ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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MICHAEL RIPPO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 44094

FILED

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APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE DONALD M. MOSLEY, PRESIDING

APPELLANT'S OPENING BRIEF

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ISSUES PRESENTED FOR REVIEW

I. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE JURY WAS ALLOWED TO USE OVERLAPPING AGGRAVATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

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V. THE PERFORMANCE OF TRIAL COUNSEL DURING THE PENALTY PHASE OF THE TRIAL FELL BELOW THE STANDARD OF REASONABLY EFFECTIVE COUNSEL IN THE FOLLOWING RESPECTS:

(a.) **Failure to Object to Unconstitutional Jury Instructions at the Penalty Hearing That Did Not Define and Limit the Use of Character Evidence by the Jury.**

(b) **Failure to Offer Any Jury Instruction with Rippo's Specific Mitigating Circumstances and Failed to Object to an Instruction That Only Listed the Statutory Mitigators and Failed to Submit a Special Verdict Form Listing Mitigatating Circumstances Found by the Jury.**

©). **Failure to Argue the Existence of Specific Mitigating Circumstances During Closing Argument at the Penalty Hearing or the Weighing Process Necessary Before the Death Penalty Is Even an Option for the Jury.**

(d). **Failure to Object to Improper Closing Argument at the Penalty Hearing.**

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VII. **RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARNTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE JURY WAS NOT INSTRUCTED ON SPECIFIC MITIGATING CIRCUMSTANCES BUT RATHER ONLY GIVEN THE STATUTORY LIST AND THE JURY WAS NOT GIVEN A SPECIAL VERDICT FONT TO LIST MITIGATING CIRCUMSTANCES. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.**

VIII. **RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE NEVADA STATUTORY SCHEME AND CASE LAW FAILS TO PROPERLY LIMIT THE INTRODUCTION OF VICTIM IMPACT TESTIMONY AND THEREFORE VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT AND FURTHER VIOLATES THE RIGHT TO A FAIR AND NON-ARBITRARY SENTENCING PROCEEDING AND DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.**

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X. **RIPPO'S CONVICTION AND SENTENCE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, AND RELIABLE SENTENCE DUE TO THE FAILURE OF This Court TO CONDUCT FAIR AND ADEQUATE APPELLATE REVIEW. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE T, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.**

XI. **RIPPO'S CONVICTION AND SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, IMPARTIAL JURY FROM CROSS-SECTION OF THE COMMUNITY, AND RELIABLE DETERMINATION DUE TO THE TRIAL, CONVICTION AND SENTENCE BEING IMPOSED BY A JURY FROM WHICH AFRICAN AMERICANS AND OTHER MINORITIES WERE SYSTEMATICALLY EXCLUDED AND UNDER REPRESENTED. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE T, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.**

XII. **RIPPO' S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE NEVADA STATUTORY SCHEME AND CASE LAW WITH RESPECT TO THE AGGRAVATING CIRCUMSTANCES ENUNCIATED IN NRS 200.033 FAIL TO NARROW THE CATEGORIES OF DEATH ELIGIBLE DEFENDANTS.**

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STATEMENT OF THE CASE

MICHAEL DAMON RIPPO (hereinafter referred to as RIPPO) stands convicted of a number of felonies, including two counts of First Degree Murder (A.A. Vol. II, pp. 415). He was sentenced to death by lethal injection by the trial jury (A.A. Vol. II, pp. 415). RIPPO was represented by Steve Wolfson and Phil Dunleavy at trial.

RIPPO was indicted by the Clark County Grand Jury on June 5, 1992, on charges of Murder, Robbery, Possession of Stolen Vehicle, Possession of Credit Cards Without the Cardholder's Consent and Unauthorized Signing of Credit Card Transaction Document (A.A. Vol. II, pp. 378). RIPPO was arraigned on July 20, 1992, before the Honorable Gerard Bongiovanni and waived his right to a trial within sixty days (A.A. Vol. II, pp. 379). Oral requests for discovery and reciprocal discovery were granted by the Court (A.A. Vol. II, pp. 379). RIPPO'S formal Motion for Discovery was granted by the Court on November 4, 1992 (A.A. Vol. II, pp. 381).

Prior to the District Court arraignment, the State filed a Notice of Intent to Seek the Death Penalty alleging the existence of four aggravating circumstances, to wit: (1) the murders were committed by a person under a sentence of imprisonment; (2) the murders were committed by a person who had been previously convicted of a felony involving violence, (3) the murders were committed during the perpetration of a robbery, and (4) the murders involved torture or mutilation of the victims.

The trial date was continued several times, the first being at the request of defense counsel on February 5, 1993, due to a scheduling conflict and the case was reset for trial for September 13, 1993 (A.A. Vol. II, pp. 382-383). On September 10, 1993, the date set for the hearing of a number of pretrial motions the defense moved to continue the trial date based on having just received from prosecutor John Lukens, on September 7th, notice of the State's

intent to use at least two new expert witnesses and a number of jail house snitches and discovery had not yet been provided on any of the new witnesses (A.A. Vol. II, pp. 384). The Court granted the defense request to continue the trial date and same was reset to February 14, 1994 (A.A. Vol. II, pp. 385).

A status hearing on the trial date was held on January 31, 1994, at which time the defense indicated that subpoenas had been served on the two prosecutors on the case, John Lukens and Teresa Lowry, as they had participated in the service of a search warrant and had discovered evidence thereby making themselves witnesses in the case (A.A. Vol. II, pp. 387). A Motion to Disqualify the District Attorney's office was thereupon filed along with a Motion to Continue the Trial (A.A. Vol. II, pp. 388). At the hearing of the Motions the Court continued the trial date to March 28, 1994, in order to allow time for an evidentiary hearing on the disqualification request and because the court's calendar would not accommodate the trial date (A.A. Vol. II, pp. 389).

The evidentiary hearing on the Motion to Disqualify the District Attorney's office was heard on March 7, 1994, and two days later the Court granted the motion and removed Lukens and Lowry from the case, but declined to disqualify the entire office and ordered that other district attorneys be assigned to the case (A.A. Vol. II, pp. 390-392). Prosecutors Mel Harmon and Dan Seaton were assigned the case. At a status hearing on March 18th defense counsel indicated that they had just been provided with a substantial amount of discovery that had been previously withheld and that the State had filed a motion to Amend the Indictment and that therefore the defense was again put in the position of having to ask the Court to continue the trial date. The Court granted the motion and reset the trial date for October 24, 1994 (A.A. Vol. II, pp. 392-393).

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The October trial date was also vacated and reset based on representations made by the District Attorney at the calendar call on October 21, 1994 (A.A. Vol. II, pp. 397). The date was reset for August and September, 1995, however due to conflicting trial schedules, the date was once again reset for January 29, 1996 (A.A. Vol. II, pp. 398). On January 3, 1996 the State was allowed to file an Amended Indictment over the objection of RIPPO (A.A. Vol. II, pp. 398).

Jury selection commenced on January 30, 1996, and the evidentiary portion of the trial began on February 2, 1996 (A.A. Vol. II, pp. 400-403). An interruption of the trial occurred between February 7th and February 26th based on the failure of the State to provide discovery concerning a confession and inculpatory statements claimed to have been made by RIPPO to one of the State's witnesses (A.A. Vol. II, pp. 405-412). The trial thereafter proceeded without further interruption and final arguments were made to the jury on March 5, 1996.

