ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

MICHAEL RIPPO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 44094

FILED

SEP 28 2005

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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 REPLY BRIEF

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05-19197

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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.

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.

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.

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.

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.

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

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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.

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.

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,

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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.

STATEMENT OF THE CASE

Appellant hereby adopts the statement of the facts as annunciated in Appellant's Opening Brief.

STATEMENT OF FACTS

Appellant hereby adopts the statement of the facts as annunciated in Appellant's Opening Brief.

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.

After the penalty phase, the jury sentenced Mr. Rippo to death finding six aggravating circumstances. The aggravating circumstances relevant for purposes of this issue are 1) the

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murder was committed by a person under sentence of imprisonment; 2) the murder was committed by a person who had been previously been convicted of a felony involving the use of threat of violence to another person; 3) the murders were committed by a person engaged in the commission of or an attempt to commit robbery; 4) the murder was committed while the person was engaged in the commission of or an attempt to commit burglary (S.A., VOL. 17, pp. 3163-3164). [1] On direct appeal, appellate counsel argued that Mr. Rippo's sentence of death had been improperly decided based upon the jury considering overlapping aggravators. 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. At the time of direct appeal, this Court had not yet decided McConnell v. State, 102 Ad. Op. 105, 102 P.3d 606 (December 29, 2004). In Mr. Rippo's opening brief, he requested that this Court revisit this issue based upon this Court's ruling in McConnell v. State.

In the State's Answering brief, the State argues that this issue is barred by the law of the case doctrine (State's Answering Brief, pp. 5). The State correctly points out that this argument was in fact raised on direct appeal. However, the Court can take notice that the McConnell decision was not decided at the time of Mr. Rippo's direct appeal. Additionally, the State argues that this issue was not briefed in the Defendant's Petition for Writ of Habeas Corpus in the district court below (State's Answering Brief, pp. 6). The State's argument is inaccurate. In fact, on August 8, 2002, Supplemental Points and Authorities in Support of the Petition for Writ of Habeas Corpus were filed on behalf of Mr. Rippo. Originally, Mr. David Schieck was appointed to represent Mr. Rippo in his Post-Conviction Relief. In the Supplemental Brief, Mr. Schieck wrote

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[1] Mr. Rippo was also found to have committed murder that involved torture. This Court held on direct appeal there was sufficient evidence to find that the murder involved torture. Therefore, this aggravator had already been deemed to be valid.

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that this issue had been previously raised on direct appeal. At the end of informing the district court that the issue had been raised on direct appeal, Mr. Rippo states,

> Rippo as part of his Supplemental Petition, herein, reasserts that the death penalty was returned in violation of the Eighth and Fourteenth Amendment right to a fair sentencing proceedings and one not arbitrary and capricious in its use. (See, Supplemental Brief (A.A. VOL. I, pp. 031).

The State is correct when they argue that Mr. Rippo did not extensively brief the McConnell decision in the Writ of Habeas Corpus. However, Mr. Rippo clearly reasserted this issue for Post-Conviction Relief purposes. Hence, the State's argument that this issue was not briefed in the petition below is inaccurate. Mr. Rippo would respectfully request that this Court revisit this issue based upon McConnell v. State.

The State was permitted at the penalty phase to double count the same conduct in accumulating three aggravating circumstances(S.A., Vol. 17, pp. 3191-392). The robbery, burglary and kidnapping aggravating circumstances are all based on the same set of operative facts and unfairly accumulated to compel the jury towards 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. In McConnell, this Court concluded that,

> The interpretation of our death penalty statutes that we now embrace will provide a more certain framework within which prosecutors statewide may exercise their very important discretion in these matters, and will provide greater certainty and fairness of application within the trial, appellate, and federal court systems. 102 P.3d. 606, 627.

This Court's conclusion provides the Court's concern that there be greater certainty and fairness in the application of the death penalty within the trial, appellate, and federal court systems. It therefore comes to reason that this Court was concerned about the entire weighing process of aggravators whether or not the defendant is at trial, on appeal, or in habeas review in the federal court system. Mr. Rippo raised this issue on direct appeal and reasserted the issue at post-

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conviction. Moreover, Mr. Rippo has raised this issue again, before this Court.

