

No. _____

IN THE
Supreme Court of the United States

RODNEY EMIL,

Petitioner,

v.

BRIAN E. WILLIAMS, SR., WARDEN, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Nevada

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODNEY LYN EMIL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73461

FILED

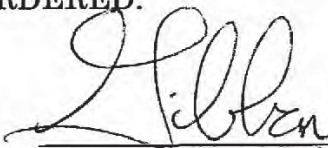
DEC 06 2019

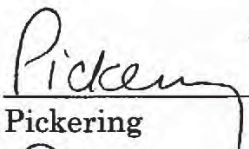
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER DENYING REHEARING

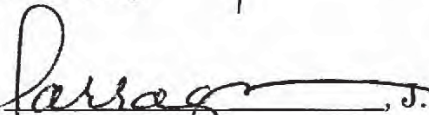
Rehearing denied. NRAP 40(c).

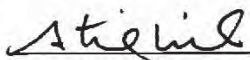
It is so ORDERED.


Gibbons, C.J.
Gibbons


Pickering, J.
Pickering


Hardesty, J.
Hardesty


Parraguirre, J.
Parraguirre


Stiglich, J.
Stiglich


Cadish, J.
Cadish


Silver, J.
Silver

cc: Hon. Douglas W. Herndon, District Judge
Federal Public Defender/Central Dist. of CA.
Joel M. Mann, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODNEY LYN EMIL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73461

FILED

SEP 13 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Yaceny
DEPUTY CLERK

ORDER OF AFFIRMANCE

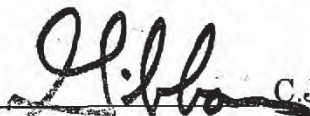
This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.


Appellant filed his petition on January 11, 2017, more than one year after the remittitur issued on appeal from the judgment of conviction. *Emil v. State*, 105 Nev. 858, 784 P.2d 956 (1989). The petition was therefore untimely filed. See NRS 34.726(1). Moreover, because appellant previously sought postconviction relief,¹ the petition was successive to the extent it raised claims that were previously litigated and resolved on their merits, and it constituted an abuse of the writ to the extent it raised new claims. See NRS 34.810(2). Finally, because the State pleaded laches, appellant had to overcome the presumption of prejudice to the State. See NRS 34.800(2). Accordingly, the petition was procedurally barred absent a demonstration of good cause and actual prejudice, NRS 34.726(1); NRS 34.810(3), or a showing that the procedural bars should be excused to prevent a fundamental miscarriage of justice, *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

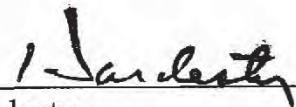
¹See, e.g., *Emil v. State*, Docket No. 21663 (Order of Affirmance, June 27, 1991).


Appellant argues that he demonstrated good cause and prejudice sufficient to excuse the procedural bars because *Hurst v. Florida*, 136 S. Ct. 616 (2016), set forth a new retroactive rule that requires trial courts to instruct jurors that the State must prove that the aggravating circumstances are not outweighed by the mitigating circumstances beyond a reasonable doubt. We disagree. See *Castillo v. State*, 135 Nev., Adv. Op. 16, 442 P.3d 558 (2019) (discussing death-eligibility in Nevada and rejecting the argument that *Hurst* announced new law relevant to the weighing component of Nevada's death penalty procedures); *Jeremias v. State*, 134 Nev. 46, 57-59, 412 P.3d 43, 53-54 (same), *cert. denied*, 139 S. Ct. 415 (2018). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


C.J.
Gibbons


Pickering, J.


Hardesty, J.


Parraguirre, J.

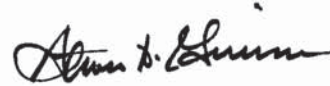

Stiglich, J.


Cadish, J.


Silver, J.

cc: Hon. Douglas W. Herndon, District Judge
Federal Public Defender/Central Dist. of CA.
Joel M. Mann, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX C



CLERK OF THE COURT

1 PWHC
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4 Facsimile: (702) 789-1045
Email: joel@legalmann.com

5 HILARY POTASHNER (Cal. State Bar No. 145632)
Federal Public Defender, Central District of California
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Assistant Federal Public Defender
California State Bar No. 233848
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MARK YIM (*pro hac vice* pending)
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11 Attorneys for Petitioner

12 DISTRICT COURT
CLARK COUNTY, NEVADA

13 RODNEY LYN EMIL,

14 Petitioner,

15 v.

16 TIMOTHY FILSON, Warden, Ely State Prison,
and ADAM PAUL LAXALT, Nevada Attorney
17 General

18 Respondents.

Case No. C082176
Dept. No. III

PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION)

(Death Penalty Habeas Corpus Case)

19 Petitioner Rodney Lyn Emil files this Petition for Writ of Habeas Corpus (Post-
20 Conviction) pursuant to Nevada Revised Statute (“NRS”) sections 34.724 and 34.820. Emil
21 alleges that he is being held in custody in violation of the Fifth, Sixth, Eighth, and Fourteenth
22 Amendments to the Constitution of the United States of America; Article 1, sections Three, Six,
23 Eight, and Nine, and Article 4, section Twenty-One of the Constitution of the State of Nevada;

1 and the rights afforded to him under federal law enforced under the Supremacy Clause of the
2 United States Constitution. U.S. Const. art. VI.

3 DATED this 11th day of January, 2017.

4 Respectfully submitted,
5 HILARY POTASHNER
6 Federal Public Defender

7 /s/ Claudia Pamela Gómez
8 CLAUDIA PAMELA GÓMEZ
9 Assistant Federal Public Defender

10 /s/ Mark Yim
11 MARK YIM
12 Assistant Federal Public Defender

13 **NOTICE OF MOTION**

14 TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Respondent,

15 PLEASE TAKE NOTICE that the “PETITION FOR WRIT OF HABEAS CORPUS
16 (POST-CONVICTION)” filed January __, 2017 will be heard on the 28 day of
17 Feb., at the hour of 9:00 am a.m./p.m., in Department XVII of the District Court.