Guilty verdicts were returned on two counts of first degree murder, and one count each of robbery and unauthorized use of a credit card (A.A. Vol. II, pp. 412). The penalty hearing commenced on March 12, 1996 and concluded on March 14, 1996 with verdicts of death on both of the murder counts. On the remaining felony counts RIPPO was sentenced to a total of twenty-five (25) years consecutive to the murder counts (A.A. Vol. II, pp. 417).

RIPPO pursued a direct appeal to this Court with the conviction and sentence being affirmed on October 1, 1997. Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997). RIPPO filed for Rehearing and on February 9, 1998, an Order was entered Denying Rehearing. A Petition for Writ of Certiorari was filed with the United States Supreme Court and Certiorari was denied on October 5, 1998. This Court issued it's Remittitur on November 3, 1998. RIPPO timely filed the instant Petition for Writ of Habeas Corpus on December 4, 1998.

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On August 8, 2002, Mr. David Schieck filed a Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (A.A. Vol. I, pp. 001-104). On March 12, 2004, the undersigned was permitted to file a second Supplement Petition in Support of the Writ of Habeas Corpus (A.A. Vol. I, pp. 168-216).

On August 20, 2004, an evidentiary hearing was held wherein, trial attorneys, Mr. Steve Wolfson and Mr. Phillip Dunleavy testified (A.A. Vol. II, pp. 278-306). Thereafter, on September 10, 2004, the continuation of the evidentiary hearing was held wherein, Mr. David Schieck, appellate counsel testified (A.A. Vol. II, pp. 307-368). On December 1, 2004, the district court entered the written Findings of Fact and Conclusions of Law denying the Writ of Habeas Corpus (A.A. Vol. II, pp. 374-377). A timely notice of appeal was filed on October 12, 2004 (A.A. Vol. II, pp. 369-370). The instant appeal follows.

It is important to note, that in Mr. David Schieck's supplement filed on August 8, 2002, he included all of the issues that had previously been raised in this Court on direct appeal. Whereas, the undersigned supplement did not include those issues. For purposes of this appeal, Mr. Rippo will only include the issues from the post-conviction relief and not issues that were previously raised on direct appeal. However, Mr. Rippo will include his first issue in this appeal an issue that was considered on direct appeal but based on new case law he would respectfully request that this Court consider the issue.

STATEMENT OF FACTS

[1]On February 20, 1992, the apartment manager of the Katie Arms Apartment Complex

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[1] This Statement of Facts comes verbatim from this Court's statement of facts from Mr. Rippo's direct appeal opinion filed on October 1, 1997. The undersigned has previously raised a lengthy statement of facts that will not be included in the instant appeal (as this brief has a 30 page limit and the statement of facts is very lengthy, the undersigned cites this Court's statement of facts) but the full statement of facts is

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in Las Vegas discovered the bodies of Denise Lizzi and Lauri Jacobson in Jacobson's apartment. Officers from the Las Vegas Metropolitan Police Department ("LVMPD") arrived at the scene and recovered a clothing iron and a hair dryer, from which the electrical cords had been removed, a black leather strip, a telephone cord, and two pieces of black shoelace. They observed glass fragments scattered on the living room and kitchen floor areas.

In April 1992, the LVMPD arrested Diana Hunt and charged her with the killing and robbery of Lizzi and Jacobson. As part of her plea agreement, Hunt agreed to testify at the trial of Michael Rippo. Hunt testified to the following:

At the time of the murders, Hunt was Rippo's girlfriend. On February 18, 1992, she and Rippo went to the Katie Arms Apartment Complex to meet Jacobson, who was home alone. Rippo and Jacobson injected themselves with morphine for recreational purposes. Shortly thereafter, Lizzi arrived, and she and Jacobson went outside for approximately twenty minutes. While Jacobson and Lizzi were outside, Rippo closed the apartment curtain and the window and asked Hunt to give him a stun gun she had in her purse. Rippo then made a phone call.

When Jacobson and Lizzi returned to the apartment, they went into the bathroom. Rippo brought Hunt a bottle of beer and told her that when Jacobson answered the phone, Hunt should hit Jacobson with the bottle so that Rippo could rob Lizzi. A few minutes later the phone rang, and Jacobson came out of the bathroom to answer it. Hunt hit Jacobson on the back of her head withe the bottle causing Jacobson to fall to the floor. Rippo and Lizzi were yelling in the bathroom, and Hunt could hear the stun gun being fired. Hunt witnesses

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included in the Appellant's Appendix in the undersigned's Supplemental Brief in Support of Habeas Corpus for this Court's review in the event that they need an extensive rendition of the statement of facts.

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Rippo wrestle Lizzi across the hall into a big closet. Hunt ran to the closet and observed Rippo sitting on top of Lizzi and stunning her with the stun gun. Hunt then went to the living room and helped Jacobson sit up. Rippo came out of the closet holding a knife which he had used to cut the cords from several appliances, told Jacobson to lie down, tied her hands and feet, and put a bandanna in her mouth.

Hunt next saw Rippo in the closet with Lizzie. Rippo had tied Lizzi's hands and feet. At this point, a friend of Jacobson's approached the apartment, knocked on the door, and called out for Jacobson. Rippo put a gag in Lizzi's mouth. Jacobson was sill gagged and apparently unable to answer. After the friend left, Rippo began stunning Jacobson with the stun gun. He placed a cord or belt-type object through the ties on Jacobson's feet and writs, and dragged her across the floor to the closet. As Rippo dragged her, Jacobson appeared to be choking. Hunt began to vomit and next remembered hearing an odd noise coming from the closet. She observed Rippo with his knee in the small of Lizzi's back, pulling on an object he had placed around her neck.

When Hunt accused Rippo of choking the women, Rippo told her that he had only temporarily cut off their air supply, and that Hunt and Rippo had to leave before the two women woke up. Rippo then wiped down the apartment with a rag before leaving. While cleaning up, Rippo went into the closet and removed Lizzi's boots and pants. He explained to Hunt that he needed to remove Lizzi's pants because he had bled on them.

Later that evening, Rippo called Hunt and told her to meet him at a friend's shop. When Hunt arrived, Rippo was there with Thomas Simms, the owner of the shop, and another unidentified man. Rippo told Hunt that he had stolen a car for her and that she needed to obtain some paperwork on it. Hun believed the car, a maroon Nissan, had belonged to Lizzi.

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The next day, on February 19, 1992, Hunt and Rippo purchased a pair of sunglasses using a gold Visa card. Rippo told Hunt that he had purchased an air compressor and tools on the Sears credit cart that morning. Later that day, Hunt, who was scared of Rippo and wanted to "get away from him" went through Rippo's wallet in search of money. Hunt was unable to find any money, but she took a gold Visa card belonging to Denny Mason, Lizzi's boyfriend, and Rippo's wallet. Hunt did not know who Mason was. Around February 29, 1992, Rippo confronted Hunt. Hunt suggested to Rippo that they turn themselves into the LVMPD, but Rippo refused, telling Hunt that he had returned to Jacobson's apartment, cut the women's throats, and jumped up and down on them.

The medial examiner, Dr. Giles Sheldon Green, who performed autopsies on Lizzi and Jacobson, also testified at Rippo's trial. Dr. Green testified that Lizzi had been found with a sock in her mouth, secured by a gag that encircled her head. The sock had been pushed back so far that part of it was underneath Lizzi's tongue, blocking her airway. Pieces of cloth were found tied around each of her writs. Dr. Green testified that Lizzi's numerous injuries were consistent with manual and ligature strangulation.

Dr. Green testified that Jacobson died from asphyxiation due to manual strangulation due to manual strangulation. Dr. Green found no traces of drugs in Jacobson's system. Neither of the women' bodies revealed stun gun marks.