This Court ruled in McConnell, that Nevada's definition of capital murder did not narrow enough and that the further narrowing of the death penalty eligibility in 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, 99 Nev. 209, 215, 660 P.2d 992,995 (1983).

The McConnell Court noted, "[N]evada'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,

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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 the instant case, the State was successful in obtaining a death sentence against Mr. Rippo on three aggravating circumstances that would not be permitted pursuant to the McConnell decision. As this Court instructed in McConnell, the State would have to give the jury a special verdict form to determine whether they found Mr. Rippo guilty of premeditated and deliberate murder or whether they found Mr. Rippo guilty of First Degree Murder based upon the felony murder rule. Unfortunately, no one can answer this question. Mr. Rippo is sentenced to death after the jury found three aggravating circumstances that were clearly a result of inappropriate stacking(S.A., Vol. 17, pp. 3191-392).

Additionally, two aggravating circumstances against Mr. Rippo were found as a result of the same actions. One aggravator came as a result of Mr. Rippo being under sentence of imprisonment and another aggravator was that he had prior conviction (the same conviction) of a violent felony which arose from the same 1982 sexual assault conviction.

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

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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).

In essence, Mr. Rippo suffered as a result of two aggravating circumstances from the identical behavior. The State was not required to prove any additional facts to establish two separate aggravating circumstances.

In summary, at least four aggravating circumstances appear to be unconstitutional. Admittedly, the State would have been permitted to argue to a jury that Mr. Rippo was under sentence of imprisonment and that the murders involved torture. However, the other four aggravating circumstances (robbery, kidnaping, burglary and a previous violence offense) were all a result of unconstitutional stacking of aggravating circumstances(S.A., Vol. 17, pp. 3191-392).

In the State's answering brief, they claim that there is ample evidence of premeditation and deliberation just as there was in McConnell (State's Answering Brief, pp. 7). Unlike McConnell, Mr. Rippo did not plead guilty and admit to premeditated and deliberated First Degree Murder. In fact, there was a lengthy discussion by this Court in the McConnell, decision regarding the defendant's admission that he had committed first degree murder by premeditation and deliberation. In the instant case, that is not the case. Mr. Rippo denied culpability and proceeded to trial. Nevada is a weighing state, and there is no concrete evidence that a jury would have sentenced Mr. Rippo to death had they only been able to find two aggravating circumstances as opposed to the six that they did find. In Nevada, the jury is required to proceed through a weighing process of aggravators versus mitigators. Second, the jury has the discretion, even in the absence of mitigation to return a life sentence irregardless of the number of aggravating circumstances. The State can not argue that the numerical stacking of aggravating circumstances

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wasn't the proverbial straw that broke the camel's back and tipped the scales of justice.

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.

In the State's answering brief, they state, "[w]eighing three aggravators against no mitigating circumstances would produce the same penalty the jury found with six aggravators (State's Answering Brief, pp. 10). The State can not claim to know how a jury would have weighed the aggravators versus the mitigators had they only been able to find two and not six.

Lastly, the State claims that the McConnell decision should not be applied retroactively to Mr. Rippo's case. The State claims that this Court does not appear willing to apply the McConnell, decision retroactively. Mr. Rippo disagrees.

In 1982, this Court considered the issue of retroactivity in Franklin v. Nevada 98 Nev. 266, 646 P.2d, 543(1982). In Franklin, this Court stated, "[I]n places determining complete retroactivity or prospectivity of new constitutional rules, the Supreme Court has consistently considered three factors: 1) the purpose of the rule; 2) the reliance on prior contrary law; and 3) the effect retroactive application would have on the administration of justice. Franklin at 269 fn. 2, See Tehan v. United States, 382 U.S. 406 (1966).

