IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

MICHAEL RIPPO,

Appellant,

-vs-

E.K. McDANIEL, et al.,

Respondent.

No. 53626

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witness, Deirdre D'Amore. She was called by a witness by the State and the failure to prepare and interview resulted in her exculpatory evidence not being presented to the jury. She then should have been called as a defense witness to rehabilitate her testimony.

Deirdre D'Amore was a friend of RIPPO'S and let him stay as her residence for a short time. She was around Hunt and RIPPO before and after the murders and would have testified that Hunt never told her RIPPO committed the murders. Rather, she would have testified that Hunt claimed some one other than RIPPO was guilty. Hunt also expressed to D'Amore her dislike of Denise Lizzi and her desire to harm her.

f. *Locate, interview and call witnesses to impeach the testimony of the jailhouse snitches.*

Prior to trial RIPPO provided his attorneys with the names and location of numerous witnesses that would have substantially impeached the jailhouse witnesses called by the State. None of the listed witnesses were interviewed or called to testify at trial:

-- Mark Karigianes who was housed in a cell directly across from RIPPO and would have testified that RIPPO did not say anything like Levine was claiming.

-- Jimmy Yates who was in protective custody with David Levine and could have testified that Levine told him he was lying and only testified so he could get out of prison.

-- Martin Paris was another inmate witness who was in the

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jail with RIPPO and could have testified in rebuttal against the snitches.

-- Steve Clark was also an inmate and willing to testify against the State's jailhouse witnesses.

-- Valentino Franco was in hole with Don Hill. Hill told him that the only reason he was testifying against RIPPO was to get a parole.

-- Pat Trowbridge was also told by Hill that the only reason he was testifying against RIPPO was to get a parole.

-- David Ray Bean. RIPPO provided his attorneys with an affidavit from Bean, yet he was never interviewed nor used at trial. A copy of the Affidavit is attached hereto.

-- Terry L. Conger. RIPPO provided his attorneys with an affidavit from Conger, yet he was never interviewed nor used at trial. A copy of the Affidavit is attached hereto.

g. *Locate, interview and call as a witness Debbie Kingery who had associated with Levine for period of months and would have been able to testify that Levine was not telling the truth about the alleged conversations with RIPPO.*

h. *Locate, interview and call as a witness Kim and Paula Crespin who were potential character witnesses for RIPPO.*

They were not interviewed and were not called as witnesses at trial.

i. *Locate, interview and call as a witness Carole Campanelli who was told by Diana Hunt that she was going to*

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kill RIPPO.

She was never contacted or called as a witness.

j. *Locate, interview and call as a witness Mike Colby.*

Mike Colby was a limousine driver friend of RIPPO that could have testified that RIPPO was out on the town with himself and two women the night before RIPPO'S arrest on March 15, 1992. Colby also knew Hunt and could have testified to her bad character. Further he could have testified that RIPPO had been up for three days and high on speed when he gave his statement to the police. This information should have formed the basis to suppress the RIPPO'S interview with the police after he was taken into custody and interrogated.

k. *Locate, interview and call as a witness Christine Ann Gibbons, RIPPO'S first girlfriend when he got out of prison in 1989.*

They had dated for about a year and half, and she could have discredited much of what Hunt said about RIPPO.

l. *Locate, interview and call as a witness Ricky Price, who could have testified that Diana Hunt lied in a number of areas during her testimony concerning where she was living and what she knew about Denny Mason and Denise Lizzi.*

Additionally, after Hunt had visited Mike Beaudoin at the Clark County Detention Center, she told Ricky Price and Chris Lloyd that he said Denise Lizzi had ripped him off for 12 ounces of speed. This would have established a motive for Hunt

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to have committed the murders. Hunt testified that RIPPO hogtied her in front of Ricky Price and Chris Lloyd (11 ROA 173-174). Price would have testified that no such thing ever happened. Price was never contacted and interviewed even though he was in jail and could have been easily contacted.

m. *Locate, interview and call as a witness Christopher Lloyd.*

Chris Lloyd was an acquaintance of RIPPO that could have further discredited Hunt's testimony. Lloyd would have denied that the hogtying event ever occurred. After Lloyd was arrested at RIPPO'S house in February, 1992, Hunt bailed him out of jail. RIPPO identified Lloyd as Hunt's accomplice in Tom Christos' secret recording of his conversation with RIPPO. The police interviewed Lloyd but the defense did not.

n. *Obtain records and documentation to show that Diana Hunt had possession and used Denise Lizzi's J.C. Penney's and other credit cards in order to establish her involvement in the murders and other criminal conduct.*

This same evidence was used against RIPPO and could have been used to deflect culpability away from RIPPO.

o. *Locate and interview witness Tom Sims in order to learn that RIPPO allegedly confessed to him.*

During the Opening Statement at the guilt phase the Prosecutor informed the jury that Sims would testify that RIPPO admitted strangling the "two bitches" and that he had

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accidentally killed the first one and so had to kill the second one. On direct appeal this issue was raised as a Brady violation, however, the Nevada Supreme Court determined:

> "...the knowledge that Sims spoke with RIPPO shortly after the murders should have put RIPPO'S counsel on notice that Sims might have potentially incriminating or exculpatory evidence, and that using reasonable diligence, RIPPO'S counsel could have obtained the information through an interview."

Rippo, 113 Nev. 1257.

p. *Investigate the many phone numbers Hunt called from her hotel room at the Gold Coast as recorded on Denny Mason's credit card billing.*

Potential exculpatory evidence existed here as well as information that could have further undermined Hunt's claims.

q. *Failed to meet and confer with RIPPO concerning the defense of the case, witnesses and investigation.*

As set forth in the affidavit of RIPPO attached hereto RIPPO was housed in the Nevada Department of Prisons while waiting for trial. He requested that he be housed in southern Nevada so as to facilitate contact with his attorneys, but they failed to arrange for him to be housed at either SDCC or CCDC, and he was therefore housed at Ely State Prison. Counsel failed to have a legal visit with RIPPO while he was at ESP and only had one legal visit while he was housed for a period of time at SDCC. The failure to meet and confer with RIPPO made it impossible for him to discuss witnesses and defense theories and resulted in the failure to present the exculpatory evidence

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and witnesses described herein.

3. ***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.***

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

4. ***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.*

Prosecutor Harmon described RIPPO to the jury as looking like a "choir boy". In order to prejudice RIPPO in the eyes of the jury, the State showed the jury a picture of RIPPO as he sometimes looked in prison which was absolutely not relevant to his appearance when not in custody. In the photo RIPPO looked grungy and mean which was a stark contrast to his appearance when not in custody and at trial. When RIPPO voiced concerns to his attorneys he was told the photo didn't matter as the jury could see that RIPPO was clean cut during the trial. The jury should not have been allowed to view RIPPO as he appeared

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in prison.

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

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

The test for determining whether a reference to criminal history is error is whether "a juror could reasonably infer

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from the facts presented that the accused had engaged in prior criminal activity." Morning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) citing Commonwealth v. Allen, 292 A.2d 373, 375 (Pa. 1972). In a majority of jurisdiction improper reference to criminal history is a violation of due process since it affects the presumption of innocence; the reviewing court must therefore determine whether the error was harmless beyond a reasonable doubt. Porter v. State, 94 Nev. 142, 576 P.2d 275 (1978); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

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

b. *Failure to object to the testimony of Sims about RIPPO'S prior sexual assault and the prosecutor's reference to rape in closing argument.*

On questioning by the State, Sims told the jury:

"Q Did he tell you whether they were attractive women?

A He said they were both fine.

Q Both fine?

A Yeah.

Q Did he explain anything further in the context of that statement?

A He said that he could have -- he said both of them were fine. I could have fucked both of them, but I didn't.

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> And I don't know if -- how much further you want me to go with that.
>
> Q Well, did he say something else?
>
> A He said I'm cured. That means I'm cured." (14 ROA 62-63).

During closing argument prosecutor Seaton stated:

> "He said one other thing to Mr. Sims, that I apologize for repeating. I say it only because it's evidence. He said: Both were fine. I could have fucked both of them, but I didn't. That means I'm, cured" (3/5/96 P. 77).

There was no objection to the testimony or to the closing argument. The issue was raised on direct appeal, even in the absence of a contemporaneous objection and the Nevada Supreme Court stated: "We decline to address this argument due to Rippo's failure to object during trial." Clearly RIPPO was prejudiced by counsel's failure to object and the issue should be addressed as a Sixth Amendment violation in addition to the Due Process claim raised on direct appeal.

Prior to trial, RIPPO filed a Motion in Limine to Exclude Testimony of Defendant's Prior Bad Acts (2 ROA 238-242). The State in it's Response only argued concerning the admissibility of the prior sexual assault conviction and did not seek permission to elicit testimony concerning drugs deal arranged while RIPPO was in custody (2 ROA 376-384). At the hearing of the Motion the State conceded that the testimony concerning the prior sexual assault was not admissible as follows:

> "MR. SEATON: Judge, we have already spoken to the defense counsel, maybe even the Court in chambers, and indicated that we were not going to put

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in the prior bad act to which the defense is referring. We don't mind the granting of the motion.

THE COURT: All right. We'll grant the motion" (4 ROA 758).

Thus the record was established the prosecution could not get into the prior sexual assault, yet went ahead and did so intentionally. The failure of objection is patently a 6th Amendment violation when considered in light of the comments of trial counsel Wolfson at the hearing of the Motion to Exclude Prior Bad Acts:

"The State's position is that there is a similarity between the acts. They do not go into any kind of detail, but our position, that we feel very strongly about, is that the prejudicial effect of the admission of that evidence, although it may be similar and might be arguable relevant, far outweighs its probative value.

We're talking about conviction for a violent act that occurred many years ago, and we think that the prejudicial effect far outweighs whatever probative value it may have, and we ask you to grant that motion." (4 ROA 758)

Trial counsel's own words thus establishes prejudice suffered by RIPPO from the admission of the improper testimony.

c. *Failure to object to the prosecutor's reference to RIPPO'S post-arrest silence in closing argument.*

During closing argument at the trial the prosecutor attacked the failure of RIPPO to present testimony that he was somewhere else. Clearly this was a reference to the failure of RIPPO to take the stand on his own behalf. The improper argument was as follows:

"I'm talking about Mr. Rippo having the

opportunity to kill them -- to commit the murder. The opportunity was there, plain and simple. And interestingly, there had been no testimony that he was some place else.

The only person who tells us where he was on February the 18th, 1992, is Diana Hunt.

MR. WOLFSON: Judge, excuse me. I'm going to interpose an objection and ask to be heard at the bench.

THE COURT: You may." (21 ROA 59).

.....

"You haven't heard any witness come into this courtroom, take the oath and sit down there and say Michael Beaudoin told me that he did it. You haven't heard any witness come in here and say Tom Sims told me that he did it; or any of the other names that you've heard. There has been no indication in this case at all except what we have shown here. (Indicating)

And, ladies and gentlemen, this more clearly than anything tells us who committed these killings. That man right there, (indicating), that man named Michael Rippo, is the man who did the unthinkable, the most violent kinds of acts that we can imagine. He did those things and he needs to be told by you that he is guilty of them" (21 ROA 95).

At the ensuing break the defense made a motion for a mistrial based on the shifting of the burden of proof and the motion was denied by the Court (21 ROA 96-97; 98). No objection was made and no motion for mistrial lodged by trial counsel on the comment on RIPPO'S silence. Besides shifting the burden of proof to the defense the comments of the prosecutor implicitly commented on the fact that RIPPO did not take the stand and tell the jury who committed the murder and where he was at when the murder occurred.

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The prosecution is forbidden at trial to comment upon a defendant's election to remain silent following his arrest and after being advised of his rights as required by Miranda v. Arizona, 384 U.S. 436 (1966); Neal v. State, 106 Nev. 23, 787 P.2d 764 (1980). See, Doyle v. Ohio, 426 U.S. 610 (1976). This court has held that an attack on a defendant's silence delivered as merely an innocuous, passing comment during closing argument is not necessarily error. Fernandez v. State, 81 Nev. 276, 402 P.2d 38 (1965). However the Court in Fernandez carefully drew a distinction between a comment (whether direct or indirect) on the defendant's failure to testify and a reference to evidence or testimony that stands uncontradicted, stating

> "Paraphrasing Griffin [v. California, 85 S.Ct. 1229], what the jury may infer given no help from the Court (or prosecution) is one thing. What they may infer when the court (or prosecution) solemnizes the silence of the accused into evidence against him is quite another. Permitting such comment imposes a penalty for exercising a constitutional privilege. The dividing line must be approached with caution and conscience."

Fernandez, 81 Nev. at 279.

This issue was raised on direct appeal even though no specific objection was made by trial counsel. The Nevada Supreme Court found the comment to be an improper shifting of the burden of proof, but did not find that the comment violated the Fifth Amendment. RIPPO urges that the failure to object on Fifth Amendment grounds caused the Court to give short shrift to the issue and denied him from having the comment's propriety

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reviewed by the District Court who heard the comment in the context of the prosecutor's argument.

d. *Failure to object to an unconstitutional reasonable doubt instruction.*

The instruction given was the definition contained in NRS 175.211. "A formulation which essentially equates the standard of reasonable doubt with the standard of proof beyond a reasonable doubt necessarily violated due process by 'suggesting a higher degree of doubt than is required for acquittal under the reasonable doubt standard.' See, *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); cf. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Lord v. State*, 107 Nev. 28, 806 P.2d 548 (1991).

The language in the reasonable doubt instruction given in this case, *sub judice*, imposes an impermissibly high standard for the quantum of doubt required for acquittal. The 'govern or control' language especially exceeds the 'common sense benchmark' for doubt expounded upon by the United States Supreme Court. See, *Victor v. Nebraska*, 511U.S. 1, 114 S.Ct. 1239, 1250, 127 L.Ed.2d 583 (1994).

e. *Failure to investigate and properly cross-examine the coroner concerning the alleged stun gun marks which allowed the prosecutor to argue their presence during closing argument to the detriment of RIPPO.*

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At the grand jury one of the jurors inquired of coroner Sheldon Green whether he was familiar with stun guns and whether they would leave any external marks. Green explained that indeed the use of a stun gun would leave a pair of brown burn marks and that he found no such marks on either Lizzi or Jacobson. (6 ROA 224-225). Green further testified in response to questions from a juror that the marks would stay on a dead body and would still leave a burn mark even if applied through clothing (6 ROA 228). At trial, counsel only asked the coroner whether he found any stun gun marks on either victim, to which Green stated he had not (17 ROA 130). No questions were asked about the effect of clothing or passage of time.

As a result of trial counsel failing to fully develop the absence of stun gun marks and Green's opinion that the burn marks would appear even through clothing, during final closing argument the prosecutor was able to argue as follows:

> "Ladies and gentlemen, I simply want to point out that with the use of that stun gun, and with the number of things testified to by Miss Hunt, there are many variables. Simple because Dr. Green didn't find the physical evidence, simply because Analysts Norman and Cabrales did not perceive the evidence, doesn't mean that the accomplice testimony was a lie.
>
> Regarding the stun gun, which isn't magical at all -- but if the battery -- and I think it was Arndt who said it was a Nova brand, black, about seven inches by four inches, had two prongs which make contact with the skin and two prongs angled to carry the current of 50,000 volt capability, but it works off a nine volt battery -- and so one of the variables would be how sufficiently the battery was charged on February the 18th, 1992.

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> And regarding Lauri Jacobson in particular, another variable would be what I shall describe as the clothing factor.
>
> She was fully dressed, except for being in stocking feet at the scene. What is the effect of the stun gun -- and no one knows whether it was fully charged or partially charged -- what is the effect going to be if it is pressed, not against the skin, but against clothing?
>
> There may be an electrical charge, there may be a current, but does it leave a mark on the body?
>
> Well, the stun gun wasn't retained by the police. It wasn't tested. Not that perhaps anyone at the crime lab would have wanted to be a guinea pig to have had the stun gun tested on their bare backs or legs or arms" (3/5/96 p. 217)

The absence of marks severely impeached the testimony of Diana Hunt, the State's star witness. The absence of stun gun marks made her story completely unbelievable, especially when taken with other inconsistencies in the physical evidence. RIPPO was prejudiced by the failure of his attorneys to take advantage of the testimony elicited by a grand juror. The prosecutor was allowed to completely mislead the jurors on this matter due to the failure of trial counsel to effectively develop the testimony.

RIPPO was even further prejudiced by the failure of trial counsel to diffuse the stun gun claim as the Nevada Supreme Court relied upon the use of the stun gun to uphold the validity of the finding of torture as an aggravating circumstance. In fact the Court went so far as to describe the incident as being "accompanied by the frightful, multiple blasts with a painful high voltage stun gun". If the point had

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been made that there should have been marks if there were multiple blasts with a high voltage stun gun, and that there were none, despite the State's low battery through clothing theory, the finding of the Nevada Supreme Court on this issue would have likely been different.

f. *Called as a witness prosecutor John Lukens, who had a well known bias against RIPPO and who had been removed from the case due to his conduct.*

Lukens testimony was prejudicial to RIPPO and introduced improper evidence and Lukens' opinions into the case.

g. *During cross-examination of State's witness David Levine trial counsel elicited testimony that opened the door to highly inflammatory and prejudicial evidence of threats on Levine's life.*

On direct appeal RIPPO attacked the use of testimony of threats to witnesses as being improper, prejudicial bad act testimony. The testimony was a violation of the 14th Amendment right to Due Process and a fair trial and should not have been admitted.

The sequence of questions and answers were as follows:

"Q Why were you in a psychiatric facility?

A They put me in there 'cause -- for protection.

Q Protection from what?

A Probably because of some threats were made on me.

Q For what reason?

A For this trial.

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Q Because you were going to come in and testify?

A Yes.

Q Because you were going to come in and testify as you are today or as a character witness or an alibi witness?

A I was going to come in and testify as I was going to testify today.

Q And threats were made upon your life while you were in jail?

A Yes.

MR. WOLFSON: Objection; hearsay; beyond this witness' personal knowledge. We don't know how he knows.

BY MR. SEATON: Anybody ever threaten you?

THE COURT: Sustained.

THE WITNESS: Yes

BY MR SEATON: Directly?

A A couple times.

Q To your face?

A Well, from a distance.

Q You heard it though?

A Yeah.

Q Okay.

A So did some of the staff members.

Q And the staff members heard it as well?

A Yes.

Q And then you went into the psychiatric facility?

A Yes. And when I was in there, they stopped me from going to the gym because some of the threats were made; and when the staff overheard it, they --

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MR. WOLFSON: I'm going to object. This is hearsay.

THE COURT: Sustained.

MR. SEATON: That's all right, Judge." (19 ROA 173-176).

Generally, references to threats or danger to prosecution witnesses are improper unless admissible testimony is offered connecting the defendant with the threats or danger. United States v. Rios, 611 F.2d 1335 (10th Cir. 1979). In Rios, supra, the Court found that evidence showing that a witness was in protective custody and an innuendo that the defendant was a threat was prejudicial error. In United States v. Peak, 498 F.2d 1337, 1339 (1974) the Court found that implication during argument that the defendant was a threat to the prosecutor and the police was reversible error, even though the comment was stricken from the record and jury admonished.

> "While it may be acceptable for the prosecution to make remarks in rebuttal which imply coercion under circumstances in which the jury has before it evidence of intimidation or coercion, a proposition about which we make no decision at this time, such intimations are not proper when there is not a scintilla of evidence to substantiate the implication."

United States v. Hayward, 420 F.2d 142, 147 (D.C. Cir. 1969). See also, Hall v. United States, 419 F.2d 582 (5th Cir. 1969). This Court has followed the precedent set by the federal courts on this issue and found the admission of witness intimidation or threats to be reversible error unless the prosecutor also produces substantial credible evidence that the defendant was the source of the intimidation. Lay v. State, 110 Nev. 1189,

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886 P.2d 448 (1994).

Unfortunately for RIPPO the testimony was initially elicited by his own attorney, thereby opening the door for the State to delve into the matter and dooming the issue on direct appeal. On direct appeal the Nevada Supreme Court stated:

> "RIPPO'S counsel opened the door when, on cross-examination, he asked Levine about his confinement at the psychiatric facility and the reasons he was housed there. In an apparent attempt to portray Levine as mentally unstable, defense counsel elicited information that Levine had been threatened. Therefore, we conclude that the district attorney properly explored the testimony given during cross-examination and questioned Levine in an effort to rehabilitate his credibility."

Rippo, 113 Nev. at 1253.

RIPPO was denied a fair trial by his own attorney opening the door to damaging trial testimony and such conduct was per se ineffective assistance of counsel.

h. *Failure to challenge the admission of the testimony of David Levine, Donald Hill and James Ison on the basis that they were acting as police agents in obtaining a confession from RIPPO.*

Throughout the police investigation of this case the authorities attempted to elicit inculpatory statements from RIPPO by a variety of means, including sending an acquaintance of his wearing a wire to see him in the jail. The improper tactics were also used with the jailhouse snitches and should have been suppressed.

David Levine contacted a police officer he knew in Reno

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that Levine used to snitch to and asked the officer for help in getting out of prison in exchange for information on RIPPO. Levine told the police that RIPPO used his name on outgoing mail to Alice Starr and then the prison staff confirmed it. On this information, the State secured a search warrant for Starr's home and did so with a sealed affidavit, which indicated they didn't want to compromise Levine's undercover role. The State went to Levine and solicited him to obtain statements from RIPPO. Levine was therefore acting as a police agent interrogating RIPPO on their behalf. His entire testimony should have been the subject of a Motion to Suppress.

Likewise, Hill, after initially contacting the police, was sent back to the prison in order to obtain additional information from RIPPO.

In Boehm v. State, 113 Nev. 910, 944 P.2d 269 (1997) the Nevada Supreme Court set forth the guidelines to be followed in determining if an improper custodial interrogation took place with an inmate agent of the State. The Court stated:

> "To determine whether custodial interrogation without prior warning in contravention of the Nevada Constitution has occurred, this court examines whether the suspect was (1) in custody, (2) being questioned by an agent of the police, and (3) subject to 'interrogation'. *See, Holyfield*, 101 Nev. at 789-99, 711 P.2d at 837. First, a suspect incarcerated on other charges is 'in custody' for purposes of the above test. *Id.* at 798., 711 P.2d at 837. Second, a fellow inmate agreeing to foster police efforts to inculpate the subject of the investigation qualifies as an 'agent of the police'. *Id* 711 P.2d at 837. Third, factors tending to indicate that questioning by a fellow inmate constitutes the 'functional equivalent' of express police interrogation, *see id.*

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> at 799, 711 P.2d at 838, citing Rhode Island v. Innis, 446 U.S. at 291, 300-01 (1980), occur where (a) the police deliberately place the interrogator next to the subject in the hope of gaining incriminating testimony, (b) interrogator and subject are previously acquainted, and © it is plausible that the subject will 'talk'"

Boehm, 113 Nev. at 913.

Reasonably effective trial counsel would have filed the appropriate motions to suppress the statements allegedly made to all of the jailhouse snitches and conducted discovery of records to establish the willfulness of the placement of the inmates with RIPPO both before and after the inmates had talked with the police.

i. Trial counsel inadequately prepared for and failed to competently cross-examine numerous witnesses during trial thereby prejudicing RIPPO'S defense:

(1) Deidre D'Amore.