Thomas Sims also testified at trial the Rippo arrived at his shop on February 18, 1992, with a burgundy Nissan. When Simms asked about the ownership of the car, Rippo responded that someone had died for it. Rippo have Simms several music cassette tapes, many bearing the initials D.L., and an empty suitcase with Lauri Jacobson's name tag. On February 21, 1992, Simms heard a news report that two women had been killed and that one of them was named Denise Lizzi. On February 26, 1992, Simms met Rippo in a parking lot to

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return a bottle of morphine that Rippo had left in Simms' refrigerator. When Simms inquired about the murders, Rippo admitted that he had "choked those two bitches to death" and then he had killed the first woman accidentally so he had to kill the other one.

On September 15, 1993, Deputy District Attorneys John Lukens and Teresa Lowry accompanied two police officers in the execution of a search warrant on the home of Alice Starr. Starr had testified on the State's behalf before the grand jury but subsequently was identified by Rippo as an alibi witness. Officer Roy Chandler, on of the two officers present at the scene, testified at an evidentiary hearing that Starr's sister responded to their knock on the door, admitted the officers and the prosecutors, and told them that she and her two children were the only ones in the house. Starr, however, suddenly came out of the kitchen area. Surprised at Starr's presence, the officers checked the residence for other individuals. The officers removed their guns from their holsters. Starr corroborated the officers' version of the events, testifying that the officers did not draw their guns until she appeared from the kitchen.

During the search, on e of the officers found drugs and placed Starr under arrest. Lukens testified that he told Starr:

> I am concerned. When I was last here, you told me that your relationship with Mr. Rippo was as an acquaintance. . . I don't think you were honest with me. And if there was anything else that you weren't honest in telling me the truth about, I'd like to give you a chance to tell me.

Starr testified that Lukens did not threaten her, but she stated, "[I]f [your] going to dangle on [Rippo's] star, [you're] going to go down like he is." Upon motion by the defense, the district court disqualified Lukens and Lowry as a result of their participation in the search and requested the district attorney's office to transfer the case to different prosecutors.

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The jury found Rippo guilty of two counts of first-degree murder, and one count each of robbery and unauthorized use of a credit card. After the penalty hearing, the jury sentenced Rippo to death, finding six aggravating factors:(1) the murders were committed by a person under sentence of imprisonment; (2) the murders were committed by a person who was previously convicted of a felony involving the use or threat of violence to another person; (3) the murders were committed while the person was engaged in the commission of or an attempt to commit robbery; (4) the murders involved torture; (5) the murders were committed while the person was engaged in the commission of or an attempted to commit burglary; and (60 the murders were committed while the person was engaged in the commission of or an attempt to commit kidnapping.

ARGUMENT

I. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE JURY WAS ALLOWED TO USE OVERLAPPING AGGRAVATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

This issue was raised on direct appeal. On direct appeal, this Court concluded that Mr. Rippo could have been prosecuted separately for each of the underlying felonies and therefore each crime was properly considered as an aggravating circumstance. However, based upon a new decision from this Court, Mr. Rippo would respectfully request that this Court revisit this issue.

RIPPO herein asserts that overlapping and multiple use of the same facts as separate aggravating circumstances resulted in the arbitrary and capricious imposition of the death penalty. Trial counsel failed to file any pretrial motion challenging the aggravating

circumstances as being overlapping, failed to object at the penalty hearing to the use of the aggravators, and failed to offer any jury instruction on the matter.

The original notice of intent to seek the death penalty filed by the State on June 30, 1992 alleged the presence of four aggravating circumstances, i.e., under sentence of imprisonment, previously convicted of a felony involving violence, committed during the commission a robbery, and torture or mutilation of the victim. The State filed an Amended Notice of Intent to Seek the death penalty on March 23, 1994 wherein the State added the aggravators of: committed during the commission of a burglary; and during the commission of a kidnapping. The Amended Notice was filed after the original two prosecutors were removed from the case. The jury at the conclusion of the penalty hearing found the presence of all six (6) aggravating circumstances (A.A. Vol. II, pp. 414-415).

In essence the State was allowed to double count the same conduct in accumulating three of the aggravating circumstances. The robbery, burglary and kidnapping aggravating circumstances are all based upon the same set of operative facts and unfairly accumulated to compel the jury toward the death penalty. Additionally the aggravators for under sentence of imprisonment and prior conviction of a violent felony both arose from the same 1982 sexual assault conviction. The use of the same set of operative facts to multiple aggravating circumstances in a State that uses a weighing process, such as Nevada does, violates principles of Double Jeopardy and deprived RIPPO of Due Process of Law. United States Constitution, Amendments V1 VII, XIV; Nevada Constitution, Article I, Section 8.

In December of 2004, this Court decided McConnell v. State, 120 Ad Op. 105, 102 P.3d 606 (December 29, 2004), in that case, this Court precluded the use of predicate felonies as aggravator in a felony murder case, as in Mr. Rippo's case.

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It appears that the rational behind the McConnell decision comes from Eighth Amendment, which prohibits the infliction of cruel and unusual punishment. In 1972 the United States Supreme Court held that capital sentencing schemes which do not adequately guide sentencers discretion and thus permit the arbitrary and capricious imposition of the death penalty violates the Eighth and Fourteenth Amendments. As a result, the United States Supreme Court has held that to be constitutional a capital sentencing scheme "must generally narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant's compared to other found guilty of murder." Vant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed 2d 235 (1983).

In McConnell, this Court concluded that Nevada's only constitutional ban against the infliction of cruel or unusual punishment, and the depravation of life without due process of law requires the same narrowing the process. Nevada Constitution Article 1 § 68 (5).

This Court ruled in McConnell that Nevada's definition of capital felony murder did not narrow enough and that the further narrowing of the death eligibility is needed. Further, this Court stated that the aggravator does not provide sufficient narrowing to satisfy constitutional requirements.

The McConnell court stated, "[N]evada's statutes defines felony murder broadly." Under NRS 200.030(1)(d), felony murder is "one that is committed in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation under the age under 14, or child abuse." Further, in Nevada, all felony murder is first degree murder, and all first degree murder is essentially capital murder. Felony murder in Nevada does not even require the intent to kill or inflict great bodily harm. In Nevada, the intent simply to commit the underlying felony is transferred to the implied malice necessary to characterize the death be murder. Ford v. State,

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99 Nev. 209, 215, 660 P.2d 992,995 (1983).

The McConnell court noted, "Nevada's current definition Nevada's current definition of felony murder is broader than the definition in 1972 when Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.ed 2d 346, which temporarily ended executions in the United States."

This Court further stated that, Nevada's definition of felony murder does not afford constitutional narrowing. The ultimate holding in McConnell is that this Court "deemed it impermissible under the United States and Nevada Constitution to place an aggravating circumstance in a capital prosecution on the felony on which the felony murder is predicated." Based upon McConnell, it was impermissible for the State to charge Mr. Rippo with felony capital murder because the State based the aggravating circumstances in a capital prosecution on two of those felonies upon which the State's felony murder is predicated. McConnell, further, held that, in cases like Mr. Rippo's, "where the State bases a first degree murder conviction in whole or part of felony murder, to seek a death sentence the State will have to prove an aggravator other than one based on the felony murder predicate felony." McConnell v. State, at 624.

In McConnell, the court showed evidence that Mr. McConnell repeatedly admitted to premeditating the murder. In open court Mr. McConnell stated that he "all of a sudden I became focused, and I did, and I just made the decision I'm going to do this. I'm going to retaliate against the people that ruined my life." This was a lengthy discussion in McConnell, because it showed premeditation, which always allow for a finding of first degree murder and imposition of the death penalty. Currently, McConnell, is the subject for a request for a rehearing by this court. The federal public defender's office requested clarification from the court to file an Amicus Curiae brief on February 28, 2005, in an effort to receive clarification.

