IN THE SUPREME COURT OF THE STATE OF NEVADA

ORIGINAL

FERRILL JOSEPH VOLPICELLI,

Appellant, No. 43203

vs.

THE STATE OF NEVADA,

Respondent.

_____/

FILED

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APPELLANT'S OPENING BRIEF

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04-12802

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## ***STATEMENT OF THE CASE***

A Grand Jury was convened on June 11, 2002, to determine whether a true bill should be made against Ferrill Joseph Volpicelli, hereinafter called Appellant. Joint Appendix, hereinafter called JA, V. 1, pp. 1-149. An Indictment was filed against Appellant on June 11, 2003. JA V. 1, pp. 150-159. An Arraignment on the Indictment was heard on June 18, 2003. JA V. 1, pp. 150-180. Trial counsel filed a Petition for Writ of Habeas Corpus on September 4, 2003. JA V. 2, pp. 380-383. An Opposition to Petition for Writ of Habeas Corpus was filed on September 4, 2003. JA V. 1, pp. 181-186. Trial counsel filed a Reply in Support of Petition for Writ of Habeas Corpus on September 17, 2003. JA V. 1, pp. 187-189. The State filed Notice of Intent to Seek Habitual Criminal Status on October 9, 2003. JA V. 1, pp. 190-191. The district court filed an Order granting the Motion to Suppress regarding the presentation of Appellant's prior bad acts to the grand jury and denied the Motion to quash the Indictment. JA V. 1, pp. 192-195. Jury trial commenced and Appellant was found guilty of all charges within the Indictment. Trial Transcript, hereinafter called TT, Volumes 1, and 2. A presentence report was done on November 25, 2003. JA V. 1, pp. 196-204. A sentencing hearing was held on April 1, 2004. JA V. 1, pp. 205-250 and V. 2, pp. 251-267. During sentencing, trial counsel argued that Appellant

had some mental health problems and referred to competency reports that had been requested and received in another recent case. JA V. 2, pp. 373-379. Additional information was provided during the sentencing hearing for the district court's consideration. These included exhibits 1-7, certificates of achievement, JA V. 2, pp. 359-368, and letters of completion, JA V. 2, pp. 350-358, from trial counsel. The State presented three certificates of judgment of convictions from 1997, 1998, and 2004, and a photograph of Appellant while in custody, which was sent to his family. JA V. 2, pp. 268-339 and 340-342. Judgment was filed on April 1, 2004. JA V. 2, pp. 369-371. Notice of Appeal was filed on April 19, 2004. JA V. 2, pp. 384-385. An Order declaring Appellant a Habitual Criminal was filed on June 1, 2004. JA V. 2, p. 372.

***STATEMENT OF THE FACTS***

During the grand jury hearing and subsequent jury trial, the State was forced to prove the charges in the Indictment against Appellant. The State alleged and proved to the jury's satisfaction that Appellant and Brett Bowman conspired to cheat and defraud several local retail stores. The behavior of Appellant and Mr. Bowman included entering the stores with the intent to obtain pricing label information from retail goods. Thereafter, the information received would be used to create false and forged pricing labels. These counterfeit-pricing labels would be affixed to merchandise in the stores and purchased for less than the posted retail price. The purchasing amounted to buying under false pretences. Sometimes the forged pricing labels were removed and the products were returned for their original valid retail price, thereby making a profit. JA V. 1, pp. 150-151. Other counts that the State had to prove and subsequently received convictions for involved burglary charges for entering local retail stores with the intent to commit fraudulent felonies, described as obtaining pricing information, affixing false labels to merchandise, and purchasing it for less money. The stores involved and impacted were