Prior to trial RIPPO informed trial counsel that Deidre was his friend and that they should interview her and at trial elicit favorable character information from her. Counsel failed to do so and then totally destroyed any benefit from her testimony by continually confusing the names of the involved individuals and then eliciting unfavorable information from her.

If asked Deidre would have testified that RIPPO never indicated that he was guilty but rather was convinced that Hunt had murdered the two girls. Hunt also never accused RIPPO of having committed the murders but rather to Deidre that she

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thought someone else had done the crime, but never RIPPO. This information appears in D'Amore's statements to police, yet was never brought out during the cross-examination.

Adequate preparation would have uncovered all these important areas to pursue during cross and RIPPO was prejudiced by the failure to properly examine D'Amore on her knowledge of the case.

(2) Diane Hunt.

Trial counsel failed to thoroughly explore the contents of the initial statement to police on March 1, 1992 by Hunt. Most important, is the grievous failure to ask about that statement's final sentences. After some 37 pages of rambling discourse wherein Hunt denies knowledge about most anything, the interviewer finally asked something her:

> "Q Alright. Now you were telling me there was some other stuff that you think we should know because it proves that Mike Rippo did this murder?
>
> A No, I didn't say it proved that Mike Rippo did the murder.
>
> Q What did--
>
> A It proves that-- that I have been trying for two, almost two weeks to get in and talk to someone and tell them exactly what I was finding out, and I haven't been able to. Or I haven't-- or it hasn't happened. And I have been trying. Cause obviously everybody's thinking I have something-- or I don't know"

Trial counsel's failure to even at the very least just pull this one statement out of the statement and confront Hunt was not reasonably effective trial tactics. Only after Hunt was

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charged with the murders did she indicate that she allegedly was an eyewitness. During cross, counsel only mentioned her first statement four times and only elicited generalized information.

(3) Terry Perrilo.

Counsel should have asked her if Hunt ever claimed Rippo was a murderer or if Hunt feared him, to which Perrilo.

j. Counsel failed to introduce into evidence the last page of the transcription of the secret recording of Tom Christo's custodial interrogation of RIPPO upon which prosecutor William Hehn noted that there wasn't enough evidence to charge RIPPO with the murders.

In order to establish that the State went and solicited jailhouse snitches to fabricate testimony against RIPPO, trial counsel should have introduced into evidence the fact that without purchasing such testimony the State did not have a case against RIPPO. Attached hereto as an Exhibit is a copy of page 33 of the transcript of the secretly recorded Christos interrogation. On it prosecutor Hehn informs the police that they still do not have enough to charge RIPPO. It is at this point that the misconduct and creation of evidence begins in earnest with solicitation of inmates at the jail and prison in exchange for favors from the State. This information should not only have been presented to the jury, but also utilized in a an effort to suppress the alleged statements, as more fully discussed above.

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5. The performance of trial counsel during the penalty phase of the trial fell below the standard of reasonably effective counsel in the following respects:

a. *Failure to object to unconstitutional jury instructions at the penalty hearing that did not define and limit the use of character evidence by the jury.*

(See Claim Three hereinbelow)

b. *Failure to offer any jury instruction with RIPPO'S specific mitigating circumstances and failed to object to an instruction that only listed the statutory mitigators and failed to submit a special verdict form listing mitigatating circumstances found by the jury.*

(See Claim Four hereinbelow).

c. *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.*

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

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(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.

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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. Dugger, 481 US 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and Parker v. Dugger, 498 US 308, 111 S.Ct 731, 112 L.Ed.2d 812 (1991).

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

d. *Failure to object to improper closing argument at the penalty hearing.*

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

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

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In Evans v. State, 117 Nev. Ad. Op. 50 (2002) the Nevada Supreme 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"

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

e. *Trial counsel failed to move to strike two aggravating circumstances that were based on invalid convictions.*

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

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

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

6. ***Trial counsel failed to retain expert witnesses to testify on behalf of RIPPO and contradict the testimony from experts called by the State.***

Specifically counsel should have obtained the following experts:

a. *A forensic crime scene analyst to discuss the significance of collecting fingernail scrapings.*

b. *A forensic pathologist to discuss the alleged stun gun markings.*

c. *An expert on the motivations and relative credibility of inmate snitches.*

The failure to retain and present such witnesses doomed RIPPO'S chances of a favorable outcome and constitutes ineffective assistance of counsel.

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CLAIM TWO

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.

RIPPO herein asserts that overlapping and multiple use of the same facts as separate aggravating circumstances resulted in the arbitrary and capricious imposition of the death penalty. Trial counsel failed to file any pretrial motion challenging the aggravating circumstances as being overlapping, failed to object at the penalty hearing to the use of the aggravators, and failed to offer any jury instruction on the matter.

The original notice of intent to seek the death penalty filed by the State on June 30, 1992 alleged the presence of four aggravating circumstances, i.e., under sentence of imprisonment, previously convicted of a felony involving violence, committed during the commission a robbery, and torture or mutilation of the victim (1 ROA 7-8). The State filed an Amended Notice of Intent to Seek the death penalty on March 23, 1994 wherein the State added the aggravators of: committed during the commission of a burglary; and during the commission of a kidnapping (4 ROA 721-724). The Amended Notice was filed after the original two prosecutors were removed from the case. The jury at the conclusion of the penalty hearing

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found the presence of all six (6) aggravating circumstances (5 ROA 1041-1042)

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

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. See, Bockburger 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).

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

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

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

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Harris, 679 P.2d at 449.

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

It can be anticipated that the State will argue that any error that occurred as a result of the inappropriate stacking of the aggravating circumstances was harmless error in this case because of the existence of other valid aggravating circumstances. The Nevada statutory scheme has two components that would seem to foreclose the existence of harmless error at a penalty hearing. First the jury is required to proceed through a weighing process of aggravation versus mitigation and second, the jury has the discretion, even in the absence of mitigation to return with a life sentence irregardless of the number of aggravating circumstances. Who can say whether the numerical stacking of aggravating circumstances was the proverbial straw that broke the camel's back and tipped the scales of justice tempered by compassion in favor of the death penalty?

> "When there is a 'reasonable possibility that the erroneous submission of an aggravating circumstance tipped the scales in favor of the jury finding that the aggravating circumstances were 'sufficiently

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> substantial' to justify the imposition of the death penalty,' the test for prejudicial error has been met. (citation omitted) Because the jury arrived at a sentence of death based upon weighing . . . and it is impossible now to determine the amount of weight ascribed to each factor, we cannot hold the error of submitting both redundant aggravating circumstances to be harmless."

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

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

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

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

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CLAIM THREE

The instructions 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 and not based on valid weighing of aggravating and mitigating circumstances in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution.

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

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

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

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

> "The State has alleged that aggravating circumstances are present in this case.

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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

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

The jury may impose a sentence of death only if (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

Otherwise, the punishment imposed shall be imprisonment in the State Prison for life with or without the possibility of parole.

A mitigating circumstance itself need not be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any other juror or jurors. The entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances."

The jury was also told in Instruction 20 that:

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

The jury was never instructed that character evidence was not to be part of the weighing process to determine death eligibility or given any guidance as to how to treat the character evidence. The closing arguments of defense counsel

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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. Kemp, 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 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)."

Brooks, 762 F.2d at 1405.

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

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

Witter, 112 Nev. at 916.

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

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

Gallego, at 791. More recently the Court made crystal clear the manner to properly instruct the jury on use of character evidence:

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

Evans v. State, 117 Nev. Ad. Op. 50 (2001).

As the court failed to properly instruct the jury at the

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

CLAIM FOUR

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 not instructed on specific mitigating circumstances but rather only given the statutory list and the jury was not given a special verdict form 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.

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

In every criminal case a defendant is entitled to have the jury instructed on any theory of defense that the evidence discloses, however improbable the evidence supporting it may be. Allen v. State, 97 Nev. 394, 632 P.2d 1153 (1981); Williams v. State, 99 Nev. 530, 665 P.2d 260 (1983).

In Lockett v. Ohio, 438 US 586, 98 S.Ct 2954, 57 L.Ed. 2d 973 (1978) the Court held that in order to meet constitutional muster a penalty hearing scheme must allow consideration as a

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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. Dugger, 481 US 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and Parker v. Dugger, 498 US 308, 111 S.Ct 731, 112 L.Ed.2d 812 (1991).

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

1. Accomplice and participant Diana Hunt received favorable treatment and is already eligible for parole;

2. RIPPO came from a dysfunctional childhood;

3. RIPPO failed to receive proper treatment and counseling from the juvenile justice system;

4. RIPPO was certified as an adult and sent to adult

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prison because the State of Nevada discontinued a treatment facility of violent juvenile behaviors;

5. RIPPO was an emotionally disturbed child that needed long term treatment, which he never received;

6. RIPPO never committed a serious disciplinary offense while in prison, and is not a danger;

7. RIPPO worked well in prison and has been a leader to some of the other persons in prison;

8. RIPPO has demonstrated remorse;

9. RIPPO was under the influence of drugs at the time of the offense.

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

> "Murder of the First Degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:
>
> 1. The Defendant has no significant history of prior criminal activity.
>
> 2. The murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
>
> 3. The victim was a participant in the Defendant's criminal conduct or consented to the act.
>
> 4. The Defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.
>
> 5. The Defendant acted under duress or the domination of another person.

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6. The youth of the Defendant at the time of the crime.

7. Any other mitigating circumstances."

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

CLAIM FIVE

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.

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

The Nevada Supreme Court has held that due process requirements apply to a penalty hearing. In Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991) the Court held that due process requires notice of evidence to be presented at a penalty hearing and that one day's notice is not adequate. In the context of a penalty hearing to determine whether the

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defendant should be adjudged a habitual criminal the court has found that the interests of justice should guide the exercise of discretion by the trial court. Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990). In Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980), the United State Supreme Court held that state laws guaranteeing a defendant procedural rights at sentencing may create liberty interests protected against arbitrary deprivation by the due process clause of the Fourteenth Amendment. The procedures established by the Nevada statutory scheme and interpreted by this Court have therefore created a liberty interest in complying with the procedures and are protected by the Due Process clause.

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

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Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983).

The United States Supreme Court in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) held that the Eighth Amendment erects no per se bar to the admission of certain victim impact evidence during the sentencing phase of a capital case. The Court did acknowledge that victim impact evidence can be so unduly prejudicial as to render the sentencing proceeding fundamentally unfair and violate the Due Process Clause of the Fourteenth Amendment. Payne, 111 S.Ct at 2608, 115 L.Ed.2d at 735. In Homick v. State, 108 Nev. 127, 136-137, 825 P.2d 600, 606 (1992) this Court embraced the holding in Payne, and found that it comported fully with the intendment of the Nevada Constitution and declined to search for loftier heights in the Nevada Constitution. In cases subsequent to Homick, the Court has reaffirmed its position, finding that questions of admissibility of testimony during the penalty phase of a capital murder trial are largely left to the discretion of trial court. Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649 (1994). The Court has not however addressed the issue of presentation of cumulative victim impact evidence or been presented with a situation where the prosecution went beyond the scope of the order of the District Court restricting the presentation of the evidence.

Some State courts have voiced disapproval over the admission of any victim impact evidence at a capital sentencing hearing finding that such evidence is not relevant to prove any

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fact at issue or to establish the existence of an aggravating circumstance. State v. Guzek, 906 P.2d (Or. 1995). In considering a claim that victim impact testimony violated due process and resulting in a sentence imposed under the influence of passion, prejudice or other arbitrary factors, the Kansas Supreme Court in State v. Gideon, 894 P.2d 850, 864 (Kan. 1995) issued the following warning while affirming the sentence:

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

In the case at bar the State called five separate victim impact witnesses to testify over the objection of RIPPO. At the conclusion of the testimony RIPPO moved for a mistrial which was denied by the District Court. RIPPO also raised the issue on direct appeal on the basis that the testimony was cumulative and excessive. The Nevada Supreme Court denied the claim. The ruling in this case and others establishes that the Nevada Supreme Court puts no meaningful boundaries on victim impact testimony resulting in the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments.

CLAIM SIX

The stock jury instruction given in this case defining premeditation and deliberation necessary

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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, Sections 3, 6 and 8; Article IV, Section 21.

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

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

> "...To the extent that our criticism of the *Kazalyn* instruction in *Byford* means that the instruction was in effect to some degree erroneous, the error was not plain....
>
> Therefore, under *Byford*, no plain or constitutional error occurred here. Independently of *Byford*, however, Garner argues that the *Kazalyn* instruction caused constitutional error. We are unpersuaded by his arguments and conclude that giving the *Kazalyn* instruction was not constitutional error....
>
> ...Therefore, the required use of the *Byford* instruction applies only prospectively. Thus, with

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convictions predating *Byford*, neither the use of the *Kazalyn* instruction nor the failure to give instructions equivalent to those set forth in *Byford* provides grounds for relief."

Garner, 116 Nev. Ad. Op. 85 at 15.

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

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

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

CLAIM SEVEN

RIPPO'S conviction and sentence are invalid under the State and Federal Constitutional guarantee of due process, equal protection of the laws, and reliable sentence due to the failure of the Nevada Supreme Court to conduct fair and adequate appellate review. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

The Nevada Supreme Court's review of cases in which the

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

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

RIPPO also again hereby adopts and incorporates each and every claim and issue raised in his direct appeal as a substantive basis for relief in the Post Conviction Writ of

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Habeas Corpus based on the inadequate appellate review.

CLAIM EIGHT

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 I, Sections 3, 6 and 8; Article IV, Section 21.

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

The jury selection process in Clark County is subject to abuse and is not racially neutral in the manner in which the jury pool is selected. Use of a computer database compiled by the Department of Motor Vehicles, and or the election department results in exclusion of those persons that do not

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drive or vote, often members of the community of lesser income and minority status. The computer list from which the jury pool is drawn therefore excludes lower income individuals and does not represent a fair cross section of the community and systematically discriminates.

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

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

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thereby deprived RIPPO of a state created liberty interest and due process of law under the 14th Amendment.

CLAIM NINE

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.

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

In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980), the Supreme Court struck down a Georgia death sentence holding that the aggravating circumstance relied upon was vague and failed to provide sufficient guidance to allow a jury to distinguish between proper death penalty cases and non-death penalty cases. The Court held that under Georgia law, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 877, 103 S.Ct. at 2742.

Recent decisions of the United States Supreme Court

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

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

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

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

The factors listed in NRS 200.033, individually and in

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combination, fail to guide the sentencers discretion and create an impermissible risk of vaguely defined, arbitrarily and capriciously selected individuals upon whom death is imposed. It is difficult, if not impossible, under the factors of NRS 200.033 for the perpetrator of a First Degree Murder not to be eligible for the death penalty at the unbridled discretion of the prosecutor.

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

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

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

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

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

CLAIM TEN

Cumulative errors throughout the course of the proceedings have acted to deny RIPPO of Due Process of law and a fundamentally fair trial under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United State Constitution and the Constitution of the State of Nevada

Cumulative error has been long recognized as a viable

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basis for reversal of convictions. In Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986) the Court was confronted with a situation where neither one of two specified instances of error was sufficient to justify reversal yet the Court reversed the conviction stating:

> "The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial. Moreover, we note that the evidence against Sipsas was less than overwhelming on the question of whether Sipsas harbored the requisite intent to be convicted of first degree murder . . . In reviewing the record it is apparent that because of cumulative error, Sipsas was denied his constitutional right to a fair trial."

Other States are in accord with the reasoning of the Sipsas Court. The combined effect of the errors at trial prevented the defendant from receiving a fair trial, to which all defendants are entitled. People v. Reynolds, 575 P.2d 1286 (Colo. 1978); State v. Baker, 580 P.2d 1345 (KA 1978). Although each error standing alone may be harmless, the cumulative weight of the errors may create such an atmosphere of bias and prejudice so as to deprive the defendant of a fair trial. State v. Amorin, 574 P.2d 895 (HA 1978); Scott v. State, 257 So.2d 369 (Ala 1972).

This Court when reviewing the entire record of these proceedings and the errors and failures of counsel must find that RIPPO was denied a fundamentally fair trial and reverse this conviction and the sentence imposed.

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CONCLUSION

Based on the Points and Authorities herein contained, it is respectfully requested that the conviction and sentence of RIPPO be set aside and a new trial date set.

DATED this 7 day of August, 2002.

RESPECTFULLY SUBMITTED:

DAVID M. SCHIECK, ESQ.

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof. The pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

DATED: 8-07-02

MICHAEL RIPPO, #17097

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AFFIDAVIT OF MICHAEL RIPPO

STATE OF NEVADA)
) ss:
COUNTY OF WHITE PINE)

MICHAEL RIPPO, being first duly sworn, deposes and says:

I am the Petitioner in the instant matter and state the following to my own personal knowledge except where indicated to be on information and belief.

Private investigator Ralph Dyment only was appointed to investigate the case at the last minute. Mr. Dyment commented to me that he did not have adequate time to fully investigate the case prior to the trial starting. Prior to Mr. Dyment, an individual named Ed Wimberly was supposed to be my investigator, but to my knowledge he did nothing on the case and interviewed none of the witnesses that I gave to my attorneys. He did come to the jail to see me on one occasion that I recall and I gave him the names of a number of witnesses that I thought should be interviewed and called to testify at my trial.

When I talked with Wimberly, I also asked him to subpoena all the housing records for the snitches, specifically James Ison, David Meeker, Ray Stilson, David Levin and Donald Hill. To my knowledge none of these records were obtained to be used at trial to impeach these witnesses.

I was incarcerated in the Nevada Department of Prisons on a previous case while waiting to go to trial, and I would regularly correspond with my attorneys by mail and in the letters would tell them the names of witnesses that needed to be contacted and

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called as witnesses at trial. I had to correspond by mail because Mr. Wolfson did not come to Ely State Prison a single time to discuss the case and trial preparation with me and only saw me one time while I was in the custody of the Nevada Department of Prisons. He further failed to have be brought to the Clark County Detention Center so that there would be greater contact in preparation for trial.

Three of the State's witnesses were jailhouse snitches, David Levine, Donald Hill and James Ison who claimed that I confessed to them while we were in jail together. I provided the names of a number of witnesses that would have testified that they were present when these State witnesses were around me and that I had no such conversations with them and that they were not truthful. These witnesses included:

Mark Karigianes who was housed in a cell directly across from me and conversed with me frequently and would have testified that I did not say anything like Levine was claiming. In addition to Mr. Karigianes I had a list of names of witnesses that would discredit Levine and offered to provide them to Mr. Wolfson, however neither he nor the investigator asked for the full list.

Debbie Kingery had associated with Levine for period of months and would have been able to testify that Levine was not telling the truth about what I talked with him about.

Jimmy Yates was an inmate who was housed in PC with Levine and Levine told Yates that the only reason he was testifying

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against me was to get a parole and that he was lying about my confession. I met Yates in a segregation unit at Ely State Prison.

Martin Paris was another inmate witness who was in the jail with me and could have testified in rebuttal against the snitches. His name was give to Mr. Wolfson and he was never interviewed.

Steve Clark was also an inmate and willing to testify against the State's jailhouse witnesses. His name was given to Mr. Wolfson and he was never interviewed or called as a witness.

Valentino Franco was in hole with Don Hill. Hill told him that the only reason he was testifying against me was to get a parole. Hill also told the same thing to inmate Pat Trowbridge.

Further witnesses against Hill were Terry L. Conger and David Ray Bean. They were around Hill in Ely State Prison's law library and never heard me confess to him but did, in fact, hear Hill tell them he had a plan to get a parole. They also would have been able to testify that Hill was not well liked at Ely State Prison, nor trusted.

Other witnesses that I asked to be interviewed included:

Ricky Price, who could have testified that Diana Hunt lied in a number of areas during her testimony, including about her knowledge of Denny Mason and an occurrence of her being hog tied by me. She testified that in front of Ricky Price and Chris Lloyd I hog tied her and Ricky would have testified that it never happened. Additionally, Hunt had told Price and Lloyd that when

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she visited Mike Beaudoin at the Clark County Detention Center, he said that Denise Lizzi had ripped him of for 12 ounces of speed. This would have established a motive for Hunt to have committed the murders and this information was clearly an enticement to enlist Lloyd, Price, and myself in her crusade against Denise Lizzi. To my knowledge Price was never contacted and interviewed even though he was either in jail or on probation and could have been easily located. Police contacted Lloyd but no one from the defense team did.

Brenda Brummett was acquainted with both Mike Beaudoin and Diana Hunt. Hunt had told Brummett that someone other than me committed the murders. Hunt also had gone after her with a knife and Hunt had told her that she wanted to kick Denise Lizzi's ass and mess up her car.

Deirdre D'Amore is a friend of mine that let me stay at her place for a short while in February 1992. Hunt was with me. D'Amore did not like Hunt and on or about the 17th she asked me to tell Hunt to leave. On the morning of the 18th I did. After Hunt committed the murders on the 18th, she steadily fed D'Amore disinformation about who she thought did it but she never once told her it with me. She also expressed to D'Amore her dislike for Denise Lizzi and her desire to harm her.

Christine Ann Gibbons was my first girlfriend when I got out of prison in 1989, and we were together for about a year and half. She could have discredited much of what Hunt said about me.

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"defending" me and seemed only concerned with being paid. As a result of the ensuing 46 month wait spent mostly in the Nevada Department of Corrections, and in spite of the fact that I never confessed any culpability to anyone regarding the murders of Denise Lizzi and Lauri Jacobson, numerous jailhouse snitches surfaced because they were able to either get a look at my legal work or because of the publicity about my case in the newspapers and on television.

I gave Mr. Wolfson a legitimate way to strike two of the aggravating circumstances and he did not follow up on it. I have incontrovertible proof that my guilty plea in a prior conviction was invalid and it was that conviction that the two aggravators were based on. At one point in the pretrial stages of my case, Prosecutors Lukens and Lowry personally conducted a search of the home of my then alibi witness. Their conduct would have gone unchallenged had Mr. Dunleavy not threatened Mr. Wolfson with withdrawal.

Without my permission, Mr. Wolfson called prosecutor John Lukens as a witness for the defense. Mr. Lukens had an extreme dislike for me and had conducted himself in such an unprofessional manner while he was prosecuting my case and following Mr. Dunleavy's insistence that Mr. Wolfson challenge

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that conduct, the District Court disqualified him and prosecutor Teresa Lowry. When he got on the stand he used the opportunity to give improper opinions and to tell the jury inadmissible information about the case. I could not understand why Mr. Wolfson would call a prosecutor, especially one that clearly hated me, to testify on my behalf.

FURTHER, Affiant sayeth naught.

SIGNED UNDER PENALTY OF PERJURY
AT ELY STATE PRISON

Michael Ripp

MICHAEL RIPPO, NO. 17097

August 7, 2002.

RECEIPT OF COPY

RECEIPT OF A COPY of the foregoing document is hereby acknowledged this 8 day of August, 2002.

DISTRICT ATTORNEYS OFFICE

200 S. THIRD STREET
LAS VEGAS, NV 89155

David M. Schieck
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Mike Colby was a limousine driver friend of mine that could have testified to Hunt's bad character as well as the fact that I was out on the town with him and two women on March 14, 1992 and March 15, 1992, and that I had been up for three days and high on speed when I gave my statement to the police on March 15, 1992. This information should have formed the basis to suppress the statement because had I not been high, I never would have cooperated with police.