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In a weighing jurisdiction such as Nevada, the scales of justice can not be impermissibly skewed in favor of death. As the Mississippi Supreme Court, sitting En Banc, declared, "when life is at stake, a jury can not be allowed the opportunity to doubly weigh the commission of underlying felony and the motive behind the underlying felony as separate aggravator." Willie v. State, 585 SO 2d 660, 681 (Miss. 1991). The Willie decision was considered and adopted by this Court in McConnell.

Further, the Court must consider to obtain a death sentence, the State's must prove beyond a reasonable doubt that at least one aggravating circumstance exists. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001). If McConnell was to be applied retroactively to the instant case (in the event that it is the announcement of a new rule), the State would be left without three aggravating circumstances.

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The traditional test of the "same offense" for double jeopardy purposes is whether one offense requires proof of an element which the other does not. Bockburaer v. U.S., 284 U.S. 299, 304 (1932) . This test, does not apply, however, when one offense is an incident of another; that is, when one of the offenses is a lesser included of the other. U.S. v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 2857 (1993); Illinois v. Vitale, 447 U.S. 410, 420 100 S.Ct. 2260 (1980).

Courts of other jurisdictions have found the use of such overlapping aggravating circumstances to be improper. In Randolph v. State, 463 So.2d 186 (Fla. 1984) the court found that the aggravating circumstances of murder while engaged in the crime of robbery and murder for pecuniary gain to be overlapping and constituted only a single aggravating circumstance. See also Provence v. State, 337 So.2d 783 (Fla. 1976) cert. denied 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977).

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The California Supreme Court in People v. Harris, 679 P.2d 433 (Cal. 1984) found that evidence showed that the defendant traveled to Long Beach for the purpose of robbing the victim and committed a burglary and two murders to facilitate the robbery. In determining that the use of both robbery and burglary as special circumstances at the penalty hearing was improper the court stated:

> The use in the penalty phase of both of these special circumstances allegation thus artificially inflates the particular circumstances of the crime and strays from the high court's mandate that the state 'tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty' (Godfrey v. Georgia, (1980) 446 U.S. 420 at P.28, 100 S.Ct 1759 at p. 1764, 64 L.Ed.2d 398. The United States Supreme Court requires that the capital - sentencing procedure must be one that 'guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.' (Jurek v. Texas (1976) 428 U.S. 262 at pp. 273-74, 96 S.Ct. 2950 at pp 2956-2957) , 49 L.Ed.2d 929) . That requirement is not met in a system where the jury considers the same act or an indivisible course of conduct to be more than one special circumstance. Harris, 679 P.2d at 449.

Other States that prohibit a "stacking" or "overlapping" of aggravating circumstances include Alabama (Cook v. State, 369 So.2d 1251, 1256 (Ala. 1978) disallowing use of robbery and pecuniary gain) and North Carolina (State v. Goodman, 257 S.E.2d 569, 587 (N.C. 1979) disallowing using both avoiding lawful arrest and disrupting of lawful government function as aggravating circumstances)

It can be anticipated that the State will argue that any error that occurred as a result of the inappropriate stacking of the aggravating circumstances was harmless error in this case because of the existence of other valid aggravating circumstances. The Nevada statutory scheme has two components that would seem to foreclose the existence of harmless error at a penalty hearing. First the jury is required to proceed through a weighing process of aggravation versus mitigation and second, the jury has the discretion, even in the absence of mitigation to return with a life sentence irregardless of the number of aggravating

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circumstances. Who can say whether the numerical stacking of aggravating circumstances was the proverbial straw that broke the camel's back and tipped the scales of justice tempered by compassion in favor of the death penalty?

> When there is a 'reasonable possibility that the erroneous submission of an aggravating circumstance tipped the scales in favor of the jury finding that the aggravating circumstances were 'sufficiently substantial' to justify the imposition of the death penalty,' the test for prejudicial error has been met. (citation omitted) Because the jury arrived at a sentence of death based upon weighing . . . and it is impossible now to determine the amount of weight ascribed to each factor, we cannot hold the error of submitting both redundant aggravating circumstances to be harmless.

State v. Ouisenberry, 354 S.E.2d 446 (N.C. 1987) . A reweighing is especially inappropriate in this case as this Court has already thrown out one aggravator that went into the decision to impose the death penalty.

Justice Gunderson in his concurring opinion in Moses v. State, 91 Nev. 809, 815, 544 P.2d 424 (1975) stated.with respect to harmless error that:

> ...judicial resort to the harmless error rule, as in this case, erodes confidence in the court system, since calling clear misconduct [or error) 'harmless' will always be viewed by some as 'sweeping it under the rug.' (We can at best, make a debatable judgment call.)

The stacking of aggravating circumstances based on the same conduct results in the arbitrary and capricious imposition of the death penalty, and allows the State to seek the death penalty based on arbitrary legal technicalities and artful pleading. This violates the commands of the United States Supreme Court in Grecy v. Georgia, 428 U.S. 153 (1976) and violates the Eighth Amendment to the United States Constitution and the prohibition in the Nevada Constitution against cruel and unusual punishment and that which guarantees due process of law. Trial counsel was deficient in failing to strike the duplicate and overlapping aggravating circumstances.

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Mr. Rippo would respectfully request that this Court reverse his sentence of death and remand the case for a new penalty phase.

II. RIPPO'S CONVICTION AND SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE RIPPO WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

Standard of review for ineffective assistance of counsel. To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness,
2. counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of the trial would probably have been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U. S. 364,113 S. Ct. 838 122 2d, 180 (1993); Strickland, 466 U. S. at 687 104 S. Ct. at 2064.

"The question of whether a defendant has received ineffective assistance of counsel at

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trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, at 2070, 80 L.Ed.2d 674 (1984). This Court reviews claims of ineffective assistance of counsel under a reasonable effective assistance standard enunciated by the United States Supreme Court in Strickland and adopted by this Court in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504, (1984); *See* Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). Under this two-prong test, a defendant who challenges the adequacy of his or her counsel's representation must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Under Strickland, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id. at* 691, 104 S.Ct. at 2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id. at* 688, 104 S.Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id. at* 694, 104 S.Ct. at 2068.

The United States Constitution guarantees the Defendant the right to counsel for the defense and has pronounced that the assistance due is the "Reasonably Effective Assistance of Counsel During the Trial". See, Strickland v. Washington, 104 S. Ct. 2052 (1984). Whereby, this Court adopted the Two Prong Standard of Strickland in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

In keeping with the standard of effective assistance of counsel, the United States Supreme Court extended the right to counsel to include a convicted defendant's first appeal. See, Evitts v. Lucey, 469 U. S. 387, 105 S.Ct. 830 (1985); See also, Douglas v. California,

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372 U.S. 353 (1963).

That counsel at each of the proceedings must be adequate, meaningful, and effective. Strickland, Supra.

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised herein. Theses issues include the following:

III. TRIAL COUNSEL WOLFSON INSISTED THAT RIPPO WAIVE HIS RIGHT TO SPEEDY TRIAL AND THEN ALLOWED THE CASE TO LANGUISH FOR 46 MONTHS BEFORE PROCEEDING TO TRIAL.

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

During this inordinate delay a number of jailhouse snitches were able to gain access to RIPPO'S legal work or learn about the case from the publicity in the newspaper and television and were therefore able to fabricate testimony against RIPPO in exchange for favors from the prosecution.

