

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

---

RODNEY EMIL,

*Petitioner,*

v.

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

*Respondent.*

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

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**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 *[Signature]* 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. Yacava  
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.

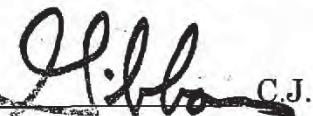
Appellant filed his petition on January 11, 2017, more than one year after the remittitur issued on appeal from the judgment of conviction. *Emil v. State*, 105 Nev. 858, 784 P.2d 956 (1989). The petition was therefore untimely filed. *See* NRS 34.726(1). Moreover, because appellant previously sought postconviction relief,<sup>1</sup> 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).

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

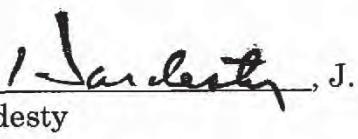
Appellant argues that he demonstrated good cause and prejudice sufficient to excuse the procedural bars because *Hurst v. Florida*, 136 S. Ct. 616 (2016), set forth a new retroactive rule that requires trial courts to instruct jurors that the State must prove that the aggravating circumstances are not 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.

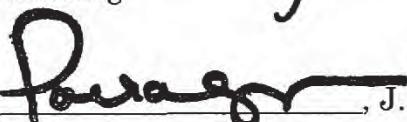
  
Gibbons

  
Pickering, J.

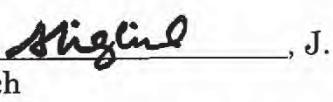
Pickering

  
Hardesty, J.

Hardesty

  
Parraguirre, J.

Parraguirre

  
Stiglich, J.

Stiglich

  
Cadish, J.

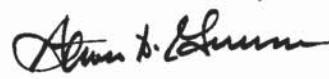
Cadish

  
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 C



CLERK OF THE COURT

PWHC  
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Federal Public Defender, Central District of California  
CLAUDIA PAMELA GÓMEZ (*pro hac vice* pending)  
Assistant Federal Public Defender  
California State Bar No. 233848  
Email: Pamela\_Gomez@fd.org  
MARK YIM (*pro hac vice* pending)  
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Facsimile: (213) 894-1679

Attorneys for Petitioner

DISTRICT COURT  
CLARK COUNTY, NEVADA

RODNEY LYN EMIL,

Petitioner,

v.

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

Respondents.

Case No. C082176  
Dept. No. III

PETITION FOR WRIT OF HABEAS  
CORPUS (POST-CONVICTION)  
(Death Penalty Habeas Corpus Case)

Petitioner Rodney Lyn Emil files this Petition for Writ of Habeas Corpus (Post-Conviction) pursuant to Nevada Revised Statute (“NRS”) sections 34.724 and 34.820. Emil alleges that he is being held in custody in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States of America; Article 1, sections Three, Six, 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  
5 Respectfully submitted,  
HILARY POTASHNER  
Federal Public Defender

6  
7 */s/ Claudia Pamela Gómez*  
CLAUDIA PAMELA GÓMEZ  
Assistant Federal Public Defender

8  
9 */s/ Mark Yim*  
10 MARK YIM  
Assistant Federal Public Defender

11 **NOTICE OF MOTION**

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

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

16  
17 DATED this 11th day of January, 2017.

18  
19 Respectfully submitted,  
HILARY POTASHNER  
Federal Public Defender

20  
21 */s/ Mark Yim*  
MARK YIM  
Assistant Federal Public Defender

## **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:

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

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

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

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

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 Procunier, 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 guilt  
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.

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

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

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

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;

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

- 23) Petitioner's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments;
- 24) Petitioner's right to due process of law, equal protection of the laws, effective assistance of counsel and a reliable sentence was violated by the ineffective assistance of state post-conviction counsel;
- 25) Petitioner's conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence due to the failure of the Nevada Supreme Court to conduct fair and adequate appellate review;
- 26) Petitioner's conviction and sentence are invalid under the constitutional guarantees of due process of law, equal protection of the laws, effective assistance of counsel and a reliable sentence because Petitioner was not afforded effective assistance of counsel on appeal;
- 27) Petitioner's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence because the Nevada capital punishment system operates in an arbitrary and capricious manner.

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

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

1

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

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

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

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

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## **GROUND FOR RELIEF**

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

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

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

## A. Supporting Facts

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

## 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

## VERIFICATION

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

DATED this 11th day of January, 2017.

