ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,

Appellant,

Vs.

LENARD VARE, WARDEN,

Respondent.

Case No. 51622

FILED

MAR 0 2 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

MOTION FOR LEAVE TO FILE AMENDED REPLY BRIEF

COMES NOW, Petitioner Ferrill Joseph Volpicelli, by and through his court appointed attorney, Kay Ellen Armstrong, and hereby moves this Honorable Court for an order allowing the filing of an Amended Reply Brief. This motion is based on Rules of Appellate Procedure 27, the attached affidavit of counsel and Exhibit A, the Amended Reply Brief,

DATED this 26th day of February, 2009

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AFFIDAVIT OF COUNSEL

Kay Ellen Armstrong, being first duly sworn, under penalty of perjury, hereby deposes and say:

1. That affiant is an attorney licensed to practice law in the State of Nevada;

2. Affiant filed Appellant's Reply Brief with the Supreme Court on February, 9, 2009;

3. On February 11, 2009 affiant received a telephone call from Petitioner indicating he had received his copy of the Appellant's Reply Brief and that it was unacceptable due to mistakes;

4. Affiant realized upon review that Petitioner was correct, and affiant has now corrected the mistakes contained in the Appellant's Reply Brief filed February 9, 2009.

Further affiant sayeth not.

Kay Ellen Armstrong

Subscribed and sworn to before me
this 26th day of February, 2009.

Notary Public

DONIS J. RODARTE
NOTARY PUBLIC
STATE OF NEVADA
No. 08-[illegible]-12 My Appt. Exp. Aug. 28, 2012

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI, Case No. 51622

Appellant,

Vs.

LENARD VARE, WARDEN,

Respondent.

_____/

APPELLANT'S REPLY BRIEF

Appeal from Order Denying Petition for
Writ of Habeas Corpus (Post-Conviction)
Second Judicial District Court, County of Washoe
The Honorable Steven P. Elliott

Kay Ellen Armstrong
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EXHIBIT "A"

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ARGUMEMT

I. The Trial Court Erroneously Dismissed all but Four of Petitioner's Grounds for Relief without a Hearing

An evidentiary hearing is required in regard to any claims that are supported by specific factual allegations unrepelled by the record and that would warrant relief if true. *Evans v. State*, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).

This court recently held that the argument that counsel made reasonable strategic choices is in many instances a difficult assessment to make without the benefit of counsel's testimony at an evidentiary hearing. *Byford v. State*, 123 Nev. Adv. Op. No. 9 (2007) at p.3.

Certainly the attorney's decision to stipulate to the admission of the "prior convictions" was not a reasonable strategic choice, and the district court should have heard evidence on this issue.

II. Counsel was Ineffective for Allowing the Sentencing Judge to Rely on a "Prior" Felony Conviction for Habitual Criminal Enhancement.

The State argues the following points against the 2004 conviction being unlawfully applied toward adjudication of habitual status:

1) Volpicelli's 193 page habeas memorandum does not include a claim that the offense date of the 2004 conviction preceded the instant conviction;

2) There was no district court order dismissing any such claim;

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3) There was no evidence of the 2004 conviction upon which appellate review can be had;

4) The Nevada Supreme Court's ruling on the habitual criminal issue on direct appeal bars such review again herein; and

5) NRS 207.010 makes no reference to offense dates, but speaks only of previous "convictions".

First, Volpicelli's habeas memorandum in fact presented the instant argument. (Appellant's Appendix to Opening Brief at 171, 172 and 290, hereinafter cited as App. 171, 172, 290). Respondent overlooked Volpicelli's clear assertion that

> The Judgment of Conviction utilized by the prosecution, entered on February 11, 2004, was not prior to [Volpicelli's] criminal arrest in October, 2001 for the primary . . . offenses. All prior convictions used to enhance a sentence must have preceded the primary offense. *Brown v. State,* 97 Nev. 101, 102, 624 P.2d 1005 (1981); *and Carr v. State,* 96 Nev. 936, 939, 620 P.2d 869 (1980) App. 171 (Emphasis added in original).

The State's first assertion is repelled by the specific argument presented in the District Court pleadings that the prior conviction of February 11, 2004 "did not precede the primary offense." App. 171. (Emphasis in original).

In fact, not only did Volpicelli outline his claim of counsel's ineffectiveness in regard to the 2004 conviction being an offense not predating the instant offense, but his appointed

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counsel's supplemental habeas petition reiterated this ground. App. 204, 205, 304.

Second, the District Court's Findings of Facts, Conclusions of Law and Judgment set forth that on August 27, 2007, it entered an order dismissing "some of the claims" (which included grounds 6 and 18). App. 409. Therefore, grounds 6 and 18 were disposed of at the district court level by order of dismissal.