IV. THE PERFORMANCE OF TRIAL COUNSEL DURING THE GUILT PHASE OF THE TRIAL FELL BELOW THE STANDARD OF REASONABLY EFFECTIVE COUNSEL IN THE FOLLOWING RESPECTS:

a. Failure to Object to the Use of a Prison Photograph of Rippo as Being Irrelevant, Unduly Prejudicial and Evidence of Other Bad Acts.

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

Prosecutor Harmon described RIPPO to the jury as looking like a "choir boy". In order to prejudice RIPPO in the eyes of the jury, the State showed the jury a picture of RIPPO as he

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sometimes looked in prison which was absolutely not relevant to his appearance when not in custody. In the photo RIPPO looked grungy and mean which was a stark contrast to his appearance when not in custody and at trial. When RIPPO voiced concerns to his attorneys he was told the photo didn't matter as the jury could see that RIPPO was clean cut during the trial. The jury should not have been allowed to view RIPPO as he appeared in prison.

It is hornbook law that evidence of other criminal conduct is not admissible to show that a defendant is a bad person or has a propensity for committing crimes. State v. Hines, 633 P.2d 1384 (Ariz. 1981); Martin v. People, 738 P.2d 789 (Cob. 1987); State v. Castro, 756 P.2d 1033 (Haw. 1988); Moore v. State, 96 Nev. 220, 602 P.2d 105 (1980). Although it may be admissible under the exceptions cited in NRS 48.045(2), the determination whether to admit or exclude evidence of separate and independent criminal acts rests within the sound discretion of the trial court, and it is the duty of that court to strike a balance between the probative value of the evidence and its prejudicial dangers. Elsbury v. State, 90 Nev. 50, 518 P.2d 599 (1974)

The prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that the accused committed the charged crime because of a trait of character. Tucker v. State, 82 Nev. 127, 412 P.2d 970 (1966) . Even where relevancy under an exception to the general rule may be found, evidence of other criminal acts may not be admitted if its probative value is outweighed by its prejudicial effect. Williams v. State, 95 Nev. 830, 603 P.2d 694 (1979).

The test for determining whether a reference to criminal history is error is whether "a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity." Morning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) citing Commonwealth v. Allen, 292 PA.2d 373, 375 (Pa. 1972) . In a majority of jurisdiction

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improper reference to criminal history is a violation of due process since it affects the presumption of innocence; the reviewing court must therefore determine whether the error was harmless beyond a reasonable doubt. Porter v. State, 94 Nev. 142, 576 P.2d 275 (1978); Chanman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

The use of the prison photograph was for the sole purpose of attempting to portray RIPPO as being of poor character and having committed other bad acts. Trial counsel clearly should have objected and prevented the use of the photograph.

V. THE PERFORMANCE OF TRIAL COUNSEL DURING THE PENALTY PHASE OF THE TRIAL FELL BELOW THE STANDARD OF REASONABLY EFFECTIVE COUNSEL IN THE FOLLOWING RESPECTS:

(a.) Failure to Object to Unconstitutional Jury Instructions at the Penalty Hearing That Did Not Define and Limit the Use of Character Evidence by the Jury.

(See argument VI. herein below)

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

(b) Failure to Offer Any Jury Instruction with Rippo's Specific Mitigating Circumstances and Failed to Object to an Instruction That Only Listed the Statutory Mitigators and Failed to Submit a Special Verdict Form Listing Mitigatating Circumstances Found by the Jury.

(See argument VI. herein below)

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

©). Failure to Argue the Existence of Specific Mitigating Circumstances During Closing Argument at the Penalty Hearing or the Weighing Process Necessary Before the Death Penalty Is Even an Option for the Jury.

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Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

As discussed above there was no verdict form provided to the jury for the purpose of finding the existence of mitigating circumstances. To compound the matter, not once during closing argument at the penalty hearing did either trial counsel submit the existence of any specific mitigating circumstance that existed on behalf of RIPPO. A close reading of the arguments reveals the existence of a number of mitigators that should have been urged to be found by the jury. These were:

(1) Accomplice and participant Diana Hunt received favorable treatment and is already eligible for parole;
(2) Rippo came from a dysfunctional childhood;
(3) Rippo failed to receive proper treatment and counseling from the juvenile justice system;
(4) Rippo, at the age of 17, was certified as an adult and sent to adult prison because the State of Nevada discontinued a treatment facility of violent juvenile behaviors;
(5) Rippo was an emotionally disturbed child that needed long term treatment, which he never received;
(6) Rippo never committed a serious disciplinary offense while in prison, and is not a danger;
(7) Rippo worked well in prison and has been a leader to some of the other persons in prison;
(8) Rippo has demonstrated remorse; and
(9) Rippo was under the influence of drugs at the time of the offense.

Death penalty statutes must be structured to prevent the penalty being imposed in an arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2126, 33 L.Ed.2d 346 (1972). A capital defendant must be allowed to introduce any relevant mitigating evidence regarding his character and record and circumstance of the offense. Woodson v. North Carolina, 428 U.S. 280,96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

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In Lockett v. Ohio, 438 US 586, 98 S.Ct 2954, 57 L.Ed. 2d 973 (1978) the Court held that in order to meet constitutional muster a penalty hearing scheme must allow consideration as a mitigating circumstance any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death. See also Hitchcock v. Duacier, 481 US 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and Parker v. Duacer, 498 US 308, 111 S.Ct 731, 112 L.Ed.2d 812 (1991).

Incredibly, at no point did RIPPO'S attorneys urge the jury to find the existence of mitigating circumstances and weigh them against the aggravators. This failure not only prejudiced RIPPO at the penalty hearing, it also precludes any meaningful review of the appropriateness of the jury's verdict of death.

(d). Failure to Object to Improper Closing Argument at the Penalty Hearing.

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

During closing argument at the penalty hearing the prosecutor made the following improper argument to the jury to which there was no objection by trial counsel:

> And I would pose the question now: Do you have the resolve, the courage, the intestinal fortitude, the sense of commitment to do your legal duty? (3/14/96 page 108).

In Evans v. State, 117 Nev. Ad. Op. 50 (2002) this Court considered the exact same comments and found:

> Other prosecutorial remarks were excessive and unacceptable and should have been challenged at trial and on direct appeal. In rebuttal closing, the prosecutor asked, 'do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of legal commitment to do your legal duty?' Asking the jury if it had the 'intestinal fortitude' to do its 'legal duty' was highly improper. The United States Supreme Court held that a prosecutor erred in trying 'to exhort the jury to do its job'; that kind of pressure . . .has no place

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> in the administration of criminal justice' 'There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from it's actual duty: impartiality'. The prosecutor's words here 'resolve,' 'determination,' 'courage,' 'intestinal fortitude,' 'commitment,' 'duty'– were particularly designed to stir the jury's passion and appeal to partiality.

It was error for counsel to fail to object to the improper argument and the failure to object precluded the matter from being raised on direct appeal.

(e) Trial Counsel Failed to Move to Strike Two Aggravating Circumstances That Were Based on Invalid Convictions.

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

The aggravating circumstances of under sentence of imprisonment and prior conviction of a violent felony were based on RIPPO'S guilty plea to the 1982 sexual assault of Laura Martin. RIPPO'S plea canvass was woefully inadequate and as such trial counsel should have filed a Motion to Strike the two aggravating circumstances that were based on the guilty plea. RIPPO brought this to the attention of trial counsel but no effort was made to invalidate the two aggravators.