Walmart, Home Depot, Bed, Bath, and Beyond, Lowe's and Shopko. JA V. 1, pp. 151-157. A final count against Appellant that the State was able to receive a jury verdict was the unlawful possession of counterfeit inventory pricing labels located in Appellant's motor vehicle. JA V. 1, pp. 157-158. Jury trial commenced on November 12, 2003. TT, V. 1. Thereafter, two additional days of jury trial proceeding on November 13 and 14, 2003. TT, V. 2. During the grand jury proceeding and subsequent jury trial, Brett Bowman testified that he knew Appellant one year before he was arrested. JA V. 1, p. 10. Mr. Bowman described the scheme as Appellant making the counterfeit labels and he would affix and purchase the merchandise. JA V. 1, p. 11. Mr. Bowman testified that they went out about twelve times and covered all the local retail stores listed in the Indictment. JA V. 1, pp. 12-13. The behavior involved Appellant entering the retail stores, getting the bar codes from lower-end items, coming out of the stores, printing the labels, and going back into the stores affixing the label on higher-end merchandise, and having Mr. Bowman go back into the store to buy the altered merchandise for a lot lower price than the original amount. JA V. 1, p. 14 and TT V. 1, pp. 157-163. Mr. Bowman testified to observing Appellant making the counterfeit labels and knowing that the label maker was kept in Appellant's vehicle. JA V. 1, pp. 15-16 and TT V. 1, p. 167. The fraudulently bought items were kept in Appellant's storage unit. JA V. 1, p. 19 and TT V. 1, p. 180. Mr. Bowman testified about using the fraudulent scheme to get a shaver, coffee maker, home theater system, computer monitors, flat screen monitors, rugs, toilet, expresso coffee system, television, sewing machines, bike, and comforter. JA V. 1, pp. 19-46. Mr. Bowman was arrested, cooperated with law enforcement, pled guilty to burglary and received 16-48 months in prison as a sentence. JA V. 1, pp. 47-48 and TT V. 1, pp. 154-155. It was also learned that Appellant used the barter system on line to sell the fraudulently obtained property. JA V. 1, p. 52. Corroborating witnesses testified

during the grand jury hearing and jury trial regarding the observation of Appellant at different stores and subsequent search of the vehicle and storage unit. Detective Scott Armitage was on surveillance and observed Appellant at Walmart and Shopko looking at bar codes and writing the numbers down on a small piece of paper. JA V. 1, pp. 55-57 and TT V. 2, pp. 4-7. After Appellant's arrest, the police recovered evidentiary items through an inventory search. They found the label maker, UPC bar code labels, and organizer, with store names and locations, and retail property purchased as part of the fraudulent scheme. JA V. 1, pp. 66-71 and TT V. 2, pp. 16, 28-31. Jennifer Powell, a Shopko cashier, made a duplicate receipt after the detective requested it to prove Appellant's fraudulent purchase of a comforter. JA V. 1, pp. 78-80. Sergeant David Della testified to observing Appellant moving boxes in and out of a Sparks storage unit. JA V. 1, pp. 85-87 and TT V. 1, pp. 110-116. Upon arresting Mr. Bowman, they found a bike he had recently purchased from Walmart resulting in a $200.00 difference between the actual and counterfeit purchase price. JA V. 1, p. 90 and TT V. 1, pp. 119-124. Store witnesses verified property found in Appellant's storage unit as purchases fraudulently obtained with great monetary differences. For example, a rug from Lowe's and a Panasonic DVD player. JA V. 1, pp. 116-119 and TT V. 1, pp. 140-147 and 189-190. Detective Thomas testified regarding the contents of the storage unit finding an accordian file with receipts from Shopko, Walmart, K-Mart, Home Depot, and Lowe's. JA V. 1, p. 134 and TT V. 2, pp. 91-92. He also found fictitious UPC labels. JA V. 1, pp. 134-135 and TT V. 2, pp. 120-121. The detectives compared the receipts to the transposition list and found matches. JA V. 1, p. 142 and TT V. 2, pp. 94-95. The grand jury returned a true bill and the jury returned guilty verdicts for all counts.

