

IN THE SUPREME COURT OF THE STATE OF NEVADA

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MICHAEL RIPPO,

S.C. CASE NO. 44094

Appellant,

**FILED**

vs.

DEC 11 2006

THE STATE OF NEVADA,

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

Respondent.

APPELLANT'S PETITION FOR REHEARING

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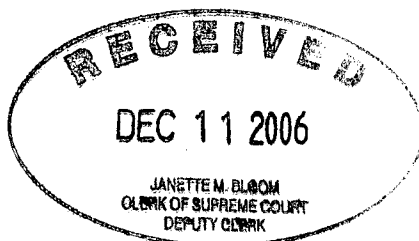
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THE STATE OF NEVADA,

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**APPELLANT'S PETITION FOR REHEARING**

COMES NOW, Christopher R. Oram, Esq., attorney for Appellant, MICHAEL RIPPO and submits the following as his Petition for Rehearing.

**PROCEDURAL DISPOSITION**

On November 16, 2006, this Court issued an opinion affirming the denial of Mr. Rippo's petition for a writ of habeas corpus. Counsel for Mr. Rippo requested an extension of time up until December 8, 2006, to file a petition for rehearing. This petition for rehearing follows. Mr. Rippo respectfully requests that this Court consider granting rehearing of it's opinion filed November 16, 2006. Mr. Rippo is petitioning this Court pursuant to NRAP rule 40.

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**PETITION FOR REHEARING**

Nevada Rules of Appellate Procedure 40(a)(1) provides in pertinent part:

Any claim that this Court has overlooked or misapprehended a material fact shall be supported by reference to the page of the transcript, appendix or record where the matter is to be found; any claim that this Court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief the petitioner has raised the issue.

**ARGUMENT**

**I. MR. RIPPO SHOULD BE GRANTED REHEARING, HAVE HIS SENTENCE VACATED AND REMAND THE MATTER FOR A NEW SENTENCING HEARING.**

Appellant Michael Rippo hereby petitions for rehearing, following this Court's decision affirming the denial of post-conviction habeas relief, filed on November 16, 2006. This petition is timely, NRAP 40(a)(1). Granting rehearing is necessary because this Court's decision "misapprehended... a material question of law in the case", NRAP 40 (c)(2)(i), and "overlooked, misapplied or failed to consider a...decision directly controlling a dispositive issue in the case." NRAP 40(c)(2)(ii). The issues raised in this petition could not be raised previously, because they arise from this Court's disposition of a constitutional claim that it raised and addressed sua sponte pursuant to NRS 177.055(2).

This Court's order of March 16, 2006, directed the parties to be prepared to address at oral argument the validity of instruction no. 7, given in the penalty phase of appellant's trial. That instruction told the jury "the entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating

1 circumstances.” This Court’s decision correctly concludes that the second clause of this  
2 sentence was inaccurate:

3           The final sentence of this instruction should have read simply: “The  
4 entire jury must agree unanimously as to whether the aggravating  
5 circumstances outweigh the mitigating circumstances.” The  
6 emphasized language implied that jurors had to agree unanimously  
7 that mitigating circumstances outweigh aggravating circumstances,  
8 when actually “a jury’s finding of mitigating circumstances in a  
9 capital penalty hearing does not have to be unanimous.”

10 On-line slip opn. at 4 (footnote omitted). But the decision proceeds to find the error  
11 harmless on the theory that “[i]t is extremely unlikely that the jurors were misled to  
12 believe that they could not give effect to a mitigating circumstance without the unanimous  
13 agreement of the other jurors.” *Id.* This conclusion is unsupported. The implication that  
14 the jury would have construed this clause as requiring unanimity in the finding of  
15 individual mitigating circumstances is a straw man: there is no question that the  
16 instruction unequivocally told the jury that “any one juror can find a mitigating  
17 circumstance without the agreement of any other jurors.”  
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19           The vice of the last clause is that it told the jury directly that it had to be  
20 unanimous in order to prevent a finding that the aggravating circumstances outweighed  
21 the mitigation.<sup>1</sup> The analogy would be an instruction on the element of the offense telling  
22 the jury that “the entire jury must agree unanimously that the element is proved beyond a  
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25           The decision states that the second clause of the instruction only “implied that  
26 jurors had to argue unanimously that mitigating circumstances outweigh  
27 aggravating circumstances,” on-line slip opn. at 4 (emphasis added), but this is  
28 simply wrong: the instruction told the jury directly that “the entire jury must agree  
unanimously as to . . . whether the mitigating circumstances outweigh the  
aggravating circumstances.”