Carole Campanelli was told by Diana Hunt that she was going to kill me. She was never contacted or called as a witness.

Kim and Paula Crespin were potential character witnesses form me. They were not interviewed and were not called as witnesses at trial.

Cindy Garcia was at the Nevada Women's Correctional Center with Diana Hunt and I had reason to believe that Hunt might have confessed the truth to her. She would have testified to this and perhaps other information had she not been coerced by Tom Sims not to help me. She and Sims were friends. To the best of my knowledge she was not located, contacted or called as a witness.

Due to the failure of Mr. Wolfson to contact, interview and call my witnesses I sent him a letter terminating his representation prior to my sentencing. A copy of that letter is attached hereto as an Exhibit.

It was my desire to invoke my right to a speedy trial, however, Mr. Wolfson insisted that I waive it. At that point, he had yet to be fully paid the $60,000 he charged my mother for

MR\ippo-070116-1858

OPPS
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Clark County District Attorney
Nevada Bar #000477
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FILED
Oct 14 3 58 PM '02
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MICHAEL DAMON RIPPO,
#0619119

Defendant.

CASE NO: C106784

DEPT NO: XIV

STATE'S OPPOSITION TO DEFENDANT'S SUPPLEMENTAL POINTS & AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: 11-14-02
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through CLARK PETERSON, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's State's Opposition to Defendant's Supplemental Points & Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction).

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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STATEMENT OF CASE

On June 5, 1992, Michael Damon Rippo, hereinafter Defendant, was indicted by a Clark County Grand Jury for the crimes of Murder (Felony - NRS 200.010, 200.030), Robbery (Felony - NRS 200.380), Possession Stolen Vehicle (Felony - NRS 205.273), Possession of Credit Cards Without Cardholder's Consent (Felony - NRS 205.690), and Unauthorized Signing of Credit Card Transaction Document (Felony - NRS 205.750), committed at and within Clark County, on or between February 18, 1992, and February 20, 1992.

Notice of Intent to Seek the Death Penalty was filed on June 30, 1992, listing the following aggravating circumstances: 1) the murders were committed by a person under sentence of imprisonment; 2) the murders were committed by a person who was previously convicted of a felony involving the use or threat of violence to another person; 3) the murders were committed while the person was engaged in the commission of or an attempt to commit robbery; and 4) the murders involved torture, or the mutilation of the victim.

On July 6, 1992, the Honorable Gerard Bongiovanni continued the arraignment to July 20, 1992, on the grounds that Defendant had not yet received a copy of the Grand Jury transcript. On July 20, 1992, Defendant again appeared before Judge Bongiovanni and entered pleas of not guilty to all of the charges against him. Defendant waived his right to a speedy trial and upon agreement of both the State and Defendant, trial was scheduled for February 8, 1993. The Court also ordered that discovery would be provided by the District Attorney's Office.

On October 21, 1992, Defendant filed a Motion for Discovery and to Inspect all Evidence Favorable to Him. This Motion requested an Order requiring the State "to reveal, produce and permit Defendant to inspect and copy all information and material favorable to a defense of this cause (including all books, papers, records, documents and objects and all facts or information of whatever source or form in the possession of, or known to, the State or any of its agents), which material and information are or may become of benefit to Defendant, either on the merits of the case or on the question of credibility of witnesses."

Defendant further requested the State furnish Defendant with: 1) a list of witnesses known to the State to have knowledge of the cause favorable to the defense, and a copy of the statement of any such witness; 2) a list of persons interviewed by the State relating to the case but who will not be called as witnesses by the State; 3) all documents relating to the investigation of the case or of Defendant which will not be introduced into evidence by the State; 4) a list of former or present agents of the State who have participated to any extent in the investigation and prosecution of the case who will not be called as State's witnesses; 5) copies of all crime lab reports or memos; 6) copies of all autopsy toxicology reports; and 7) copies of all photographs including, but not limited to, video tapes, crime scene photos, autopsy photos and forensic photos.

On October 27, 1992, the State filed an Opposition to Defendant's Motion for Discovery and State's Motion for Reciprocal Discovery.

On November 4, 1992, Judge Bongiovanni held a hearing on the motions that had been filed. The State stipulated to the discovery, and agreed to stay with the District Attorney's open file policy to the extent that it complied with applicable state and federal law. After argument, Defendant's motion for discovery was granted.

On February 17, 1993, based on a change of trial date from February 1993, to September 13, 1993, the State filed a Motion to Expedite Trial Date or in the Alternative Transfer Case to Another Department. The affidavit in support of the motion stated that the continuance of 9 ½ months would cause undue hardship and prejudice to the State, that the State must subpoena approximately 30 witnesses for the prosecution of the case, some of the State's witnesses did not have substantial ties to the community and could become impossible to locate.

On August 23, 1993, Defendant filed a Motion to Strike Aggravating Circumstances Numbered 1 and 2 and for Specificity as to Aggravating Circumstance Number 4. Defendant argued that circumstances 1 and 2 should be stricken because the plea entered in the case utilized by the State to support the aggravating circumstances was illegal because the plea was not voluntary, and there was no factual basis for it. Defendant also requested the Court

require the State to be more specific in the statement as to what torture, or mutilation the evidence would show. The State's response to the motion was filed on February 14, 1993.

On August 23, 1993, Defendant filed a Motion in Limine to Exclude Testimony of Defendant's Prior Bad Acts. The State filed an opposition to the Motion on February 7, 1994.

On August 24, 1993, Defendant filed a Motion for Discovery of Institutional Records and Files Necessary to Rippo's Defense.

On September 2, 1993, Defendant filed an Alibi Notice stating that he would call Alice Starr as his alibi witness.

On September 10, 1993, a hearing was held before the Honorable Gerard Bongiovanni regarding the Motion to Continue Trial. After discussion, the trial was continued to February 14, 1994.

At a motion hearing on January 31, 1994, counsel for Defendant informed the Court that he had subpoenaed both of the Deputy District Attorneys prosecuting this case, John Lukens and Teresa Lowry. Mr. Dunleavy stated that the Deputy District Attorneys had conducted a search of Alice Starr's home pursuant to search warrant and that in the process of seizing items in the home, the attorneys became witnesses for the defense. Counsel for Defendant further argued that the entire District Attorney's Office should be disqualified from the prosecution of this case. The Court ordered that the motion be submitted in writing and supported by an affidavit.

On February 7, 1994, Defendant filed a Motion to Continue Trial. Grounds given for the motion included: the Deputy District Attorneys prosecuting the case had been subpoenaed by the defense and therefore both they and the District Attorney's Office should be disqualified from prosecuting the case; the defense needed to interview additional witnesses they had recently received discovery on; a trial conflict with one of Defendant's counsel; and unanswered motions. An affidavit by Steven Wolfson, counsel for Defendant, was included with the motion. Also filed on February 7, 1994, was a Motion to Disqualify the District Attorney's Office. That motion was supported by affidavits from one of

Defendant's counsel, Philip Dunleavy, and the alibi witness for Defendant, Alice Starr.

On February 14, 1994, the State filed its Opposition to Motion to Continue Trial and the State also filed a Response to Motion to Disqualify the District Attorney's Office and State's Motion to Quash Subpoenas. This motion was supported by an affidavit from Deputy District Attorney John Lukens.

On March 7, 1994, an evidentiary hearing was held regarding Defendant's Motion to Disqualify the District Attorney's Office. Deputy District Attorney Chris Owens represented the State. Two days later the motion to remove Chief Deputy District Attorney Lukens and Deputy District Attorney Lowry from the case was granted. The Court, however, refused to disqualify the entire District Attorney's Office and ordered the appointment of new District Attorneys. The Court was informed that Chief Deputy District Attorneys Dan Seaton and Mel Harmon were going to replace Lukens and Lowry on March 11, 1994.

A status hearing was held on March 18, 1994 and was continued on the basis of the State's request to amend the indictment and new discovery provided to the defense. The District Court denied the State's request to amend the indictment. The State filed for a Writ of Mandamus with this Court, which was granted on April 27, 1995. An amended indictment was filed on January 3, 1996, including felony murder and aiding and abetting.

Jury selection began on January 30, 1996 and the trial commenced on February 2, 1996. A continuance was granted for Defendant to interview witnesses from February 8, 1996, to February 20, 1996. The trial commenced again on February 26, 1996.

Final arguments were made on March 5, 1996 and guilty verdicts were returned on March 6, 1992, of two counts of first degree murder, and one count each of robbery and unauthorized use of a credit card. The penalty hearing was held from March 12, 1996 to March 14, 1996. The jury found the presence of all six aggravating factors and returned with a verdict of death.

On May 17, 1996, Defendant was sentenced to: Count I - Death; Count II - Death; Count III -Fifteen (15) years for Robbery to run consecutive to Counts I and II; and Count IV- Ten (10) years for Unauthorized Signing of Credit Card Transaction Document, to run

consecutive to Counts I, II, and III; and pay restitution in the amount of $7,490.00 and an Administrative Assessment Fee. Judgment of Conviction was filed on May 31, 1996.

A direct appeal to the Nevada Supreme Court was filed challenging the conviction and sentence and on October 1, 1997 an opinion was issued affirming the judgment of conviction and the sentence of death. Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997). A Petition for Rehearing was filed October 20, 1997, and an Order Denying Rehearing was filed February 9, 1998.

A Petition for Writ of Certiorari was filed with the United States Supreme Court and Certoriari was denied on October 5, 1998.

Defendant filed the instant petition on December 4, 1998 alleging (1) ineffective assistance of counsel; (2) there were overlapping aggravating circumstances in imposing the death penalty; (3) the penalty hearing failed to appraise the jury of the proper use of character evidence; (4) the jury was not instructed on specific mitigating circumstances; (5) the court failed to properly limit the introduction of victim impact testimony; (6) the jury instruction given regarding premeditation violated Defendant's constitutional rights; (7) the Nevada Supreme court did not conduct a fair and adequate appellate review; (8) there was not a demographic representation on the jury; (9) the court failed to narrow the categories of death eligible defendants; and (10) cumulative error violated Defendant's constitutional rights.

STATEMENT OF THE FACTS

On February 20, 1992, the bodies of Denise Lizzi and Lauri Jacobson were found in Jacobson's apartment at the Katie Arms Apartment Complex. The bodies were found by the apartment manager, Wayne Hooper.

On February 17 or 18, 1992, Hooper noticed Lauri Jacobson driving away from the apartment building in her black Datsun with a tire that was nearly flat. She was being followed by a red car. The red car belonged to Wendy Liston, who followed Jacobson to Discount Tire in her car and dropped her back off at her apartment. (10 ROA 92-94).

By February 20, 1992, Hooper became concerned about Jacobson because her car had

not been moved for some time and she had not paid her rent. Mr. Hooper decided to go up to the apartment and see what was going on. (10 ROA 101, 103, 122). Mac Holloway, the security guard at the building accompanied Mr. Hooper to the apartment. Hooper knocked a number of times on the door, and upon failing to get any response, used his master key to unlock the door. Upon entering, the apartment appeared to have been ransacked. (10 ROA 104-106). Hooper walked over to the bathroom and closet light switches and turned them on at the same time. Upon turning on the lights, he noticed the two bodies in the closet. The bodies were next to each other, lying face down. (10 ROA 106-107). Mr. Hooper left the apartment, informed his wife of the bodies and she called the police. (10 ROA 110).

Officer Darryl Johnson, along with his partner Officer Gosler, was the first responding officer to the scene. There, he met with the maintenance man and Hooper and after hearing what they had discovered, he entered the apartment. He also observed the two women lying face down in the closet area. (10 ROA 134-137). Homicide was then called to the scene as was Mercy Ambulance. The ambulance attendant checked the bodies for any signs of life, but did not move them or change their positions in any way. (10 ROA 140-141).

Crime scene analysts arrived on the scene and conducted an investigation. Allen Cabrales testified that when he arrived there were two victims, both lying face down on the floor in the closet. Analyst Cabrales detected no evidence of forced entry to the apartment. When found, Denise Lizzi was wearing only a pink pair of panties, a white sweatshirt, a black muscle shirt and a pair of white socks. Lauri Jacobson was wearing a white T-shirt, blue sweat pants and a pair of white socks. (16 ROA 85).

A Hamilton Beach iron was recovered from a trash bag in the kitchen area and a Clairol hair dryer was recovered from underneath the east day bed. Both of the appliances were missing their cords. Also recovered was a black leather strip found in a trashcan in the bathroom; a telephone cord found by the entertainment center in the living room; and two pieces of black shoelace found on the carpet below Denise Lizzi in the closet. Glass fragments were also recovered. They had been scattered about on the living room-kitchen

floor area. (16 ROA 97-123).

Dr. Green's testimony of Denise Lizzi's autopsy indicated that when she was found she had a gag placed in her mouth, which was a sock pushed into her mouth and secured by a black brassiere, which encircled her head. He further testified that there was evidence that restraints were used. Pieces of cloth were found tied around each of her wrists, each with one end free. (17 ROA 59-68).

Dr. Green testified that the gag had been pushed back so far into the mouth that at least part of it was actually underneath Lizzi's tongue and was pushing it towards the back of her throat, closing the epiglottis and blocking her airway. (17 ROA 66-68).

Lividity of the body indicated that Lizzi had been lying face down after death. Very early decomposition changes had begun taking place.

Lizzi's injuries included: scraping injuries of the skin of the forehead, on the chin, under the chin, and on her right cheek; cutting wounds of the neck; and lines from a two-wire lamp cord being wrapped around her neck. (17 ROA 74-77). The neck wounds were characterized as stab wounds of slightly less than half an inch long and fairly shallow. The wounds showed evidence of bleeding and were caused by an item with a fairly sharp point. (17 ROA 83). There were wrist and ankle ligature marks on the body. (17 ROA 86). She also had tiny pinpoint hemorrhages in the insides of her eyelids and on the white parts of her eyes. (17 ROA 74).

As to Lizzi's internal injuries, Dr. Green testified to finding a great deal of hemorrhage in the deeper tissues of the neck and ligaments, which controlled the voice box. (17 ROA 89). Dr. Green testified that the results were indicative of both manual and ligature strangulation. (17 ROA 91). He testified that it looked as though some effort had been made at manual strangulation and that the ligature strangulation probably came later on.

Lizzi's death was due to asphyxia, or lack of oxygen, which Dr. Green held could have come either from the gag or from the strangulation or both. Dr. Green was not able to testify as to whether the stab wounds or the ligature wounds occurred first. Both methamphetamine and amphetamine were found in Lizzi's system. Time of death was

determined to have been 36 to 48 hours earlier. (17 ROA 62-96).

As to Lauri Jacobson, Dr. Green testified that her state of decomposition was more advanced than that of Denise Lizzi. He found a scratch on her neck, which went from about the midline of the neck toward the left, and ended in a very superficial penetrating stab wound. There was bruising behind her right ear with a quarter inch V shaped penetrating stab wound about a quarter of an inch deep. There was a small penetrating stab wound underneath her chin in the middle of her neck, as well. There was also a two and a half inch scratch on her right forearm, which Dr. Green believed occurred after her death. (17 ROA 107).

The internal examination of Lauri indicated a great deal of hemorrhage in the soft tissues around the muscles in the neck, around the thyroid gland and the presence of a fracture of the cartilage, which formed the larynx. (17 ROA 112).

Dr. Green testified that the damage was consistent with manual strangulation. Death was due to asphyxiation due to the manual strangulation. (17 ROA 114). No drugs were identified in either her liver or kidneys. Dr. Green testified that it appeared that she had been dead longer than Lizzi but he could not be absolutely certain. No evidence of ligature marks was found on Lauri.

Linda Errichetto, Director of Laboratory Services for the Las Vegas Metropolitan Police Department Forensic Laboratory, testified that there was no evidence of sexual activity on either Lauri or Lizzi. (17 ROA 21-22).

Diana Hunt was arrested and charged with the killing and robbery of Denise Lizzi and Lauri Jacobson on April 21, 1992. (11 ROA 162). Ms. Hunt testified as part of a plea negotiation at the trial of Michael Rippo. (11 ROA 166). She described the events of the murder for the jury.

Ms. Hunt stated that she was Defendant's girlfriend at the time of the murders. They had lived together in a house on Gowan Road in Las Vegas for about three weeks, but at the time of the murders they had moved in with Deidre D'Amore. (11 ROA 30-31). Hunt testified that on February 17, 1992, Defendant had helped Lauri Jacobson move. (11 ROA

33).

On February 18, 1992, Defendant woke Hunt up in the morning and told her they had to go. (11 ROA 36-38). They went to the Katie Arms Apartments and found Lauri Jacobson at home alone. (11 ROA 40). Hunt testified that Defendant and Lauri Jacobson began injecting themselves with morphine.

Denise Lizzi arrived and Lauri briefly left the apartment to go outside and speak to her. (11 ROA 46). While Lauri was out of the apartment, Defendant closed the curtains and the window and asked Diana Hunt to give him the stun gun that was in her purse. Defendant then made a phone call. (11 ROA 47-49).

After a few minutes, Lauri and Lizzi returned to the apartment. Lizzi went into the bathroom and Lauri joined her. Defendant brought Diana Hunt a beer and told her that when Lauri answered the phone she should hit her with the bottle so that Defendant could rob Lizzi. When Hunt stated that she did not want to hit Lauri, Defendant told her to do as she was told. (11 ROA 51).

A few minutes later the phone rang. Lauri came out of the bathroom and answered the phone. Diana hit Lauri with the bottle and she fell to the floor in a daze. When Diana hit Lauri, Defendant went into the bathroom, where Lizzi was. (11 ROA 53-54).

After striking Lauri, Diana heard the stun gun going off and heard Defendant and Lizzi yelling. (11 ROA 55). Defendant was fighting with Lizzi and wrestled her across the hall into a big closet. Diana continued to hear the stun gun going off, so she ran to the closet where she observed that Defendant had wrestled Lizzi to the ground and he was sitting on her and stunning her with the stun gun. Diana told the Defendant to stop and he told her to shut up. (11 ROA 56).

Diana went back out into the living room and helped Lauri sit up. Defendant then emerged from the closet with a knife in his hand. Diana had never seen the knife before. Defendant used the knife to cut the cords off various appliances in the apartment. (11 ROA 58-60).

Defendant told Lauri to lie down. She argued with him but ended up complying.

Defendant instructed her to put her hands behind her back and tied them. He then tied her feet. Defendant put a purple bandana in her mouth and tied it around her head. (11 ROA 60-61).

Diana could hear Lizzi, still in the closet, crying. She went and looked in the closet and saw Defendant in there with Lizzi. He had tied her hands behind her back and was asking her lots of questions about where drugs were and other things. (11 ROA 62).

At that point, Wendy Liston approached the apartment. Defendant stuffed something in Lizzi's mouth to keep her quiet. Diana pleaded with Defendant to just leave the apartment, but he shoved her and told her not to tell him what to do. Diana was crying and Defendant put his hand over her mouth and told her to quit crying. Liston came to the door of the apartment and was knocking and yelling for Lauri. Lauri was still gagged and was unable to answer. (11 ROA 63-64).

After Liston left, Defendant's attitude changed. He said that he was sorry that he got out of control and said that if everyone cooperated everything would be alright. Defendant then walked out to where Lauri was lying bound on the floor and began stunning her with the stun gun. Diana attempted to get the stun gun away from him but ended up tripping over Lauri and falling. (11 ROA 64-68).

Defendant then took out another cord or belt-type object and put it through the ties on Lauri's feet and wrists and put it around her back which enabled him to pick her up like a suitcase and drag her across the floor. Defendant dragged her in that fashion across the floor to the closet. Lauri was choking as Defendant dragged her. (11 ROA 68-69).

Diana crawled across the floor and began throwing up in a trash bag. She heard a noise coming from the closet and went over to see what it was. She saw Defendant with his knee in the small of Lizzi's back, pulling on an object he had placed around her neck, choking her. (11 ROA 69). Defendant was pulling so hard that the whole front of Lizzi's body was up off of the ground and Defendant's arms were straining. Diana testified that the noise that Denise Lizzi was making was a noise that she had never heard the likes of, an animal noise. (11 ROA 69-70).

The next thing Diana was aware of was Defendant shaking her, telling her that they needed to go. Diana accused Defendant of choking the women and he told her that he had just cut off their air and that they had to hurry up and leave before they woke up. Both of the women were lying face down and they were both still tied up. Defendant instructed Diana to put everything into a gym bag he was holding. Defendant also wiped the apartment down with a rag. (11 ROA 70-73).

Diana and Defendant left the apartment and Defendant closed the door and locked the deadbolt lock. Defendant walked Diana to the Pinto they were driving and told her to stop crying and go home and wait for him. (11 ROA 79). He told her that nobody had gotten hurt and that nobody had to. Diana went to Deidre D'Amore's house in the Pinto. Diana testified that after hearing the noise made by Lizzi and seeing what happened, she knew that the women were not alive. (11 ROA 80-83).

Diana testified that at one point during the clean up of the apartment, Defendant went into the closet, took off Lizzi's boots, rolled her over, undid her pants and pulled them off. Diana asked Defendant what he was doing and he stated that he had bled on her pants and that he had to remove them. Defendant also untied Lauri's hands and feet before he left the apartment. (11 ROA 82).

Later that evening, Defendant called Diana at Deidre's house. He told her to meet him at his friend's shop and gave her directions. Diana then went to the shop, which belonged to Tom Sims. When she arrived, Defendant was there with Sims and another man. He told her that he had a car for her and showed her a maroon Nissan that she believed belonged to Denise Lizzi, although he did not tell her who it belonged to at the time. Defendant told her that he stole the car from some people who would be out of town and instructed her to get some paperwork for the car. Diana felt that she could get the paperwork from her friend, Tom Christos. (11 ROA 84-88).

On Defendant's orders, Diana drove the Nissan to Tom Christos' residence. (11 ROA 88).

On February 19, 1992, Diana met up with Defendant and they went to the Meadows

Mall. On the way, Defendant told Diana that he had purchased an air compressor and some tools on a credit card earlier that morning. They then went to a shop in the mall and purchased sunglasses. Defendant paid for the glasses using a gold Visa card. (11 ROA 90-92).

Later that day, back at Deidre's house, Diana went into Defendant's wallet when he was upstairs to take some money to get away from him because she was scared. (11 ROA 93-96). Diana was scared to call the police, as Defendant had threatened to kill Deidre and her little girl if Diana went to the police. Diana did not find any money in Defendant's wallet but she took a gold Visa card belonging to Denny Mason. (11 ROA 96).

Diana then went back to Christos' house where she was supposed to pick up the paperwork for the car, but the paperwork was not ready. However, it was Teresa's, Christos' girlfriend's, birthday, so she went out to celebrate with Diana. Because they were dressed up, they took the Nissan. (11 ROA 99).

They started to go back to Christos' after picking up the Nissan, but Teresa was crying and stated that he had been beating her and that she did not want to go back there. Instead of going home, they went to a bar named Marker Downs. They also went to the shopping mall. (11 ROA 101-102). Defendant had discovered that the card was missing and was calling around telling her to give it back. Diana told him that she would meet him at the mall to give the card back and that Defendant had to bring her some money. Defendant never showed up at the mall so Diana decided to use the card to purchase perfume for Teresa for her birthday. (11 ROA 102).