18 DATED this 11th day of January, 2017.

19 Respectfully submitted,
20 HILARY POTASHNER
21 Federal Public Defender

22 /s/ Mark Yim
23 MARK YIM
Assistant Federal Public Defender

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PROCEDURAL ALLEGATIONS

1. Petitioner Rodney Lyn Emil is currently in the custody of the State of Nevada at Ely State Prison in Ely, Nevada, pursuant to a state court judgment of conviction and death sentence. Respondent Timothy Filson is the Warden of Ely State Prison. Emil's death sentence was entered on June 14, 1988, in the Eighth Judicial District Court of Clark County, Nevada.

2. On December 28, 1987, the State of Nevada filed a criminal complaint charging Emil with murder with the use of a deadly weapon. On January 26, 1988, at a preliminary hearing, the court bound Emil over to further proceedings in the Eighth Judicial Court of Clark County, Nevada. *State of Nevada v. Rodney Lyn Emil*, Eighth Judicial District Court Case No. C082176. On February 4, 1988, the State filed a one-count Information against Emil in the Eighth Judicial District Court. On May 10, 1988, the State gave notice of intent to seek death and notice of aggravating circumstances including murder committed by a person previously convicted of murder and murder for pecuniary gain.

3. On May 24, 26, 27, 31, and June 1, 2, 3, 1988, Emil was tried before a Clark County jury. The trial was presided over by the Honorable Carl J. Christensen of the Eighth Judicial District Court. Emil was represented at trial by David Schieck and Cal Potter. On June 3, 1998, the jury convicted Emil on the single charge.

4. On June 8, 1988, the penalty hearing commenced before the trial jury. On June 9, 1988, the jury imposed the sentence of death. The judgment of conviction was entered on June 14, 1988. A timely notice of appeal was filed on July 12, 1988.

5. David Schieck also represented Emil during his direct appeal to the Nevada Supreme Court. On January 3, 1989, Appellant's Opening Brief was filed. The following issues were raised:

- 1 I) It was reversible error to admit the testimony of Martin Koba without proper
2 foundation;
- 3 II) The evidence adduced at trial failed to establish Emil's guilt beyond a
4 reasonable doubt;
- 5 III) The polygraph report of Frederick Woodall should have been admitted at the
6 penalty hearing;
- 7 IV) The prior murder conviction should not have been allowed as an aggravating
8 circumstance;
- 9 V) The State should not have been allowed to offer testimony concerning the
10 Tolley murder in the penalty hearing; and
- 11 VI) Prosecutorial misconduct during the final argument requires a new penalty
12 hearing.

13 *Rodney Emil v. State*, case no. 19431 (Nev.). On December 28, 1989, Emil's conviction and
14 sentence were affirmed by the Nevada Supreme Court. *Rodney Emil v. State*, 105 Nev. 858, 784
15 P.2d 956 (1989). The petition for rehearing, which was timely filed, was denied and the
16 remittitur issued on March 14, 1990.

17 6. On May 17, 1990, Emil filed a Petition for Post-Conviction Relief and a Motion
18 for New Trial Based on Newly Discovered Evidence in the Eighth Judicial District Court. The
19 Motion for New Trial was based on two grounds:

- 20 1) subsequent to testifying at the trial and penalty phase of this case, it was
21 determined that Mary Emil Deitrich was suffering from a brain tumor which
22 interfered with her thinking process, and
23

1 2) Alan Carmack was willing to testify that the events as testified by Frederick
2 Woodall did not happen.

3 Motion for New Trial, *State v. Rodney L. Emil*, case no. C082176 (8th Dist. Ct. May 16, 1990).

4 7. On August 16, 1990 an evidentiary hearing on the Motion for New Trial was
5 conducted in which Alan Carmack was called as the sole witness. The motion was denied by the
6 District Court on August 23, 1990.

7 8. On August 20, 1990, Emil filed a timely notice of appeal of the District Court's
8 denial of the Motion for New Trial. On August 23, 1990, Chris Maglaras was formally
9 appointed to represent Emil in appealing the denial of his Motion for New Trial. The Nevada
10 Supreme Court issued an order dismissing the appeal on June 27, 1991 and the remittitur issued
11 on July 16, 1991. Attorney Chris Maglaras was permitted to withdraw from Emil's case.

12 9. On November 8, 1991, Emil, through his federal court-appointed counsel Patricia
13 Erickson, filed in United States District Court a Petition for Writ of Habeas Corpus and a Motion
14 to Stay Proceedings in Federal Court in order to exhaust issues Emil wished to present in federal
15 court. The petition was dismissed without prejudice in order to allow Emil to return to state
16 court and exhaust his state remedies. Dkt. 17, *Rodney Emil v. Ray Proconier, etc.*, case no. CV-
17 N-91-524-LDG (D. Nev.).

18 10. On July 14, 1992, Emil filed a superseding Petition for Post-Conviction Relief in
19 the Eighth Judicial District Court, and on September 23, 1992, the Eighth Judicial District Court
20 appointed Patricia Erickson as counsel during the post-conviction litigation. Emil filed pro se a
21 Petition for Post-Conviction Relief with Erickson's assistance raising the following claims:

22 1) Violation of constitutional right to effective assistance of counsel at the
23 preliminary hearing;

1 2) Violation of constitutional right to effective assistance of counsel during
2 phase of trial;

3 3) Violation of constitutional right to effective assistance of counsel during
4 penalty phase of litigation;

5 4) Violation of constitutional right to due process by State's failure to disclose all
6 promises, inducements and benefits obtained by persons who testified at trial
7 (*Giglio*);

8 5) Violation of constitutional right to due process by the State's failure to disclose
9 all exculpatory (*Brady, Agurs* materials) evidence known to it at the time of trial;
10 and

11 6) Violation of the state and federal constitutional right to due process through the
12 erroneous instruction of the jury at both guilty and penalty phase.

13 Petition for Post-Conviction Relief, *Rodney Lyn Emil v. State of Nevada*, case no. C82176, 8th
14 Dist. Ct. July 14, 1992. On August 11, 1993, Emil filed an Amended Petition for Post-
15 Conviction Relief. Amended Petition for Post-Conviction Relief, *Rodney Lyn Emil v. State*,
16 case no. C82176 (8th Dist. Ct. August 11, 1993). On October 25, 1993, the State filed its
17 Answer in Opposition to Amended Petition for Post-Conviction Relief. On January 18, 1994,
18 Emil filed a Reply to Answer in Opposition to Amended Petition For Post-Conviction Relief.