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## *ARGUMENT*

I. THE DISTRICT COURT MAY HAVE ERRED IN FINDING THE INDICTMENT LAWFUL WHEN THE PROSECUTOR ADMITTED THE 1998 PRIOR BURGLARY CONVICTION DURING THE GRAND JURY HEARING

The district court may have erred in finding the Indictment should stand after the prosecutor admitted Appellant's 1998 burglary conviction. At the conclusion of a nine-witness grand jury hearing on June 11, 2002, the prosecutor admitted Exhibit 16, Appellant's 1998 burglary conviction, for a limited purpose. JA V. 1, p. 145. The prosecutor explained that the allegation is not relevant as to whether Appellant committed the offenses charged in the Indictment. However, it was relevant for the sentencing judge if the Appellant was convicted of any of the burglary charges. JA V. 1, pp. 145-146. Thereafter, trial counsel filed a pretrial petition for writ of habeas corpus. JA V. 2, pp. 380-383. It stated that the prior burglary conviction was improperly presented for the grand jury's consideration. The State filed an Opposition to the writ of habeas corpus on September 4, 2003, indicating that the habeas corpus is an inappropriate vehicle to challenge the State's evidence at a grand jury proceeding; the State appropriately introduced the 1988 burglary conviction for the limited purpose of notice; and the State's evidence at grand jury was sufficient to indict the Appellant even if the prior conviction was inadmissible. The proper vehicle to challenge the validity of evidence presented at the grand jury proceedings is a Motion. NRS 174.105(1), Franklin v. State, 89 Nev. 382, 387, 513 P.2d 1252, 1256 (1973), Cook v. State, 85 Nev. 692, 462 P.2d 523 (1969) and Turpin v. Sheriff, 87 Nev. 236, 484 P.2d 1083 (1971). The State relied upon NRS 484.3792(2), Nevada's DUI sentencing provision, requiring that evidence of prior DUI convictions used to enhance a DUI to a felony be presented to the grand jury. Finally, the State argued that even if the admissibility of the 1998 burglary conviction was improper, there was sufficient evidence to return a true bill.

JA V. 1, pp. 181-186. The State relied on the nine witnesses and fifteen exhibits to bolster their argument. JA V. 1, p. 185. Trial counsel replied by asking the district court to consider the writ as a motion, NRS 484.3792(2) inapplicable to the facts, and Appellant was unfairly prejudiced by the admission of the 1998 burglary conviction. JA V. 1, pp. 187-189. The district court filed an Order on November 7, 2003, regarding these issues. JA V. 1, pp. 192-195. The district court held that the Appellant's pretrial writ of habeas corpus was considered as a motion to suppress under NRS 174.105(2). After consideration of the arguments submitted, the court granted the Appellant's motion to suppress finding that the prior burglary conviction when presented during a seven count burglary grand jury proceeding was improper bad act evidence and the cases cited by the State relating to DUI law were inapplicable. However, the request to quash the indictment was denied because the State presented nine witnesses, including an accomplice, who testified to witnessing various acts committed by Appellant during the ten charged crimes as well as describing the merchandise obtained. JA V. 1, pp. 193-194.

The district court may have erred in not quashing the indictment based upon the improper admission of the 1998 burglary conviction because the grand jurors were tainted by this information and returned a true bill. However, given the nature of the witnesses and exhibits presented during the grand jury hearing, it was reasonable to believe that the slight or marginal test for indictment status was met. As such, this Court may find that the improper conduct was harmless beyond a reasonable doubt given the subsequent jury trial convictions.

II. THE APPELLANT MAY NOT HAVE BEEN COMPETENT DURING THE CRIMES

In an earlier case, Appellant was evaluated for competency by Dr. Robert E. Hiller, JA V. 2, pp. 373-376, and Dr. Bill Davis, pp. 377-379. At that time, Dr. Hiller noted that Appellant presented with numerous characteristics associated with a significant personality disorder and a