In Gier v. Ninth Judicial District Court of Nevada, this Court provided that, "[n]ew rules apply prospectively unless they are rules of constitutional law, and then they apply retroactively only under certain circumstance." Gier v. Ninth Judicial District Court of the State of Nevada, 106

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Nev. 208, at 212; 789 P.2d 1245 (1990), See Franklin v. State, 98 Nev. 2666, 646 P.2d 543 (1982). In Teague v. Lane, Director, Illinois Department of Corrections, 489 U.S. 288 109 S. Ct. 1060; 103 L.Ed 2d 334 (1989), the United States Supreme Court articulated that in a new rule of constitutional dimension would apply retroactively. In Teague, the majority opinion provided two exceptions when a new constitutional rule would apply retroactively. A new constitutional rule should be applied retroactively ". . . if it required the observance of the bedrock procedural elements that were absolutely prerequisite to the fundamental fairness implicit in the concept of ordered liberty." Id.

The United States Supreme Court has held that in general, a case announces a new rule when it breaks new ground or imposes a new obligation on the State or Federal government. Teague, 489 U.S.288 at 301.

Perhaps, Justice O'Connor was concerned with a legal principle the Supreme Court addressed in Teague. The Supreme Court explained that, "[f]urthermore, as we recognized in Engle v. Issac, [s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover during a habeas proceedings, new constitutional commands" Teague, 489 U.S. 288 at 310. (citations omitted). In Teague, United States Supreme Court addresses the concerns mirrored by Justice O'Connor in her dissenting opinion in Ring. It is interesting and important to note that in both instances the Court was addressing defendants who are attacking constitutional issues in habeas proceedings after exhausting their state remedies.

In the instant case, Mr. Rippo specifically raised this issue on direct appeal. Therefore, the McConnell, decision should be applied to him. Second, a review of McConnell, does not make it clear whether or not the McConnell decision should be applied retroactively. However, based on the fact that this Court in McConnell, relied on prior case law. Combined with the fact that this

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Court in McConnell concluded that the McConnell decision would provide greater certainty and fairness of application within the trial, appellate and federal court systems. This appears to indicate that this Court is willing to apply the McConnell decision to the instant case. Out of fairness and equity, Mr. Rippo specifically raised this issue prior to the McConnell decision on direct appeal. Mr. Rippo reasserted this issue on post-conviction relief. Mr. Rippo has extensively briefed this issue on appeal from post-conviction relief. Mr. Rippo should receive the benefit of this Court's ruling in McConnell and the application of McConnell to Mr. Rippo's case would provide to greater certainty and fairness of the application within the appellate and federal court system. Mr. Rippo respectfully request that this Court deem the four aggravating circumstances in question unconstitutional. Mr. Rippo would respectfully request that this Court reverse his sentences 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.

This issue is submitted.

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

A. The 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 mitigating circumstances found by the jury.

There was no verdict form provided to the jury for the purpose of finding the existence of

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This argument is taken out of chronological order from appellant's opening brief. The purpose is to address the penalty phase issues together for purposes of this reply brief.

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tailored mitigating circumstances. A review of the entire record on appeal demonstrates that a number of mitigating circumstances should have been urged to the jury. They 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).

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).

In response, the State argues that trial counsel failed to argue all of the mitigating circumstances listed in appellant's opening brief, based upon a trial tactic. The State contends,

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"[t]hus, trial counsel was presented with an extremely delicate balancing act. That he chose to illuminate some details in his summation and leave others to be considered as part of the evidence as a whole was clearly a reasonable course" (State's Answering Brief, pp. 22). The State must remember that Mr. Rippo's life held in the balance. It can hardly be considered a tactical decision to fail to raise mitigating circumstances. By the State's own admission, trial counsel failed to argue that Mr. Rippo was remorseful and the he was under the influence of drugs at the time of the murder and that Diana Hunt had received favorable treatment after testifying against the defendant (Appellant's Opening Brief, pp. 21, lines 17-21).