19 11. On April 21 and 26, 1995, an evidentiary hearing was held on Emil's Petition for
20 Post-Conviction Relief.

21 12. On September 12, 1995, the Eighth Judicial District Court denied Emil post-
22 conviction relief concluding that: 1) there was no willful suppression of *Brady* material; 2) trial
23 counsel's effectiveness did not fall below a reasonable standard; 3) there was evidence sufficient

1 enough to convict; 4) not disclosing difficulties in locating a witness did not violate Emil's
2 substantive rights; and 5) all other claims were summarily denied. Order Denying Petition for
3 Post-Conviction Relief, *State v. Rodney Lyn Emil*, case no. C82176 (8th Dist. Ct. September 12,
4 1995).

5 13. On March 29, 2000, the Nevada Supreme Court issued an opinion denying post-
6 conviction relief. *Emil v. State*, 116 Nev. 1370, 62 P.3d 1154 (2000).

7 14. Emil filed his Petition for Writ of Habeas Corpus in propria persona in the United
8 States District Court on December 13, 2000. Dkt. No. 1, *Emil v. E. K. McDaniel*, case no. CV-
9 00654-KJD -VPC (D. Nev.). The federal court appointed the Federal Public Defender's Office
10 of Nevada to represent Emil on January 22, 2001. Dkt. No. 12, *Emil v. E. K. McDaniel*, case no.
11 CV-00654-KJD-VPC (D. Nev.). On March 3, 2006, Emil through counsel filed his Amended
12 Petition for Writ of Habeas Corpus in the United States District Court. Dkt. No. 135, *Emil v. E.*
13 *K. McDaniel*, CV-00654-HJD (VPC).

14 15. On June 19, 2006, Emil filed a Petition for Writ of Habeas Corpus in the Eighth
15 Judicial District Court. The grounds raised in the 2006 petitioner included:

16 1) Petitioner's conviction and death sentence are invalid under the federal
17 constitutional guarantees of due process, equal protection, and a reliable sentence
18 due to the State's failure to disclose exculpatory and impeachment evidence;

19 2) Petitioner's conviction and death sentence are invalid under the federal
20 constitutional guarantees of due process, equal protection, and a reliable sentence
21 due to the State's failure to disclose exculpatory and impeachment evidence;

1 3) Petitioner's conviction and death sentence are invalid under the federal
2 constitutional guarantees of due process, equal protection, and a reliable sentence
3 due to the State's failure to disclose exculpatory and impeachment evidence;

4 4) Petitioner's conviction and death sentence are invalid under the federal
5 constitutional guarantees of due process, equal protection, effective assistance of
6 counsel and a reliable sentence due to the State's failure to disclose exculpatory
7 and impeachment evidence due to the State's interference with the presentation of
8 a defense;

9 5) Petitioner's conviction and death sentence are invalid under the federal
10 constitutional guarantees of due process, equal protection, trial before an impartial
11 jury, and a reliable sentence due to the substantial and injurious effect of a
12 consistent pattern of prosecutorial misconduct and overreaching which distorted
13 the fact finding process and rendered the trial and sentencing hearing
14 fundamentally unfair;

15 6) Petitioner's conviction and death sentence are invalid under the federal
16 constitutional guarantees of effective assistance of counsel, due process of law,
17 equal protection of the laws, trial by jury, confrontation of witnesses, and a
18 reliable sentence due to the failure of pre-trial, trial, and sentencing counsel to
19 provide reasonably effective assistance;

20 7) Petitioner's conviction and death sentence are invalid under the federal
21 constitutional guarantees of effective assistance of counsel, due process of law,
22 equal protection of the laws, trial by jury, confrontation of witnesses, and a
23

1 reliable sentence due to the failure of trial and sentencing counsel to provide
2 reasonably effective assistance regarding murder for remuneration;

3 8) Petitioner's conviction and death sentence are invalid under the federal
4 constitutional guarantees of effective assistance of counsel, due process of law,
5 equal protection of the laws, trial by jury, confrontation of witnesses, and a
6 reliable sentence due to the failure of pre-trial, trial, and sentencing counsel to
7 provide reasonable effective assistance regarding the State's key witness;

8 9) Petitioner's conviction and death sentence are invalid under the federal
9 constitutional guarantees of effective assistance of counsel, due process of law,
10 equal protection of the laws, trial by jury, confrontation of witnesses, and a
11 reliable sentence due to the refusal of the trial court to admit polygraph of State's
12 key witness;

13 10) Petitioner's death sentence is invalid under the federal constitutional
14 guarantees of due process, equal protection, and a reliable sentence because
15 Petitioner is actually innocent,

16 11) Petitioner's conviction and death sentence are invalid under the federal
17 constitutional guarantees of effective assistance of counsel, due process of law,
18 equal protection of the laws, trial by jury, confrontation of witnesses, and a
19 reliable sentence due to the ineffectiveness of trial counsel to not object to trial
20 court's malice instruction;

21 12) Petitioner's conviction and death sentence are invalid under the federal
22 constitutional guarantees of effective assistance of counsel, due process of law,
23 equal protection of the laws, trial by jury, and a reliable sentence due to trial

1 court's due process violation regarding jury's consideration of non-statutory
2 aggravators

3 13) Petitioner's death sentence is invalid under the federal constitutional
4 guarantees of due process, equal protection, access to the courts, the right to trial
5 in the state and district where his crime was committed, and a reliable sentence,
6 and under international law, due to the State's failure to prove all elements
7 beyond a reasonable doubt;

8 14) Petitioner's conviction and death sentence are invalid under the federal
9 constitutional guarantees of due process, equal protection, trial before an impartial
10 jury, effective assistance of counsel, and a reliable sentence because of the trial
11 court's failure to properly instruct the jury concerning reasonable doubt;

12 15) Petitioner's conviction and sentence are invalid under the constitutional
13 guarantees of due process, trial by jury, effective assistance of counsel and a
14 reliable sentence due to jury misconduct;

15 16) Petitioner's death sentence is invalid under the federal constitutional
16 guarantees of due process, equal protection, a reliable sentence, and effective
17 assistance of counsel for constitutional violations regarding punishment jury
18 instructions;

19 17) Petitioner's death sentence is invalid under the federal constitutional
20 guarantees of due process, equal protection, effective assistance of counsel, and a
21 reliable sentence, due to trial court error in admission of non-statutory
22 aggravators;
23

