of the  
18 community, is more attuned to the current moral sensibility and reflects the values of the  
19 community as a whole. Again, this case involved one murder, no deadly weapon, no sexual  
20 attack, nothing heinous as far as mutilation of the victim and prior criminal convictions  
21 sustained by Dennis which were unrelated and remote in time. A jury would have been  
22 provided with the mental health information about this Viet Nam Veteran and felt that death  
23 was not warranted. Judges, on the other hand, hear many, many remorse filled settings with  
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1 persons suffering from varying stages of mental health problems. As Justice Stevens has  
2 commented, “given the political pressures they face, judges are far more likely than juries to  
3 impose the death penalty.” Harris v. Alabama, 513 U.S. 504, at 521 (1995) (Stevens, J.,  
4 dissenting).

5 This postulate has empirical support: Judges who face election are far more likely to  
6 impose the death penalty than either juries or appointed judges. See Stephen B. Bright &  
7 Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and*  
8 *the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 793-94 (1995). Compliance with the  
9 rule announced in *Ring* would certainly improve the accuracy of capital trials in Nevada.

10 Justice Breyer noted in his concurring opinion in *Ring*, entrusting a jury with the  
11 authority to impose a capital verdict is an important procedural safeguard, because the jury  
12 members “are more attuned to the community’s moral sensibility,” “reflect more accurately the  
13 composition and experiences of the community as a whole,” and act to “express the conscience  
14 of the community on the ultimate question of life or death.” 536 U.S. at 615-16 (Breyer, J.,  
15 concurring in the judgment)(internal citations and quotation marks omitted).  
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18 *Ring* established the bedrock principle that, under the Sixth Amendment, a jury  
19 verdict is required on the finding of aggravated circumstances necessary to the imposition of  
20 the death penalty. 536 U.S. at 609. *Ring* requires the vacation of a capital judgment based on  
21 judge-made findings. Depriving a capital defendant of his constitutional right to  
22 have a jury decide whether he is eligible for the death penalty is an error that necessarily  
23 affects the framework within which the trial proceeds. Indeed, the sentencing proceeded under  
24 a completely incorrect, and constitutionally deficient, frame-work. In short, allowing a  
25 constitutionally-disqualified fact-finder to decide the case is a structural error, and *Ring* error  
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1 is not susceptible to harmless-error analysis. Thus, Dennis is entitled to a new penalty phase  
2 proceeding before a jury, at the very least. Even this remedy will not correct the errors found  
3 at the guilt phase of the case.

4 The Supreme Court has explained on numerous occasions that a "truly watershed  
5 case" is one of a "small core of rules" that is "groundbreaking." See, e.g., Q'Dell, 521 U.S. at  
6 167; Caspari, 510 U.S. at 396; Graham, 506 U.S. at 478. *Ring* fits in that mold as it affects  
7 the structure of every capital trial and has rendered unconstitutional every substantive statute  
8 in conflict with its dictates. *Ring* directly impacted the substance of approximately one-fourth  
9 of the 38 state capital murder statutes and established irreducible minimum structural  
10 requirements for all capital cases.

11 The Supreme Court's recent opinion in Nguyen v. United States, 123 S. Ct. 2130  
12 (2003), reaffirms that any decision of an improperly constituted judicial body must be  
13 vacated.. "Death is different" and all rules established for the protection of the capital  
14 defendant should be strictly enforced. ABA Guideline 11.2. The three judge panel's  
15 imposition of death in this case must be vacated.

16 In compliance with this Court's ruling in *Colwell*, the Ninth Circuit has advised that the  
17 three judge panel approach to a sentence of death is a procedure which diminishes the  
18 likelihood of an accurate conviction. As such, even if *Colwell* is not overturned by this Court,  
19 Dennis is entitled to relief. The Ninth Circuit Court has determined that sentencing by jury  
20 verdict is superior in capital cases. This viewpoint is supported by the recent legislative  
21 changes to the capital sentencing scheme in Nevada by the 2003 Legislature.

22 Contrary to the fact setting in *Colwell*, Dennis has claimed that his guilty plea was not  
23 voluntary and knowing and that he was not competent to waive the jury panel or to plead  
24

1 guilty. At this point, his Petition has been dismissed without the ability to present evidence  
2 and testimony on that subject. The claims in the Petition, if true, would entitle Dennis to  
3 relief.