After leaving Marker Downs, Teresa and Diana went to another bar named Club Rock. (11 ROA 103). Diana called Christos from the bar and told her that Teresa was drunk and that she needed to bring her home. Christos was mad and told her that he did not want her back. Diana got a room at the Gold Coast and she and Teresa went back there with some people they had picked up at the bar. The room was paid for with Denny Mason's credit card. (11 ROA 104).

Sometime during the night with Teresa, Diana went to a friend's house and got some

spray paint. She got some primer and sprayed the front fender of the Nissan. While she was at the house where she got the paint, Diana heard that the murders had been discovered. She knew for sure then that she was driving Lizzi's car so she drove it to the Albertsons on Rainbow and left it there. (11 ROA 112-113).

Around February 29, 1992, with Deidre's help, Diana attempted to get in touch with Kyle Edwards of the Las Vegas Metropolitan Police Department. She got in touch with Edwards as Defendant was trying to get into Deidre's apartment. Defendant came into the house and Diana left. Either that same day or the next, Diana called back to Deidre's house and asked her if Defendant was there and Deidre said that he was not. Diana went over to the house to get the rest of her belongings and Defendant was waiting in the house for her. (11 ROA 115-118). As she got in her car to leave, Defendant got in also. Defendant refused to get out of the car and kept telling Diana not to leave. Diana started driving to a friend's house and Defendant told her that he wanted to kill a lot of people, including her and started telling her what he would do to her if she left. She suggested that they go to the police but Defendant said no. During the conversation, Defendant told her that he had cut the women's throats and had jumped up and down on them. He also described setting up the phone call to distract Lauri with his friend Alice. At one point, the car ran out of gas and Diana ran out of the car and flagged down the first car that came by. She went to the gas station up the road and called her friend Doug. When she got back to the car, some of the belongings were missing. (11 ROA 120-121).

Diana went to a home on Nelson Street owned by her friend Brenda's uncle. Defendant later showed up at the residence. Diana did not expect him and did not want to see him again. (11 ROA 154-155). Diana and Defendant had a confrontation outside of the residence. Defendant began yelling at Diana and she yelled back that he had killed those girls and that she could prove it. Defendant ran around the front of Deidre's truck that he had driven and began punching Diana in the face. Others, including Michael Beaudoin and Brenda were present for the fight. Defendant continued to hit Diana in the face and then began stunning her with the stun gun. (11 ROA 159). Defendant then began choking Diana

and banging her head. When Diana became aware that she was passing out she looked at Michael Beaudoin and told him that she could prove it. With that, Beaudoin pulled Defendant off of her. Diana suffered black eyes and a split lip. The police arrived but Defendant had run away. (11 ROA 159-161).

Diana gave a statement to the police later the next morning. Out of fear for her safety, she did not tell the officers what she knew about the murders. She informed the officers that she was leaving town for Yerington, Nevada. She was arrested in Yerington on April 21, 1992. Pursuant to a plea negotiation, Diana pled guilty to robbery and received a fifteen-year sentence. In return, she agreed to cooperate with the prosecution in this case. (11 ROA 162-168).

Diana told the jury that before the murders Defendant had been upset with Lauri and Lizzi for burning him in a drug deal. She further testified that prior to the murders Defendant had used her to demonstrate to his friends how to restrain someone by tying her hands and feet with a karate belt.

Tom Christos corroborated Diana's claims that she had gone to him regarding altering the color and acquiring paperwork for a maroon 300ZX. He further testified that on February 20, 1992, Defendant called his house looking for Diana. Defendant left a message for Diana that "The cat is out of the bag."

Michael Beaudoin testified that he had met with Defendant, who showed him Lizzi's empty wallet and one of her garage openers. He also stated that on February 29, Defendant was fighting with Diana, punching her and stunning her.

David Levine, a friend of Defendant's in jail, testified that he had a lot of conversations with Defendant while they were in jail together. (19 ROA 145). Defendant told him that he had killed the two girls. At one point, Defendant wrapped a sheet around the veins in his arm, and then wrapped a three pronged extension cord around his arm and tapped his veins. Defendant stated that was how he "did" Lizzi. (19 ROA 150-153)

Denny Mason testified at the trial that Denise Lizzi was his girlfriend off and on for four or five years. (16 ROA 38). He testified that about a week before the murders he gave

Lizzi his credit card to buy some things for his house. (16 ROA 48-49). When shown charge slips, he could not account for charges on his bill to: SunTeleGuide, Gold Coast Hotel and Casino; The Sunglasses Company; 7-Eleven; and Texaco, Inc. He could also not account for charges made on his Dillards Card on Feb. 19, 1992. (16 ROA 59-61). Mason further testified that the charge slip from Sears was not in the handwriting of Denise Lizzi.

Tom Sims testified that Defendant showed up at his shop on February 18, 1992 with the maroon Nissan. Defendant offered to sell the car to Sims. (14 ROA 28-30). When Sims asked about the ownership of the car, Defendant told him that someone had died for it. (14 ROA 32). Sims told Defendant that he wanted nothing to do with the car and to get it away from his shop. (14 ROA 33).

Sims testified that Defendant left his shop and the car for a period of time and returned with Diana Hunt. (14 ROA 41). Defendant had a great deal of money with him that he said he had obtained by winning a royal flush. Sims told Defendant that he wanted the car gone by the next morning and it was. (14 ROA 42).

On February 21, 1992, Sims heard a report that two women had been killed and one of them was named Denise Lizzi. This struck Sims because Defendant had given Sims tapes with the initials D.L. on them. Sims then became suspicious and looked at a suitcase Defendant had left with him. The nametag on the suitcase indicated that it belonged to Lauri Jacobson. (14 ROA 36-37; 46-47).

Sims next came into contact with Defendant on February 26, 1992, when Defendant called and asked to come by and pick up some morphine that he had left in Sims' refrigerator. (14 ROA 49-50). Sims did not want to meet with Defendant at his shop, so he met him in a Kmart parking lot. (14 ROA 55-56). When Sims asked about the murders, Defendant confessed to them. Defendant told Sims that he had choked those two bitches to death. He added that he had killed the first one accidentally so he had to kill the other. (14 ROA 56-57).

Defendant also told Sims that as he was carrying one of the girls into the back her face hit the coffee table. He informed Sims that Diana Hunt had been with him at the

apartment. Sims asked Defendant if he thought he could trust Diana and Defendant replied that Diana had hit one with a bottle and he trusted her. (14 ROA 57-58).

Sims asked Defendant why one of the girls had been found without pants on and Defendant replied that he had bled on the girl during the murders and bled on her pants so he had to dispose of them. Defendant told Sims that the girls were both "fine" and that he could have fucked both of them but he did not, which meant that he was cured. (14 ROA 61-63).

Carlos Caipa, an employee of Sears, testified that in February, 1992, he was employed in the hardware department at Sears. He identified Defendant as the man who purchased a compressor, sander, spray gun, and couplings, all with extended warranties, with Denise Lizzi's credit card. (18 ROA 176-183). He stated that the name on the card was Denise Lizzi and the signature on the card was that of Denny Mason. (18 ROA 184-185).

William Leaver, questioned document examiner with the Las Vegas Metropolitan Police Department testified that he had examined documents identified to The Sunglasses Company and Sears signed D. Mason. He stated that there were similarities between the signatures on the slips and the known writing of Defendant. (19 ROA 14-16).

The jury found Defendant guilty of two counts of first-degree murder, and one count each of robbery and unauthorized use of a credit card.

During the penalty hearing, numerous witnesses came forward to testify about the Defendant's past criminal conduct and about the effect the murder of these two girls had on the family and friends.

Laura Conrady testified about her brutal rape at the hands of Defendant in January 1982. She told the jury that she was awakened with a knife to her throat and Defendant sitting on top of her. (22 ROA 42-43). Laura clearly identified Defendant as the man who assaulted her. Defendant was wearing gloves and in one hand was the butcher knife and the other was over her mouth. Defendant asked her where her money was but she did not have any. (22 ROA 45-46).

At some point, Defendant tied up Laura's hands with her bathrobe tie and her feet with cords that she believed Defendant cut off of her vacuum cleaner. (22 ROA 47-48).

When Laura asked Defendant who he was and how he got there, he hit her and told her to shut up. (12 ROA 48). Defendant cut the sweatshirt off of Laura with his knife by slitting it down the back. At that point, Laura was naked from the waist up, so she asked Defendant if she could put some clothes on. Defendant went to her drawer, threw everything out, and told her to put on a tube top that he found. (22 ROA 50-52). Soon after, Defendant cut off Laura's sweat pants. He asked her if "she wanted to fuck." (22 ROA 52). Laura testified that she got hysterical at that point and was begging Defendant not to do anything. Defendant laughed at her. (22 ROA 54). Defendant asked Laura if she had any scissors and she told him they were in the living room. Defendant got the scissors, placed Laura, still tied up, in a chair and cut off some of her hair.

Defendant then used the scissors to cut the cords off Laura's legs. At one point, Laura felt as though she was going to throw up. Defendant used a cord that he put around Laura's neck to drag her into the bathroom. Defendant then took Laura into the bedroom, told her that he wanted to fuck and put her on the bed. Defendant cut off her panties with the knife, spread her legs and said: "I want to fuck." Defendant pulled his pants down, got on top of Laura and raped her. Defendant penetrated Laura but did not ejaculate. (22 ROA 58-59).

After he was finished, Defendant got up and pulled Laura into the other room by her tube top. Defendant was touching her breasts in a sexual fashion as they walked into the living room. Defendant took Laura to a sofa and sat her down. He then cut off the tube top, gagged her with it and tied it in the back. Defendant took the knife and was going around her nipples with it. He told Laura that one time he cut a girl's nipples off, but she was already dead. Defendant also took a fountain pen and inserted it into Laura's vagina. (22 ROA 59-62).

As Laura became more upset, Defendant got more violent. He pushed her onto the floor face down and kicked her while she was on the ground. Laura was lying naked on the floor, in a crouched position and Defendant began to beat her with nunchucks. (22 ROA 62-66). Laura felt that she was about to pass out but felt that if she did, she was going to die. She worked the tube top out of her mouth and begged Defendant not to hurt her anymore.

Laura even offered Defendant her car if he would just leave.

Defendant told Laura that he could not leave because she knew what he looked like. As he said this, Laura noticed that Defendant was pointing the knife at her back. Laura said that she would not tell anyone and Defendant told her that if she did, he would come back and kill her. (22 ROA 66).

Sometime during the attack, Defendant unwound wire hangers to make them into a long piece. He wrapped them around Laura's neck and was pulling on them. Laura could not breathe and felt as though she was going to die. (22 ROA 67).

Laura told Defendant where her car keys were and he went and got them. Defendant left and Laura went to the kitchen and cut her bindings off. She went and got her robe and tried to use the phone, which did not work. Laura then went and got help from a neighbor. (22 ROA 67-70).

As a result of the attack, Laura received fifteen stitches behind her ear, a concussion, black, swollen eyes and a huge bump on her leg that might have been the result of a bone chip. Laura never went back to the apartment. She testified that even to this day, she is never alone, and watches carefully over her children. (22 ROA 74-75).

Jack Hardin testified about his investigation of the burglary of a Radio Shack in 1981. (22 ROA 109). He told the jury about receiving a tip that identified the suspects as Defendant and another individual. Hardin responded to the address belonging to the other individual's father. As Hardin introduced himself to Mr. Stevenson, the father, the boys (Defendant and the other individual) were tipped off about the officers' presence and fled. Officers pursued the boys and they were apprehended. Inside the residence, Officer Hardin found a great deal of computers and property belonging to Radio Shack. Also recovered was a .22 caliber blue steel Luger, a .22 caliber Luger revolver; a .357 Luger and a .25 caliber Bauer. (22 ROA 110-115).

Defendant was eventually booked for three counts of burglary and two counts of possession of stolen property. At a plea hearing, Defendant admitted committing the burglaries. The losses sustained by the businesses involved were in the amounts of

$10,186.84 and $3,142.27. (22 ROA 119-120). Defendant was committed to Spring Mountain Youth Camp on April 29, 1981 and released on August 26, 1981. (22 ROA 136).

John Hunt testified that on December 18, 1981, he was called to the home of JoAnne Pinther based on her report that her son had information about burglaries in the area, including one at her own home. The boys questioned by Officer Hunt told him about a person dealing in stolen property and that he received it from Defendant and another boy. Defendant was a runaway at the time, so officers went to the other boy's home to investigate. Inside the attic of that home officers found two rifles, a shotgun and four handguns. The other boy in the burglaries implicated the Defendant.

On January 20, 1982, Defendant was in juvenile custody for a different charge and was served with the burglary warrants. Defendant admitted to the burglaries but refused to cooperate with the officers.

The reason Defendant was in custody on January 20, 1982, was because he had been arrested outside the home of Katherine Smith on January 18, 1982. (23 ROA 10-11). Defendant was waving a handgun around and trying to gain entry into Ms. Smith's home. (23 ROA 28).

Other witnesses were presented for information on Defendant both by the State and by Defendant. Defendant also exercised his right of allocution. After all the witnesses were heard and closing statements, the jury returned verdicts of death, finding all six charged aggravating factors.

ARGUMENT

I. DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Defendant argues that he is entitled to an evidentiary hearing on the grounds of ineffective assistance of counsel. This claim is without merit. Pursuant to NRS 34.770(1), the judge or justice, upon review of the return, answer and all supporting documents, which are filed, shall determine whether an evidentiary hearing is required. A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations that, if true, would entitle him to relief unless the factual allegations are repelled by the record.

Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). However, "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); *citing* Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981). As evidenced by the arguments below, the State alleges that Defendant's claims for relief are without merit and belied by the record. As such, he is not entitled to an evidentiary hearing.

II. DEFENDANT WAS PROVIDED WITH EFFECTIVE ASSISTANCE OF COUNSEL (Defense Claim One)

Defendant's arguments that his Sixth and Fourteenth Amendment rights to effective assistance of counsel were violated are without merit. The Supreme Court has clearly established the appropriate test for determining whether a defendant received constitutionally defective assistance of counsel. To demonstrate ineffective assistance of counsel, a convicted defendant must show both that his counsel's performance was deficient, and that the deficient performance prejudiced his defense. Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). The Nevada Supreme Court has adopted this test articulated by the Supreme Court. Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995).

Counsel's performance is deficient where counsel made errors so serious that the adversarial process cannot be relied on as having produced a just result. Strickland, at 686. The proper standard for evaluating an attorney's performance is that of "reasonably effective assistance." Strickland, at 687. This evaluation is to be done in light of all the circumstances surrounding the trial. Id. The Supreme Court has created a strong presumption that defense counsel's actions are reasonably effective:

> Every effort [must be made] to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . .A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id at 689-690. "[S]trategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825

P.2d 593, 596 (1992). The Nevada Supreme Court has held that it is presumed counsel fully discharged his duties, and said presumption can only be overcome by strong and convincing proof to the contrary. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978).

It is not enough for a defendant to show deficient performance on the part of counsel; a defendant must also demonstrate that the deficient performance prejudiced the outcome of his case. Strickland v. Washington, 566 U.S. 668, 686, 104 S.Ct. 2052, 2065 (1984). In meeting the prejudice requirement of an ineffective assistance of counsel claim, a defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 401, 990 P.2d 1263, 1268 (1999) *citing* Strickland, 566 U.S. 668, 687, 104 S.Ct. 2052, 2066 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. *citing* Strickland, 466 U.S. at 687-89, 694.

In the present case, the Defendant alleges that defense counsel was ineffective in six ways: (1) for failing to declare a mistrial or proceed in a timely fashion to prepare and proceed during trial; (2) for failing to adequately investigate and confer with Defendant concerning his defense; (3) failing to expedite his trial; (4) failing to adequately represent him during trial; (5) failing to adequately represent him during the penalty hearing; and (6) failing to retain expert witnesses. However, as demonstrated below, Defendant fails to support any of his allegations.

A. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBTAIN A MISTRIAL AND HE ADEQUATELY PREPARED FOR TRIAL (Defense Claim One, Issue 1)

Defendant argues that defense counsel was ineffective for failing to obtain either a mistrial or to have been prepared to proceed against the new evidence in a more timely fashion. However, Defendant's argument is belied by the record. In fact, his trial counsel made two motions for mistrial—once after opening by the State and once again after cross-examination of Mr. Sims. Apparently Defendant now believes that he is not just entitled to a counsel that makes appropriate motions, but is entitled to a counsel that wins them.

It should be noted that Defendant raised this issue under a claim of a discovery

violation and the Nevada Supreme Court held that there was no discovery violation on the part of the State, as the statements were oral inculpatory statements, and that the continuance cured any prejudice the Defendant might have suffered. *See* Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997).

On February 8, 1996, following counsel's second mistrial motion, the district court heard arguments from defense counsel that the court should grant the Defendant a mistrial for the State's failure to convey Mr. Sims knowledge of an alleged suitcase, tape cassette, and confession by the Defendant. Trial Transcript, February 8, 1996, Volume I p. 9. Defense counsel argued that under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), and Giglio v. U.S., 405 U.S. 150, 92 S. Ct. 763 (1972), they were entitled to the State's evidence including the alleged confession, and that if the defense had known of this evidence, they would have changed not only their opening statement, cross-examine questions of Mr. Sims and other witnesses, but also the overall defense strategy and the structure of how the case was to be tried. However, the Court held that because Mr. Sims was going to testify either at this trial or the next, and in the sense of justice, the Court would allow the defense team twelve (12) days to obtain and interview certain witnesses regarding Mr. Sims' testimony. As such, trial counsel cannot be held incompetent for failing to obtain a mistrial when defense counsel argued and lost that motion in district court.

In addition, in order to achieve the best possible result for his client, defense counsel was given twelve days to locate addresses of witnesses from 1983, interview these witnesses and to investigate the alleged confession information revealed by Mr. Sims. Such a time period did not unduly prejudice the Defendant as the time only allowed defense counsel to become more prepared for trial. Further, if the court had not granted the Defendant the interruption in trial, Defendant would be arguing that defense counsel was negligent in not properly researching the confession given to him. Hence, this is a bare allegation, which does not warrant relief, Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984) as Defendant has failed to make a showing of what prejudice he received from the twelve day delay. Additionally, any prejudice was cured by the delay afforded to counsel as noted by the

Nevada Supreme Court in Rippo, *supra*, thus preventing Defendant from being able to demonstrate prejudice under a Strickland analysis.

B. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE EVERY POSSIBLE LEAD MENTIONED BY DEFENDANT (Defense Claim One, Issue 2)

Defendant argues that defense counsel was ineffective for failing to pursue evidence prior to trial. Defendant then proceeds to list a host of information he believes that defense counsel should have discovered and presented at trial.

An ineffective assistance of counsel claim premised upon a theory of a failure to investigate requires that "'[a] defendant who alleges [a] failure to investigate ... must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991) (*quoting* United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989). Furthermore, it is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989). In examining Defendant's numerous allegations of failures to investigate, the relevant inquiry is whether counsel's decisions were reasonable under the circumstances at the time the decision was made.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense to conclude that a particular act or omission of counsel as unreasonable.

Strickland, 466 U.S. at 689, 104 S.Ct. at 2065 (citing Engle v. Issac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-75 (1982)).

In the instant case, the Defendant lists a host of witnesses and evidence that should have been investigated that either (1) discredits the jailhouse snitches or (2) inculpates Diana Hunt in the murder of the two girls. However, Defendant fails to reveal how this evidence would have altered the outcome of the trial as: (1) Diana Hunt admits to being present at the time of the murders and to hitting Jacobson over the head with a beer bottle; (2) that she drove around in Jacobson's car and used stolen credit cards from that apartment; (3) that she

did not come forward with information regarding the murders until she was arrested; (4) that she was testifying as part of a plea negotiation; (5) the jailhouse snitches were not employed by the State; and (6) even if the jailhouse snitches had access to newspapers discussing the trial, there was no evidence in these papers that would confer what they testified the Defendant told them.

Defendant has compiled a laundry list of alleged evidence that would have aided him, but in the end it is just that—a laundry list. Defendant fails to provide any affidavits of the alleged witnesses (other than his own affidavit), newspaper clippings, or evidence supporting his contentions that if defense counsel had researched these leads, this information would have been discovered. These claims are nothing more than Defendant's speculation dressed up to look like real issues. However, because Defendant fails to make claims with specificity and demonstrate how this evidence would alter the outcome of the trial, his claims lack merit. Therefore, Defendant's argument is a bare allegation, which does not warrant relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

C. DEFENDANT'S DELAY DID NOT PREJUDICE HIM (Defense Claim One, Issue 3)

Defendant alleges that trial counsel was ineffective for waiving Defendant's right to a speedy trial and then allowing the trial to be delayed for 46 months. Namely, Defendant argues that this delay allowed a number of jailhouse snitches to come forward. However, defense counsel's actions with regard to obtaining continuances should be viewed as a "tactical" decision that is "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; *see also*, Howard v State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984). Here, defense counsel requested a continuance in order to adequately and properly prepare for Defendant's trial. It should be noted that defense counsel was faced with the daunting task of attempting to save the Defendant's life against the overwhelming evidence against him and defense counsel had numerous witnesses, documents, and evidence to investigate. It is not the fault of defense counsel that Defendant

was unable to keep quiet while in custody, granting the State with numerous jailhouse snitches. In addition, Defendant offers no evidence that these jailhouse snitches obtained their information after the issuance of the continuances were granted or that they would not have come forward if the trial had not been delayed. Further, Defendant has failed to establish how he was truly prejudiced by these continuances. Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. As such, Defendant's argument is a bare allegation, which does not warrant relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

D. COUNSEL WAS EFFECTIVE DURING THE TRIAL (Defense Claim One, Issue 4)

Defendant argues that he received ineffective assistance of counsel when his trial counsel failed to object to numerous episodes of prosecutorial misconduct during the guilt and penalty phases of the trial. Defendant has failed to demonstrate that his counsel was ineffective.

1. Prosecutorial Misconduct

> In addressing the issue of prosecutorial misconduct, the Supreme Court has stated,
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> > [A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.

United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). Inappropriate prosecutorial comments, standing alone do not warrant reversal of a criminal conviction if the proceedings were otherwise fair. United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). In order to reverse a conviction, the errors must be "of constitutional dimension and so egregious that they denied [the defendant] his fundamental right to a fair jury trial." Williams v. State, 113 Nev. 1008, 1018, 945 P.2d 438, 444 (1997), overruled on other grounds in Byford v. State, 116 Nev. Adv. Op. 23, 994 P.2d 700 (2000).

In order for a defendant to prove prosecutorial misconduct, he must show "that the remarks made by the prosecutor were 'patently prejudicial'." This standard of review is

based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). The defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054.

Defendant points to five alleged instances of prosecutorial misconduct which his attorney failed to object to. Each of these statements will be reviewed individually below.

A. Photograph of Defendant (Defense Claim One, Issue 4a)

Defendant alleges that defense counsel was ineffective for failing to object to the admittance of a picture of the Defendant while incarcerated. However, Defendant argues that this picture constitutes evidence of other criminal conduct that is not admissible to show that defendant is a bad person or has a propensity for committing crimes. This is simply not the case here. Introducing a picture of the Defendant does not consist of showing a prior criminal act or criminal conduct. It simply depicts how the Defendant looked on a certain day.