1 18) Petitioner's death sentence is invalid under the federal constitutional
2 guarantees of due process, equal protection, and a reliable sentence, due to trial
3 court error in refusing instruction on non-statutory mitigating evidence;

4 19) Petitioner's death sentence is invalid under the federal constitutional
5 guarantees of due process, equal protection, effective assistance of counsel, and a
6 reliable sentence, due to State's failure of notice of forensic expert and trial
7 counsel's ineffectiveness for failure to engage its own forensic expert;

8 20) Petitioner's death sentence is invalid under the federal constitutional
9 guarantees of due process, equal protection, and a reliable sentence, due to trial
10 counsel's ineffectiveness in the punishment phase;

11 21) Petitioner's conviction and death sentence are invalid under the federal
12 constitutional guarantees of due process, equal protection, the effective assistance
13 of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the
14 cumulative errors in the admission of evidence and instructions, gross misconduct
15 by state officials and witnesses, and the systematic deprivation of Petitioner's
16 right to the effective assistance of counsel;

17 22) Petitioner's conviction and sentence violate the constitutional guarantees of
18 due process of law, equal protection of the laws and a reliable sentence and
19 international law because Petitioner's capital trial and sentencing and review on
20 direct appeal were conducted before state judicial officers whose tenure in office
21 was not during good behavior but whose tenure was dependent on popular
22 election;
23

1 23) Petitioner's death sentence is invalid under the federal constitutional
2 guarantees of due process, equal protection, and a reliable sentence because
3 execution by lethal injection violates the constitutional prohibition against cruel
4 and unusual punishments;

5 24) Petitioner's right to due process of law, equal protection of the laws, effective
6 assistance of counsel and a reliable sentence was violated by the ineffective
7 assistance of state post-conviction counsel;

8 25) Petitioner's conviction and death sentence are invalid under the federal
9 constitutional guarantees of due process, equal protection, and a reliable sentence
10 due to the failure of the Nevada Supreme Court to conduct fair and adequate
11 appellate review;

12 26) Petitioner's conviction and sentence are invalid under the constitutional
13 guarantees of due process of law, equal protection of the laws, effective assistance
14 of counsel and a reliable sentence because Petitioner was not afforded effective
15 assistance of counsel on appeal;

16 27) Petitioner's death sentence is invalid under the federal constitutional
17 guarantees of due process, equal protection, and a reliable sentence because the
18 Nevada capital punishment system operates in an arbitrary and capricious manner.

19 16. The Eighth Judicial District Court denied Emil's petition on March 24, 2008, and
20 a Notice of Appeal was timely filed on April 17, 2008. Judgment was affirmed by the Nevada
21 Supreme Court in Case No. 51474 on July 20, 2010. A Petition for Rehearing was filed on
22 August 9, 2010 and was denied on November 17, 2010. The remittitur issued on December 13,
23 2010.

1 17. On July 1, 2011, Emil filed a Second Amended Petition for Writ of Habeas
2 Corpus in United States District Court. Dkt. No. 181, *Emil v. E. K. McDaniel*, CV-00654-KJD-
3 VPC (D. Nev.). On May 23, 2012, the Federal Public Defender’s Office of Nevada filed a
4 motion requesting the substitution of counsel citing a conflict of interest. Dkt. Nos. 199, 200,
5 *Emil v. E. K. McDaniel*, CV-00654-KJD-VPC (D. Nev.). On July 12, 2012, current counsel, the
6 Federal Public Defender’s Office of the Central District of California, was appointed to represent
7 Emil. On March 11, 2013, Emil filed a Third Amended Petition for Writ of Habeas Corpus in
8 the United States District Court. Dkt. No. 212, *Emil v. E. K. McDaniel*, CV-00654-KJD-VPC
9 (D. Nev.). Because newly appointed counsel discovered new, unexhausted claims, the United
10 States District Court stayed Emil’s federal case on November 15, 2013, to allow Emil the chance
11 to present his claims to the state courts. Emil’s case in the United States District Court remains
12 pending.

13 18. On October 7, 2013, Emil filed a Petition for Writ of Habeas Corpus in the Eighth
14 Judicial District Court. The grounds raised in the 2013 petition included:

15 Claim One: Petitioner’s right to a fair trial was violated when the trial court
16 coerced the jury to reach a guilty verdict;

17 Claim Two: Petitioner’s conviction is invalid because his capital jury was not
18 required to find all the independent elements of first degree murder, thus reliving
19 the state of the burden of proof;

20 Claim Three: Petitioner was denied his right to effective assistance of appellate
21 counsel;

22 Claim Four: Petitioner’s conviction and death sentence are invalid under the
23 constitution because the jury committed misconduct;

1 Claim Five: Petitioner was denied his right to effective assistance of post-
2 conviction counsel

3 19. On April 8, 2014, the Eighth Judicial District Court issued an order denying
4 Emil's petition, and the Notice of Entry was entered on April 14, 2014. On May 7, 2014, Emil
5 timely filed his Notice of Appeal. After briefing by the parties, the Nevada Supreme Court
6 affirmed the Eighth Judicial District Court's denial on April 22, 2016. The remittitur issued on
7 November 7, 2016.
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1 **STATEMENT WITH RESPECT TO CLAIMS RAISED FOR THE FIRST TIME IN**
2 **THE INSTANT PETITION**

3 20. The claim presented in this petition has not been presented to the state courts for
4 review because the claim is based on new, intervening authority from the United States Supreme
5 Court, *Hurst v. Florida*, 136 S. Ct. 616 (2016). Emil can demonstrate good cause and prejudice
6 to overcome the state procedural bars when a federal court holds that a prior determination of the
7 state courts is erroneous. *See Lozada v. State*, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994);
8 *accord Evans v. State*, 117 Nev. 609, 643, 28 P.3d 498, 521 (2001) (good cause to overcome
9 state procedural default exists when “a federal court concludes that a determination of this court
is erroneous”).