As the State improperly stacked aggravating circumstances the removal of the prior conviction would have eliminated the two most damaging aggravators. Defense counsel should have pushed for an evidentiary hearing where a review of the transcripts from the plea hearing would have shown an improper guilty plea canvass under Nevada law.

The number of aggravators in this case unduly swayed the jury. If one aggravator was enough to impose the death sentence, then surely six meant death was the only answer. This should have compelled defense counsel to utilize any avenue of attack available against the aggravators.

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VI. THE INSTRUCTION GIVEN AT THE PENALTY HEARING FAILED TO APPRAISE JURY OF THE PROPER USE OF CHARACTER EVIDENCE AND AS SUCH THE IMPOSITION OF THE DEATH PENALTY WAS ARBITRARY NOT BASED ON VALID WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

NRS 200.030 provides the basic scheme for the determination of whether an individual convicted of first degree murder can be sentenced to death and provides in relevant portion:

> 4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:
> (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances; or
> (b) By imprisonment in the state prison:

In the case at bar, in addition to the alleged aggravating circumstances there was a great deal of "character evidence" offered by the State that was used to urge the jury to return a verdict of death. The jury, however, was never instructed that the "character evidence" or evidence of other bad acts that were not statutory aggravating circumstances could not be used in the weighing process.

Instruction No. 7 given to the jury erroneously spelled out the process as follows:

> The State has alleged that aggravating circumstances are present in this case. The defendants have alleged that certain mitigating circumstances are present in this case.
>
> It shall be your duty to determine:
>
> (a) Whether an aggravating circumstance or circumstances are found to exist; and
> (b) Whether a mitigating circumstance or circumstances are found to exist; and

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©) Based upon these findings, whether a defendant should be sentenced to life imprisonment or death.

The jury may impose a sentence of death only if (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.
Otherwise, the punishment imposed shall be imprisonment in the State Prison for life with or without the possibility of parole.
A mitigating circumstance itself need not be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any other juror or jurors. 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 circumstances."

The jury was also told in Instruction 20 that:

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

The jury was never instructed that character evidence was not to be part of the weighing process to determine death eligibility or given any guidance as to how to treat the character evidence. The closing arguments of defense counsel also did not discuss the use of the character evidence in the weighing process and that such evidence could not be used in the determination of the existence of aggravating or mitigating circumstances.

In Brooks v. Kemo, 762 F.2d 1383 (11th Cir. 1985) the Court described the procedure that must be followed by a sentencing jury under a statutory scheme similar to Nevada:

After a conviction of murder, a capital sentencing hearing may be held. The jury hears evidence and argument and is then instructed about statutory aggravating circumstances. The Court explained this instruction as follows:

The purpose of the statutory aggravating circumstance is to limit to a large degree, but not completely, the fact finder's discretion. Unless at least one of the ten statutory aggravating circumstances exist, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the fact finder has a

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discretion to decline to do so without giving any reason .. . [citation omitted]. In making the decision as to the penalty, the fact finder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phase of the trial. The circumstances relate to both the offense and the defendant.

[citation omitted] . The United States Supreme Court upheld the constitutionality of structuring the sentencing jury's discretion in such a manner. Zant v. Stephens, 462 13.5. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1963)" Brooks, 762 F.2d at 1405.

In Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996) the Court stated:

Under NRS 175.552, the trial court is given broad discretion on questions concerning the admissibility of evidence at a penalty hearing. Guy, 108 Nev. 770, 839 P.2d 578. In Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990), cert. denied, 499 U.S. 970 (1991), this court held that evidence of uncharged crimes is admissible at a penalty hearing once any aggravating circumstance has been proven beyond a reasonable doubt. Witter, 112 Nev. at 916.

Additionally in Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1995) the court in discussing the procedure in death penalty cases stated:

If the death penalty option survives the balancing of aggravating and mitigating circumstances, Nevada law permits consideration by the sentencing panel of other evidence relevant to sentence NRS 175.552. Whether such additional evidence will be admitted is a determination reposited in the sound discretion of the trial judge. Gallego, at 791.

More recently the Court made crystal clear the manner to properly instruct the jury on use of character evidence:

To determine that a death sentence is warranted, a jury considers three types of evidence:'evidence relating to aggravating circumstances, mitigating circumstances and 'any other matter which the court deems relevant to sentence' . The evidence at issue here was the third type, 'other matter' evidence. In deciding whether to return a death sentence, the jury can consider such evidence only after finding the defendant death—eligible, i.e., after is has found unanimously at least one enumerated aggravator and each juror has found that any mitigators do not outweigh the aggravators. Of course, if the jury decides that death is not appropriate, it can still consider 'other matter' evidence in deciding on another sentence. Evans v. State, 117 Nev. Ad. Op. 50 (2001).

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As the court failed to properly instruct the jury at the penalty hearing the sentence imposed was arbitrary and capricious and violated RIPPO'S rights under the Eighth Amendment to be free from cruel and unusual punishment and to Due Process under the Fourteenth Amendment and must be set aside.

VII. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARNTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE JURY WAS NOT INSTRUCTED ON SPECIFIC MITIGATING CIRCUMSTANCES BUT RATHER ONLY GIVEN THE STATUTORY LIST AND THE JURY WAS NOT GIVEN A SPECIAL VERDICT FONT TO LIST MITIGATING CIRCUMSTANCES. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

At the penalty hearing Instruction number 17 given to the jury listed the seven mitigating circumstances found in NRS 200.035. No other proposed mitigating circumstances were given to the jury. The verdict forms given to the jury did not contain a list of proposed mitigating circumstances to be found by the jury.

In every criminal case a defendant is entitled to have the jury instructed on any theory of defense that the evidence discloses, however improbable the evidence supporting it may be. Allen v. State, 97 Nev. 394, 632 P.2d 1153 (1961); Williams v. State, 99 Nev. 530, 665 P.2d 260 (1983).

In Lockett v. Ohio, 438 US 586, 98 S.Ct 2954, 57 L.Ed. 2d 973 (1978) the Court held that in order to meet constitutional muster a penalty hearing scheme must allow consideration as a mitigating circumstance any aspect of the defendant's character or record or any of the

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circumstances of the offense that the defendant proffers as a basis for a sentence of less than death. See also Hitchcock v. Duager, 481 US 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and Parker v. Dupder, 498 US 308, 111 S.Ct 731, 112 L.Ed.2d 812 (1991).

NRS 175.554 (1) provides that in a capital penalty hearing before a jury, the court shall instruct the jury on the relevant aggravating circumstances and "shall also instruct the jury as to the mitigating circumstances alleged by the defense upon which evidence has been presented during the trial or at the hearing". Byford v. State, 116 Nev. Ad. Op. 23 (2000). It was a violation of the 14th and 8th Amendments to fail to instruct the jury on the defense mitigators and further a 6th Amendment violation for counsel at trial not to submit a proper instruction and special verdict form to the jury. This failure was especially harmful to RIPPO, when just from a review of the closing arguments there were valid mitigating circumstances that likely would have been found by one or more of the jurors. These are:

1. Accomplice and participant Diana Hunt received favorable treatment and is already eligible for parole;
2. Rippo came from a dysfunctional childhood;
3. Rippo failed to receive proper treatment and counseling from the juvenile justice system;
4. Rippo was certified as an adult and sent to adult prison because the State of Nevada discontinued a treatment facility of violent juvenile behaviors;
5. Rippo was an emotionally disturbed child that needed long term treatment, which he never received;
6. Rippo never committed a serious disciplinary offense while in prison, and is not a danger;
7. Rippo worked well in prison and has been a leader to some of the other persons in prison;
8. Rippo has demonstrated remorse;
9. Rippo was under the influence of drugs at the time of the offense.