history of significant polysubstance dependence. JA V. 2, p. 376. Additionally, Dr. Davis opined that Appellant had an adjustment disorder with mixed anxiety and depressed mood. JA V. 2, p. 379. The Department of Parole and Probation interviewed appellant after his conviction. At that time, he advised them that he was physically and mentally abused by his father and sexually abused by his grandfather from the approximate ages of four to ten-year-old. Additionally, he admitted to suffering from asthma, sleep apnea, vertigo, depression, panic anxiety disorder, and drug addiction. JA V. 1, p. 197. During sentencing, trial counsel advised the parties that Appellant was diagnosed with clinical depression, prescribed Prozac, and felt better than he had ever felt in his whole life. JA V. 1, p. 248. Furthermore, since Appellant was in custody, October, 2001, he was successfully treated for his mental illness condition and had been very productive. JA V. 1, p. 248. Thereafter, trial counsel admitted several positive documents showing Appellant's achievements while in custody awaiting sentencing. JA V. 2, 350-358 and 359-368. Therefore, Appellant was untreated for his mental illness until he was placed in custody. Thereafter, Appellant had improved mentally and become very productive, completing programs and staying trouble free at the jail. JA V. 1, 248-250. Appellant described his family members as having mental illness. For example, Appellant's brother and sister had been on psychotropic medication for ten to fifteen years, because of a familial chemical imbalance. JA V. 2, p. 256. Appellant further explained his drug addiction and how that came about because he was self-medicating and attempting to produce some endorphins. JA V. 2, p. 256. Appellant believed that he needed some psychotherapy to help his mental illness. JA V. 2, p. 257. Therefore, given the nature of Appellant's mental health problems, and his obvious rehabilitation after receiving medical treatment, he may not have been competent during the crimes.

## III. THE JURY MAY NOT HAVE FOUND SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF ALL COUNTS IN THE INDICTMENT

The evidence presented during the jury trial encompassed many witnesses and documents. For example, on November 12, 2003, the prosecutor called Detective Della to testify that he and other detectives surveyed Appellant over a period of time noticing that he had a storage unit in Sparks that he moved boxes in and out of, picked up Brett Bowman while driving his van, observed Mr. Bowman purchase a mountain bike at a great reduction in price, and arrested Appellant and Mr. Bowman while driving after a fraudulent purchase, locating property and indicia of fraud within the vehicle. TT V. 1, pp. 116-124. Other surveillance officers presented were Detective Scott Armitage who noticed Appellant looking at labels and recording information on a small note pad, inventoried Appellant's van upon arrest, and located comforters and a mountain bike, a label maker, bar code labels, receipts, and a transposition sheet inside. TT V. 2, pp. 5-8 and 16-31. Detective Lodge also noticed Appellant looking at items from Home Depot and writing down notes on a notepad. TT V. 2, pp. 46-48. Detective Brown noticed the same suspicious behavior from Appellant while shopping at Walmart. TT V. 2, p. 57. After arrest, Detective Thomas received a search warrant for Appellant's storage unit and located three pick-up truckloads of merchandise. TT.V. 2, pp. 85-86. After receiving cooperating information from Accomplice Brett Bowman, the receipts and transposition sheet were used to match fraudulently purchased items. According to Mr. Bowman, Appellant would make fictitious labels reflecting lower prices and affixing these UPC bar codes on higher priced merchandise, reflecting savings of upward of several dollars to hundreds of dollars. TT V. 1, pp. 159-163 and V. 2, pp. 95-98 (Panasonic DVD Home theatre System), V. 2, pp. 100-102 (computer monitors), V. 2, p. 104, (sewing machines), V. 2, pp. 105-109, (rugs), V. 2, p. 116,

(toothbrush), V. 2, pp. 117-118 (coffee machines), V. 2, pp. 118-119 (toilet), and other miscellaneous items. V. 2, pp. 122-127.

The defense requested but was denied a Motion to Dismiss the State's case for failure to prove their case based upon a violation of NRS 175.291, opining that there was no independent evidence to show Appellant's guilt outside of Accomplice Brett Bowman's testimony. TT V. 2, pp. 147-150. The prosecutor argued that the question was properly for the jury to decide and that the physical evidence found in Appellant's van and storage unit supported Accomplice Bowman. TT V. 2, pp. 151-152. The district court agreed with the State. TT V. 2, p. 152.

The jury may have convicted based upon insufficient evidence because not one witness except Accomplice Brett Bowman ever testified about any criminal conduct exhibited by Appellant and Mr. Bowman could have achieved all crimes by himself, having access to all idicia of fraud. TT V. 2, pp. 32-41, (Detective Armitage), TT V. 2, p. 50, (Detective Lodge), TT V. 2, p. 57, (Detective Brown), TT V. 2, p. 133, (Detective Thomas).