10 **PRIOR COUNSEL**

11 The attorneys who previously represented Smith were:

- 12 A. Pretrial/Trial Proceedings
 Leslie Stovall -- preliminary hearing
 David Schieck -- trial
 Cal Potter -- trial
- 13
- 14 B. First Direct Appeal
 David Schieck
- 15
- 16 C. Motion for New Trial; Petition for Post-Conviction Relief (1990)
 David Schieck
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- 18 D. Appeal of Motion for New Trial
 Chris Maglaras
- 19
- 20 E. Petition for Post-Conviction Relief (1992)
 Patricia Erickson
- 21
- 22 F. Appeal of 1992 PCR Petition
 Patricia Erickson
 Patrick McDonald
- 23 G. Federal Petition for Writ of Habeas Corpus
 Patricia Erickson
 Federal Public Defender, Nevada
 Federal Public Defender, Central District of California

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- H. 2006 Petition for Writ of Habeas Corpus
Federal Public Defender, Nevada

- I. Appeal of 2006 Post-Conviction Petition
Federal Public Defender, Nevada

- J. 2013 Petition for Writ of Habeas Corpus
Federal Public Defender, Central District of California

- K. Appeal of 2013 Post-Conviction Petition
Federal Public Defender, Central District of California

1 **GROUND FOR RELIEF**

2 21. Emil hereby asserts the following ground for relief. References in this Petition to
3 the accompanying exhibits incorporate the contents of the exhibit as if fully set forth herein.

4 **CLAIM ONE: PETITIONER’S SENTENCE IS INVALID BECAUSE THE JURY**
5 **APPLIED AN UNCONSTITUTIONAL STANDARD OF PROOF FOR WEIGHING**
6 **AGGRAVATING AND MITIGATING FACTORS**

7 22. Petitioner’s death sentence is invalid under the Fifth, Sixth, Eighth, and
8 Fourteenth Amendments to the United States Constitution and Article One, Sections Three,
9 Eight, and Nine, and Article Four, section Twenty-One of the Nevada Constitution. A capital
10 defendant, before being sentenced to death, has a right to a trial by jury and to have every fact
11 exposing him to a death sentence proven by the State beyond a reasonable doubt. The jury in
12 Petitioner’s capital trial was instructed to evaluate the evidence necessary to qualify Petitioner
13 for a death sentence under an unconstitutionally lax standard of proof: It was instructed that as a
14 prerequisite to sentencing Petitioner to death, it needed to find, by an undefined “sufficient”
15 standard, that the mitigation did not outweigh the statutory aggravating circumstances. The state
16 and federal constitutions require that finding to be made beyond a reasonable doubt.

16 **A. Supporting Facts**

17 23. The penalty phase jury was not properly instructed that in order to sentence
18 Petitioner to death, it needed to find all statutory prerequisites to an ultimate death sentence
19 beyond a reasonable doubt. Under Nevada law, before a defendant may be sentenced to death,
20 the jury must make two separate findings: (1) that at least one statutory aggravating
21 circumstance exists, and (2) that the mitigating circumstances do not outweigh the aggravating
22 circumstances. NRS 175.554(3). Only after the jury makes both of those findings may it then
23 decide whether to sentence a capital defendant to death or prison. NSC 175.554(2)(c) & (3).

1 24. Petitioner’s jury was instructed in the penalty phase that any findings of
2 aggravating circumstance had to be made beyond a reasonable doubt. (Ex. A, Penalty Phase Jury
3 Instruction No. 7, at 264.) The jury was not instructed, however, that it had to find the second
4 prerequisite to a death sentence, that the mitigating circumstances were not outweighed by the
5 aggravating circumstances, beyond a reasonable doubt. (*Id.*) Instead, it was instructed that it
6 could choose whether to sentence petitioner to death if it found that “there are no mitigating
7 circumstances sufficient to outweigh the aggravating” circumstances found. (*Id.*, emphasis
8 added.)

9 **B. Applicable Law**

10 25. Under *Hurst v. Florida*, 136 S. Ct. 616, 621-24 (2016), only a jury can find the
11 facts that permit a death sentence, and the jury must do so under a beyond-a-reasonable-doubt
12 standard. Such required jury fact finding includes the weighing of aggravation and mitigation
13 that must occur under Nevada law before the jury may turn to the ultimate question of whether to
14 impose a life or a death sentence.

15 26. The Delaware Supreme Court, on August 2, 2016, invalidated Delaware’s death
16 penalty sentencing scheme in light of the Supreme Court’s decision in *Hurst*. Delaware’s death
17 penalty law, the Delaware Supreme Court held, violated the sixth amendment and due process
18 because it did not require aggravation and mitigation to be weighed beyond a reasonable doubt.
19 *Rauf v. Delaware*, 145 A.3d 430, 434 (Del. 2016) (so holding in certified question 4); *id* at 481-
20 82 (majority concurring opinion of Strine, CJ, joined by Holland and Seitz, JJ); *id.* at 484-85,
21 487 (majority concurring opinion of Holland, J., joined by Strine, CJ, and Seitz, J).

22 27. On December 15, 2016, the Delaware Supreme Court held that its decision in
23 *Rauf* was fully retroactive. *Powell v. Delaware*, 2016 WL 7243546 (Del., Dec. 15, 2016).
Central to *Powell*’s retroactivity holding was the fact that *Hurst* and *Rauf* demanded that all

1 facts, including the determining of whether aggravators outweigh mitigators, must be found
2 beyond a reasonable doubt, in order to comport with the Sixth Amendment and the Due Process
3 Clause. Constitutional errors regarding the proper standard of proof, the Delaware Supreme
4 Court held, render a decision fundamentally unfair and inaccurate, and thus require retroactivity.
5 The *Powell* Court's retroactivity holding relied upon *Ivan V. v. City of New York*, 407 U.S. 203,
6 205 (1972) (per curiam) (holding that beyond-a-reasonable-doubt constitutional violations are
7 retroactive because "the major purpose of the constitutional standard of proof beyond a
8 reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that
9 substantially impairs the truth-finding function") and *Hankerson v. North Carolina*, 432 U.S.
10 233, 243-44 (1977) (emphasizing undeviating adherence to retroactivity rule of *Ivan V.* because
11 of the importance of the accuracy and truth-finding function). *See Powell* at *5.

12 28. The weighing process performed by the penalty phase sentencer in Nevada is
13 entirely idiosyncratic; the weighing process does not depend on the number of aggravating or
14 mitigating circumstances; the jury may give any circumstance whatever weight it determines is
15 appropriate. No entity other than the jury can perform the necessary weighing, and the failure to
16 instruct the jury on the standard by which it was required to find this death-eligibility factor is
17 prejudicial per se.

