

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,

Case No. 51622

Appellant,

Vs.

FILED

LENARD VARE, WARDEN,

MAR 02 2009

Respondent.

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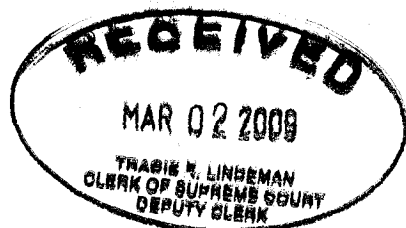
MOTION FOR LEAVE TO FILE AMENDED REPLY BRIEF

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;

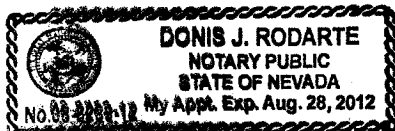
4. Affiant realized upon review that Petitioner was correct, and affiant has now corrected the mistakes contained in the Appellant's Reply Brief filed February 9, 2009.

Further affiant sayeth not.


Kay Ellen Armstrong

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


Notary Public



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

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EXHIBIT "A"

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6

ARGUMENT

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;

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

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

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

8 First, Volpicelli's habeas memorandum in fact presented
9 the instant argument. (Appellant's Appendix to Opening Brief at
10 171, 172 and 290, hereinafter cited as App. 171, 172, 290).

11 Respondent overlooked Volpicelli's clear assertion that

12 The Judgment of Conviction utilized
13 by the prosecution, entered on
14 February 11, 2004, was not prior
15 to [Volpicelli's] criminal arrest
16 in October, 2001 for the primary
17 . . . offenses. All prior convictions
18 used to enhance a sentence must have
19 preceded the primary offense. *Brown*
20 *v. State*, 97 Nev. 101, 102, 624 P.2d
21 1005 (1981); and *Carr v. State*, 96 Nev.

22 936, 939, 620 P.2d 869 (1980) App. 171
23 (Emphasis added in original).

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

28 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

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

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

8 Third, even if there was no documentary evidence existent
9 in the record, sufficient evidence of the offense date related
10 to the 2004 conviction is found in the words of Deputy District
11 Attorney Riggs when she introduced into evidence in support of
12 the habitual criminal enhancement the conviction of February 11,
13 2004, for aiding and abetting in the commission of an attempt to
14 obtain money by false pretenses, and declared that Volpicelli's
15 offense for the "2004 cert that you have in your hand" occurred
16 "while in jail on charges specifically in this case." App. 20,
17 21.

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

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

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

3 Lastly, the State opines that NRS 207.010 makes no
4 reference to offense dates, but only requires previous
5 convictions. Citing *O'Neill v. State*, 123 Nev. 9, 153 P.3d 38
6 (2007). Respondents argue that habitual status under NRS
7 207.010 requires but a showing that Volpicelli had been thrice
8 convicted. *O'Neill*, however, addresses solely the issue of
9 whether the statute violates the U.S. Supreme Court decision in
10 *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Id.* *O'Neill* in no
11 manner whatsoever addressed this Court's previous rulings in
12 *Brown v. State*, 97 Nev. 101, 624 P.2d 1005 (1981) and *Carr v.*
13 *State*, 96 Nev. 936, 620 P.2d 869 (1980), in which this Court
14 stated "[a]ll prior convictions used to enhance a sentence must
15 have preceded the primary offense." The facts of this case are
16 simple. Per District Attorney Riggs' own arguments,
17 Volpicelli's offense in relation to his 2004 conviction occurred
18 after the primary offense in this case--while he was in jail for
19 the primary offense, in fact. Per *Carr* and *Brown*, *supra*, the
20 2004 conviction should not be used for an adjudication of
21 habitual criminal under NRS 207.010.

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

25 Here, the State argues for a dismissal of the assertion
26 that double jeopardy precludes the Court's sanction of multiple
27 convictions for the same conduct.
28

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

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

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

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

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

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

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

16 Burglary related cases purport possession of
17 instrumentality as incidental to burglary and sentenced
18 accordingly. As far as the State's argument with *Dixon* is
19 concerned, the Blockburger Test is not the only standard for
20 determining whether [multiple punishments] impermissibly involve
21 the same offense. *Brown v. Ohio* 432 U.S. 166, at 167 (1977).
22 The Blockburger Test was developed "in the context of multiple
23 punishments imposed in a single prosecution." *Garrett v. U.S.*,
24 105 S.Ct 2407, 2411 (1985). In that context "the double
25 jeopardy clause" does no more than prevent the sentencing court
26 from prescribing greater punishment than the legislature
27
28

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

10
11 **IV. Counsel was Ineffective for Failing to Contest**

12 **The Restitution Amount.**

13
14 The State argues the following points that counsel was not
15 ineffective at sentencing in rebutting the claimed restitution:

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

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

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

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

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

1 of the foregoing, and during the hearing, he had an obligation
2 to ensure justice was served in an accurate and equitable
3 manner. See e.g., *Wilson v. State*, 105 Nev. 110, 113, 771 P.2d
4 583, 584 (1989), (counsel deficient when he fails to proffer
5 mitigating evidence at sentencing); *Shields v. State*, 97 Nev.
6 472, 473, 634 P.2d 468, 469 (1981), (counsel must ensure that
7 inaccurate information in a PSI is brought to sentencing court's
8 attention).

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

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

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

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

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

24 First, Respondent's claim of not proffering "a single one"
25 of the alleged prior inconsistent or perjured statements is
26 belied by the Court's record. The writ's grounds 11 and 12
27 specifically address each incident. App. 132-143.
28

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

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

19 Bowman further denied any discussions with the state about
20 imposing a habitual criminal life sentence enhancement if he
21 failed to testify against Volpicelli. Yet, transcribed
22 conversations with Detective Thomas and Bowman, as well as
23 between Bowman and his family prove to the contrary. App. 133,
24 134.

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

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

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

22 There are additional examples of testimony conflicting
23 against recorded interviews with Detectives concerning the
24 facilitation of Bowman's paycheck from the Sand's Casino by
25 detectives while Bowman was in custody, and depositing same in
26 the inmate trust account. But at trial there was a denial of
27 such a favor by Bowman - followed by vouching by District
28

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

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

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

25 Hence, Volpicelli was prejudiced by trial counsel's
26 ineffectiveness to bring the foregoing issues in Grounds 11 and
27 12 to the jury's attention and that of the court record.

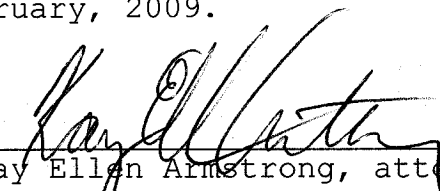
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CONCLUSION

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.

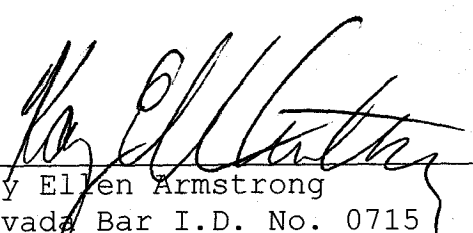

Kay Ellen Armstrong, attorney for
Ferrill Volpicelli, Petitioner

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