Third, even if there was no documentary evidence existent in the record, sufficient evidence of the offense date related to the 2004 conviction is found in the words of Deputy District Attorney Riggs when she introduced into evidence in support of the habitual criminal enhancement the conviction of February 11, 2004, for aiding and abetting in the commission of an attempt to obtain money by false pretenses, and declared that Volpicelli's offense for the "2004 cert that you have in your hand" occurred "while in jail on charges specifically in this case." App. 20, 21.

Fourth, the Nevada Supreme Court's review on appeal did not address whether the enhancement offense predated or post-dated the instant offense, but, instead addressed, as stated by this Court: "Volpicelli contends that the District Court abused its discretion when it found habitual criminal status and ran two of the enhanced sentences consecutively. Volpicelli's argument is based on the fact that none of his prior convictions were violent, and that he had untreated mental health problems." App. 89.

Respondent's law of the case argument is repelled by the clear language of this Court's analysis of Volpicelli's actual

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direct appeal arguments, arguments having nothing to do with offense dates.

Lastly, the State opines that NRS 207.010 makes no reference to offense dates, but only requires previous convictions. Citing *O'Neill v. State,* 123 Nev. 9, 153 P.3d 38 (2007). Respondents argue that habitual status under NRS 207.010 requires but a showing that Volpicelli had been thrice convicted. *O'Neill*, however, addresses solely the issue of whether the statute violates the U.S. Supreme Court decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). *Id. O'Neill* in no manner whatsoever addressed this Court's previous rulings in *Brown v. State,* 97 Nev. 101, 624 P.2d 1005 (1981) and *Carr v. State,* 96 Nev. 936, 620 P.2d 869 (1980), in which this Court stated "[a]ll prior convictions used to enhance a sentence must have preceded the primary offense." The facts of this case are simple. Per District Attorney Riggs' own arguments, Volpicelli's offense in relation to his 2004 conviction occurred after the primary offense in this case--while he was in jail for the primary offense, in fact. Per *Carr* and *Brown*, supra, the 2004 conviction should not be used for an adjudication of habitual criminal under NRS 207.010.

III. Counsel was Ineffective for Failing to Argue Possession of Counterfeit Labels Merged with the Offense of Burglary for Sentencing Purposes.

Here, the State argues for a dismissal of the assertion that double jeopardy precludes the Court's sanction of multiple convictions for the same conduct.

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1) The State contends that NRS 205.965 cannot be a lesser included offense or incidental to burglary, NRS 205.060.

2) That Volpicelli unlawfully possessed pricing paraphernalia, and then when he entered the store with larcenous intent, a second crime was committed.

3) The State cites *U.S. v. Dixon,* 113 S.Ct 2849 (1993) in support of the foregoing with the 'same evidence' doctrine in *Grady* being overturned in *Dixon;* thereby reviving the 'same elements' test.

Inasmuch as NRS 205.965 is a relatively new statute, and oddly enough became effective a little more than two weeks before Volpicelli's arrest, it is now posited by the Petitioner that this Court compare NRS 205.965 with that of NRS 205.080. Both statutes require possession of instrumentality(s), as well as the intent to commit a crime. So, a defendant is entitled to a lesser-included offense instruction when (1) all elements of the lesser offense are included within the offense charged, and (2) there is sufficient evidentiary basis for the lesser charge. *Rease v. U.S.,* 113 S.Ct 2849 (1993).

In *People v. Blahuta*, 264 N.E. 2d 819, 822 (1970) the Illinois appellate court ruled in favor of the defendant in reversing the sentences imposed for both attempted burglary and possession of burglary tools since both offenses arose out of the same conduct. The same court held the conviction for possession of burglary tools must be reversed since both it and the conviction for burglary arose out of the same conduct. See *People v. Garnes,* 198 N.E. 2d 399, 1401 (1973).

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In the instant case, it is abundantly clear that absent the possession of the instrumentality(s), under NRS 205.965, there is no evidence of intent to commit Volpicelli's crime(s) at entry to the retail establishments. Likewise, the burglary itself, under NRS 205.060, is required to show the intent to defraud for NRS 205.965. Otherwise, anyone merely in possession of UPC information, labels, receipts, or copies of receipts is guilty of a felony under NRS 205.965.

In fact, the information in the indictment, specifically at counts II and V (App. 5-8) clearly purports the crime of burglary (under NRS 205.060) to obtain the instrumentalitie(s) under NRS 205.965. Hence, the State's position that Volpicelli's possession of the pricing information was a specific crime from when he entered the store with larcenous intent is misplaced.