18 29. Failure to instruct the jury on the burden of proof beyond a reasonable doubt
19 violated Petitioner's right to a jury trial, due process of law, and a reliable sentence, and
20 constitutes structural error which is prejudicial per se. In the alternative, the failure of the jury
21 instruction to require that mitigating circumstances not be outweighed by aggravating
22 circumstances beyond a reasonable doubt was prejudicial, and the State cannot prove beyond a
23 reasonable doubt that the error was harmless.

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PRAYER FOR RELIEF

For the reasons stated above, this Court should issue a Writ of Habeas Corpus, vacate Emil’s death sentence, and grant him a new sentencing hearing.

DATED this 11th day of January, 2017.

HILARY POTASHNER
Federal Public Defender

/s/ Claudia Pamela Gómez
CLAUDIA PAMELA GÓMEZ
Assistant Federal Public Defender

/s/ Mark Yim
MARK YIM
Assistant Federal Public Defender

1 **VERIFICATION**

2 Under penalty of perjury, the undersigned declares that they are counsel for Petitioner
3 Rodney Lyn Emil named in the foregoing petition and knows the contents thereof; that the
4 pleading is true of their own knowledge except as to those matters stated on information and
5 belief and as to such matters they believe them to be true. Emil personally authorized
6 undersigned counsel to commence this action.

7 DATED this 11th day of January, 2017.

8 Respectfully submitted

9 HILARY POTASHNER
Federal Public Defender

10 /s/ Claudia Pamela Gómez
11 CLAUDIA PAMELA GÓMEZ
Assistant Federal Public Defender

12 /s/ Mark Yim
13 MARK YIM
Assistant Federal Public Defender

1 **CERTIFICATE OF SERVICE**

2 In accordance with EDCR 7.26(b)(6), the undersigned hereby certifies that on the 11th
3 day of January, 2017, a true and accurate copy of the foregoing PETITION FOR WRIT OF
4 HABEAS CORPUS (POST-CONVICTION) was filed electronically with the Eighth Judicial
5 District Court and served by depositing same in the United States mail, first-class postage
6 prepaid, addressed as follows:

7 Victor-Hugo Schulze, II
8 Senior Deputy Attorney General
9 Office of the Attorney General
10 555 East Washington Avenue, #3900
11 Las Vegas, Nevada 89101

12 Timothy Filson
13 Warden, Ely State Prison
14 P.O. Box 1989
15 Ely, Nevada 89301

16 Steven S. Owens
17 Chief Deputy District Attorney
18 200 Lewis Avenue
19 Las Vegas, Nevada 89101

20 /s/ Isabel Prado
21 An Employee of the Federal Public Defender
22 Central District of California
23

EXHIBIT A

EXHIBIT 110

EXHIBIT 110

REMI1-8JDC08760

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- FILED IN OPEN COURT -
JUN 9 1988 6:13 PM '19

DISTRICT COURT

Clark County, Nevada

LORETTA BOYKIN, CLERK
Elizabeth L. ...
Deputy

THE STATE OF NEVADA,
Plaintiff,
-vs-
RODNEY LYN EMIL,
Defendant,

CASE NO. C82176
DEPT. NO. VII

INSTRUCTIONS TO THE JURY
INSTRUCTION NO. I

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this penalty hearing. It is your duty as jurors to follow these Instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these Instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the Instructions of the Court.

FPD 01-289 EMIL, RODNEY
Prior Counsel - Patti Erickson
Rec'd 2/15/01 PE000269

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The State has alleged that aggravating circumstances are present in this case.

The Defendant has alleged that certain mitigating circumstances are present in this case.

It shall be your duty to determine:

(a) Whether an aggravating circumstance or circumstances are found to exist; and

(b) Whether a mitigating circumstance or circumstances are found to exist; and

(c) Based upon these findings, whether the Defendant should be sentenced to life imprisonment or death.

The jury may impose a sentence of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

Otherwise, the punishment imposed shall be imprisonment in the State Prison for life with or without the possibility of parole.

FPD 01-289 EMIL, RODNEY
Prior Counsel - Patti Erickson
Rec'd 2/15/01 PE000275

Details of filing: *Petition for Writ of Habeas Corpus (Post-conviction)*
Filed in Case Number: 88C082176

E-File ID: 8969304

Lead File Size: 172524 bytes

Date Filed: 2017-01-11 17:06:57.0

Case Title: 88C082176

Case Name: The State of Nevada vs Rodney L Emil

Filing Title: Petition for Writ of Habeas Corpus (Post-conviction)

Filing Type: EFO

Filer's Name: Mark Yim

Filer's Email: Mark_Yim@fd.org

Account Name: Pro Bono Account

Filing Code: PWHC

Amount: \$ 0.00

Court Fee: \$ 0.00

Card Fee: \$ 0.00

Payment: Processing complete. Payment not yet captured.

Comments:

Courtesy Copies: Isabel_Prado@fd.org, Gary_Rowe@fd.org

Firm Name: Office of the Federal Public Defender

Your File Number:

Status: Accepted - (A)

Date Accepted: 2017-01-12 08:46:26.0

Review Comments:

Reviewer: Allison Behrhorst

File Stamped Copy: [88C082176-8969304 PWHC_Petition_for_Writ_of_Habeas_Corpus_Post_conviction_.pdf](#)

Cover Document:

Documents: Lead Document: [2017_Hurst_State_Petition.pdf](#) 172524 bytes

Attachment # 1: [Ex A - Penalty Phase Jury Instruc.pdf](#) 87765 bytes

Data Reference ID:

Credit Card Response: System Response: 0
Reference:

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODNEY LYN EMIL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65627

FILED

JUN 24 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.¹

[Signature], C.J.
Parraguirre

[Signature], J.
Hardesty

[Signature], J.
Douglas

[Signature], J.
Cherry

[Signature], J.
Saitta

[Signature], J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Federal Public Defender/Central Dist. of CA.
Joel M. Mann, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹The Honorable Mark Gibbons, Justice, voluntarily recused himself from participation in the decision of this matter.

16-19782

Supreme Court of Nevada
NOTICE OF ELECTRONIC FILING

Notice is given of the following activity:

Date and Time of Notice: Jun 24 2016 11:17 a.m.