Therefore, absent Accomplice Brett Bowman, nobody viewed Appellant commit any crime. As such, the jury may have convicted based upon insufficient evidence.

## IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN FINDING HABITUAL CRIMINAL STATUS FOR TWO COUNTS AND RUNNING THEM CONSECUTIVE

The State filed Notice of Intent to Seek the Habitual Criminal Status on October 9, 2003, under NRS 207.010. JA V. 1, pp. 190-191. Upon review of the prior certificates of judgment of convictions from 1997, 1998, and 2004, and hearing argument and witnesses during sentencing, the district court found Appellant to be an Habitual Criminal and filed an Order on June 1, 2004. JA V. 2, p. 372. During the sentencing hearing, the State requested that the district court find Appellant an habitual criminal for a variety of reasons. Initially, the State marked and admitted the three prior certifications of judgment of convictions under exhibits 1, 2, and 3. The first

certification of judgment of conviction was filed February 11, 2004, in CR02-0148, involving the crime of aiding and abetting in the commission of attempting to obtain money by false pretenses. JA V. 2, pp. 268-283. The prior certification showed that Appellant was represented by counsel, had a sentencing, and judgment of conviction sentencing Appellant to 12-48 months in prison consecutive to CR03-1263. The second prior certification of judgment of conviction was filed November 3, 1998, in CR98-2160, involving two counts of burglary. JA V. 2, pp. 284-303. This prior certification showed an arraignment with the assistance of counsel, a guilty plea memorandum, and sentence of 24-72 and 16-72 months in prison to run consecutive to each other and consecutive to the federal prison term. The third prior certification of judgment of conviction was filed on May 16, 1997, in CR-N-96-46-HDM (RAM), in the United States District Court, involving four counts of tax perjury. Appellant was represented by counsel and received twenty-two months for each count to run concurrent with each other. Thereafter, the State requested that the district court impose a sentence of life imprisonment with ten years minimum served in prison on each felony count. JA V. 1, p. 209. The State called Officer Scott Hopkins as a sentencing witness. During his surveillance, he testified that he observed Appellant committing these crimes after he had already been sentenced for his federal cases. JA V. 1, p. 212. Appellant had commented to the officer that the federal prison time of twenty-two months was worth a million, insinuating that he had made a million dollars through his various fraud scams. JA V. 1, pp. 213-214. The officer identified a photograph of Appellant that was sent to him by Lori, Appellant's wife at the time, which was inscribed on the back stating, "I'm too sexy for this place. It has been like a vacation. Just missing stores." JA V. 1, pp. 215-217, and JA V. 2, pp. 340-342. The State called Officer Reed Thomas to describe the Repeat Offender Program Officers' contact with Appellant and Brett Bowman. JA V. 1, p. 220. The officer discussed

Appellant's use of his son to obtain money by false pretenses, advising his daughter to run up the credit cards, putting the storage unit in his stepdaughter's name, and describing the contents of the storage unit, packed with stolen items. JA V. 1, pp. 223-225. The officer advised the parties that Appellant had been arrested and convicted of open and gross lewdness and indecent exposure. JA V. 1, p. 226. Finally, the officer testified to making a report as to the estimate of value and property located in the storage unit, over $10,000.00 of merchandise, and a speculative idea of Appellant's tax-free income per year, being between $50,000.00-$93,000.00. JA V. 1, pp. 227-229 and V. 2, pp. 343-349. The State explained the federal conviction for tax perjury to the parties during the sentencing hearing, explaining that between 1989 and 1992, Appellant managed to accumulate $800,000.00 worth of credit on his credit cards that were used to pay off mortgages, obtain a rental unit, and bought personal items for himself and his family. JA V. 1, p. 242. Thereafter, trial counsel attempted to bring forward mitigating evidence on behalf of Appellant. Finally, being properly diagnosed and treated for his mental illness, Appellant was presented as feeling better than he had ever felt in his life. From the evaluations done by Drs. Hiller and Davis, Appellant received mental health care through psychotropic medication during the last two-years of incarceration. JA V. 1, p. 248. Trial counsel outlined Appellant's productivity during his jail experience and produced letters and certificates of achievement. JA V. 2, pp. 350-358 and 359-368. Although not specifically reviewed by trial counsel, these documents included: Street Readiness Program, Parenting Module, Substance Abuse Addiction and Recovery Module, Relapse Prevention Module, Anger Management Module, two classes in Computer Assisted Alcohol Abuse Prevention Module, and Domestic Violence Module. JA V. 2, pp. 350-358. Additional certifications included: Inmate Achievement Certificate in Survive and Change Program, two classes for Life Skills and Overcoming Substance Abuse,