Further, defense counsel was not ineffective for failing to object to the admittance of the picture. Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; *see also* Howard v State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984). Here, the defense counsel may have thought that by objecting to the admittance of Defendant's prison photograph, he would draw more attention to how the Defendant looks in the picture compared to how he appeared in court. Defense Counsel believed that Defendant's clean-cut look in trial was all that mattered and that an objection to the admittance of the picture would only discredit Defendant's current appearance further. As such, defense counsel cannot be held ineffective for tactical decisions he made. Doleman, 112 Nev. at 846, 921 P.2d at 280.

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B. Prior Bad Acts (Defense Claim One, Issue 4b)

Defendant alleges that counsel was ineffective for failing to object to evidence regarding Defendant's statements to Mr. Sims that because both girls were fine and that he didn't take them, that he was cured. Defendant also objects to the State's reference of this quote in his closing statement. 14 ROA 62-63 and March 5, 1996, p.77. Essentially, the Defendant is arguing that because the State had agreed not to bring in evidence of Defendant's prior bad acts, they violated this agreement when they elicited this testimony from Mr. Sims. However, Defendant is mistaken. This statement made by Mr. Sims is neither a reference to Defendant's prior sexual assault nor his prior rape charge. Mr. Sims is merely relying the conversation he had with Defendant after the murders were committed as part of Defendant's confession. Neither the rape charge nor the sexual assault charge were ever brought to the attention of the jury during the trial. Hence, the State cannot be charged with committing prosecutorial misconduct in eliciting legal and logically relevant evidence. Further, defense counsel cannot be charged with failure to object to admissible evidence. As such, defense counsel was not ineffective and Defendant's allegations are nothing more than naked allegations belied by the record. *See* Hargrove v. State, 100 Nev. 498, 686 P.2d. 222 (1984).

C. State's Closing Argument Regarding Defendant's Silence (Defense Claim One, Issue 4c)

Defendant alleges that defense counsel was ineffective for failing to object to the State's closing statements regarding the lack of an alibi for the Defendant. However, Defendant's argument is belied by the record.

First, Defendant appears to be arguing that defense counsel was ineffective for failing to object to the State's argument based on Defendant's Fifth Amendment right not to testify. However, after the statement regarding Defendant's lack of alibi was made, defense counsel objected. At this point, both the State and the defense counsel approached the bench and discussed the defense's objection to the State's comment. There is no record of what argument defense counsel proffered in this sidebar and as such, Defendant's argument that

defense counsel used the wrong objection is nothing more than a bare naked allegation. *See* Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Further, defense counsel made a motion for a mistrial at the closing of State's closing remarks based on the State shifting the burden of proof. Both of defense counsel's arguments were rejected by the court.

Second, the court will not "second-guess an attorney's tactical decisions where they relate to trial strategy and are within the attorney's discretion." Davis v. State, 107 Nev. 600, 603, 817 P.2d 1169, 1171 (1991) (*citing* Wilson v. State, 99 Nev. 362, 372, 664 P.2d 328, 334 (1983) and Watkins v. State, 93 Nev. 100, 102, 560 P.2d 921, 922 (1977)). Clearly, defense counsel's ability to object and proffer an argument for that objection is considered a tactical decision that was within the sound discretion of defense counsel and therefore does not entitle Defendant to relief.

Finally, the State's comments were addressed on direct appeal. The Nevada Supreme Court held that the prosecutor made impermissible references to Rippo's failure to call any witnesses on his behalf and, in so doing, might have shifted the burden of proof to the defense. However, the error was harmless in light of the overwhelming evidence of guilt supporting Rippo's conviction. *Cf.* Morris v. State, 112 Nev. 260, 264, 913 P.2d 1264, 1267-68(1996) (improper comment by prosecutor on post-arrest silence of defendant does not require reversal if references are harmless beyond a reasonable doubt and such references will be considered harmless beyond a reasonable doubt if there is overwhelming evidence of guilt). As such, it is clear from the record that defense counsel attempted to do everything possible (i.e. objection, motion for mistrial, and appeal) in order to have the State's closing statements disregarded. Therefore, Defendant's argument is a bare allegation, which does not warrant relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Similarly, as harmless error, any failure by counsel cannot be said to have prejudiced the outcome of his case. *See* Strickland, *supra*.

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D. Failure to Challenge the Admissibility of Jailhouse Snitches (Defense Claim One, Issue 4h)

Defendant alleges that reasonable counsel would have filed appropriate motions to suppress the statements allegedly made to all of the jailhouse snitches. However, Defendant appears to argue prosecutorial misconduct on the part of the State for eliciting testimony from the Defendant while they claim he was being interrogated.

NRS 34.810 states:

> "1. The court shall dismiss a petition if the court determines that:
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief...."

A challenge of State conduct is an issue that should have been raised on a direct appeal. Accordingly, this issue is not cognizable in a petition for post-conviction relief and must be dismissed.

Further, even if Defendant was truly arguing ineffective assistance of counsel, judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Here, there was overwhelming evidence the Defendant had voluntarily given these jailhouse snitches information regarding his involvement in the murder of the two young women as evidenced from (1) there knowledge of the crime; (2) the fact that he sent mail out under another prisoner's name; and (3) that these snitches all contacted the State and where not sent in by the State to elicit the testimony. As such, Defendant's argument is nothing more than a bare naked allegation belied by the record. *See* Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

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E. Failed to Present evidence of the last page of the transcript of the secret recording of Tom Christo (Defense Claim One, Issue 4j)

Defendant alleges that defense counsel was negligent in failing to admit into evidence the last page of a secret recording of Tom Christo's custodial interrogation of the Defendant and the State's comment that they did not have enough evidence to convict the Defendant. Defendant blatantly accuses the State of improperly offering favors to jailhouse snitches in return for government favors. Not only is Defendant off keel in making such an accusation, but if such an accusation were to be made, Defendant should have raised it on his direct appeal. *See* NRS 34.810. Accordingly, this issue is not cognizable in a petition for post-conviction relief and must be dismissed.

Further, the document the Defendant refers to merely states that they cannot see the case getting any better without statements from other witnesses. See Petition Exhibit, page 33. Defense counsel was not ineffective for failing to admit this into evidence as such a written paragraph can be interrupted in different ways. Further, the written statement could have been considered inadmissible under the work-product exception. As such, the extent and manner of admitting into evidence is a strategic decision of defense counsel entitled to deference by a reviewing court. *See* Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

2. Counsel Was Effective During the Trial

A. Reasonable Doubt Instruction (Defense Claim One, Issue 4d)

Defendant argues that the reasonable doubt instruction given in his case creates a standard of proof that falls below the standard of proof required by the constitution. He cites to no valid authority to support his proposition that this instruction was unconstitutional and his argument is without merit.

Even if this court were to consider this claim, it is without merit. The Jury Instruction stated:

> The defendant is presumed innocent until the contrary is proved. The presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the

> crime charged and that the defendant is the person who committed the offense.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the defendant, he is entitled to a verdict of not guilty.
> [5 ROA 1192]

The reasonable doubt instruction given in Defendant's case is the exact language set forth by the Nevada Legislature in subsection 1 of NRS 175.211. The Nevada Supreme Court has determined that in Nevada the statutory definition is constitutional and a proper instruction. Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997).

Since this instruction was a proper statement of law, defense counsel was not ineffective for failing to object to this instruction during trial.

B. Failure to Investigate and Properly Cross-Examine the Coroner (Defense Claim One, Issue 4e)

Defendant argues that defense counsel should have done more investigation regarding the effects of the stun gun through clothing, which was a question raised by a juror at the grand jury hearing. Defendant contends that defense counsel's failure to do so allowed the State to argue that the clothing worn by the girls allowed the stun gun marks to not be shown. Defendant is mistaken in his argument.

First, Defendant bases his argument on an off-handed remark by the coroner at the grand jury hearing. Defendant has failed to offer any documented evidence or affidavits confirming the alleged information he claims defense counsel should have discovered. The law demands that Defendant must come forth with support for his allegations otherwise his demand for relief must be denied. *See* Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Second, the State argued that the marks were not seen on the body because of the low charge left in the battery of the stun gun. Third, there was overwhelming evidence of Defendant's

guilt within the trial that would negate any claims of the jury instructions lowering the State's burden or proof. Defendant cannot claim that the jury was fraudulently lead down the wrong path of deceit when: (1) Diana Hunt testified that she was present with the Defendant when the murder occurred and how it occurred; (2) Defendant confessed to Mr. Sims that he committed the murders; (3) he used Dennis Lizzi's boyfriend's credit card; (4) numerous jailhouse snitches testified to Defendant's confession with information only someone present at the scene of the crime would have known; (5) Defendant failed to establish an alibi; and (6) electrical cords were used to choke and tie up the victims which appears to be the Defendant's modus operandi. As such Defendant merely presents bare allegations and he is not entitled to relief.

C. Lukens Taking the Stand (Defense Claim One, Issue 4f)

Although Defendant claims his counsel was deficient for allowing Lukens to take the stand, he provides no factual or legal basis for such a challenge. (Petition p. 55). Defendant provides no indication of what argument should have been made or what legal grounds would have rendered Luken's testimony as irrelevant. Without such a factual assertion, this court should not speculate as to Defendant's claim and is unable to address such an issue. Hargrove v. State, 100 Nev. 498, 502-503, 686 P.2d 222 (1984).

D. Trial Counsel Opened the Door to Highly Inflammatory Statements (Defense Claim One, Issue 4g)

Defendant alleges that counsel was ineffective for eliciting testimony from Levine, one of the jailhouse snitches, that he was housed in a psychiatric ward. However, the court will not "second-guess an attorney's tactical decisions where they relate to trial strategy and are within the attorney's discretion." Davis v. State, 107 Nev. 600, 603, 817 P.2d 1169, 1171 (1991) (*citing* Wilson v. State, 99 Nev. 362, 372, 664 P.2d 328, 334 (1983) and Watkins v. State, 93 Nev. 100, 102, 560 P.2d 921, 922 (1977)). Defense counsel inquired into the location of where Mr. Levin was being housed in order to impeach Mr. Levine's testimony by making him appear instable. This was clearly a tactical decision that was within the sound

discretion of defense counsel and therefore does not entitle Defendant to relief.

E. Failure to Competently Cross-Examine Numerous Witnesses (Defense Claim One, Issue 4i)

The Defendant alleges that trial counsel failed to adequately cross-examine three witnesses – Deidre D'Amore, Diane Hunt, and Terry Perrilo. In his Petition, the Defendant devotes nearly two pages to impugning the character of the Hunt and supposed evidence of the other two witnesses. Among other accusations, the Defendant suggests that a rambled statement by Diane Hunt proves that she is guilty and that Perillo and D'Amore should have been asked directly whether they thought the Defendant was guilty.

However, other than broadly attacking the fact that Hunt rambled on in her police interview and that D'Amore and Perrilo may have thought the Defendant was innocent, the Defendant fails to allege any specific, material facts that trial counsel failed to elicit during his cross-examination. He also fails to explain how D'Amore and Perrilo's opinions would have been relevant to charges of First Degree Murder when neither of them witnessed the crime; where able to provide the Defendant with an alibi; and Diana Hunt was not on trial for First-Degree Murder. In short, the Defendant does not explain what "serious doubts" about the outcome of the trial would have been raised had defense counsel attacked these witnesses the way the Defendant would have liked. His allegations are nothing more than naked and unsubstantiated allegations belied by the record, and should be denied. Hargrove, 100 Nev. at 502.

Furthermore, the extent and manner of cross-examining a witness is a strategic decision of defense counsel entitled to deference by a reviewing court. *See* Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

E. TRIAL COUNSEL WAS EFFECTIVE DURING PENALTY PHASE (Defense Claim One, Issues 5 a through e)

Defendant alleges that trial counsel made five errors during the penalty phase that amounted to ineffective assistance of counsel. However, the record belies all of Defendant's

arguments.

First, Defendant argues that counsel was ineffective for failing to object to the jury instruction regarding character evidence. However, as discussed below in argument IV(A), penalty jury instructions seven and eight made it clear that the jury could not sentence Defendant to death based on character evidence presented during the penalty hearing. Further, the jury found six aggravating factors and found that these factors outweighed the mitigating circumstances. Thus, it is clear that the jury followed the instructions above. As such, the failure to instruct the jury that they could not consider character evidence prior to finding aggravating circumstances could be nothing more than harmless error, Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 826 (1967) and trial counsel was not ineffective for failing to object.

Second, Defendant argues that trial counsel was ineffective for failing to offer a jury instruction that stated the jurors could take into account evidence of other mitigating factors in addition to those listed in the statute. However, as stated in argument IV(c)(i), in Byford v. State, 994 P.2d 700, 715 (2000), the defendant claimed that the district court had erred in refusing to give the jury an instruction regarding specific mitigating factors. The Court explained that even if the District Court erred in not giving the instruction, it did not violate the eighth and fourteenth amendments pursuant to a Supreme Court decision in Buchanan v. Angelone, 522 U.S. 269, 275, 118 S.Ct. 757, 761 (1998) as the defendant had been given the opportunity to argue the additional mitigating factors during the penalty hearing. Id. As in Byford, Defendant's constitutional rights were not violated when the special jury instruction was not given. Further, instruction number sixteen indicated that the jury could consider any other mitigating factor. Trial Transcript, March 14, 1996, p. 90.

Third, Defendant contends that trial counsel was ineffective for failing to raise specific mitigating circumstances during closing arguments at the penalty hearing. However, as stated above, Defendant's constitutional rights were not violated and other mitigating circumstances were given for the jury to consider. Further, defense counsel talked about the

following; (1) that Defendant had an emotionally disturbed childhood; (2) that he got lost in the juvenile system; (3) that Defendant is a person who needs help which the prison system could provide; and (4) that he has kept a clean record history in prison (24 ROA 118-121). In addition, Defendant argues that defense counsel should have done an evaluation where the attorney placed the mitigating factors against each aggravating factor. A failure to make this specific type of argument is clearly a tactical decision that was within the sound discretion of defense counsel and therefore does not entitle Defendant to relief.

Fourth, Defendant argues that defense counsel failed to object to State's closing argument statement regarding "intestinal fortitude". Defendant relies on the Nevada Supreme Court's decision in Evans v. State, 117 Nev. Adv. Op. 50, 28 P.3d 498 (2001), to support his proposition. In Evans, while the Court did hold that such statements are excessive and unacceptable, they do not necessarily deprive the defendant of his right to a fair trial. Instead, the court held that the Defendant must present further evidence of prejudice against the defendant that would deny him of his fair trial. In Evans, the prosecutor followed this statement asking the jury to give the defendant the death sentence on factors other than the three types of evidence the jury is to consider, i.e. mitigating factors, aggravating factors, and any other matter which the court deems relevant to sentence. That was not the case here. The State closed his argument with the question to the jury asking whether or not they had the resolve to sentence the Defendant to death but did not use the statement to bolster evidence or prior criminal conduct on the part of the Defendant. As such, Defendant's reliance on this case is unfounded and counsel was not ineffective for failing to object during the State's closing statement.

Finally, Defendant argues that counsel was ineffective for failing to challenge two aggravating factors based on Defendant's 1982 conviction and sentence for sexual assault. However, at the time of the penalty hearing, there was no denying that Defendant was under a term of imprisonment and that the felony he was convicted of involved the use of threat to another person. Further, there is no evidence that Defendant's plea canvass was inadequate

nor were their any appeals, petitions, or affidavits before the Court or defense counsel that would suggest Defendant's prior conviction was invalid. As such, defense counsel was not ineffective for failing to challenge his plea canvass in his prior felony as defense counsel and Defendant's petition should be dismissed.

F. TRIAL COUNSEL FAILED TO RETAIN EXPERT WITNESSES TO TESTIFY ON BEHALF OF THE DEFENDANT (Defense Claim One, Issue 6)

In considering whether trial counsel has met the standard of effective assistance of counsel, the court should first determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); *citing*, Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once this decision is made, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280; *citing*, Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; *see also*, Howard v State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984).

Counsel is only charged with making reasonable investigations, where an investigation is unnecessary, counsel is not required to take further action. Strickland v. Washington, 466 U.S. 668, 690, 80 L.Ed.2d. 657 (1984). Further, a particular decision not to investigate may be based on counsel's reasonable decisions under the totality of the circumstances. Id. Here, as stated above, there was overwhelming evidence of the Defendant's guilt. As such, trial counsel made a tactical decision to focus on more relevant parts of the Defendant's trial rather than fingernail scrapings, alleged stun gun markings, or experts on the motivations of jailhouse snitches and their relative credibility. Moreover, based on Defendant's argument, there is absolutely no indication that these experts would have discovered any favorable evidence. The law demands that Defendant must come forth

with support for his allegations otherwise his demand for relief must be denied. *See* Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

III. THERE WERE NO OVERLAPPING AGGRAVATING CIRCUMSTANCES (Defense Claim Two)

In Claim Two, Defendant asserts his sentence is invalid under the State and Federal Constitution guarantee of due process because the jury was allowed to use overlapping aggravating circumstances in imposing the death penalty. Specifically, Defendant claims that it was improper for the State to use robbery, burglary and kidnapping as aggravating factors because they were all based on the same set of operative facts. Additionally, Defendant claims that using all three charges as aggravating factors violated the Double Jeopardy clause.

However, the Nevada Supreme Court has dismissed this argument. *See* Bennett v. State, 106 Nev. 135, 142, 787 P.2d 797, 801 (1990). In Bennett, the defendant argued that the State had improperly used burglary and robbery as two separate aggravating factors even though the charges arose out of the same indistinguishable course of conduct. Id. In disagreeing with the defendant, the Nevada Supreme Court reasoned that because the defendant could be prosecuted for both crimes separately and because convictions of both burglary and robbery do not violate the double jeopardy clause, as they are separate and distinct offenses they could both be used separately as aggravating factors. Id. *See also* Wilson v. State, 99 Nev. 362, 376, 664 P.2d 328, 336 (1983) (where the court found that any enumerated felonies that are committed during the course of a murder can be aggravating factors). Lastly, the Court held that if the legislature intended to prohibit the use of multiple aggravating circumstances in this context it would have provided accordingly.

Because it was not improper for the State to use robbery, burglary and kidnapping as aggravating factors, Defendant's due process rights were not violated and the aggravating circumstances given to the jury were constitutional. Since the aggravators were not improperly overlapping, Defense counsel cannot be said to be ineffective in not striking them. *See* Strickland, *supra*.

IV. DEFENDANT IS BARRED FROM RAISING CLAIMS THREE, FOUR, FIVE, SIX, AND EIGHT IN HIS PETITION AS THEY SHOULD HAVE BEEN RAISED ON APPEAL

NRS 34.810(1)(b)(2) states that the Court shall dismiss a petition for habeas corpus if the defendant's conviction was based on a trial and the grounds could have been raised in a direct appeal or a prior petition for writ of habeas corpus unless the court finds both good cause for failure to bring such issues previously and actual prejudice to the defendant. See NRS 34.810(1)(b). Good cause is "an impediment external to the defense which prevented [the petitioner] from complying with the state procedural rules." Crump v. Warden, 113 Nev. 293, 298, 934 P.2d 247, 252 (1997).

In the instant case, Defendant was convicted by a jury and subsequently raised fifteen issues in his direct appeal to the Supreme Court of Nevada. The Court disposed of each of Defendant's arguments. *See* Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997). Because NRS 34.810 is a rule of procedural default, Defendant has the burden of demonstrating good cause for failing to raise the present grounds for post-conviction relief in his earlier petition and the burden of establishing that he will suffer actual prejudice if the grounds are not considered. Crump, 113 Nev. at 302, 934 P.2d at 252. Claims three, four, six and eight are all grounds that Defendant should have raised on direct appeal. Defendant provides no explanation for not filing these issues on direct appeal. As such, he is barred from raising these claims in the instant petition.

However, even if this Court were to address the claims, which are procedurally barred, it would find no merit to their claims. The merits of these claims will be addressed below.

A. THE PENALTY HEARING DID NOT FAIL TO APPRAISE THE JURY OF THE PROPER USE OF CHARACTER EVIDENCE (Defense Claim Three)

In Claim Three, Defendant argues that the failure to properly apprise the jury of the use of character evidence in a penalty hearing violated his constitutional rights. As argued above, this issue is not properly before the court, as it was not raised on direct appeal.

However, even based on its merits this Defendant deserves no relief. The jury was given instructions seven and eight. They read as follows:

> 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 circumstances or circumstances found.
>
> The law never requires that a sentence of death be imposed; the jury however, may only consider the option of sentencing the Defendant to death where the State has established beyond a reasonable doubt that an aggravating circumstance or circumstances exist and the mitigating evidence is not sufficient to outweigh the aggravating circumstance.

Trial Transcript, March 14, 1996, p.83-85. These two jury instructions made it clear that the jury could not sentence Defendant to death based on character evidence presented during the penalty hearing. Further, the jury found six aggravating factors and found that these factors outweighed the mitigating circumstances. *See* Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997). Thus, it is clear that the jury followed the instructions above. As such, the failure to instruct the jury that they could not consider character evidence prior to finding aggravating circumstances could be nothing more than harmless error. Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 826 (1967).

B. THE COURT DID PROPERLY LIMIT VICTIM IMPACT TESTIMONY (Defense Claim Five)

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

In Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909 (1976), the United States Supreme Court upheld the constitutionality of death sentences when the sentencing authority (judge or jury) is guided by statutory standards. These standards require the judge or jury to consider specific aggravating circumstances and any mitigating circumstances. Most states, including Nevada, have imposed certain aggravating circumstances that must be proven by the

prosecution in order to avoid arbitrary and capricious sentencing. "The Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." Zant v. Stephens, 462 U.S. 682, 103 S. Ct. 2733 (1983). However, general references to an offense, as "especially heinous, atrocious or cruel" may be unconstitutionally vague. Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853 (1988). Accordingly, most statutes provide guidance as to what factors make an offense especially heinous: for example, torture, mutilation, and multiple killings. Here, the court provided the jury with multiple instructions as guided by the Nevada Revised Statutes.

Further, the Nevada Supreme Court has held that questions of admissibility of testimony during the penalty phase of a capital trial are largely left to the trial judge's discretion and will not be disturbed absent an abuse of discretion. Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649, 656 (1994). A jury considering the death penalty may consider victim-impact evidence as it relates to the victim's character and the emotional impact of the murder on the victim's family. Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991); Homick v. State, 108 Nev. 127, 136, 825 P.2d 600, 606 (1992); *see also* NRS 175.552. A victim can express an opinion regarding the defendant's sentence only in non-capital cases. Witter v. State, 112 Nev. 908, 922, 921 P.2d 886, 896 (1997).

In the instant case, five witnesses testified as to the character of the victims and the impact the victims' deaths had on the witnesses' lives and the lives of their families. The Nevada Supreme Court, on Defendant's direct appeal, concluded that each testimonial was individual in nature, and that the admission of the testimony was neither cumulative nor excessive. As such, the district court did not abuse its discretion in allowing all five witnesses to testify.

Three of the witnesses referred to the brutal nature of the crime. The State instructed the family members not to testify about how heinous the crimes were, and the district court apparently relied, in part, on these instructions in allowing the victim-impact testimony.