4 A review of the fact setting found in Mack v. State, 119 Nev. Adv. Op. 50, decided  
5 September 8, 2003, demonstrates drastic differences in the record utilized by the Nevada  
6 Supreme Court to support its holding that Mack waived the right to sentencing before a jury  
7 knowingly and voluntarily. Mack signed a statement acknowledging that his attorneys had  
8 advised him on the potential benefits and detriments involved in waiving his right to have my  
9 case heard before a jury which included the following language I understand that by choosing  
10 to have my trial heard by a judge, and if I am convicted of first-degree murder, my sentence  
11 will be decided by a three-judge panel I have discussed these matters with my counsel and I  
12 have decided to waive my right to a jury trial. " This did not occur in Dennis. Mack's case  
13 did not involve a guilty plea, it involved a bench trial before a judge. The guilt phase evidence  
14 was presented and defense counsel had a right to defend against the charge. Mack was found  
15 guilty by a judge after evaluation of the evidence presented.

16 Factually, Mack is not on point with Dennis. Mack had a prior conviction for another  
17 strangulation murder of a female victim in 1994. The victim was sexually assaulted. Semen  
18 was found in the victim's vagina and on her left foot. The victim had suffered trauma during  
19 the sexual assault. Mack had convictions for battery causing substantial bodily harm in 1980,  
20 burglary and two counts of possession of stolen property in 1980, burglary and possession of  
21 stolen property in 1983, and conspiracy to commit larceny from the person in 1991. There  
22 was no evidence that Mack had a mental disorder at the time of the murder.

23 In Mack, supra, the Nevada Supreme Court cited extensively to *Colwell* and *Ring* but  
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1 failed to address the ruling of the Ninth Circuit in *Summerlin*. The Court did not acknowledge  
2 the extensive legislative changes which include striking the use of a three judge panel in  
3 Nevada. In fact, how can it possibly be that if Dennis was to commit his crime this year he  
4 would be entitled to different constitutional rights than by committing the crime in 1999. This  
5 rationale cannot withstand constitutional scrutiny and is a violation of the equal protection  
6 clause. Either this Court should overrule Mack v. State, 119 Nev. Adv. Op. 50, decided  
7 September 8, 2003, or it should limit the case to its facts and grant Dennis relief. Dennis did  
8 not waive his right to the jury sentencing as he was never advised that he had such a right to  
9 waive.  
10

11           Regarding other jurisdictions which have reviewed the question of retroactivity of  
12 *Ring*, the Tenth Circuit Court of Appeals held in Cannon v. Mullin, 297 F.3d 989, 994  
13 (10thCir. 2002) that *Ring* was not retroactive under AEDPA, but did not reach the question of  
14 retroactivity under a *Teague* analysis.  
15

16           The only other Court to date to have reviewed the question of whether *Ring* was  
17 retroactive under a *Teague* analysis was the Eleventh Circuit Court of Appeals in a case  
18 entitled Turner v. Crosby, \_\_\_ F.3d \_\_\_, No. 02-14941, 2003 WL 21739734 (11th Cir. July  
19 29, 2003). In *Turner*, the Eleventh Circuit held that the petitioner's claim was procedurally  
20 barred, but held in the alternative that *Ring* was a procedural rule that should not be applied  
21 retroactively. The Eleventh Circuit did not address the question of whether *Ring* had  
22 substantive impact on Florida law in its consideration of whether *Teague* barred the retroactive  
23 application of *Ring*. See *Turner*, 2003 WL 2173934, at \*33-\*37. Thus, the Ninth Circuit's  
24 consideration in this respect was different from the issue addressed by the Eleventh Circuit. To  
25 the extent that the Eleventh Circuit relied on a pure analogy to *Apprendi* in its *Ring* analysis,  
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1 the Ninth Circuit disagreed with the 11<sup>th</sup> Circuit's conclusions. *Id.* at \*30-\*37.

2 Factually, Turner stabbed one of his victims 51 times, eight of which stab wounds  
3 would have been fatal, stabbed the other victim 16 times, shot the door off with a shotgun, had  
4 stalked the victims for about five months, threatening them and calling them lesbians. The  
5 killing of one of the victims occurred in the presence of her children (also Turner's children).  
6 The fact setting in *Turner* is not remotely on point with that of Dennis. Turner had never  
7 attempted suicide and had no history of mental health problems. Turner's case was tried  
8 before a jury for both guilt and sentencing stages of the case. The jury recommended a  
9 sentence of death. The sentencing scheme then allowed the trial court to conduct additional  
10 evidentiary hearings, evaluate additional evidence and after all of that, the sentencing court  
11 imposed one sentence of death and one sentence of life without release in accordance with the  
12 jury recommendations. Dennis did not have a jury recommendation. Dennis's case did not  
13 proceed to jury trial.  
14

15  
16 The verdict of death imposed by the three judge panel must be vacated. Dennis is  
17 entitled to a new penalty phase hearing before a jury of his peers. Ring is retroactive and must  
18 be applied retroactively to Dennis, thereby causing the verdict of death imposed by the three  
19 judge panel to be declared unconstitutional.  
20