Literacy/ESL Tutor Training, NSP Gardening Class I, Participation in Bridges to Freedom, the Way to Happiness Course, Self Improvement and Job Search Workshop, and Christian Way in Marriage. JA V. 2, pp. 359-368. Thereafter, trial counsel argued that Appellant was ready to lead a lawful life now that he had been treated for his mental health condition, he had honorable discharges from periods of probation, the disparity in treatment between he and Mr. Bowman was great (receiving 16-42 months), his mature age and intelligence, deserves a sentence of 4-40 years in prison and no habitual offender status. JA V. 1, pp. 249-250 and V. 2, pp. 251-253. Appellant explained to the district court about his troubled childhood, familial chemical imbalance, self-medication with drugs, and need for psychotherapy. JA V. 2, pp. 255-257. Thereafter, the district court found that upon review of Appellant's prior record, including the prior felony convictions, the long pattern of theft, and the fact that he made a living for years as a career criminal, he was the poster child for habitual criminality. Therefore, the district court imposed two terms of life in prison with the possibility of parole in ten years to run consecutive to one another and the other counts would run concurrently so that Appellant would have to spend at least twenty years in prison before parole eligibility, and the sentence would run consecutive to any other sentencing currently being served. JA V. 2, pp. 261-263.

NRS 207.010(2) indicates that the trial judge may, at his discretion, dismiss a count under the section, which is included in any indictment or information for purposes of habitual criminal status. Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993). The decision to adjudicate an individual as a habitual criminal is not an automatic one. Sessions v. State, 106 Nev. 186, 190, 789 P.2d 1242, 1244 (1990). The district court may dismiss counts brought under the habitual criminal statute when the prior offenses are stale, trivial, or where an adjudication of habitual criminality would not serve the interests of the statute or justice. Some considerations

within the discretion of the district court are whether the prior convictions were *violent or remote in time*. Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). The district court should provide reasons for finding an habitual criminal status, however, this Court has stated that there is not a requirement for the district courts to utter 'talismanic' phrases such as "'just and proper.'" Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000).

In United States v. Woodruff, 50 F.3d 673 (9th Cir. 1995), the district court must weigh the appropriate factors for and against the habitual criminal enhancement. The sentencing judge is required to make an actual judgment on the question of whether it is just and proper for the defendant to be punished and segregated as a habitual criminal. In Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229 (1980), the Supreme Court held that the state laws guaranteeing a defendant procedural rights at sentencing may create liberty interests protected against arbitrary deprivations by the due process clause of the Fourteenth Amendment. Therefore, when a state has provided a specific method for determining whether a certain sentence shall be imposed, "it is not correct to say that the defendant's interest in having that method adhered to 'is merely a matter of state procedural law.' " Fetterly v. Paskett, 997 F.2d 1295, 1300 (9th Cir. 1993) citing Hicks v. Oklahoma, cert. denied, ___ U.S. ___, 115 S.Ct. 290, 130 L.Ed.2d 205 (1994). Based on *Hicks*, this court found that state law requiring that the Washington Supreme Court review and make particular findings before affirming a death sentence created a constitutionally protected liberty interest. Cambell v. Blodgett, 997 F.2d 512, 522 (9th Cir. 1992), cert. denied, ___ U.S. ___, 114 S.Ct. 1337, 127 L.Ed.2d 685 (1994). Nevada's law requiring a court to review and make particularized findings that it is "just and proper" for a defendant to be adjudged a habitual offender also creates a constitutionally protected liberty interest in a sentencing procedure. In Walker v. Deeds, 50 F.2d 690 (9th Cir. 1995), it was held that because

the state court did not make the requisite individualized determination that it was "just and proper," *Walker* be adjudged a habitual offender as mandated by Nevada law, *Walker's* due process rights were violated.