During the evidentiary hearing, (post-conviction relief) appellate counsel, Mr. David Schieck explained,

> And it's been my experience that its much better to list what you believe your mitigators are in an instruction to the jury, number one, so that they know they can consider those, and that that's your theory of mitigation.
>
> Second, the jury, should be given the opportunity to check on a proper verdict form which mitigators they have found in the case, so with the Court at a later date is going to re-weigh the death penalty, they'll know that the jury found their were, in fact, the existence of mitigating circumstances. (A. A., Volume II, 329-330).

Mr. Schieck further stated, "[i]n hindsight, I believe I should have raised it. Failure to properly instruct, not the argument of counsel, the failure to properly instruct the jury as to the use of those mitigating circumstances, the Supreme Court since Mr. Rippo's direct appeal has ruled that the defense is entitled to an instruction that lists your mitigating circumstances, not just the laundry list. And I believe I should have raised it when I did the appeal back in 1992." (A.A.,Vol. II, pp. 330-331).

Therefore, the State's contention that appellant's counsel was not remiss for failing to raise this issue on direct appeal is belied by the testimony of appellate counsel. Appellate counsel, agreed at the post-conviction evidentiary hearing that he should have raised the issue on direct

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appeal. The appellate counsel and trial counsel failed to object to the improper closing argument at the penalty phase.

During closing argument, at the penalty phase, the prosecutor made the following argument to the jury: "[a]nd 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?" (A.A. Vol. II, pp.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 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.

In the State's answering brief, they argue that trial counsel was not ineffective for objecting to this argument. The State cites to the district court's comment during the evidentiary hearing wherein the court determined that objected at closing argument is a rather dangerous situation that looks like counsel is hiding the ball (State's Answering Brief, pp. 24, lines 13-14). The State cites the district court's opinion from the bench that objecting during closing argument has the appearance to the jury that the defense is hiding the ball. Hypocritically, the State throughout their brief argues that issues can not be considered by this Court unless there is a contemporaneous objection. In fact, the State argues that since trial counsel failed to object to this comment that this should preclude appellate consideration (State's Answering Brief, pp. 22, lines 26-27). On the one hand, the State would have this Court believe that it is appropriate tactics for trial counsel to fail

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to object because it has the appearance of "hiding the ball". On the other hand, since defense counsel failed to object this Court should not consider the issue. Mr. Rippo was damned if his attorney objects because it appears he is "hiding the ball". Mr. Rippo is damned if his attorney doesn't object because then the issue can't be raised for appellate consideration. This argument is obviously in direct contradiction to the rules of advocacy. Mr. Rippo was on trial for his live. When the State makes an objectionable comment during closing argument counsel should object so that this Court can consider the issues. The district court's determination that objecting has the appearance that the defense is hiding the ball is meritless. That type of tactic only leads to the State arguing on appeal that the issue should not be considered of the failure to object. Hence, the failure to object provides appellate counsel with an argument of plain error only.

The State correctly points out that in Evans, this Court considered other factors in reversing Mr. Evans sentence of death besides the single comments made by the prosecutor in closing argument. However, in viewing the record as a whole, this Court will note that Mr. Rippo endured numerous errors during the penalty phase.

Lastly, the State argues that at the evidentiary hearing, Judge Mosley stated, "[h]ow would defense counsel know they would have a legal ground to object without the benefit of the Supreme Court determination." (State's Answering Brief, pp. 24, lines 10-12). The district court inquired how appellate counsel would have been able to raise this issue on direct appeal and trial counsel having knowledge that this was objectionable given the fact that the Evans decision was subsequent to Mr. Rippo's penalty phase. To answer the district court's question, one only needs to review the testimony given by appellate counsel Mr. David Schieck at the evidentiary hearing. During the evidentiary hearing, Mr. Schieck was asked about this particular statement during the closing argument of the penalty phase. Mr. Schieck responded that the had heard that quote in many of his cases (AA.,Vol. II, pp. 342). Mr. Schieck admitted that he had not raised the issue

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on direct appeal. (AA.,Vol. II, pp. 342). Mr. Schieck explained that he had been the trial and appellate counsel for Billy Castillo and had heard the same prosecutor make an almost identical argument (AA.,Vol. II, pp. 343). During the Castillo trial, Mr. Schieck objected and raised the issue on direct appeal. This is an interesting coincidence, as the State cited to the Castillo decision in their answering brief (State's Answering Brief, pp. 23, footnote 7).