21 **2. THE DISTRICT COURT COMMITTED ERROR WHEN IT DISMISSED**  
22 **APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-**  
23 **CONVICTION).**

24 Judge Berry's order denying the habeas petition is not in compliance with applicable  
25 statutory protocol. NRS 34.830(1) provides that "Any order that finally disposes of a petition,  
26 whether or not an evidentiary hearing was held, must contain specific findings of fact and  
27 conclusions of law supporting the decision of the court." Judge Berry's order, is devoid of any  
28

1 findings of fact or legal conclusions. It is not possible to determine on what basis Judge Berry  
2 deemed the petition unworthy of an evidentiary hearing. This is particularly troublesome  
3 because upon initial review of the petition and motion work Judge Berry ordered the parties to  
4 schedule the matter for an evidentiary hearing. (AA 4: 799-801). Presumably, upon initial  
5 review of the petition, the supplemental petition and the State's initial Motion to Dismiss,  
6 Judge Berry found that the petition made allegations, which if true and not repelled by the  
7 record, would entitle Dennis to relief. Apparently, something changed Judge Berry's mind in  
8 this respect, but she did not inform us of her reasoning in the order granting the State's Motion  
9 to Reconsider Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction).  
10 Without specific findings and legal conclusions as guidance, one is left to speculate as to the  
11 grounds for denying Dennis relief without conducting an evidentiary hearing. Judge Berry  
12 relied upon Colwell v. State, 118 Nev. Adv. Op. 80 (decided December 18, 2002) in upholding  
13 the verdict of death imposed by the three judge panel but failed to express any factual or legal  
14 opinions for dismissing the remaining 30+ claims filed by Dennis. As was shown above, the  
15 validity of the Colwell decision has been cast in doubt, in its interpretation of the  
16 constitutional requirement for jury sentencing in death penalty cases, and more importantly in  
17 its applicability to the facts in Dennis' case.

20  
21 Given the existing state of Nevada law regarding the need to conduct an evidentiary  
22 hearing upon a petition, Judge Berry's denial of the petition without a hearing must be  
23 presumed a conclusion that 's claims were (1) repelled by the available record; (2) barred by  
24 law of the case doctrine; or (3) unfounded in law.

25 In Grondin v. State, 94 Nev. 454, 634 P.2d 456 (1981) this Court found:

26 "Appellant asserts that the district court should have  
27

1 accorded him a hearing on the merits of his petition for post-  
2 conviction relief because he raised constitutional questions of  
3 law and fact. Appellant's claim that the performance of his trial  
4 attorney denied him of his Sixth Amendment right to effective  
5 representation is, under the circumstances of this case, a  
6 question of fact. We stated in *Doggett v. State*, 91 Nev. 768,  
7 771, 542 P.2d 1066, 1068 (1975):

8 Where factual allegations are  
9 made which, if true, could  
10 establish a right to relief, a  
11 convicted person must be allowed  
12 an evidentiary hearing on such  
13 issue, unless the available record  
14 repels such allegations. *Fine v.*  
15 *Warden*, 90 Nev. 166, 521 P.2d  
16 374 (1974).

17 Appellant, therefore, should have had an evidentiary  
18 hearing on the merits of his petition, but because counsel at the  
19 post-conviction stage of the proceedings neglected his  
20 responsibility, such a hearing was neither requested nor  
21 conducted. “

22 Similarly, in *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984) it was observed:

23 “Appellant's motion consisted primarily of “bare” or “naked”  
24 claims for relief, unsupported by any specific factual allegations  
25 that would, if true, have entitled him to withdrawal of his plea.  
26 Specifically, appellant's claim that certain witnesses could  
27 establish his innocence of the bomb threat charge was not  
28 accompanied by the witness' names or descriptions of their  
intended testimony. As such, to the extent that it advanced  
merely “naked” allegations, the motion did not entitle appellant  
to an evidentiary hearing. See *Vaillancourt v. Warden*, 90 Nev.  
431, 529 P.2d 204 (1974); *Fine v. Warden*, 90 Nev. 166, 521  
P.2d 374 (1974); see also *Wright v. State*, 619 P.2d 155, 158  
(Kan.Ct.App. 1980) (to entitle defendant to an evidentiary  
hearing, a post-conviction petition must set forth “a factual  
background, names of witnesses or other sources of evidence  
demonstrating . . . entitlement to relief”). To the extent that the  
motion and supplemental authorities raised allegations supported  
by factual claims, particularly the allegation of ineffective  
counsel, we note that the factual claims were belied by the  
record, especially the transcript of the change of plea canvass. A  
defendant seeking post-conviction relief is not entitled to an  
evidentiary hearing on factual allegations belied or repelled by

1 the record. See *Grondin v. State*, 97 Nev. 454, 634 P.2d 456  
2 (1981).”