1 reasonable doubt or that the element is not proven”; and such an instruction would be  
2 recognized instantly as an impermissible reversal of the burden of proof. The fact that the  
3 erroneous burden of proof instruction was contradicted by another part of the same  
4 instruction that stated the correct rule did nothing to dispel its unconstitutionality, because  
5 rational jurors would have believed both parts of the instruction, that is, that while the  
6 finding that aggravation outweighed mitigation had to be found unanimously in order to  
7 establish death-eligibility, a finding that mitigation outweighed aggravation also had to be  
8 found unanimously in order to prevent death-eligibility which, as the decision  
9 acknowledges, is entirely wrong. In turn, this instruction did prevent the jurors from  
10 giving full effect to mitigating evidence, but not because it suggested that the jurors had  
11 to agree unanimously on the existence of any mitigating factor: rather, it erroneously  
12 prevented each individual juror from avoiding a finding of death eligibility by telling the  
13 jurors that a finding that mitigation outweighed aggravation had to be unanimous, rather  
14 than correctly informing them that any single juror could prevent a finding of death  
15 eligibility by finding that mitigation outweighed aggravation. This instruction thus did  
16 prevent individual jurors from giving full effect to the mitigation evidence that each of  
17 them found.

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22 This issue is governed by Davis v. Mitchell, 314 F.3d 682, (6<sup>th</sup> Cir. 2003). There,  
23 an instruction told the jury that it must acquit a defendant of the element that the  
24 aggravating factors outweighed the mitigating factors before considering non-death  
25 sentences, in combination with a verdict form that provided only for a unanimous finding  
26 on that issue, was found unconstitutional. The court concluded that the combination of  
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1 the instruction and the verdict forms violated the Eighth Amendment because they  
2 “‘would’ lead a reasonable juror to conclude that the only way to get a life verdict is if the  
3 jury unanimously finds that the aggravating circumstances do not outweigh the mitigating  
4 circumstances. . .” 318 F.3d. at 689. This Court’s decision simply does not address the  
5 actual error that arose from the instruction, which is that each juror was not informed that  
6 he or she individually could prevent a finding of the outweighing element.  
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8 The Court’s decision regarding prejudice is also misdirected. Nevada’s capital  
9 sentencing scheme allows any juror to reject imposition of a death sentence on any  
10 grounds, even in the absence of any mitigation, see Bennett v. State, 111 Nev. 1099,  
11 1110, 901 P.3d 676 (1995), and gives each juror the unlimited right to give whatever  
12 weight to aggravation and mitigation he or she wishes to. Under these circumstances,  
13 there is no possibility of this Court conducting a rational review of prejudice based upon  
14 what a “reasonable” juror would have done, because it is precisely the subjective response  
15 of the individual jurors that is the key of the sentencing scheme.  
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18 This Court is aware of cases involving multiple murders of extraordinary brutality  
19 in which juries have not imposed the death penalty, e.g., Daniels v. State, 114 Nev. 261,  
20 266, 956 P.2d 157 (1997); Ducksworth v. State, 113 Nev. 780, 789, 942 P.2d 157 (1997);  
21 and nothing in this Court’s decision suggests that it considered the effect of mercy in its  
22 decision to uphold the death sentence. This Court has recognized that it is institutionally  
23 incapable of acting as an “appellant sentencing body,” State v. Sims, 107 Nev. 438, 440,  
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1 814 P.2d 63 (1991), and this case demonstrated why that is so.<sup>2</sup>

2 Accordingly, this Court should grant rehearing, vacate the sentence and remand the  
3 matter for a new sentence hearing.

4 **CONCLUSION**

5 Based upon the foregoing reasons Mr. Rippo would respectfully request that this Court  
6 reconsider the arguments above pursuant to a petition for rehearing under NRAP 40.

7 DATED this 8 day of December, 2006.

8 Respectfully submitted by:

9 

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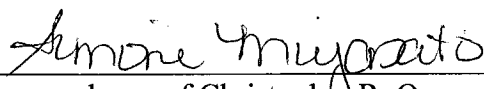
20 Further, this Court's "finding" that that the mitigating evidence was not  
21 "weighty," on-line slip opn. at 3, is a complete usurpation of the jury's role, in  
22 violation of our constitution's prohibition against finding facts on appeal in  
23 criminal cases. Nev. Const. Art. 6 § 4; N.R.S. 177.025; Bolden v. State, 97 Nev.  
24 71, 73, 624 P.3d 20 (1981); State v. McKay, 63 Nev. 114, 154, 165 P.389 (1946);  
25 State of Nevada v. Mills, 112 Nev. 403, 406 (1877); see also Clemons v. State,  
26 593 P.2d 1004, 1005-1006 (Miss. 1992). Appellate reweighing is fundamentally  
27 inconsistent with the right to jury trial on all elements of capital eligibility, which  
28 includes the "outweighing" element, Johnson v. State, 118 Nev. 787, 802-803, 59  
P.3d 450 (2002), under Ring v. Arizona, 536 U.S. 584, 604-608 (2002) and  
Apprendi v. New Jersey, 530 U.S. 466, 477 (2000). These precedents, although  
not applicable retroactively in general, are part of the existing law that this Court  
must apply on appeal, see Slack v. McDaniel, 529 U.S. 473, 487 (2000) (appeal  
is "distinct step" in litigation to which net statutory rule applies).

**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 8 day of December, 2006, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **APPELLANT'S PETITION FOR REHEARING**, addressed to:

David Roger  
District Attorney  
200 Lewis Avenue  
Las Vegas, Nevada 89155

George Chanos  
Nevada Attorney General  
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An employee of Christopher R. Oram, Esq.

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