Case Title: EMIL (RODNEY) VS. STATE (DEATH PENALTY-PC)
Docket Number: 65627
Case Category: Criminal Appeal

Document Category: Filed Order Denying Rehearing. "Rehearing Denied." NRAP 40(c). fn1[The Honorable Mark Gibbons, Justice, voluntarily recused himself from participation in the decision of this matter.]
Submitted by: Issued by Court
Official File Stamp: Jun 24 2016 09:08 a.m.
Filing Status: Accepted and Filed

Docket Text: Filed Order Denying Rehearing. "Rehearing Denied." NRAP 40(c). fn1[The Honorable Mark Gibbons, Justice, voluntarily recused himself from participation in the decision of this matter.]

The Clerk's Office has filed this document. It is now available on the Nevada Supreme Court's E-Filing website. Click [here](#) to login to eFlex and view this document.

Electronic service of this document is complete at the time of transmission of this notice. The time to respond to the document, if required, is computed from the date and time of this notice. Refer to NEFR 9(f) for further details.

Clerk's Office has electronically mailed notice to:

Joel Mann
Mark Yim
C. Gomez
Adam Laxalt
Steven Owens

No notice was electronically mailed to those listed below; counsel filing the document must serve a copy of the document on the following:

Hilary Potashner

This notice was automatically generated by the electronic filing system. If you have any questions, contact the Nevada Supreme Court Clerk's Office at 775-684-1600 or 702-486-9300.

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODNEY LYN EMIL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65627

FILED

APR 22 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a fourth postconviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Rodney Lyn Emil shot and killed his stepfather on Father's Day in 1984. A jury convicted him of first-degree murder and sentenced him to death. This court affirmed his conviction and sentence on direct appeal. *Emil v. State*, 105 Nev. 858, 784 P.2d 956 (1989). In this appeal from the denial of his fourth postconviction petition for a writ of habeas corpus, Emil argues that the district court erred by denying his petition as procedurally barred without conducting an evidentiary hearing.

Because he filed his petition on October 7, 2013, approximately 23 years after this court resolved his direct appeal, the petition was untimely under NRS 34.726(1). The petition was also successive because he had previously sought postconviction relief and therefore was procedurally barred. NRS 34.810(1)(b)(2). To overcome the procedural defaults, Emil had to demonstrate good cause and prejudice. NRS 34.726(1); NRS 34.810(3).

As cause to overcome the procedural default rules, Emil argues that postconviction counsel who represented him in his 1992 postconviction proceedings rendered ineffective assistance and abandoned him, as evidenced by this court's removal of counsel.¹ *Emil v. State*, Docket No. 28463 (Order, June 24, 1997). His claim lacks merit because he had no right to the effective assistance of postconviction counsel. While it is arguable whether the petition filed in 1992 can be considered his first postconviction petition in light of his 1990 postconviction petition that was not expressly resolved by the district court, both postconviction petitions were filed before the effective date of the statute mandating appointment of counsel for a first postconviction habeas petition in a death penalty case. See NRS 34.820(1); 1991 Nev. Stat., ch. 44, §§ 32-33, at 92; *Mazzan v. Warden*, 112 Nev. 838, 841 n.1, 921 P.2d 920, 921 n.1 (1996). Because counsel was not appointed pursuant to NRS 34.820, Emil did not have a right to the effective assistance of postconviction counsel. See *Bejarano v. Warden*, 112 Nev. 1466, 1470 n.1, 929 P.2d 922, 925 n.1 (1996); *McKague v. Warden*, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996).

¹To the extent Emil relies on *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012), and *Maples v. Thomas*, 565 U.S. ___, 132 S. Ct. 912 (2012), as good cause to excuse the delay in raising his postconviction claims, his claim lacks merit. His postconviction petition was filed more than one year after *Martinez* and *Maples* were decided, and therefore he did not raise this claim within a reasonable time. See *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Moreover, we held in *Brown v. McDaniel*, 130 Nev., Adv. Op. 60, 331 P.3d 867, 871-72 (2014), that *Martinez* does not apply to Nevada's statutory procedures. To the extent Emil relies on *Maples* for the proposition that counsel's abandonment may constitute good cause, we conclude that he was not abandoned as contemplated by *Maples*.

Accordingly, the ineffective assistance of postconviction counsel cannot serve as good cause to overcome the procedural bars.² *Pellegrini v. State*, 117 Nev. 860, 887-88, 34 P.3d 519, 537-38 (2001). Therefore, the district court did not err by denying the petition as procedurally barred without conducting an evidentiary hearing. *See Nika v. State*, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008) (observing that an evidentiary hearing is warranted only where a petitioner “asserts specific allegations that are not belied or repelled by the record and that, if true, would entitle him to relief”).

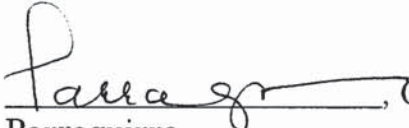
In addition to the procedural bars in NRS 34.726 and NRS 34.810, the district court denied the petition based on laches under NRS 34.800. Emil argues that NRS 34.800 does not apply because the State failed to explain how it was prejudiced by the delay in filing the petition. His contention lacks merit for two reasons. First, because five years elapsed between the appeal of the judgment of conviction and the filing of the postconviction petition, a rebuttable presumption of prejudice to the State arose. NRS 34.800(2). Therefore, Emil, not the State, bore the burden of overcoming that presumption, *id.*, and he has not done so. Second, even assuming that he could overcome the laches bar, his petition is procedurally barred under NRS 34.726 and NRS 34.810.³

²To the extent Emil argues that he continued to be deprived of conflict-free counsel after initial counsel was removed, that circumstance does not constitute good cause because he still did not have the right to the effective assistance of postconviction counsel.


³Emil argues that he is actually innocent of first-degree murder and the death penalty. Below, he asserted a claim that he is actually innocent of the death penalty because the jurors’ “deliberations did not involve
continued on next page . . .

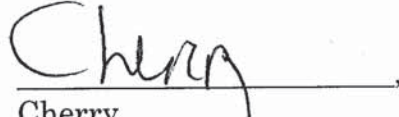
Having considered Emil's arguments and concluded that no relief is warranted, we


ORDER the judgment of the district court AFFIRMED.⁴


Parraguire, C.J.


Hardesty, J.


Douglas, J.


Cherry, J.


Saitta, J.


Pickering, J.