3 The Hargrove standard continues to govern the issue of whether to conduct a hearing  
4 on a post-conviction habeas petition. See, e.g. Pangallo v. State, 112 Nev. 1533, 930 P.2d.  
5 100 (1996); Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992).

6 With respect to a conclusion that any of Dennis's claims were barred by law of the case  
7 doctrine, Nevada law is clear that claims that were adjudicated in prior appellate decisions may  
8 not be relitigated in subsequent habeas proceedings. See Hall v. State, 91 Nev. 314, 315, 535  
9 P.2d 797, 798 (1975); Valerio v. State, 112 Nev. 383, 915 P.2d 874 (1996). Moreover, the  
10 law of the case doctrine cannot be avoided by a more detailed and precisely focused argument.  
11 Pertgen v. State, 110 Nev. 554, 557-58, 875 P.2d 361, 363 (1994). Having said that, the only  
12 question that Dennis litigated at the direct appeal stage of the case was whether the sentence of  
13 death was excessive. All other issues remain available for post-conviction review.

14  
15 Nor does it appear that Dennis's habeas claims are repelled by the existing record. In  
16 fact, the majority of his claims are supported by the record. For example, his mental health  
17 concerns are supported by the lack of medication, the lack of expert testimony on the subject,  
18 and the answers of Dennis to the panel. The issues surrounding counsel's inability to  
19 competently recommend the guilty plea are supported by the record in that the plea entered  
20 while discovery was still being received and documents needed for the penalty phase had not  
21 been received by counsel. However, one can only speculate as to the conclusions made by  
22 Judge Berry supporting her decision to cancel an evidentiary hearing and deny the petition. As  
23 a result, appellate review also becomes a matter of speculation. Judge Berry's decision  
24 represents an abuse of discretion as the decision made is completely unsupported by the  
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1 record. This Court, in its review of the habeas pleadings of Dennis, can see that the  
2 Hargrove/Grondin standard has been met, and an evidentiary hearing should be ordered on  
3 remand.

4 A review of the Opening Brief on direct appeal reveals the failure of appellate counsel  
5 to raise serious issues found in this case for appellate review. As such, this Court must remand  
6 and allow those issues which cannot be determined as constitutional error to be litigated via  
7 the remedy found in Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Judge Berry erred in  
8 dismissing those claims without access to the remedy found in *Lozada*.  
9

10 The constitutional right to effective assistance of counsel extends to a direct appeal.  
11 Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective  
12 assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set  
13 forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and  
14 Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (Nev. 1996).  
15

16 Dennis has demonstrated that appellate counsel was ineffective for failing to address  
17 the unconstitutionality of the three judge panel system which imposed the sentence of death  
18 upon Dennis. He is entitled to relief. His other habeas claims also make allegations, which if  
19 true, would entitle him to relief. The claims are not belied or repelled by the record. They are  
20 stated with more than sufficient legal and factual specificity to merit a hearing on them.  
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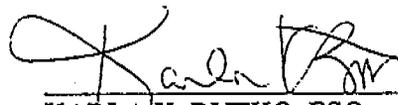
#### 22 CONCLUSION

23 Wherefore, Appellant respectfully requests that this Honorable Court review this  
24 matter and set aside his previously entered guilty plea, allowing him to proceed to trial on the  
25 merits of the case. Alternatively, Appellant seeks a new penalty phase proceeding before a  
26 jury of his peers. Should these requests be denied, Dennis seeks an evidentiary hearing on the  
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merit of the claims that he brought forth in his habeas action at the district court level.

DATED this 16 day of September, 2003.

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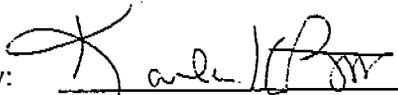
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled,  
"APPELLANT'S OPENING BRIEF," and to the best of my knowledge, information,  
and belief, it is not frivolous or interposed for any improper purpose. I further certify  
that this brief complies with all applicable Nevada Rule of appellate Procedure, in  
particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters  
in the record to be supported by appropriate references to the record on appeal. I  
understand that I may be subject to sanctions in the event that the accompanying brief is  
not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16<sup>th</sup> day of September, 2003.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, 1030 Holcomb Avenue, Reno, NV 89502, and that on this date I caused the foregoing document to be delivered to all parties to this action by

\_\_\_\_\_ placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

\_\_\_\_\_ personal delivery

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addressed as follows:

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DATED this 16<sup>th</sup> day of September, 2003.

  
\_\_\_\_\_  
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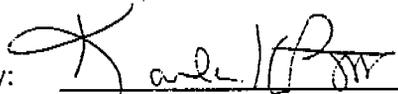
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10

11 DATED this 16<sup>th</sup> day of September, 2003.

12  
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14 By:



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