Thus, the testimony, insofar as it described the nature of the victims' deaths went beyond the boundaries set forth by the State. However, the fact that the murders were brutal certainly contributed to the emotional suffering of the victims' families. Therefore, the Nevada Supreme Court concluded that the statements were relevant to Defendant's moral culpability and blameworthiness. *See* Payne, 501 U.S. at 825, 111 S.Ct. at 2608; *see also* Atkins v. State, 112 Nev. 1122, 1136, 923 P.2d 1119, 1128 (1996) (prosecutor's statements that defendant "brutally murdered" and "savaged" the victim were proper to describe the impact of the crime on the victim and her family), *cert. denied,* 520 U.S. 1126, 117 S.Ct. 1267, 137 L.Ed.2d 346 (1997).

Finally, Defendant argues that other courts have examined the issue of cumulative victim impact statements and determined that these statements imposed sentences under influence of passion, prejudice, and other arbitrary factors. Defendant refers this Court to the Kansas Supreme Court decision in State v. Gideon, 894 P.2d 850 (Kan. 1995). However, not only is the Supreme Court of Kansas decisions not of persuasive authority here in Nevada, Gideon's argument was vastly different than the Defendant's argument.

In Gideon, the defendant argued to the Court that the victim family gave statements and did not testify as required.

C. THE DEFENDANT DOES NOT HAVE A CONSTITUTIONAL RIGHT TO A RACIALLY DIVERSE AND BALANCED JURY AND THUS COUNSEL DID NOT ERR IN FAILING TO REQUEST ONE (Defense Claim Six)

In Claim eight, Defendant, who is white, evidently believes that he has a Constitutional right to have a racially mixed jury that includes at least one member of the African American race or that of a minority. Further, Defendant alleges that the system in which Nevada selects it's jury pool violated Defendant's constitutional rights because the DMV list does not take into account those persons that do not drive nor does the court system follow up on people that skip out of jury duty. Essentially, Defendant appears to argue that any jury panel that does not conform to the standard of being racially mixed is per se unconstitutional even without a particularized showing of prejudice.

The Defendant's argument is incorrect. At best, a criminal defendant has the right to a jury that is selected in a nondiscriminatory, race-neutral manner. *See* Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Doyle v. State, 112 Nev. 879, 921 P.2d 901 (1996). He is not entitled to a jury having any particular, absolute racial composition. Simply put, there is no quota system for juries.

Moreover, "[t]o establish a prima facie case, the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." Doyle, 112 Nev. at 887. In this case, the Defendant is a white male who was tried before an all-white jury. He is a member of the same cognizable racial group that composed the entire jury and he has not alleged that any jurors were removed solely because of their race. Thus, the Defendant cannot even establish a prima facie case of discrimination, much less the kind of compelling case needed to demonstrate an equal protection or due process violation. Accordingly, his argument is totally without merit.

D. THE JURY INSTRUCTIONS WERE NOT FAULTY

Defendant is barred from raising claims that the instructions to the jury were improper. Failure to object to jury instructions or request special instructions precludes appellate review of the jury instructions. Etcheverry v. State, 107 Nev. 782, 784, 821 P.2d 350 (1991). In the instant case, Defendant failed to object to the jury instructions, which he now claims were improper. As such, he is precluded from raising these issues on appeal. Defendant attempts to get around this bar by couching his objections to the jury instructions in an ineffective assistance of counsel claim. Even addressed on their merits, Defendant's attorney was not improper in not objecting to the jury instructions discussed below.

1. The Jury Was Instructed On Specific Mitigating Circumstances (Defense Claim Four)

In Claim Four, Defendant claims that his eighth and fourteenth amendment rights were violated when the District Court did not give a jury instruction delineating the mitigating factors he claimed were present in addition to the statutory mitigating factors. This claim is

without merit.

In Byford v. State, 994 P.2d 700, 715 (2000), the defendant claimed that the district court had erred in refusing to give the jury an instruction regarding specific mitigating factors. The Court found that the defendant had not properly preserved the issue for appeal. Id. Further, the Court explained that even if the District Court erred in not giving the instruction, it did not violate the eighth and fourteenth amendments pursuant to a Supreme Court decision in Buchanan v. Angelone, 522 U.S. 269, 275, 118 S.Ct. 757, 761 (1998). The Nevada Supreme Court further explained that the defendant had been given the opportunity to argue the additional mitigating factors during the penalty hearing. Id. As in Byford, Defendant's constitutional rights were not violated when the special jury instruction was not given. Further, instruction number sixteen indicated that the jury could consider any other mitigating factor. Trial Transcript, March 14, 1996, p. 90.

Finally, this is an issue that the Defendant should have raised this issue on a direct appeal, and is therefore, an issue that is not cognizable in a petition for post-conviction relief and must be dismissed. *See* NRS 34.810(1)(b)(2).

2. The Jury Instruction Given Regarding Premeditation Did Not Violate Defendant's Constitutional Rights (Defense Claim Six)

In Claim Six, Defendant raises issues relating to the jury instruction on the concepts of premeditation and deliberation. He contends the jury was improperly instructed.

Defendant claims that the instruction failed to adequately define the terms "premeditation and deliberation."[1] At the time of Defendant's trial, the instruction given regarding premeditation and deliberation had been held proper. *See, e.g.*, Kazalyn v. State, 108 Nev. 67, 75-76, 825 P.2d 578, 583-584 (1992); Geary v. State, 112 Nev. 1434, 1439,

[1] The court instructed the jury as follows: "Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing. Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if a jury believes from the evidence that the act constituting the killing had been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder."

> 2. Whether or not the defendant or his counsel affirmatively waives the appeal, the sentence must be reviewed on the record by the supreme court, which shall consider, in a single proceeding in an appeal is taken:
>
> (a) Any errors enumerated by way of appeal;
>
> (b) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
> (c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
>
> (d) Whether the sentence of death is excessive, considering both the crime and the defendant.

The Nevada Supreme Court's order affirming Defendant's conviction and sentence of death filed on October 1, 1997 demonstrates that the Court did review Defendant's death sentence as required by NRS 177.055.

The Nevada Supreme Court addressed the issues presented by Defendant on appeal. *See* Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997). Defendant claims that the fact the Nevada Supreme Court failed to provide discussion on six of Defendant's appellate claims demonstrates that it did not comply with the requirement to address issues presented on appeal. This is belied by the record. See Hargrove v. State. In its order, the Nevada Supreme Court listed the six issues and stated, "We have reviewed each of these issues and conclude they lack merit." Id.

Further, Defendant argues that there was no indication by the Supreme Court that they gave his sentence the "mandatory review". However, in its order, the Nevada Supreme Court stated:

> NRS 177.055(2) requires this court to review whether the sentences of death were imposed under the influence of passion, prejudice, or any arbitrary factor, and whether the sentences are excessive considering both the crime and the defendant. The jury heard evidence relating to both aggravating and mitigating circumstances, finding five valid aggravating circumstances and no mitigating circumstances. We conclude that the sentences of death were not imposed under the influence of passion, prejudice, or any arbitrary factor, and that the sentences were not excessive considering both the crimes and the defendant. Therefore, we hold that the sentences of death were appropriate under NRS 177.055(2).

Id at 1265. The record indicates that the Supreme Court fully complied with the mandatory review of Defendant's death sentence. As such, Defendant's claim that his rights were violated is without merit.

VI. THE COURT DID NARROW THE CATEGORIES OF DEATH ELIGIBLE DEFENDANTS (Defense Claim Nine)

Defendant alleges that the Nevada statutory scheme does not narrow the class of murders that are eligible for the death penalty and that the decision is left to the prosecutors. Defendant relies on several cases is Georgia to support his proposition. Again, Defendant's arguments lack merit and must be denied.

As a preliminary matter, this is an issue that the Defendant should have raised this issue on a direct appeal, and is therefore, an issue that is not cognizable in a petition for post-conviction relief and must be dismissed. *See* NRS 34.810(1)(b)(2).

On the merits, however, the Court has clearly stated that Nevada's death sentencing procedure is constitutional. See, e.g., Colwell v. State, 112 Nev. 807, 811, 919 P.2d 403, 407-08 (1996); Nueschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985). Furthermore, a statute enacted by the legislature is presumptively constitutional, and anyone attacking the validity of a statute bears the burden of clearly demonstrating the statute is unconstitutional. Sun City Summerlin Community Ass'n v. State By and Through Dept. of Taxation, 113 Nev. 835, 944 P.2d 234 (1997); Skipper v. State, 110 Nev. 1031, 879 P.2d 732 (1994). Therefore, Defendant bears the burden of proving Nevada's death penalty statute is unconstitutional.

In his Petition, Defendant argued that the Nevada death penalty statutory scheme fails to narrow the categories of eligible defendants, thereby failing to honor the spirit of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976), and Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). However, the Georgia statute at issue in Gregg is virtually identical to the Nevada death penalty statute and that statute was held to properly narrow the category of eligible defendants.

This Court has recognized that "Nevada's capital punishment law was amended in 1977 with inconsequential revision from the death penalty statutes in Georgia and Florida. Georgia and Florida statutes survived constitutional scrutiny by the United States Supreme Court and satisfied the constitutional deficiencies enunciated in Furman." Greene v. State, 113 Nev. 157, 167, 931 P.2d 54, 64 (1997) (*citing* Gregg v. Georgia, 428 U.S. 153, 196-207, 96 S.Ct. 2909 (1976); Proffitt v. Florida, 428 U.S. 242, 251-253, 96 S.Ct. 2960 (1976); *accord* Ybarra v. State, 100 Nev. 167, 175, 679 P.2d 797, 802 (1984). Therefore, this issue should be dismissed for lack of merit.

VII. THERE WAS NO CUMULATIVE ERROR (Defense Claim Ten)

In Claim Ten, Defendant argues that cumulative error denied him a fair trial and as such, he is entitled to reversal of his conviction. Reversal, based on cumulative error, is proper if the aggregate effects of actual errors are the cause of an unfair trial to a criminal defendant. Libby v. State, 109 Nev. 905, 859 P.2d 1050 (1993); Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985); 110 Nev. 554, 566, 875 P.2d 361, 368 (1994). This court has held that instances of error, not materially prejudicial or egregious do not warrant reversal of a conviction. Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 300 (1999). In Leonard, defendant claimed several errors, including prosecutorial misconduct by witness vouching. Although this Court found the occurrence of misconduct by the prosecution, the court held it was not particularly egregious. Id. The absence of any substantial errors led the court to hold the defendant's claim for reversal for cumulative error was without merit. Id.

The Nevada Supreme Court has also held that although individual errors may be harmless, the cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial. Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994). But, no harmless error analysis is warranted where a defendant fails to show that any errors occurred. As Justice Gunderson put it in his dissenting opinion in LaPena v. State, 92 Nev. 1, 14, 544 P.2d 1187, 1195 (1976), "nothing plus nothing plus nothing is nothing."

Finally, relevant factors to consider in evaluating a claim of cumulative error include whether "'the issue of innocence or guilt is close, the quantity and character of the error, and

the gravity of the crime charged.'" Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1289 (1996) (*quoting* Big Pond, 101 Nev. at 3, 692 P.2d at 1289), *cert. denied*, 519 U.S. 1012, 117 S.Ct. 519 (1996); *see also* Lay v. State, 110 Nev. at 1199, 886 P.2d at 454. 18.

Here, Defendant has failed to make a proper showing for post-conviction relief on any of his claims, and therefore there can be no accumulation of errors sufficient to render his conviction constitutionally invalid. Since the decision of Defendant's guilt was not close, and there were no errors that were materially prejudicial to the Defendant, Defendant's cumulative error contention is without merit.

CONCLUSION

Based on the foregoing, this Court should deny the Defendant's petition for Writ of Habeas Corpus; find that the Defendant was given effective assistance of counsel and that none of his constitutional rights were violated.

DATED this 14th day of October, 2002.

Respectfully submitted,
STEWART L. BELL
Clark County District Attorney
Nevada Bar #000477

BY _____
CLARK PETERSON
Chief Deputy District Attorney
Nevada Bar #006088

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL DAMON RIPPO,

Defendant.

Case No. C106784
Dept. XIV

REPORTER'S TRANSCRIPT
OF
PRELIMINARY HEARING

BEFORE THE HONORABLE DONALD M. MOSLEY

DISTRICT JUDGE

Taken on Thursday, November 27, 2002

At 9:00 a.m.

APPEARANCES:

For the State: CLARK PETERSON, ESQ.
Deputy District Attorney

For the Defendant: DAVID M. SCHIECK, ESQ.

Reported by: Maureen Schorn, CCR No. 496, RPR

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CE

LAS VEGAS, NEVADA. THURSDAY, NOVEMBER 27, 2002, 9:00 A.M.

* * * *

THE COURT: C106784, State versus Michael Damon Rippo, R-i-p-p-o. The record will reflect the presence of Mr. Schieck representing the defendant. The absence of the defendant is noted. He is in the State prison.

Do you wish to waive his presence, Mr. Schieck?

MR. SCHIECK: Yes, please, Your Honor.

THE COURT: Mr. Peterson for the State. We did discuss this in chambers. We want a dual setting here. We want a status check in the first or second week in January, and we need a date for an evidentiary hearing approximately at the end of January.

THE CLERK: Status check date will be January 15th at 9:00 a.m.

THE COURT: And a Friday at the end of January for a hearing.

THE CLERK: Friday, February 1st, 10:00 a.m.

THE COURT: Thank you.

/ / /

/ / /

MR. SCHIECK: Thank you very much.

MR. PETERSON: Thank you, Your Honor.

ATTEST: Full, true and accurate transcript of proceedings.

MAUREEN SCHORN, CCR NO. 496, RPR

SUPP
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Attorney for Petitioner
MICHAEL DAMON RIPPO

FILED
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CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA Plaintiff, vs. MICHAEL DAMON RIPPO, Defendant.	CASE NO.: C106784 DEPT. NO.: XIV

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, the Defendant, MICHAEL DAMON RIPPO, by and through his counsel of record, CHRISTOPHER R. ORAM, ESQ. and does hereby submit his supplemental brief in support of Defendant's Writ of Habeas Corpus filed with this Honorable Court.

///

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This supplement is made and based upon the pleadings and papers on file herein, the foregoing Memorandum of Points and Authorities, and any oral argument adduced at the time of hearing.

DATED this 10 day of February, 2004.

Respectfully submitted by:

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I. STATEMENT OF THE CASE

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

RIPPO was indicted by the Clark County Grand Jury on June 5, 1992, on charges of Murder, Robbery, Possession of Stolen Vehicle, Possession of Credit Cards Without the Cardholder's Consent and Unauthorized Signing of Credit Card Transaction Document (1 ROA 1- 4) . RIPPO was arraigned on July 20, 1992, before the Honorable Gerard Bongiovanni and waived his right to a trial within sixty days (5 ROA 18-23) . Oral requests for discovery and reciprocal discovery were granted by the Court (5 ROA 18-23) . RIPPO'S formal Motion for Discovery was granted by the Court on November 4, 1992 (5 ROA 1113-1125).

Prior to the District Court arraignment, the State filed a Notice of Intent to Seek the Death Penalty alleging the existence of four aggravating circumstances, to wit: (1) the murders were committed by a person under a sentence of imprisonment; (2) the murders were committed by a person who had been previously convicted of a felony involving violence, (3) the murders were committed during the perpetration of a robbery, and (4) the murders involved torture or mutilation of the victims (1 ROA 7-8).

The trial date was continued several times, the first being at the request of defense counsel on February 5, 1993, due to a scheduling conflict and the case was reset for trial for September 13, 1993. On September 2, 1993, RIPPO filed a Notice of Alibi (2 ROA 284-286) . On September 10, 1993, the date set for the hearing of a number of pretrial motions the defense moved to continue the trial date based on having just received from prosecutor John Lukens, on

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September 7th, notice of the State's intent to use at least two new expert witnesses and a number of jail house snitches and discovery had not yet been provided on any of the new witnesses (2 ROA 295-306) . The Court granted the defense request to continue the trial date and same was reset to February 14, 1994 (2 ROA 304)

A status hearing on the trial date was held on January 31, 1994, at which time the defense indicated that subpoenas had been served on the two prosecutors on the case, John Lukens and Teresa Lowry, as they had participated in the service of a search warrant and had discovered evidence thereby making themselves witnesses in the case (2 ROA 323-326) . A Motion to Disqualify the District Attorney's office was thereupon filed along with a Motion to Continue the Trial (2 ROA 358-375; 351- 357). At the hearing of the Motions the Court continued the trial date to March 28, 1994, in order to allow time for an evidentiary hearing on the disqualification request and because the court's calendar would not accommodate the trial date (2 ROA 14-15).

The evidentiary hearing on the Motion to Disqualify the District Attorney's office was heard on March 7, 1994, and two days later the Court granted the motion and removed Lukens and Lowry from the case, but declined to disqualify the entire office and ordered that other district attorneys be assigned to the case (3 ROA 680-684) . Prosecutors Mel Harmon and Dan Seaton were assigned the case. At a status hearing on March 18th defense counsel indicated that they had just been provided with a substantial amount of discovery that had been previously withheld and that the State had filed a motion to Amend the Indictment and that therefore the defense was again put in the position of having to ask the Court to continue the trial date. The Court granted the motion and reset the trial date for October 24, 1994.

The October trial date was also vacated and reset based on representations made by the District Attorney at the calendar call on October 21, 1994 (4 ROA 828—829) . The date was

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reset for August and September, 1995, however due to conflicting trial schedules, the date was once again reset for January 29, 1996. On January 3, 1996 the State was allowed to file an Amended Indictment over the objection of RIPPO (4 ROA 847-849).

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

Guilty verdicts were returned on two counts of first degree murder, and one count each of robbery and unauthorized use of a credit card (5 ROA 1001) . The penalty hearing commenced on March 12, 1996 and concluded on March 14, 1996 with verdicts of death on both of the murder counts. On the remaining felony counts RIPPO was sentenced to a total of twenty-five (25) years consecutive to the murder counts (Minutes page 40).

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

II. STATEMENT OF THE FACTS

A. TRIAL TESTIMONY

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Lauri Jacobson moved into a studio apartment in the Katie Arms, a weekly rental complex, on February 8, 1992 (10 ROA 92- 94). Jacobson failed to make the rental payment that was due on the 15th of February. On the 17th or the 18th she was observed by apartment manager Wayne Hooper, driving her vehicle, a black Datsun, with a flat tire, followed by a red Camaro (10 ROA 96; 100).

On the 20th of February, Hooper became concerned because the overdue rent still hadn't been paid and Jacobson's car hadn't been moved for a couple of days and the keys were in the car, so he decided to check the apartment (10 ROA 101; 103; 122) . Hooper used his master key to get into the apartment which appeared to have been ransacked, with beer bottles on the floor, the phone laying in the middle of the floor with the receiver off the hook and clothes everywhere (10 ROA 104-106) After walking into the apartment Hooper observed two persons laying face down in the walk-in closet (10 ROA 106-107) . The police were then called (10 ROA 110)

Officer Darryl Johnson responded to the Katie Arms and, after meeting with the security officers and manager, proceeded up to the Jacobson apartment (10 ROA 134-137) . After observing two deceased females in the closet the homicide section was notified (10 ROA 140-141) . The two females were identified as Jacobson and her friend Denise Lizzi.

Crime scene analyst called to the scene made a number of observations. There was no evidence of forced entry into the apartment (16 ROA 85) . An iron was recovered from a trash bag in the kitchen and a hair dryer from underneath the east day bed (16 ROA 97) . The cords had been cut from both appliances (16 ROA 98) . Lizzi had a big piece of cloth tied to her left forearm and wrapped around her head and mouth was a piece of dark cloth (16 ROA 113) . No bindings were found on the body of Jacobson (16 ROA 114) . Fragments of brown glass were recovered from the floor area of the kitchen and living room (16 ROA 122—123).

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Crime scene analyst Cabrales learned that a number of police officers had entered and viewed the crime scene and evidence was developed that showed that the crime scene had been contaminated (16 ROA 137—138) . Cabrales prepared a memorandum stating that "Obviously, the crime scene was not protected and the integrity of all evidence recovered from the scene has been compromised" (16 ROA 138).

Denny Mason and Lizzi had been on and off boyfriend and girlfriend for four or five years (16 ROA 38). He had given Lizzi a Nissan 300ZX automobile (16 ROA 43), and about a week before she was found dead, let her use his Visa card to go shopping to buy some things for his house (16 ROA 48-49). Mason did not authorize anyone to make purchases from the Sungear Company (16 ROA 59) nor use the card at the Gold Coast from February 19th through the 21st (16 ROA 61) . Lizzi also had access to Mason's Dillard's card. To the best of his knowledge Mason had never met or heard of RIPPO (16 ROA 42).

Diana Hunt, who was originally arrested and charged as a co-defendant with RIPPO, was called by the State pursuant to her plea negotiations (11 ROA 164-166) . According to Hunt, she started dating RIPPO in January, 1992, and they lived together for a period to time in a house on Gowan Road (11 ROA 30; 31) As of February 17th they were living with Deidre D'Amore, a friend of RIPPO (11 ROA 32), and RIPPO told Hunt that he had been over to Jacobson's apartment helping her move (11 ROA 33;34). The following day, at about 9:00 a.m. RIPPO woke up Hunt and they then drove to the Katie Arms, to help Jacobson move (11 ROA 36—38) . After entering the apartment, Hunt sat on the couch and Jacobson and RIPPO were running around the apartment, laughing and doing drugs (11 ROA 40). Hunt observed RIPPO inject a substance into his arm and Jacobson to do the same into her left wrist (11 ROA 41).

Denise Lizzi arrived at the apartment complex and Jacobson went down and talked with

her for about twenty minutes (11 ROA 46). While Jacobson was downstairs, RIPPO closed the curtains and the window and asked Hunt for the stun gun that was in her purse, then made a telephone call (11 ROA 47-49). Denise and Jacobson came back into the apartment and went into the bathroom at which time RIPPO went into the kitchen and got a bottled beer and brought it to Hunt (11 ROA 51). When he handed her the beer, RIPPO told Hunt that "when Lauri answers the phone, I want you to hit her with the bottle so I can rob Denise." (11 ROA 51). A few minutes later the phone rang and when Lauri bent over to get the phone, Hunt hit her on the back of the head with the bottle (11 ROA 53). Lauri fell to the floor but wasn't knocked out (11 ROA 53-54).

Hunt, after hitting Lauri with the bottle, could hear the stun gun going off in the bathroom and RIPPO and Denise arguing (11 ROA 55). RIPPO wrestled Denise out of the bathroom and into a big closet across the hall (11 ROA 55). Hunt ran to the closet and observed RIPPO sitting on top of Denise and still stunning her with the stun gun (11 ROA 56). Hunt went back to where Lauri was located and helped her sit up and RIPPO came out of the closet with a knife in his hand and cut the cords off of appliances (11 ROA 58—59). The cords were then used to tie the hands and the feet of Lauri (11 ROA 60). A bandana was then used to gag her mouth (11 ROA 61).

Hunt went back and looked in the closet again and observed that Denise's hands and feet were tied and RIPPO was asking her all kinds of questions (11 ROA 62). RIPPO then put something inside of Denise's mouth and she fell over on her side (11 ROA 62). At that point in time someone came to the door of the apartment and was yelling for Lauri and after about five minutes left (11 ROA 63-64).