Burglary related cases purport possession of instrumentality as incidental to burglary and sentenced accordingly. As far as the State's argument with *Dixon* is concerned, the Blockburger Test is not the only standard for determining whether [multiple punishments] impermissibly involve the same offense. *Brown v. Ohio* 432 U.S. 166, at 167 (1977). The Blockburger Test was developed "in the context of multiple punishments imposed in a single prosecution." *Garrett v. U.S.*, 105 S.Ct 2407, 2411 (1985). In that context "the double jeopardy clause" does no more than prevent the sentencing court from prescribing greater punishment than the legislature

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intended. *Missouri v. Hunter,* 103 S.Ct 673,678 (1983). Lastly, the State may bring, and a jury may consider, in a single proceeding, multiple charges arising from the same conduct, without violating double jeopardy; However, the Courts may not enter multiple convictions for the same criminal conduct. *Id,* at 678. Hence, to punish Volpicelli under NRS 205.965 consecutive to NRS 205.060 constitutes an abuse of discretion in view of *stare decisis,* as well as violates the double jeopardy doctrine for due process.

IV. Counsel was Ineffective for Failing to Contest The Restitution Amount.

The State argues the following points that counsel was not ineffective at sentencing in rebutting the claimed restitution:

1) That only some of the stolen goods had been returned to others.

2) The claim that property had been returned was based entirely on a document that was prepared by an assistant city attorney, well after sentencing. App. 388.

3) That counsel conceded trial counsel should not be found ineffective in failing to utilize that which did not exist. App. 389.

Moreover, the State's position is that trial counsel had no information whatsoever in order to challenge the restitution at sentencing. However, the foregoing arguments are belied by the Court's record. At sentencing, on April 1, 2004, amidst all interested parties in the courtroom, the sentencing transcripts

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provided the following: District Attorney Riggs questioned Detective Thomas concerning the conditions of the property at bar, as well as an accountability of same. App. 37. There the court, including trial counsel, becomes aware that not all property confiscated from Volpicelli was admitted as evidence, nor charged in the indictment. Yet, the Reno Police Department took it upon themselves to dispose of all Volpicelli's property. Next, trial counsel probes Detective Thomas insofar as the accountability, accuracy and valuation of the property relative to the alleged losses sustained by the retailers. App. 45, 46. At that point, the entire courtroom became aware that all the property was to be returned to the respective retailers since Detective Thomas had obtained signatory documentation from retailers to accept the returned property, "as new, in the box". In addition, Exhibit 5 (The Financial Impact Report), was submitted by the District Attorney and Parole and Probation reiterating that "all retailers in this case and mentioned in the Grand Jury Indictment have noticed [Detective Thomas] that they wish to have their property returned." App. 52. Again, there was adequate notification to trial counsel so that he could challenge the inflated restitution amount in view of the foregoing testimony and exhibit. This is especially true because trial counsel had supposedly reviewed the purported restitution owed to retailers in the PSI and Exhibit 5 prior to sentencing. App. 19. In *State v. Ferguson*, 798 P.2d 413, 415 (AZ. App. Div, 1990) it is noted that evidence regarding the items returned is relevant to the amount of restitution the defendant owes. Hence, after trial counsel was amply informed

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of the foregoing, and during the hearing, he had an obligation to ensure justice was served in an accurate and equitable manner. See e.g., *Wilson v. State,* 105 Nev. 110, 113, 771 P.2d 583, 584 (1989), (counsel deficient when he fails to proffer mitigating evidence at sentencing); *Shields v. State,* 97 Nev. 472, 473, 634 P.2d 468, 469 (1981), (counsel must ensure that inaccurate information in a PSI is brought to sentencing court's attention).

V. Trial Counsel was Ineffective for Failing to Impeach the State's Primary Witness, Mr. Volpicelli's Original Co-Defendant, with his Many Prior Inconsistent Statements.

The State argues the following points against counsel's ineffectiveness in failing to more thoroughly impeach the defendant's accomplice:

1) Volpicelli's petition does not identify a single one of the alleged prior statements, and that the Court should discount the argument, citing *Browning v. State,* 120 Nev. 347, 354, 91 P.3d 39, 45 (2004).

2) That the few alleged inconsistent statements heard at the evidentiary hearing were not inconsistent at all; and,

3) Trial counsel's performance did not fall below an objective standard of reasonableness, and that the outcome of trial would probably not have been different.

First, Respondent's claim of not proffering "a single one" of the alleged prior inconsistent or perjured statements is belied by the Court's record. The writ's grounds 11 and 12 specifically address each incident. App. 132-143.