The only instruction the jury received was the stock instruction that reads:

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

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1. The Defendant has no significant history of prior criminal activity.
2. The murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
3. The victim was a participant in the Defendant's criminal conduct or consented to the act.
4. The Defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.
5. The Defendant acted under duress or the domination of another person.
6. The youth of the Defendant at the time of the crime.
7. Any other mitigating circumstances."

This instruction did absolutely nothing to inform the jury of the mitigators that actually applied to the case, and given the nature of this and other penalty hearing errors, mandates that the sentence be reversed.

VIII. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE NEVADA STATUTORY SCHEME AND CASE LAW FAILS TO PROPERLY LIMIT THE INTRODUCTION OF VICTIM IMPACT TESTIMONY AND THEREFORE VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT AND FURTHER VIOLATES THE RIGHT TO A FAIR AND NON-ARBITRARY SENTENCING PROCEEDING AND DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

The Nevada capital statutory scheme and case law impose no limits on the presentation of victim impact testimony and as such results in the arbitrary and capricious imposition of the death penalty.

This Court has held that due process requirements apply to a penalty hearing. In Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991) the Court held that due process requires

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notice of evidence to be presented at a penalty hearing and that one day's notice is not adequate. In the context of a penalty hearing to determine whether the defendant should be adjudged a habitual criminal the court has found that the interests of justice should guide the exercise of discretion by the trial court. Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990)

In Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980), the United State Supreme Court held that state laws guaranteeing a defendant procedural rights at sentencing may create liberty interests protected against arbitrary deprivation by the due process clause of the Fourteenth Amendment. The procedures established by the Nevada statutory scheme and interpreted by this Court have therefore created a liberty interest in complying with the procedures and are protected by the Due Process clause.

The Eighth Amendment to the United States Constitution requires that the sentence of death not be imposed in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153 (1976) . The fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. Woodson v. North Carolina, 428 U.S. 280 (1976) . Evidence that is of a dubious or tenuous nature should not be introduced at a penalty hearing, and character evidence whose probative value is outweighed by the danger of unfair prejudice, of confusion of. the issues or misleading the jury should not be introduced. Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983).

The United States Supreme Court in Payne v. Tennessee, 501 U.S. 808, Ill. S.Ct. 2597, 115 L.Ed.2d 720 (1991) held that the Eighth Amendment erects no per se bar to the admission of certain victim impact evidence during the sentencing phase of a capital case. The Court did

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acknowledge that victim impact evidence can be so unduly prejudicial as to render the sentencing proceeding fundamentally unfair and violate the Due Process Clause of the Fourteenth Amendment. Payne, 111 S.Ct at 2608, 115 L.Ed.2d at 735. In Homick v. State 108 Nev. 127, 136-137, 825 P.2d 600, 606 (1992) this Court embraced the holding in Payne, and found that it comported fully with the intendment of the Nevada Constitution and declined to search for loftier heights in the Nevada Constitution. In cases subsequent to Homick, the Court has reaffirmed its position, finding that questions of admissibility of testimony during the penalty phase of a capital murder trial are largely left to the discretion of trial court. Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649 (1994). The Court has not however addressed the issue of presentation of cumulative victim impact evidence or been presented with a situation where the prosecution went beyond the scope of the order of the District Court restricting the presentation of the evidence.

Some State courts have voiced disapproval over the admission of any victim impact evidence at a capital sentencing hearing finding that such evidence is not relevant to prove any fact at issue or to establish the existence of an aggravating circumstance. State v. Guzek, 906 P.2d (Or. 1995) . In considering a claim that victim impact testimony violated due process and resulting in a sentence imposed under the influence of passion, prejudice or other arbitrary factors, the Kansas Supreme Court in State v. Gideon, 894 P.2d 850, 864 (Kan. 1995) issued the following warning while affirming the sentence:

> When victims' statements are presented to a jury, the trial court should exercise control. Control can be exercised, for example, by requiring the victims' statements to be in question and answer form or submitted in writing in advance. The victims' statements should be directed toward information concerning the victim and the impact the crime has on the victim and the victims' family. Allowing the statement to range far afield may result in reversible error.

In the case at bar the State called five separate victim impact witnesses to testify over

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the objection of RIPPO. At the conclusion of the testimony RIPPO moved for a mistrial which was denied by the District Court. RIPPO also raised the issue on direct appeal on the basis that the testimony was cumulative and excessive. This Court denied the claim. The ruling in this case and others establishes that this Court puts no meaningful boundaries on victim impact testimony resulting in the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments.

IX. THE STOCK JURY INSTRUCTION GIVEN IN THIS CASE DEFINING PREMEDITATION AND DELIBERATION NECESSARY FOR FIRST DEGREE MURDER AS "INSTANTANEOUS AS SUCCESSIVE THOUGHTS OF THE MIND" INSTRUCTION VIOLATED THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION, WAS VAGUE AND RELIEVED THE STATE OF IT' S BURDEN OF PROOF ON EVERY ELEMENT OF THE CRIME. UNITED STATES CONSTITUTION AMENDMENTS 5, 6,\8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTION 5, 6, 8, AND 14; ARTICLE IV, SECTION 21.

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

The challenged, instruction was modified by the Court in Byford v. State, 116 Nev. Ad. Op. 23 (2000) . In Byford, the Court rejected the argument as a basis for relief for Byford, but recognized that the erroneous instruction raised "a legitimate concern" that the Court should address. The Court went on to find that the evidence in the case was clearly sufficient to establish premeditation and deliberation.

Subsequent to the decision in Byford, supra, further challenges have been made to the instruction with no success. In Garner v. State, 116 Nev. Ad. Op. 85 (2000), the Court discussed at length the future treatment of challenges to what has been deemed the "Kazalyn" instruction. In denying relief to Garner, the Court stated:

. . .To the extent that our criticism of the Kazalyn instruction in Byford means

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that the instruction was in effect to some degree erroneous, the error was not plain.

Therefore, under Byford, no plain or constitutional error occurred here. Independently of Byford, however, Garner argues that the Kazalyn instruction caused constitutional error. We are unpersuaded by his arguments and conclude that giving the Kazalyn instruction was not constitutional error. . . .Therefore, the required use of the Byford instruction applies only prospectively. Thus, with convictions predating Byford, neither the use of the Kazalyn instruction nor the failure to give instructions equivalent to those set forth in Byford provides grounds for relief."Garner, 116 Nev. Ad. Op. 85 at 15.

The State, during closing argument took full advantage of the unconstitutional instruction, arguing to the jury, inter alia:

> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind.
>
> How quick is that?
>
> For if the jury believes from the evidence that the acts constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.
>
> So contrary to TV land, premeditation is something that can happen virtually instantaneously, successive thoughts of the mind." (3/5/96 p. 14).

It is respectfully urged that trial counsel was ineffective in failing to object to the premeditation and deliberation instruction and that RIPPO was prejudiced by the failure.

X. RIPPO'S CONVICTION AND SENTENCE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, AND RELIABLE SENTENCE DUE TO THE FAILURE OF This Court TO CONDUCT FAIR AND ADEQUATE APPELLATE REVIEW. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE T, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

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This Court's review of cases in which the death penalty has been imposed is constitutionally inadequate. The opinions rendered by the Court have been consistently arbitrary, unprincipled and result oriented. Under Nevada law, this Court had a duty to review RIPPO'S sentence to determine (a) whether the evidence supported the finding of aggravating circumstances; (b) whether the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor; whether the sentence of death was excessive considering both the crime and the defendant. NRS 177.055(2). Such appellate review was also required as a matter of constitutional law to ensure the fairness and reliability of RIPPO'S sentence.