In Castillo v. State, 114 Nev. 271, 279-280, 956 P.2d 103, 109 (1998), this Court noted that Mr. Castillo's appellate counsel raised the issue as to the prosecutor's argument on future dangerousness not the reference to the jury's duty. Therefore, the district court concern that appellate counsel would not have known this issue is belied by the evidentiary hearing transcript of Mr. Schieck. Mr. Schieck was trial counsel for Billy Castillo and objected to a similar if not identical statement by the prosecutor. On appeal, Mr. Schieck raised the issue of improper argument by the prosecutor as an issue of future dangerousness and not moral duty. Therefore, the logical reasoning demonstrates that appellate counsel in the instant case, was aware of this issue and had seen this type of argument many times.

Admittedly, at the evidentiary hearing, Mr. Schieck explained that he could not recall if the Castillo matter went to trial before or after he competed the appellate brief for Mr. Rippo. However, the issue remains the same in both Mr. Rippo's case and in Mr. Evan's case. The prosecutor was the same in both cases. The prosecutor made an almost identical argument in both cases. In Evans, the prosecutor's argument was found to be a factor in determining that Mr. Evan's penalty phase should be reversed. Here, the prosecutor's argument was just as damaging and improper as it was in the Evans case. A review of the entire penalty phase demonstrates that the State was permitted to receive multiple overlapping and stacking aggravators along with improper argument. These problems are compounded by the fact that there was no jury instruction listing the tailored mitigators that could have been offered for Mr. Rippo.

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It was error for trial counsel to fail to object to this improper argument and failure to raise this matter on direct appeal.

IV. 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.

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
> ©) 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." (SA.,Vol. 17, pp. 3171).

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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 (S. A. Vol. 17, pp. 3184).

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 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

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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).

On direct appeal, this issue was not raised. At the evidentiary hearing, appellate counsel, Mr. Schieck, explained, " . . . and I'm sure I had concerns over the instructions and the process that was being used in death penalty cases that - - and this is one of those issues that I believe I should have raised to preserve the issue, without necessarily believing the Supreme Court was going to change the existing precedent on it, in order to preserve for further challenges. And the Supreme Court has changed the instruction on talking about the use of character evidence, and when it can be build into the weighing process." (A.A., Vol. II, pp. 357).

Mr. Schieck admitted that this was an issue that should have been raised on direct appeal. In the instant case, there was a great deal of character evidence offered against Mr. Rippo. As in Evans, the prosecutor made a similar improper argument regarding the moral duty of the jury and

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stressed the character of both Mr. Evans and Mr. Rippo. Mr. Evans received a new penalty phased based upon several assignments of error. In the instant case, Mr. Rippo has also suffered from numerous error in both the trial and penalty phase. For the foregoing reasons, Mr. Rippo respectfully requests that this Court reverse his sentences of death and remand the case for a new penalty phase based upon violations of the United States Constitution Amendments Five, Six, Eight and Fourteen.

V. 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.

This issue is submitted as set forth in opening brief.

VI. 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.

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

This issue is submitted as set forth in opening brief.

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

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CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

This issue is submitted as set forth in opening brief.

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.**

This issue is submitted as set forth in opening brief.

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.**

This issue is submitted as set forth in opening brief.

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.**

This issue is submitted as set forth in opening brief.

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.

This issue is submitted as set forth in opening brief.

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.**

This issue is submitted as set forth in opening brief.

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CONCLUSION

Based on the foregoing Mr. Rippo would respectfully request that this Court reverse his convictions based on violations of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

DATED this 26 day of September, 2005.

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CERTIFICATE OF COMPLIANCE

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

DATED this 26 day of September, 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 30 day of September, 2004, 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 REPLY BRIEF**, addressed to:

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