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The record therein cites over a dozen pages of excerpts from trial testimony, as well as admissible recorded and transcribed conversations between Volpicelli's accomplice (hereafter 'Bowman') and authorities. Materially relevant statements are made by the foregoing individuals concerning Volpicelli's alleged involvement, the accomplice's attempts to minimize his involvement, as well as promises proffered by the State to Bowman. More specifically, the Court record will show that at the Grand Jury Indictment, at trial, and under oath the following:

The District Attorney probed Bowman as to any threats or promises in exchange for Bowman's cooperation and/or testimony. Yet, recorded conversations between Detectives Reed and Brown with Bowman demonstrate promises were made. Bowman was promised that Volpicelli would not be made aware of Bowman testifying against Volpicelli. But most importantly, Bowman was able to retain illegally acquired property and was never subject to criminal charges for same. App. 132, 133.

Bowman further denied any discussions with the state about imposing a habitual criminal life sentence enhancement if he failed to testify against Volpicelli. Yet, transcribed conversations with Detective Thomas and Bowman, as well as between Bowman and his family prove to the contrary. App. 133, 134.

At trial, the District Attorney questioned Bowman in an attempt to minimize Bowman's culpability or participation in the alleged scheme by inquiring if Bowman had ever visited or accessed the storage unit, which Boman denied. However,

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transcribed interviews with Detective Thomas and Bowman demonstrate Bowman's knowledge of the unit's contents, despite supposedly never having been there. Also, an affidavit by a witness and contained in the writ as an exhibit, describes Bowman as being seen at the storage unit, as well as having access to a computer in order to manufacture UPC labels, despite testimony that Bowman had no access. App. 135, 136.

Both at the indictment proceedings and at trial, Bowman's testimony characterized him as being a pawn in Volpicelli's scheme, whereby Volpicelli entered retailers and placed UPC labels on merchandise which Bowman subsequently purchased. Yet, transcribed conversations between Bowman and Detectives at the time of arrest indicate Bowman was acting alone, i.e., absent Volpicelli's participation of placing labels on the merchandise. Most importantly there is a discussion noted wherein Bowman initially claimed "[Volpicelli] wouldn't even set that up"--meaning he wouldn't go into the store and adhere the UPC labels to the bike on October 17, 2001. Yet, at trial and at the Grand Jury proceedings, Bowman claims Volpicelli placed the UPC tag on the bike in no less than 3 different locations each time he testified. App. 135, 136.

There are additional examples of testimony conflicting against recorded interviews with Detectives concerning the facilitation of Bowman's paycheck from the Sand's Casino by detectives while Bowman was in custody, and depositing same in the inmate trust account. But at trial there was a denial of such a favor by Bowman – followed by vouching by District

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Attorney Riggs once the perjury was brought to the attention of the jury. App. 136-139.

Lastly, there are transcribed conversations between Detective Thomas and Bowman involving the controversial Home Entertainment Electronics at Bowman's residence which is probed by detectives as to its origin and acquisition. Bowman finally claimed it was fruit from the poisonous tree and that he bought it through the scheme on his own. Yet, at trial Detective Thomas claimed that the same CD/Stereo Center/Home Entertainment Center was never an item of interest. Incidentally, Bowman was never charged for the fraudulent acquisition, and retained same. App. 132, 133, 138, 139. The lower court reviewed the alleged inconsistent and/or perjured testimony by Bowman following the evidentiary hearing, all to no avail.

In the end, had trial counsel previewed the transcribed transcripts in their entirety so as to effectively cross examine Bowman, there is a likely chance that Bowman could have been impeached. At closing arguments, trial counsel could have brought Jury Instruction #10 to the jury's attention. Instruction 10 was an admonishment to "disregard the whole of the evidence of any such witness . . . ." "If the jury believes that any witness has willfully sworn falsely." App. 16. The jury would have realized that without Bowman's testimony there was no case.

Hence, Volpicelli was prejudiced by trial counsel's ineffectiveness to bring the foregoing issues in Grounds 11 and 12 to the jury's attention and that of the court record.

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CONCLUSION

It is paramount that this Court review the instant case with *de novo* review on each of the twenty-three (23) grounds proffered in Volpicelli's writ as to the cumulative effect. The ineffectiveness of counsel has overwhelmingly prejudiced Volpicelli and denied him due process and equal protection under the law.

DATED this 26th day of February, 2009.

Kay Ellen Armstrong, attorney for
Ferrill Volpicelli, Petitioner

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 a reference to the page of the transcript or appendix where the matter relied on is to be found. 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 26th day of February, 2009.

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CERTIFICATE OF SERVICE

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

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March 2, 2009