Respectfully submitted

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

## **CERTIFICATE OF SERVICE**

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

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

Timothy Filson  
Warden, Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301

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

/s/ Isabel Prado  
An Employee of the Federal Public Defender  
Central District of California

# EXHIBIT A



# EXHIBIT 110

# EXHIBIT 110

- FILED IN OPEN COURT -

1 DISTRICT COURT

2 JUN 9 1988 2:30 PM  
19

3 Clark County, Nevada

LORETTA BOWMAN, CLERK

*Elizabeth L. Bowman*  
Deputy

4 THE STATE OF NEVADA,

5 Plaintiff,

6 -vs-

7 RODNEY LYN EMIL,

## 8 Defendant,

9  
10INSTRUCTIONS TO THE JURY

## INSTRUCTION NO. I

## 11 MEMBERS OF THE JURY:

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

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

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INSTRUCTION NO.

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

5 The Defendant has alleged that certain mitigating circum-  
6 stances are present in this case.

7 It shall be your duty to determine:

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

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

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

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

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

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

264

**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](88C082176-8969304_PWHC_Petition_for_Writ_of_Habeas_Corpus_Post_conviction.pdf)**Cover Document:****Documents:** Lead Document: [2017\\_Hurst State Petition.pdf](2017_Hurst State Petition.pdf) 172524 bytesAttachment # 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.<sup>1</sup>

*Parraguirre*, C.J.

Parraguirre

*Douglas*, J.

Douglas

*Saitta*, J.

Saitta

*Hardesty*, J.

Hardesty

*Cherry*, J.

Cherry

*Pickering*, 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

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

Supreme Court of Nevada

NOTICE OF ELECTRONIC FILING

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**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.<sup>1</sup> *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).

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<sup>1</sup>To 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.<sup>2</sup> *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.<sup>3</sup>

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<sup>2</sup>To 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.

<sup>3</sup>Emil 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.<sup>4</sup>

Parraguirre, C.J.

Parraguirre

Hardesty, J.

Hardesty

Douglas, J.

Douglas

Cherry, J.

Cherry

Saitta, J.

Saitta

Pickering, J.

Pickering

... *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.

<sup>4</sup>The 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

- FILED IN OPEN COURT -

JUN 9 1988 @ 2:30 PM  
19

DISTRICT COURT

Clark County, Nevada

LORETTA BOWMAN CLERK

*Elizabeth Dugayle*

1 THE STATE OF NEVADA, )  
2 Plaintiff, )  
3 -vs- )  
4 RODNEY LYN EMIL, )  
5 Defendant, )

CASE NO. C82176

DEPT. NO. VII

INSTRUCTIONS TO THE JURY

INSTRUCTION NO. I

10  
11 MEMBERS OF THE JURY:

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

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

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INSTRUCTION NO.

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

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

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

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INSTRUCTION NO. 3

INSTRUCTION NO.

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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

INSTRUCTION NO. 5

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

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

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

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

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

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INSTRUCTION NO. 6

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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INSTRUCTION NO.

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

5 The Defendant has alleged that certain mitigating circum-  
6 stances are present in this case.

7 It shall be your duty to determine:

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

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

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

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

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

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INSTRUCTION NO.

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3 You are instructed that the following factors are circum-  
4 stances by which Murder of the First Degree may be aggravated:

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

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

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1 INSTRUCTION NO. 9

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

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

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INSTRUCTION NO.

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

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1 INSTRUCTION NO. 11

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

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INSTRUCTION NO. 13

2 The credibility or believability of a witness should be  
3 determined by his manner upon the stand, his relationship to the  
4 parties, his fears, motives, interests or feelings, his opportu-  
5 nity to have observed the matter to which he testified, the rea-  
6 sonableness of his statements and the strength or weakness of his  
7 recollections.

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

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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.

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

INSTRUCTION NO.

15

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

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

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

INSTRUCTION NO.

16

3 During your deliberation you will have all the exhibits  
4 which were admitted into evidence, these written instructions,  
5 and forms of verdicts which have been prepared for your conven-  
6 ience.

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

Carl F. Christensen  
District Judge

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

# APPENDIX G

1 DISTRICT COURT

2 Clark County, Nevada

3

4 THE STATE OF NEVADA,

CASE NO. C82176

5 Plaintiff,

DEPT. NO. VII

6 -vs-

7 RODNEY LYN EMIL,

- FILED IN OPEN COURT -

8 Defendant,

JUN 9 1988 C 2:30 PM

9 LORETTA BOWMAN, CLERK

By *Elizabeth D'Angelis* Deputy

10

11

S P E C I A L

12

V E R D I C T

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

19



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

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

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DATED in Las Vegas, Nevada, this 9<sup>th</sup> day of June, 1988.

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*Hollett Dale Hibbard*

FOREMAN