Hunt's story continued with RIPPO allegedly putting another cord between the ones on

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Lauri's hands and feet and picking her up and dragging her across the floor with it (11 ROA 68). Lauri was choking (11 ROA 68). Hunt threw up and then went and looked in the closet and saw RIPPO with his knee in the small of Denise's back with something around her neck and pulling real hard and choking her (11 ROA 69). RIPPO started grabbing all kinds of things putting them into a bag and told Hunt to clean up everything and put everything into the bag (11 ROA 71-72). RIPPO wiped down everything in the apartment (11 ROA 73). At one point RIPPO untied Denise's feet and removed her pants stating that he had bled on her pants (11 ROA 82).

When they left the apartment RIPPO had two bags with him and told Hunt to just go home and wait and that nobody got hurt (11 ROA 79). Later that evening RIPPO called and told her to meet him at a friend's shop (11 ROA 84). Hunt drove to the shop of Tom Sims and met RIPPO who told her that he had a car for her, which was a maroon Nissan (11 ROA 84-85). Hunt had a friend, Tom Christos, who could get paperwork on the car and RIPPO asked her to do so (11 ROA 86). She therefore drove the car over to Christos' house (11 ROA 88).

The following day RIPPO told her that he had purchased an air compressor and some tools at Service Merchandise that morning with a credit card (11 ROA 90-91). At the Meadows Mall, Hunt and RIPPO purchased two pair of sunglasses for $160.00 using a Gold Visa credit card (11 ROA 92-93; 12 ROA163). The credit card was presented and signed in the name of Denny Mason (12 ROA 173-174). Upon returning to Deidre's residence, Hunt got into RIPPO'S wallet because she wanted to get away from him and took the Visa card (11 ROA 93—96). The credit card was in the name of Denny Mason (11 ROA 96).

According to Hunt after stealing the credit card, she went to the residence of Christos and he told her to go get the maroon car (11 ROA 97-98). February 19, 1992 was the birthday of Teresa Perillo and she was living with her boyfriend Tom Christos at that time, and she

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complained to Hunt that Christos had been beating her and that she didn't want to go back to the house (11 ROA 99) . The two went to a shopping mall and on the way RIPPO beeped Hunt and he wanted the credit card back and arrangements were made to meet at the mall, but RIPPO did not show up (11 ROA 101-102) . While they were at the mall, Hunt bought cologne for Teresa (11 ROA 102), and the pair went to several bars (11 ROA 103) and then got a room at the Gold Coast using the Denny Mason credit card (11 ROA 104) . During the evening Hunt stopped at a friend's house and got some primer paint and sprayed the car because she knew it was stolen and wanted to change the appearance of the car (11 ROA 105).

On February 29th, Hunt called the police and told them that she knew something (11 ROA 112) . The next day RIPPO got into Hunt's Dodge Colt with her and as they were driving made statements to her about what would happen to her if she left and that he had gone back to the Jacobson apartment and cut the throats of the girls and jumped up and down on them (11 ROA 115-118) The car ran out of gas and Hunt jumped out of the car, leaving her belongings behind and ran down the street and called her friend (11 ROA 120) . After her friend picked her up, they went back to her car and her bag was missing from the car and the door was open (11 ROA 121).

In the early morning hours of March 1, 1992, Hunt had further contact with RIPPO at a house in North Las Vegas (11 ROA 154-155) . As RIPPO was getting out of his car he was saying that she had killed the two girls and he had proof (12 ROA 92). A confrontation occurred and Hunt yelled back that he had killed those girls and she could prove it, and RIPPO ran around the front of the car and started punching her in the face (11 ROA 156) . He also stunned her with the stun gun and when he got her down on the ground started choking her and banging her head into the pavement (11 ROA 159) . Other individuals pulled RIPPO off of Hunt and the police

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were called, but RIPPO left before the police arrived (11 ROA 159- 161).

Hunt was arrested for the killing and robbery of Lizzi and Jacobson on April 21, 1992 in Yerington, Nevada (11 ROA 162). On June 2, 1992, she entered in to a plea agreement whereby she wouldn't be prosecuted for the murders if she cooperated with the police and testified against RIPPO (11 ROA 166) . She pled guilty to robbery and was sentenced to fifteen years in prison (11 ROA 168) . Also part of the plea agreement was that Hunt would not be prosecuted for any other uncharged conduct, including credit card fraud, selling drugs and stealing cars (12 ROA 9). While in prison Hunt asked the District Attorney's Office to help her get reclassified to a minimum facility and such a letter was written by Deputy District Attorney Dan Seaton (12 ROA 105-106) . At the time of her testimony she had already been before the parole board and been denied parole (12 ROA 120).

Hunt had been in a mental hospital for eleven and a half months when she was 16 years old (12 ROA 14) . She had a tattoo on her arm with two lighting bolts and the letters SWP which stood for Supreme White Power (12 ROA 23) . Neither she nor RIPPO took a knife or gun to the apartment which is something Hunt thought they would bring along if they were planning to commit robbery or murder (12 ROA 58).

Teresa Perillo had lived with Tom Christos for about a year and was acquainted with Hunt through Hunt's cousin Carrie Burns (13 ROA 7-9) . On the way to the Mall, Hunt stopped at an apartment complex and removed the car cover from a maroon Nissan and stated that because it was Perillo's birthday she deserved to drive in a better car (13 ROA 10-12) . Hunt told her that she had repossessed the car from a bad drug deal (13 ROA 12) . They then went to Dillards in the mall and Hunt purchased perfume using a credit card (13 ROA 13). It was Hunt that rented the motel room at the Gold Coast (13 ROA 18) Sometime after their arrival at the

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Gold Coast, Hunt left to go to Perillo's residence to pick up a phone book that had some paperwork for the car in it (13 ROA 19). While Hunt was gone, Perillo checked the billing information on the television and observed that the name on the room was Denny Mason (13 ROA 20) Perillo also observed Hunt to have identification belonging to other persons with her, and remembered seeing the name Denise Lizzi (13 ROA 36) . At nine o'clock the following evening they took a gentleman that they had picked up at the Club Rock back to the bar and went to the house of a friend of Hunt's so that Hunt could purchase a gun (13 ROA 21) . There was no transaction for a gun, but Hunt did ask for primer paint so that she could change the appearance of the car (13 ROA 22). Hunt then took Perillo back to her residence and Perillo did not see Hunt again after February 20, 1992 (13 ROA 25-26).

RIPPO had called the house of Christos on the 20th in the early evening hours looking for Hunt and left a message with Christos that "the cat is out of the bag" (19 ROA 48-49). Hunt had previously talked with Christos about his experience with stolen vehicles and she had come to him looking for a way to get rid of the stolen car (19 ROA 52) . Christos wasn't surprised when she showed up on his doorstep with a stolen car (19 ROA 55).

Laurie Jacobson had worked at a bar called Tramps with Wendy Liston (13 ROA 43) . They had lived together in 1990 and 1991 (13 ROA 45) . When Laurie started doing drugs a rift arose between the two of them and Laurie was asked to move out (13 ROA 46-47). Liston was trying to get her off of drugs but Lizzi kept coming over and trying to get her to continue to use drugs (14 ROA 15) . Liston had met Lizzi on only couple of occasions (13 ROA 49) . Laurie would obtain her drugs from Lizzi or through a friend associated with Lizzi known to her as RIPPO (13 ROA 52) . After Laurie moved into the Katie Arms apartments, Liston would go by the apartment during her lunch hour take her food or money or anything she needed and at the

same time was trying to convince her to move (13 ROA 54).

Liston had last seen Jacobson the Monday before she died; February 17, 1992 (13 ROA 58-59) . On the evening before Jacobson had asked her to come over, and when she got there Jacobson and RIPPO were discussing some morphine that she had (13 ROA 61) . RIPPO and Jacobson went into the bathroom and intravenously used the morphine (13 ROA 63) . Liston also went over to the apartment on her lunch hour on the 17th and RIPPO was also present at said time (13 ROA 64) . Jacobson needed the tire fixed on her car and Liston followed her to Discount Tire in her car and then dropped her back off at her apartment (13 ROA 64-67).

Liston went back to the Jacobson apartment on the 18th and observed that the tire had been fixed on the car, and looked in the back of the car and saw a pair of her boots that she wanted back (13 ROA 73) . Liston went upstairs and knocked on the door and tried the door and window but they were locked and there was no answer at the door (13 ROA 74-75) . After about ten minutes she yelled through the door and left (13 ROA 76).

Thomas Sims had operated a maintenance company since 1989 in Las Vegas (14 ROA 27) . Sims had known RIPPO since 1985 and on February 18th, RIPPO entered his office early in the afternoon and said that he had a car that he wanted Sims to look at and wanted to know if he wanted to buy it or knew someone that would want to buy the car (14 ROA 28-30) . RIPPO brought a suitcase and perhaps a box with him and started going through the items on the couch (14 ROA 31) . Sims asked where the car had come from and RIPPO told him that someone had died for the car (14 ROA 32) . The car was a Nissan 300ZX and Sims told him that he did not want the car there and to get it away from his shop (14 ROA 33) . RIPPO wanted $2,000.00 for the car because he wanted to leave town (14 ROA 35). RIPPO gave Sims a number of tapes and the suitcase (14 ROA 36-37) . RIPPO left the car behind and was gone for about an hour and a

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half and came back around closing time with Diana Hunt (14 ROA 442) RIPPO had a stack of one hundred dollar bills and stated that he had just won a royal flush, and Sims emphasized to him that he wanted the car gone by the time he came to work the next morning (14 ROA 42). When Sims came to work the next morning at 7:30 AM the car was gone (14 ROA 45).

On the 21st of February, Sims saw a broadcast that two women had been killed and that one of them was named Denise Lizzi and realized that was the same name that was on a number of the tapes that had been given to him by RIPPO (14 ROA 46- 47). On February 26th RIPPO called Sims and wanted to come by and pick up a bottle of morphine he had left in a refrigerator at the office (14 ROA 49-50). Sims didn't want RIPPO coming to his shop and agreed to meet him somewhere to deliver it to him (14 ROA 53) . Sims eventually met RIPPO at a K-Mart parking lot because RIPPO'S car had broken down and gave him the bottle (14 ROA 55-56) . According to Sims, he asked RIPPO about the murders and RIPPO said that he had choked those two bitches to death and that he had accidentally killed the one girl so he had to kill the other (14 ROA 56; 62) . Sims then drove RIPPO to the Stardust Hotel and on the way RIPPO told him that he was carrying or dragging one of the girls to the back and her face hit the coffee table, and that Diana Hunt was with him and had participated in the murders (14 ROA 57-58) . When asked if he trusted Hunt, RIPPO replied that Hunt had hit the girl over the head with a beer bottle and that he trusted her fully (14 ROA 59) . Sims also asked why one of the girls had no pants on and RIPPO told him that he had cut his finger during the incident and dropped blood on her pants so he had to take the pants and dispose of them (14 ROA 61) . Finally, RIPPO indicated that he could have fucked both of the girls and that he didn't and that meant that he was cured (14 ROA 63).

Sims had been interviewed by the police and only answered the specific questions that

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they asked and did not volunteer any information about the events he claimed occurred on February 26, 1992. (14 ROA 65-66) The first time that Sims had told anybody about the additional statements he claimed RIPPO made was around October, 1993, when he talked with Teresa Lowry and John Lukens in the District Attorney's Office (14 ROA 86-87) . Sims only provided his story about what RIPPO allegedly told him after Sims had been arrested for drug and ex-felon in possession of firearm charges.

Diana Hunt had provided Sims with copies of the discovery on the case (16 ROA 13).

The autopsies of Lizzi and Jacobson occurred on February 21, 1992, and were performed by Dr. Sheldon Green (17 ROA 59). Initial observations of Lizzi revealed that a sock had been pushed into her mouth and secured by a gag that encircled her head (17 PCA 62) Upon opening the mouth to recover the sock, Green noted that the sock had been pushed in so that the tongue was forced into the back of the throat, completely blocking off the airway (17 ROA 66; 68) Pieces of cloth were tied around each wrist (17 ROA 68) Two ligature marks were completely circling the neck that were consistent with an electrical type of cord (17 ROA 73; 81) There were a few tiny pinpoint hemorrhages in the inside of the eyelids and on the white part of the eye (17 ROA 74) These are commonly found in situations where there is an acute asphyxial death (17 ROA 74) There was scarring in the left arm that was typical of people who have used intravenous drugs (17 ROA 77) There were modest abrasions or scraping injuries of the skin on the forehead and under the chin (17 ROA 77) Located in the neck area were two small stab wounds which went through the skin into the band of muscle that comes from a point behind the ear to the top of the breastbone (17 ROA 83) At the time of the autopsy there were no ligatures around the ankle, however there were marks that would strongly suggest that there had been something tied there following death (17 ROA 86) Internal examination showed a lot of hemorrhage in the

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deeper tissues and the ligaments that control the voice box and the thyroid gland that were typical of strangulation (17 ROA 89) Green believed that there was a combination of manual and ligature strangulation involved in the death of Lizzi (17 ROA 91) Toxicology revealed methamphetamine in the blood and the urine in the amount of 5,288 nanograms which is unusually high (17 ROA 95; 96).

There were no restraints associated with the autopsy of Lauri Jacobson (17 ROA 105; 128) There was some apparent damage around the neck and behind the right ear, and a scratch on the neck which ended in a very superficial little stab wound (17 ROA 107) . In the neck there was a great deal of hemorrhage in the soft tissue around the muscle and the thyroid gland and in addition there was an actual fracture of the cartilage which forms the voice box or larynx (17 ROA 112) Death was the result of asphyxiation due to manual strangulation (17 ROA 114) It would require something in the area of two, three or four minutes to cause death by such strangulation (17 ROA 124- 125) There were no epidural, subdural or subarachnoid hemorrhages present and no discrete hemorrhages were found in the scalp (17 ROA 133). No stun gun marks were found on either victim (17 ROA 130).

During the autopsy of Lizzi a black scarf was recovered from her left wrist (17 ROA 21-22) . A pair of blue sweat pants was removed from the right wrist (17 ROA 24) . A black sock was recovered from inside her mouth (17 ROA 26) . A pair of black panties was recovered from around the head of Lizzi (17 ROA30).

Sexual assault kits were recovered from both victims with negative results (18 ROA 113).

The torso of Lauri Jacobson had glass shards from about the waist to the neck (17 ROA 31).

Sheree Norman had impounded a plastic cylinders, spoons, hypodermic syringes, a Q-tip

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and smoking devices that were analyzed and found to contain residues of methamphetamine and marijuana (17 ROA 166-167).

Fingerprint comparisons revealed that eleven prints were recovered inside the apartment that belonged to police officers (18 ROA 30) . One fingerprint was identified as belonging to homicide detective Scholl (18 ROA 3D) and one was also identified to Officer Goslar (18 ROA 31) . These were the only positive matches found within the apartment (18 ROA 32).

Carlos Ciapa, the sales manager at Sears in the Boulevard Mall was working in the hardware department on February 19, 1992, and sold a compressor, a spray gun, an air sander, couplings and a warranty to RIPPO (18 ROA 17 6—183) . The items were paid for with a Sears credit card in the name of Denise Lizzi and signed in the name of Denny Morgan (18 ROA 184-185).

The handwriting on the Sunglass Company and Sears receipts was examined by document examiner William Leaver who determined that there were similarities between the signatures on the documents and the handwriting of RIPPO (19 ROA 6-14), indicating a possibility that RIPPO was the author of the signatures (19 ROA 14-16).

Deidre D'Amore testified that she knew RIPPO and Hunt and that during February, 1992, she allowed them to live in her townhouse with her for a period of two weeks. RIPPO was her friend and if it wasn't for RIPPO she would not have allowed Hunt to stay at her residence. On occasions she would let RIPPO or Hunt borrow her Isuzu pickup truck. She was only casually acquainted with Lauri Jacobson and Denise Lizzi and had seen Denise driving a red Nissan 300 ZX about a week prior - to February 18, 1992. Around the 18th the police had impounded her truck after RIPPO had borrowed it and recovered a pair of Oakley sunglasses inside of the truck. She had never seen the sunglasses before her testimony.

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Hunt had conversations with D'Amore wherein Hunt indicated that she had a romantic interest in Michael Beaudoin and that Beaudoin hated Denise Lizzi and that Hunt was "psyching out" Denise because Beaudoin had asked her to. Hunt told her that she like to beat up Denise.

D'Amore was not fond of Hunt and had told RIPPO that she wanted her out of the house. Hunt had been stealing items out of her house, and D'Amore had caught her and confronted her about it.

David Levine was in custody in the Southern Desert Correctional Center with RIPPO in January, 1993 (19 ROA 145). Levine was a porter on the floor and had the opportunity to play cards and talk with RIPPO (19 ROA 146) . RIPPO had Levine call his girlfriend and give her messages to handle things for him and to give messages to his attorney (19 ROA 150). According to Levine, RIPPO confessed to him that he had killed the two women and that after killing them he went and played video poker and hit a royal flush (19 ROA 153) . RIPPO also tried to figure out if Levine and he were on the street at the same time in order to use him as an alibi witness and then a character witness (19 ROA 157).

B. PENALTY HEARING TESTIMONY

Laura Martin lived in an apartment in Las Vegas on January, 1982 (22 ROA 37; 39) . She had gone to bed at about midnight on the 15th and to the best of her knowledge the doors and windows were locked when she went to bed (22 ROA 4 0-41) She was awakened at about 7:30 AM with RIPPO sitting on top of her with a knife to her throat (22 ROA 42-43) asking where her money was kept (22 ROA 45-46) . RIPPO tied her hands with her bathrobe tie and then tied her feet with electrical cords (22 ROA 47-48) . Five cut sections of electrical cord were found in the apartment (22 ROA 97) . When Martin asked questions he hit her and told her to shut up (22 ROA 48) . RIPPO cut her clothes off with the knife, and then allowed her to put a tube top on (22

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ROA 50—52) . He was just mumbling and moving around the apartment (22 ROA 52) . RIPPO just paced around the apartment and pretty much talking or mumbling the whole time that he was there (22 ROA 86) . She was asked if she wanted to engage in sex and when she begged him not to do so, he just laughed (22 ROA 54). At one point RIPPO got her down on the bed and spread her legs apart and raped her, although he did not ejaculate (22 ROA 59) . At one point he placed the knife in the area of her breasts and said that he was going to cut her nipples off and that he had done it before, but that girl was dead (22 ROA 62).

Martin begged for her life and RIPPO indicated that if she told anyone he would come back and kill her (22 ROA 66) . He tried to choke her with wire clothes hangers (22 ROA 67). RIPPO got her car keys and left and she ran to a neighbor and called the police (22 ROA 67-70) . Martin ended up with about 15 stitches behind her ear, a concussion, black eyes and a huge bump on her leg that she thought might have been a chipped bone (22 ROA 74) . She never went back to her apartment and had been unable to live alone since the incident (22 ROA 75).

On April 1, 1981, Metro Officer Jack Hardin became involved in the investigation of a burglary of a Radio Shack in the area of Nellis and the Boulder Highway (22 ROA 109) Sixteen year old RIPPO was identified as a suspect and Hardin therefore went to an apartment on East Tropicana and made contact with the occupant and located a great deal of electronic equipment (22 ROA 110-113) . Also recovered were four firearms (22 ROA 115) . RIPPO was arrested for the burglary of the Radio Shack and of Holman's of Nevada and taken to the Clark County Juvenile facility (22 ROA 119) . He was also booked as a runaway (22 ROA 120). It was his mother's request that he be committed to Spring Mountain Youth Camp (22 ROA 136).

RIPPO was committed to the Spring Mountain Youth Camp on April 29, 1981 and remained there until August 26, 1981 when he was released to his parents (22 ROA 130) . During

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his stay at SMYC RIPPO was under the supervision of Mr. Carriaga who died and the State therefore called Robert Sergi who remembered RIPPO as pleasant to be around, but that he gave the impression of just shining him on (22 ROA 152) . Sergi never got the impression that he intended to end his criminal lifestyle (22 ROA 161).

In December, 1981, two rifles and four handguns were recovered in the attic of a home wherein RIPPO was living (23 ROA 10). RIPPO had run away from home and had stolen the guns in residential burglaries according to a friend of RIPPO'S (23 ROA 11) . On January 20, 1982, RIPPO was taken into custody on other charges and the burglary warrants were served at the same time (23 ROA 12-13) . When interviewed RIPPO couldn't remember most of the burglaries because he was high on drugs (23 ROA 16) . RIPPO had been arrested in front of an apartment waiving a gun and trying to gain entrance (23 ROA 28).

Tom Maroney was the juvenile parole officer for RIPPO and prepared the certification report to the juvenile court recommending that RIPPO be certified as an adult on the charges of sexual assault, burglary and others (23 ROA 40) . After his arrest RIPPO escaped from the Juvenile Detention Center (23 ROA 43) . Maroney believed that RIPPO was very bright and knew the difference between right and wrong (23 ROA 48). Psychologist Joanna Triggs evaluated RIPPO while he was in the juvenile system and found that his memory was intact and had no hallucinations and no evidence of paranoia or delusions (23 ROA 75) . He had average to above average intelligence, was not depressed, not suicidal, and had good social skills meaning that he related very well and had good charisma (23 ROA 75).

On the sexual assault case, RIPPO was sentenced to life in prison with the possibility of parole (23 ROA 101). RIPPO had told his Parole and Probation officer that he was under the influence of phencyclidine which had been added to a marijuana cigarette when he committed the

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crime (23 ROA 108). RIPPO paroled from the prison sentence on October 24, 1989 (23 ROA 120). The parole was revoked on April 30, 1992 (23 ROA 125). He was therefore under a sentence of imprisonment on February 18, 1992 (23 ROA 125).

Correctional Officer Eric Karst testified that in March, 1986 at Southern Nevada Correctional Center in Jean, Nevada he searched the cell of RIPPO and located a nine inch buck knife, a pair of nunchuks, a compass, money and a wrench (23 ROA 147) Also found was a brass smoking pipe (23 ROA 149) . RIPPO carried some status with him in prison such that he was known as a stand up convict that carried his own and was very seldom challenged to fight because his reputation was that he would not back down from any fights (23 ROA 151).

Victim impact testimony was offered from the father and mother-in-law of Lauri Jacobson (23 ROA 175-183; 184-188). Also offering victim impact testimony were the mother, brother and the father of Denise Lizzi (23 ROA 189-207).

James Cooper was employed as a vocational education instructor in laundry and dry cleaning with the Nevada Prison system in the early 1980's and later became involved with a prison ministry (24 ROA 6-7) . Cooper first met RIPPO at the prison in Jean, Nevada in 1982 (24 ROA 7). RIPPO looked like an eighth grader and shaved his head to try and make himself look tougher (24 ROA 8). RIPPO worked in the laundry and never caused any problems and was one of the inmate workers that Cooper could leave unsupervised (24 ROA 9) . Cooper had maintained contact with RIPPO and believed that he was reaching out for the Lord as he grew older (24 ROA 12). Cooper was of the opinion that RIPPO would not be a problem to the prison, but would rather be an asset (24 ROA 13).

RIPPO'S stepfather, Robert Duncan, told the jury about his contact with RIPPO after he had already reached the prison system (24 ROA 23). While he was incarcerated Duncan supplied

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him with a typewriter, computer and computer courses and he did quite well, additionally excelling in drawing and writing (24 ROA 31) . When RIPPO was released on parole he came to live with Duncan and his mother arid lived in their residence for about nine to ten months (24 ROA 25) . RIPPO worked a number of jobs during that period of time, only changing when a better job became available (24 ROA 26-29) . The parole officer only came to visit once and didn't even come into the house because he said that he had a heavy case load and didn't have the time (24 ROA 30).