In the present case, the district court determined habitual status after hearing from all parties. In particular, the finding was the following:

> Well, in reviewing Appellant's record, I have to consider the nature of his prior felony convictions. And the prior felony convictions, in fact, are largely part of a theft scheme that Appellant developed years ago and persisted in stealing from stores over the course of a long time and perhaps various methods.
>
> Apparently, he starts this activity started with getting duplicate copies of credit card receipts and then using that method to return property for full value that wasn't purchased for the full value, progressed to more sophisticated crime of using false UPC labels on boxes of merchandise. But that shows a long pattern of this type of theft.
>
> And not only is it theft, but it's a theft that was actually used to support Appellant, so it's different than you see in most cases. You don't see that many people who actually earn a living from theft or crime. Usually people have other employment, they, you know, live their life generally supporting themselves lawfully but then have a sideline perhaps of criminal activity, but Appellant, in fact, is a career criminal and that's how he has made a living for years while not incarcerated.
>
> And under all the evidence that I see here, I do in fact find that Appellant is a habitual criminal. In fact, you are the poster child for habitual criminality in that every time you're released from custody it seems like you're out making a full-time living stealing. So there really isn't any doubt in my mind that the statutory scheme for habitual criminality applied to you, Appellant.
>
> And with that, I will sentence you as a habitual criminal. I think society needs to be protected from this level of theft where you're actually making a full good living from stealing. And also our law enforcement authorities need to devote themselves to other people than to constantly monitor you as you pursue this scheme of theft to make a living. JA V. 2, pp. 261-262.

It appears clear that the district court make a finding of habitual criminal status based upon all the evidence presented. The three prior certifications of judgment of convictions appear to be constitutionally sound. The district court listened to all the parties, considered aggravating and mitigating evidence, and incorporated language consistent with due process protection. However, the district court abused its discretion when finding two counts satisfied the habitual

criminal statute and ran those life sentences consecutively. When considering Appellant's untreated mental health problems and the fact that the prior convictions were not violent, the district court abused its discretion.

***CONCLUSION***

The district court may have erred in finding the indictment lawful when the prosecutor admitted the 1998 prior burglary conviction during the grand jury hearing. This was unnecessary and prejudicial against Appellant. Although the district court granted the Motion to Dismiss the prior as violative, the Indictment was not dismissed because of the overwhelming evidence showing slight or marginal evidence.

Appellant may not have been competent during the crimes since he was evaluated by Drs. Hiller and Davis, opining that he had significant substance abuse problems, adjustment disorders and mixed anxiety and depression.

The jury may have convicted Appellant upon insufficient evidence since none of the detectives observed any criminal conduct committed by him over a lengthy period of time and the State relied upon Accomplice Brett Bowman to describe the fraudulent behavior of Appellant. Under NRS175.291, the State must have independent evidence supporting their accomplice testimony. In this case, Brett Bowman cooperated with police received a light prison sentence at the restitution center for burglary, and could have had access to all fraudulently obtained property and indicia of fraud.

Appellant should not have been deemed an habitual criminal because none of his prior felony convictions are violent. Furthermore, Appellant's mental health history should have been considered in mitigation and the district court abused its discretion in finding habitual criminal status for two convicted counts and running them consecutively.

RESPECTFULLY submitted.

DATED this 14 day of July, 2004.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14 day of July, 2004.

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## CERTIFICATE OF MAILING

I Mary Lou Wilson, hereby certify pursuant to NRCP 5(b), that on the 14 day of July, 2004, I deposited for mailing a copy of the foregoing to:

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