

KAY ELLEN ARMSTRONG
ATTORNEY AT LAW
209 N. PRATT AVE.
CARSON CITY, NEVADA 89701
PHONE (775) 883-3990, FAX (775) 883-4030

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,

No. 51622

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

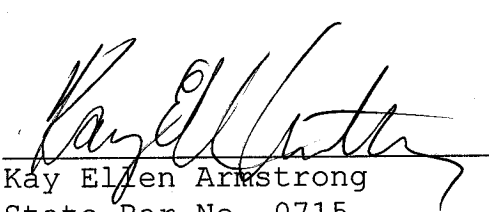
JAN 06 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Woop
DEPUTY CLERK

MOTION TO RECALL REMITTITUR

Comes now the Appellant, Ferrill Joseph Volpicelli, by and through his court appointed attorney, Kay Ellen Armstrong and moves this Honorable Court for an order recalling the remittitur issued on December 29, 2009. This motion is based on the Affidavit of counsel and Exhibits A and B attached hereto.

Dated this 6th day of January, 2010.


Kay Ellen Armstrong
State Bar No. 0715
208 N. Pratt Ave.
Carson City, NV 89701
(775) 883-3990
Attorney for Appellant

RECEIVED

JAN 06 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

1A-00321

KAY ELLEN ARMSTRONG
ATTORNEY AT LAW
209 N. PRATT AVE.
CARSON CITY, NEVADA 89701
PHONE (775) 883-3990, FAX (775) 883-4030

AFFIDAVIT

STATE OF NEVADA)
) ss
CARSON CITY)

KAY ELLEN ARMSTRONG, being first duly sworn, deposes
and says as follows:

1. I was appointed to represent the Appellant at the
District Court level on August 10, 2006.

2. On December 7, 2009 I received an Order of Affirmance
from this court dated December 3, 2009.

3. On December 9, 2009 I mailed a copy of the Order of
Affirmance addressed to the Appellant at the Lovelock
Correctional Facility, P. O. Box 359, Lovelock, NV 89419-0359.

4. On December 28, 2009 I received the Order of Affirmance
sent to the Appellant on December 9, 2009 from the United State
Postal Service marked Return to Sender, Forward Time Expired.
(Exhibit A).

5. On December 28, 2009 I mailed another copy of the Order
of Affirmance to the Appellant addressed to the Lovelock
Correctional Center, 1200 Prison Road, Lovelock, NV 89419-5110.

6. On December 30, 2009 Appellant telephoned me and stated
he had received the Order of Affirmance and requested affiant to
file a Petition for Rehearing (Exhibit B) pursuant to NRAP Rule
40.

Further affiant sayeth not.


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1 Dated this 6th day of January, 2010.

2
3 
4 Kay Ellen Armstrong
5 State Bar No. 0715
6 208 N. Pratt Ave.
7 Carson City, NV 89701
8 (775) 883-3990

9
10 SUBSCRIBED AND SWORN to before
11 me this 6th day of January, 2010.

12
13 
14 Notary Public

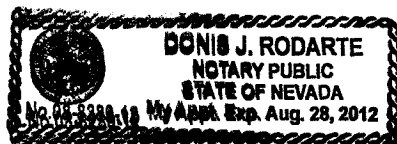


EXHIBIT A

Kay Ellen Armstrong
Attorney at Law
209 N. Pratt Ave.
Carson City, NV 89701



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12/28/09

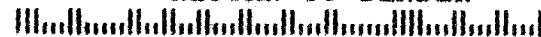
Ferrill Volpicelli #79565
Lovelock Correctional Facility

P.O. Box
Lovelock,

LOVE359* 894194013 1708 12 12/20/09
FORWARD TIME EXP RTN TO SEND
:LOVELOCK CORRECTIONAL CENTER
1200 PRISON RD
LOVELOCK NV 89419-5110

RETURN TO SENDER

8941930353 BOC



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IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,

No. 51622

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

PETITION FOR REHEARING

In its December 3, 2009 Order of Affirmance, the Court ruled "the conviction....was not properly used as a past conviction for purposes of adjudication as a habitual criminal in the instant matter (citation omitted). However, we conclude that any error was harmless because a sufficient number of convictions was presented. See NRS 178.598 (stating that "[a]ny error, defect, irregularity or variance which does not effect substantial rights shall be disregarded)." Ferrill Joseph Volpicelli, Appellant, vs. The State of Nevada, Respondent, Order of Affirmance, #51622, handed down on December 3, 2009, p. 3.

The Court reasoned that the two (2) additional convictions which were considered by the sentencing court listed six (6) additional felonies which were properly considered. Id.

The judgment relied upon is attached to this petition as Exhibit 1. The Court noted in its affirmance that the

EXHIBIT B

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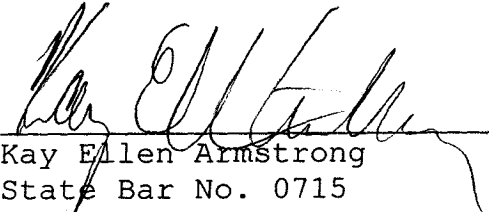
1 prosecutor argued the tax perjury convictions stemmed from four
2 (4) years of activity. This is not apparent from the face of
3 the document.

4 This Court has long held where two (2) or more convictions
5 grow out of the same act, transaction or occurrence, and are
6 prosecuted in the same indictment or information, those several
7 convictions may be utilized only as a single prior conviction
8 for purposes of applying the habitual criminal statute. *Rezin*
9 *v. State*, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979). (Emphasis
10 added.)

11 Because the sentencing judge improperly considered a prior
12 conviction, this matter should have been remanded for sentencing
13 before a different judge.

14 Therefore, it is respectfully requested that this Court
15 grant the Petition for Rehearing.

16 Dated this 6th day of January, 2010.

17
18
19
20 
21 Kay Ellen Armstrong
22 State Bar No. 0715
23 208 N. Pratt Ave.
24 Carson City, NV 89701
25 (775) 883-3990
26 Attorney for Appellant
27
28

CERTIFICATE OF SERVICE

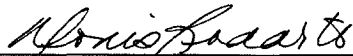
Pursuant to NRCP 5 (b), I certify that I an employee
of Kay Ellen Armstrong, Attorney at Law, and on this date I
deposited for mailing, a true copy of the attached document to:

Ferrill Volpicelli #79565
Lovelock Correctional Facility
1200 Prison Road
Lovelock, NV 89419-0359

State of Nevada Attorney General
100 N. Carson St.
Carson City, NV 89701

Washoe County District Attorney
One South Sierra St.
Reno, NV 89520

January 6, 2010


Donis Rodarte

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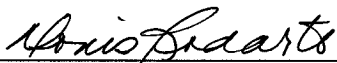
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