... continued

substantial mitigating circumstances, and evidence of innocence, which trial counsel never investigated, identified or presented.” We conclude that the district court did not err by denying this claim. *See generally Lisle v. State*, 130 Nev., Adv. Op. 39, 351 P.3d 725, 734 (2015) (observing that “an actual-innocence inquiry in Nevada must focus on the objective factors that make a defendant eligible for the death penalty,” that is, the aggravating circumstances, and, therefore, a claim of actual innocence of the death penalty offered as a gateway to reach a procedurally defaulted claim cannot be grounded in new evidence of mitigating circumstances). Further, because he did not raise a claim in his postconviction petition that he is actually innocent of first-degree murder, we need not consider that claim. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). As to Emil's contention that the district court misapplied the law-of-the-case doctrine in denying his petition, we conclude that no relief is warranted.

⁴The Honorable Mark Gibbons, Justice, voluntarily recused himself from participation in the decision of this matter.

cc: Hon. Douglas W. Herndon, District Judge
Federal Public Defender/Central Dist. of CA.
Joel M. Mann, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX F

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- FILED IN OPEN COURT -

DISTRICT COURT

JUN 9 1988 @ 2:30 PM '19

Clark County, Nevada

LORETTA BOWMAN, CLERK

Loretta Bowman

CASE NO. C82176

DEPT. NO. VII

THE STATE OF NEVADA,
Plaintiff,

-vs-

RODNEY LYN EMIL,
Defendant,

INSTRUCTIONS TO THE JURY

INSTRUCTION NO. I

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this penalty hearing. It is your duty as jurors to follow these Instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these Instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the Instructions of the Court.

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-292

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INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

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INSTRUCTION NO. 3

The trial jury shall fix the punishment for every person convicted of murder of the first degree.

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INSTRUCTION NO. 4

The jury shall fix the punishment at:

- (1) Death, or
- (2) Life imprisonment without the possibility of parole,
or
- (3) Life imprisonment with the possibility of parole.

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-295

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1. Life imprisonment with the possibility of parole is a sentence to life imprisonment which provides that the defendant would be eligible for parole after a period of ten years.

This does not mean that he would be paroled after ten years, but only that he would be eligible after that period of time.

2. Life imprisonment without the possibility of parole means exactly what it says, that the defendant shall not be eligible for parole.

3. If you sentence the Defendant to death you must assume that the sentence will be carried out.

4. Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, you are instructed that you may not speculate as to whether the sentence you impose may be changed at a later date.

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-296

INSTRUCTION NO. 6

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The Jury is instructed that in determining the appropriate penalty to be imposed in this case that it may consider all evidence introduced at both the penalty hearing phase of these proceedings and at the trial of this matter.

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The State has alleged that aggravating circumstances are present in this case.

The Defendant has alleged that certain mitigating circumstances are present in this case.

It shall be your duty to determine:

(a) Whether an aggravating circumstance or circumstances are found to exist; and

(b) Whether a mitigating circumstance or circumstances are found to exist; and

(c) Based upon these findings, whether the Defendant should be sentenced to life imprisonment or death.

The jury may impose a sentence of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

Otherwise, the punishment imposed shall be imprisonment in the State Prison for life with or without the possibility of parole.

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-298

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INSTRUCTION NO. 8

You are instructed that the following factors are circumstances by which Murder of the First Degree may be aggravated:

(1) The murder was committed by a person who was previously convicted of another murder.

(2) The murder was committed by a person, for himself or another, for the purpose of receiving money or any other thing of monetary value.

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-299

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INSTRUCTION NO. 9

The conviction of the Defendant for Murder of the First Degree with Use of a Deadly Weapon on February 9, 1988 may be used as an aggravating circumstance in this case even though that conviction occurred subsequent to the murder of Charles Howard Emil. The only requirement is that the other murder conviction must have occurred prior to this penalty hearing.

The focal point is the time of sentencing. The trial jury is entitled to consider all relevant aspects of the defendant's criminal background prior to rendering sentence.

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-300

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INSTRUCTION NO. 10

The burden rests upon the prosecution to establish any
aggravating circumstance beyond a reasonable doubt.

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-301

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INSTRUCTION NO. 11

A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation.

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-302

INSTRUCTION NO. 12

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Murder of the First Degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:

(1) The defendant has no significant history of prior criminal activity.

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

(4) The victim was a participant in the defendant's criminal conduct or consented to the act.

(5) The defendant acted under duress or under the domination of another person.

(6) The youth of the defendant at the time of the crime.

(7) Any other mitigating circumstance.

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-303

INSTRUCTION NO. 13

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The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-304

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INSTRUCTION NO. 14

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-305

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INSTRUCTION NO. 15

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

It will be the jury's duty to select one appropriate verdict pertaining to the punishment which is to be imposed and one appropriate special verdict pertaining to the jury's findings with respect to aggravating and mitigating circumstances.

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-306

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INSTRUCTION NO. 16

During your deliberation you will have all the exhibits which were admitted into evidence, these written instructions, and forms of verdicts which have been prepared for your convenience.

Your verdicts must be unanimous. When you have agreed upon your verdicts, they should be signed and dated by your foreman.

Paul Christensen
District Judge

FPD 01-289 EMIL, RODNEY
Prior Counsel - P. McDonald
Rec'd 3/5/01 PM-307

APPENDIX G

Emil - 8 JUDGE 838

DISTRICT COURT
Clark County, Nevada

THE STATE OF NEVADA,
Plaintiff,

-vs-

RODNEY LYN EMIL,
Defendant,

CASE NO. C82176
DEPT. NO. VII

- FILED IN OPEN COURT -
JUN 9 1988 *2:30 pm*

LORETTA BOYMAN, CLERK
By Elizabeth D'Angelillo
Deputy

SPECIAL
VERDICT

We, the Jury in the above entitled case, having found the defendant, RODNEY LYN EMIL, GUILTY of Murder of the First Degree, designate that the aggravating circumstance(s) checked has (have) been established beyond a reasonable doubt and further find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance(s) found.



The murder was committed by a person who was previously convicted of another murder.



The murder was committed by a person, for himself or another, for the purpose of receiving money or any other thing of monetary value.

DATED in Las Vegas, Nevada, this 9th day of June, 1988.

Robert Dale Hibbard
FOREMAN