The opinion affirming RIPPO'S conviction and sentence provides no indication that the mandatory review was fully and properly conducted in this case. In fact the opinion while noting that no mitigating circumstances were found, failed to notice that there was no jury verdict form for the jurors to find mitigating circumstances included in the record on appeal. The statutory mechanism for review is also faulty in that the Court is not required to consider the existence of mitigating circumstances and engage in the necessary weighing process with aggravating circumstances to determine if the death penalty in appropriate.

RIPPO also again hereby adopts and incorporates each and every claim and issue raised in his direct appeal as a substantive basis for relief in the Post Conviction Writ of Habeas Corpus based on the inadequate appellate review.

XI. <u>RIPPO'S CONVICTION AND SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, IMPARTIAL JURY FROM CROSS-SECTION OF THE COMMUNITY, AND RELIABLE DETERMINATION DUE TO THE TRIAL, CONVICTION AND SENTENCE BEING IMPOSED BY A JURY FROM WHICH AFRICAN AMERICANS AND OTHER MINORITIES WERE SYSTEMATICALLY EXCLUDED AND UNDER REPRESENTED. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE T, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.</u>

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

RIPPO is not an African American, however was tried by a jury that was under represented of African Americans and other minorities. Clark County has systematically excluded from and under represented African Americans and other minorities on criminal jury pools. According to the 1990 census, African Americans - a distinctive group for purposes of constitutional analysis - made up approximately 8.3 percent of the population of Clark County, Nevada. A representative jury would be expected to contain a similar proportion of African Americans. A prima facie case of systematic under representation is established as an all white jury and all white venire in a community with 8.3 percent African American cannot be said to be reasonably representative of the community.

The jury selection process in Clark County is subject to abuse and is not racially neutral in the manner in which the jury pool is selected. Use of a computer database compiled by the Department of Motor Vehicles, and or the election department results in exclusion of those persons that do not drive or vote, often members of the community of lesser income and minority status. The computer list from which the jury pool is drawn therefore excludes lower income individuals and does not represent a fair cross section of the community and systematically discriminates.

The selection process for the jury pool is further discriminatory in that no attempt is made to follow up on those jury summons that are returned as undeliverable or are delivered and generate no response. Thus individuals that move fairly frequently or are too busy trying to earn a living and fail to respond to the summons and thus are not included within the venire. The failure of County to follow up on these individuals results in a jury pool that does

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not represent a fair cross section of the community and systematically discriminates.

RIPPO was denied his Sixth Amendment right to a jury drawn from a fair cross-section of the community, his right to an impartial jury as guaranteed by the Sixth Amendment, and his right to equal protection under the 14th Amendment. The arbitrary exclusion of groups of citizens from jury service, moreover, violates equal protection under the state and federal constitution. The reliability of the jurors' fact finding process was compromised. Finally, the process used to select RIPPO'S jury violated Nevada's mandatory statutory and decisional laws concerning jury selection and RIPPO'S right to a jury drawn from a fair cross-section of the community, and thereby deprived RIPPO of a state created liberty interest and due process of law under the 14th Amendment.

XII. RIPPO' S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE NEVADA STATUTORY SCHEME AND CASE LAW WITH RESPECT TO THE AGGRAVATING CIRCUMSTANCES ENUNCIATED IN NRS 200.033 FAIL TO NARROW THE CATEGORIES OF DEATH ELIGIBLE DEFENDANTS.

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

In Gregg v. Georgia, 428 U.S. 238, 92 S.Ct. 2726. 3 L.Ed.2d 346 (1972), the United States Supreme Court held that death penalty statutes must truly guide the jury's determination in imposing the sentence of death. The Court held that the sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which death penalty is imposed from the many cases in which it is not." Id. at 188, 96 S.Ct. at 2932.

In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980) , the Supreme Court struck down a Georgia death sentence holding that the aggravating circumstance relied upon

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was vague and failed to provide sufficient guidance to allow a jury to distinguish between proper death penalty cases and non-death penalty cases. The Court held that under Georgia law, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." at 877, 103 S.Ct. at 2742.

Recent decisions of the United States Supreme Court demonstrate that all the factors listed in the Nevada Capital Sentencing Statute (NRS 200.033) are subject to challenge on the grounds of 8th Amendment Prohibition against vagueness and arbitrariness, for both on its face and as applied in RIPPO'S case.

In Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130 (1992) the United States Supreme Court noted that where the sentencing jury is instructed to weigh aggravating and mitigating circumstances, the factors guiding the jury's discretion must be objectively and precisely defined:

> Although our precedence do not require the use of aggravating factors they have not permitted a state in which aggravated factors are decisive to use factors of vague or imprecise content. A vague aggravated factor employed for the purpose of determining whether defendant is eligible for the death penalty fails to channel the sentencers discretion. A vague aggravating factor used in the weighing process is in essence worst, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty and he might otherwise be by relying upon the existence of illusory circumstance. Id. at 382."

Among the risk the court identified as arising from the vague aggravating factors are randomness in sentence decision making and the creation of a bias in favor of death. (Ibid.) Each of the factors contained in NRS 200.033 is subject to the prescription against vague and imprecise sentencing factors that fail to appraise the sentencer of the findings •that are necessary to warrant imposition of death. (Maynard v. Cartwright, 486 U.S. 356 (1988))

The factors listed in NRS 200.033, individually and in combination, fail to guide the sentencers discretion and create an impermissible risk of vaguely defined, arbitrarily and

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capriciously selected individuals upon whom death is imposed. It is difficult, if not impossible, under the factors of NRS 200.033 for the perpetrator of a First Degree Murder not to be eligible for the death penalty at the unbridled discretion of the prosecutor.

The Supreme Court in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980) reversed under the 8th Amendment a sentence of death obtained under Georgia Capital Murder Statute but permitted such a sentence for an offense that was found beyond a reasonable doubt to have been "outrageously and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." (Id. at 422). Despite the prosecutor's claim that the Georgia courts had applied a narrowing construction to the statute (Id at 429-430), the plurality opinion recognized that:

> In the case before us the Georgia Supreme Court has affirmed the sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.'"

There is nothing in these words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility can fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Id. at 428-429) .

To be consistent with the 8th Amendment, Capital Murder must take into account the concepts that death is different (California v. Ramos, 463 U.S. 992, 103 S. Ct. 3445 (1983)), in that the death penalty must be reserved for those killings which society views as the most "egregious . . . affronts to humanity." (Zant v. Stephens, 462 U.S. at 877, Footnote 15 (citing Gregg v. Georgia, (1976) 428 U.S. 153, 184.)) Across the board eligibility for the death penalty also fails to account for the different degrees of culpability attendant to different types of murders, enhancing the possibility that sentencing will be imposed arbitrarily without regard for the blameworthiness of the defendant or his act.

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The Nevada Statutory scheme is so broad as to make every first degree murder case into a death penalty case. The Statute does not narrow the class of murderers that are eligible for the death penalty. The scheme leaves the decision when to seek death solely in the unbridled discretion of prosecutors. Such a scheme violates the mandates of the United States Supreme Court.

CONCLUSION

Therefore, based upon the arguments herein, Mr. Rippo would respectfully request the reversal of his sentence of death and convictions based upon appellate counsel failing to raise the necessary arguments on direct appeal and for violations of the United States Constitutions Amendments Fourteen, Eight, Five, and Six.

DATED this 2 dated this May, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this amended 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 2 day of May, 2005.

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 2 day of May, 2005, 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 OPENING BRIEF**, addressed to:

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