The younger sister of RIPPO, Stacie Roterdam, told the jury about her relationship with her brother and the early years of their lives (24 ROA 41) . RIPPO was the family clown, whenever anyone was down or something was going on around the house he was there the make them laugh (24 ROA 42) . When the parents would fight he would comfort his sisters and tell them that it would be OK (24 ROA 42).

A letter from RIPPO'S mother was read to the jury because she could not come to Court to testify based on orders of her doctor as she was suffering from acute anxiety reaction and anxiety depression (24 ROA 63) . She described her son and the difficulties he encountered while growing up and how he first got into trouble (24 ROA 61-67).

RIPPO exercised his right to allocution and told the jury that the reason that he pled guilty to the sexual assault charge was to spare the victim the anguish of testifying (24 ROA 74) . He further expressed his sorrow for the families of the two victims (24 ROA 75—76).

III. ARGUMENT

I. 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

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

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

1. counsel's performance fell below an objective standard of reasonableness,

2. counsel's errors were so severe that they rendered the verdict unreliable.

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

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

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counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

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

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

In keeping with the standard of effective assistance of counsel, the United States Supreme Court extended the right to counsel to include a convicted defendant's first appeal. See, Evitts v. Lucey, 469 U. S. 387, 105 S.Ct. 830 (1985); See also, Douglas v. California, 372 U.S. 353 (1963).

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

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

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

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

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

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

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

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

Prosecutor Harmon described RIPPO to the jury as looking like a "choir boy". In order to prejudice RIPPO in the eyes of the jury, the State showed the jury a picture of RIPPO as he sometimes looked in prison which was absolutely not relevant to his appearance when not in custody. In the photo RIPPO looked grungy and mean which was a stark contrast to his appearance when not in custody and at trial. When RIPPO voiced concerns to his attorneys he was told the photo didn't matter as the jury could see that RIPPO was clean cut during the trial. The jury should not have been allowed to view RIPPO as he appeared in prison.

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

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

The test for determining whether a reference to criminal history is error is whether "a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity." Morning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) citing Commonwealth v. Allen, 292 PA.2d 373, 375 (Pa. 1972) . In a majority of jurisdiction improper reference to criminal history is a violation of due process since it affects the presumption of innocence; the reviewing court must therefore determine whether the error was harmless beyond a reasonable doubt. Porter v. State, 94 Nev. 142, 576 P.2d 275 (1978); Chanman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

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

have objected and prevented the use of the photograph.

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

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

(See argument V. herein below)

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

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

(See argument V. herein below)

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

(c). 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.

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

As discussed above there was no verdict form provided to the jury for the purpose of finding the existence of mitigating circumstances. To compound the matter, not once during

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closing argument at the penalty hearing did either trial counsel submit the existence of any specific mitigating circumstance that existed on behalf of RIPPO. A close reading of the arguments reveals the existence of a number of mitigators that should have been urged to be found by the jury. These were:

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

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

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

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Parker v. Duacer, 498 US 308, 111 S.Ct 731, 112 L.Ed.2d 812 (1991).

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

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

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

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

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

In Evans v. State, 117 Nev. Ad. Op. 50 (2002) the Nevada Supreme 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"

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

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

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

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

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

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

V. <u>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.</u>

Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to

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raise on appeal, or completely assert all the available arguments supporting constitutional issues raised in this argument.

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

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

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

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

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

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the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances."

The jury was also told in Instruction 20 that:

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

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

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

> After a conviction of murder, a capital sentencing hearing may be held. The jury hears evidence and argument and is then instructed about statutory aggravating circumstances. The Court explained this instruction as follows:
>
> The purpose of the statutory aggravating circumstance is to limit to a large degree, but not completely, the fact finder's discretion. Unless at least one of the ten statutory aggravating circumstances exist, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the fact finder has a 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,

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499 U.S. 970 (1991), this court held that evidence of uncharged crimes is admissible at a penalty hearing once any aggravating circumstance has been proven beyond a reasonable doubt. Witter, 112 Nev. at 916.

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

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

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

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

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

VI. 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.

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

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

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

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

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

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review of the closing arguments there were valid mitigating circumstances that likely would have been found by one or more of the jurors. These are:

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

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

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

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

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

VII. 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

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STATUTORY SCHEME AND CASE LAW FAILS TO PROPERLY LIMIT THE INTRODUCTION OF VICTIM IMPACT TESTIMONY AND THEREFORE VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT AND FURTHER VIOLATES THE RIGHT TO A FAIR AND NON-ARBITRARY SENTENCING PROCEEDING AND DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

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

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

The Nevada Supreme Court has held that due process requirements apply to a penalty hearing. In Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991) the Court held that due process requires notice of evidence to be presented at a penalty hearing and that one day's notice is not adequate. In the context of a penalty hearing to determine whether the defendant should be adjudged a habitual criminal the court has found that the interests of justice should guide the exercise of discretion by the trial court. Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990).

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

The Eighth Amendment to the United States Constitution requires that the sentence of

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

The United States Supreme Court in Payne v. Tennessee, 501 U.S. 808, Ill. S.Ct. 2597, 115 L.Ed.2d 720 (1991) held that the Eighth Amendment erects no per se bar to the admission of certain victim impact evidence during the sentencing phase of a capital case. The Court did acknowledge that victim impact evidence can be so unduly prejudicial as to render the sentencing proceeding fundamentally unfair and violate the Due Process Clause of the Fourteenth Amendment. Payne, 111 S.Ct at 2608, 115 L.Ed.2d at 735. In Homick v. State 108 Nev. 127, 136-137, 825 P.2d 600, 606 (1992) this Court embraced the holding in Payne, and found that it comported fully with the intendment of the Nevada Constitution and declined to search for loftier heights in the Nevada Constitution. In cases subsequent to Homick, the Court has reaffirmed its position, finding that questions of admissibility of testimony during the penalty phase of a capital murder trial are largely left to the discretion of trial court. Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649 (1994). The Court has not however addressed the issue of presentation of cumulative victim impact evidence or been presented with a situation where the prosecution went beyond the scope of the order of the District Court restricting the presentation of the evidence.

Some State courts have voiced disapproval over the admission of any victim impact evidence at a capital sentencing hearing finding that such evidence is not relevant to prove any

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fact at issue or to establish the existence of an aggravating circumstance. State v. Guzek, 906 P.2d (Or. 1995) . In considering a claim that victim impact testimony violated due process and resulting in a sentence imposed under the influence of passion, prejudice or other arbitrary factors, the Kansas Supreme Court in State v. Gideon, 894 P.2d 850, 864 (Kan. 1995) issued the following warning while affirming the sentence:

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

In the case at bar the State called five separate victim impact witnesses to testify over the objection of RIPPO. At the conclusion of the testimony RIPPO moved for a mistrial which was denied by the District Court. RIPPO also raised the issue on direct appeal on the basis that the testimony was cumulative and excessive. The Nevada Supreme Court denied the claim. The ruling in this case and others establishes that the Nevada Supreme Court puts no meaningful boundaries on victim impact testimony resulting in the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments.

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

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

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

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

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

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

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

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on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility can fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Id. at 428-429) .

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

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

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mitigating circumstances and engage in the necessary weighing process with aggravating circumstances to determine if the death penalty in appropriate.

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

X. **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.**

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

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

The jury selection process in Clark County is subject to abuse and is not racially neutral

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

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

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

XI. 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

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AGGRAVATING CIRCUMSTANCES ENUNCIATED IN NRS 200.033 FAIL TO NARROW THE CATEGORIES OF DEATH ELIGIBLE DEFENDANTS.

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

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

In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980) , the Supreme Court struck down a Georgia death sentence holding that the aggravating circumstance relied upon was vague and failed to provide sufficient guidance to allow a jury to distinguish between proper death penalty cases and non-death penalty cases. The Court held that under Georgia law, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." at 877, 103 S.Ct. at 2742.

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

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

Although our precedence do not require the use of aggravating factors they have

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

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

The factors listed in NRS 200.033, individually and in combination, fail to guide the sentencers discretion and create an impermissible risk of vaguely defined, arbitrarily and capriciously selected individuals upon whom death is imposed. It is difficult, if not impossible, under the factors of NRS 200.033 for the perpetrator of a First Degree Murder not to be eligible for the death penalty at the unbridled discretion of the prosecutor.

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

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

There is nothing in these words, standing alone, that implies any inherent restraint

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CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA Plaintiff, vs. MICHAEL DAMON RIPPO, Defendant.	CASE NO.: C106784 DEPT. NO.: XIV

ERRATA TO SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, the Defendant, MICHAEL DAMON RIPPO, by and through his counsel of record, CHRISTOPHER R. ORAM, ESQ. and does hereby submit his Errata to Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

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The Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), should have been contained pages 1-46, however, pages 40-44 (attached hereto) were missing from the Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 11 day of March, 2004.

Respectfully submitted by:

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

IX. 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 THE NEVADA SUPREME COURT TO CONDUCT FAIR AND ADEQUATE APPELLATE REVIEW. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE 1, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

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

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

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

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mitigating circumstances and engage in the necessary weighing process with aggravating circumstances to determine if the death penalty in appropriate.

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

X. 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.

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

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

The jury selection process in Clark County is subject to abuse and is not racially neutral

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

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

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

XI. 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

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AGGRAVATING CIRCUMSTANCES ENUNCIATED IN NRS 200.033 FAIL TO NARROW THE CATEGORIES OF DEATH ELIGIBLE DEFENDANTS.

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

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

In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980) , the Supreme Court struck down a Georgia death sentence holding that the aggravating circumstance relied upon was vague and failed to provide sufficient guidance to allow a jury to distinguish between proper death penalty cases and non-death penalty cases. The Court held that under Georgia law, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." at 877, 103 S.Ct. at 2742.

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

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

Although our precedence do not require the use of aggravating factors they have

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

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

The factors listed in NRS 200.033, individually and in combination, fail to guide the sentencers discretion and create an impermissible risk of vaguely defined, arbitrarily and capriciously selected individuals upon whom death is imposed. It is difficult, if not impossible, under the factors of NRS 200.033 for the perpetrator of a First Degree Murder not to be eligible for the death penalty at the unbridled discretion of the prosecutor.

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

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

There is nothing in these words, standing alone, that implies any inherent restraint

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA Plaintiff, vs. MICHAEL DAMON RIPPO, Defendant.	CASE NO.: C106784 DEPT. NO.: XIV

RECEIPT OF COPY

RECEIPT OF A COPY of the attached **ERRATA TO SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS** is hereby acknowledged this 17 day of March, 2004.

DAVID ROGER, DISTRICT ATTORNEY

By _____
DEPUTY DISTRICT ATTORNEY
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FILED
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Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA Plaintiff, vs. MICHAEL DAMON RIPPO, Defendant.	CASE NO.: C106784 DEPT. NO.: XIV

ERRATA TO SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, the Defendant, MICHAEL DAMON RIPPO, by and through his counsel of record, CHRISTOPHER R. ORAM, ESQ. and does hereby submit his Errata to Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

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MRippo-070116-1745

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The Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), should have been contained pages 1-46, however, pages 40-44 (attached hereto) were missing from the Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 11 day of March, 2004.

Respectfully submitted by:

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FILED
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CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
MICHAEL DAMON RIPPO,
#0619119
Defendant.

CASE NO: C106784
DEPT NO: XIV

STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: 4-16-04
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through CLARK PETERSON, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction).

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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STATEMENT OF THE CASE

This is a supplement to the Petition for Writ of Habeas Corpus (Post Conviction) filed on behalf of Michael Damon Rippo, hereinafter, "Defendant." Defendant was convicted after a trial by jury of two (2) counts of first-degree murder, and one (1) count each of robbery and unauthorized use of a credit card. After a penalty hearing, the jury found six aggravating circumstances had been established beyond a reasonable doubt. Defendant is currently awaiting a sentence of death for both first-degree murder convictions.

PROCEDURAL HISTORY

On June 5, 1992, Michael Damon Rippo, hereinafter "Defendant", was indicted by a Clark County Grand Jury for the crimes of Murder (Felony - NRS 200.010, 200.030), Robbery (Felony - NRS 200.380), Possession Stolen Vehicle (Felony - NRS 205.273), Possession of Credit Cards Without Cardholder's Consent (Felony - NRS 205.690), and Unauthorized Signing of Credit Card Transaction Document (Felony - NRS 205.750), committed at and within Clark County, on or between February 18, 1992, and February 20, 1992.

Notice of Intent to Seek the Death Penalty was filed on June 30, 1992, listing the following aggravating circumstances: 1) the murders were committed by a person under sentence of imprisonment; 2) the murders were committed by a person who was previously convicted of a felony involving the use or threat of violence to another person; 3) the murders were committed while the person was engaged in the commission of or an attempt to commit robbery; and 4) the murders involved torture, or the mutilation of the victim.

On July 6, 1992, the Honorable Gerard Bongiovanni continued the arraignment to July 20, 1992 on the grounds that Defendant had not yet received a copy of the Grand Jury transcript. On July 20, 1992, Defendant again appeared before Judge Bongiovanni and entered pleas of not guilty to all of the charges against him. Defendant waived his right to a speedy trial and upon agreement of both the State and Defendant, trial was scheduled for February 8, 1993. The Court also ordered that discovery would be provided by the District Attorney's Office.

On October 21, 1992, Defendant filed a Motion for Discovery and to Inspect all Evidence Favorable to Him. This Motion requested an Order requiring the State "to reveal, produce and permit Defendant to inspect and copy all information and material favorable to a defense of this cause (including all books, papers, records, documents and objects and all facts or information of whatever source or form in the possession of, or known to, the State or any of its agents), which material and information are or may become of benefit to Defendant, either on the merits of the case or on the question of credibility of witnesses." Defendant further requested the State furnish Defendant with: 1) a list of witnesses known to the State to have knowledge of the cause favorable to the defense, and a copy of the statement of any such witness; 2) a list of persons interviewed by the State relating to the case but who will not be called as witnesses by the State; 3) all documents relating to the investigation of the case or of Defendant which will not be introduced into evidence by the State; 4) a list of former or present agents of the State who have participated to any extent in the investigation and prosecution of the case who will not be called as State's witnesses; 5) copies of all crime lab reports or memos; 6) copies of all autopsy toxicology reports; and 7) copies of all photographs including, but not limited to, video tapes, crime scene photos, autopsy photos and forensic photos.

On October 27, 1992, the State filed an Opposition to Defendant's Motion for Discovery and State's Motion for Reciprocal Discovery.

On November 4, 1992, Judge Bongiovanni held a hearing on the motions that had been filed. The State stipulated to the discovery, and agreed to stay with the District Attorney's open file policy to the extent that it complied with applicable state and federal law. After argument, Defendant's motion for discovery was granted.

On February 17, 1993, based on a change of trial date from February 1993, to September 13, 1993, the State filed a Motion to Expedite Trial Date or in the Alternative Transfer Case to Another Department. The affidavit in support of the motion stated that the continuance of 9 ½ months would cause undue hardship and prejudice to the State, that the State must subpoena approximately 30 witnesses for the prosecution of the case, some of the

State's witnesses did not have substantial ties to the community and could become impossible to locate.

On August 23, 1993, Defendant filed a Motion to Strike Aggravating Circumstances Numbered 1 and 2 and for Specificity as to Aggravating Circumstance Number 4. Defendant argued that circumstances 1 and 2 should be stricken because the plea entered in the case utilized by the State to support the aggravating circumstances was illegal because the plea was not voluntary, and there was no factual basis for it. Defendant also requested the Court require the State to be more specific in the statement as to what torture, or mutilation the evidence would show. The State's response to the motion was filed on February 14, 1993.

On August 23, 1993, Defendant filed a Motion in Limine to Exclude Testimony of Defendant's Prior Bad Acts. The State filed an opposition to the Motion on February 7, 1994.

On August 24, 1993, Defendant filed a Motion for Discovery of Institutional Records and Files Necessary to Rippo's Defense.

On September 2, 1993, Defendant filed an Alibi Notice stating that he would call Alice Starr as his alibi witness.

On September 10, 1993, a hearing was held before the Honorable Gerard Bongiovanni regarding the Motion to Continue Trial. After discussion, the trial was continued to February 14, 1994.

At a motion hearing on January 31, 1994, counsel for Defendant informed the Court that he had subpoenaed both of the Deputy District Attorneys prosecuting this case, John Lukens and Teresa Lowry. Mr. Dunleavy stated that the Deputy District Attorneys had conducted a search of Alice Starr's home pursuant to search warrant and that in the process of seizing items in the home, the attorneys became witnesses for the defense. Counsel for Defendant further argued that the entire District Attorney's Office should be disqualified from the prosecution of this case. The Court ordered that the motion be submitted in writing and supported by an affidavit.

On February 7, 1994, Defendant filed a Motion to Continue Trial. Grounds given for

the motion included: the Deputy District Attorneys prosecuting the case had been subpoenaed by the defense and therefore both they and the District Attorney's Office should be disqualified from prosecuting the case; the defense needed to interview additional witnesses they had recently received discovery on; a trial conflict with one of Defendant's counsel; and unanswered motions. An affidavit by Steven Wolfson, counsel for Defendant, was included with the motion. Also filed on February 7, 1994, was a Motion to Disqualify the District Attorney's Office. That motion was supported by affidavits from one of Defendant's counsel, Philip Dunleavy, and the alibi witness for Defendant, Alice Starr.

On February 14, 1994, the State filed its Opposition to Motion to Continue Trial and the State also filed a Response to Motion to Disqualify the District Attorney's Office and State's Motion to Quash Subpoenas. This motion was supported by an affidavit from Deputy District Attorney John Lukens.

On March 7, 1994, an evidentiary hearing was held regarding Defendant's Motion to Disqualify the District Attorney's Office. Deputy District Attorney Chris Owens represented the State. Two days later the motion to remove Chief Deputy District Attorney Lukens and Deputy District Attorney Lowry from the case was granted. The Court, however, refused to disqualify the entire District Attorney's Office and ordered the appointment of new District Attorneys. The Court was informed that Chief Deputy District Attorneys Dan Seaton and Mel Harmon were going to replace Lukens and Lowry on March 11, 1994.

A status hearing was held on March 18, 1994 and was continued on the basis of the State's request to amend the indictment and new discovery provided to the defense. The District Court denied the State's request to amend the indictment. The State filed for a Writ of Mandamus with this Court, which was granted on April 27, 1995. An amended indictment was filed on January 3, 1996, including felony murder and aiding and abetting.

Jury selection began on January 30, 1996 and the trial commenced on February 2, 1996. A continuance was granted for Defendant to interview witnesses from February 8, 1996, to February 20, 1996. The trial commenced again on February 26, 1996.

Final arguments were made on March 5, 1996 and guilty verdicts were returned on

March 6, 1992, of two counts of first degree murder, and one count each of robbery and unauthorized use of a credit card. The penalty hearing was held from March 12, 1996 to March 14, 1996. The jury found the presence of all six aggravating factors and returned with a verdict of death.

On May 17, 1996, Defendant was sentenced to: Count I - Death; Count II - Death; Count III -Fifteen (15) years for Robbery to run consecutive to Counts I and II; and Count IV- Ten (10) years for Unauthorized Signing of Credit Card Transaction Document, to run consecutive to Counts I, II, and III; and pay restitution in the amount of $7,490.00 and an Administrative Assessment Fee. Judgment of Conviction was filed on May 31, 1996.

A direct appeal to the Nevada Supreme Court was filed challenging the conviction and sentence and on October 1, 1997 an opinion was issued affirming the judgment of conviction and the sentence of death. Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997). A Petition for Rehearing was filed October 20, 1997, and an Order Denying Rehearing was filed February 9, 1998.

A Petition for Writ of Certiorari was filed with the United States Supreme Court and was denied on October 5, 1998.

Defendant filed a Petition of Writ of Habeas Corpus (Post Conviction) on December 4, 1998 alleging (1) ineffective assistance of counsel; (2) there were overlapping aggravating circumstances in imposing the death penalty; (3) the penalty hearing failed to appraise the jury of the proper use of character evidence; (4) the jury was not instructed on specific mitigating circumstances; (5) the court failed to properly limit the introduction of victim impact testimony; (6) the jury instruction given regarding premeditation violated Defendant's constitutional rights; (7) the Nevada Supreme court did not conduct a fair and adequate appellate review; (8) there was not a demographic representation on the jury; (9) the court failed to narrow the categories of death eligible defendants; and (10) cumulative error violated Defendant's constitutional rights. Defendant's instant supplement was filed February 10, 2004.

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STATEMENT OF THE FACTS

The beaten, battered and strangled bodies of Denise Lizzi and Lauri Jacobson were discovered dumped inside a closet of Lauri's home, still enveloped by the electrical cords Defendant used to end their lives.

During the guilt phase of trial, the State called Wayne Hooper, the apartment manager at Lauri's complex, who made the gruesome discovery. Mr. Hooper testified that the last time he had seen Lauri was on either February 17 or 18, 1992. He noticed her driving away from the apartment building in her black Datsun with a tire that was nearly flat. A red car belonging to Wendy Liston was following her and later dropped Lauri back off at the apartment complex. (10 ROA 92-94).

By February 20, 1992, Mr. Hooper became concerned about not seeing Lauri for a few days, so he and a building security guard went to Lauri's apartment to check on her. (10 ROA 101, 103, 122). After failing to get a response to his repeated knocking, Mr. Hooper used his master key to enter what turned out to be the ransacked apartment. (10 ROA 104-106). Upon switching the closet light on, Mr. Hooper discovered the women's lifeless bodies, bound and lying face down. (10 ROA 106-107). Mr. Hooper returned to his own apartment where his wife summoned the police. (10 ROA 110).

Las Vegas Metropolitan Police Officers Darryl Johnson was one of the first responding officers. Officer Johnson testified that upon his arrival, Mr. Hooper informed him of the discovery and after viewing the bodies he summoned Homicide detectives. (10 ROA 134-137, 140-141).

Las Vegas Metropolitan Police Department Crime Scene Analyst, Allen Cabrales testified that when he arrived there were two female victims, both lying face down on the floor in the closet. He testified further that there was no sign of forced entry to the apartment. Denise Lizzi was wearing only a pink pair of panties, a white sweatshirt, a black muscle shirt and a pair of white socks. Lauri Jacobson was wearing a white T-shirt, blue sweat pants and a pair of white socks. (16 ROA 85).

A Hamilton Beach iron was recovered from a trash bag in the kitchen area and a

Clairol hair dryer was recovered from underneath a day bed. Both of the appliances were missing their cords. Also recovered was a black leather strip found in a trashcan in the bathroom; a telephone cord found by the entertainment center in the living room; and two pieces of black shoelace found on the carpet below Denise Lizzi in the closet. Glass fragments were also recovered. They had been scattered about on the living room-kitchen floor area. (16 ROA 97-123).

The State called Dr. Giles Sheldon Green to establish the cause of death. Dr. Green's testimony of Denise Lizzi's autopsy indicated that she was found with a makeshift "gag" in her mouth; the gag was actually comprised of a sock shoved inside her mouth and secured by a black brassiere, which encircled her head. The gag had been pushed so far back into Denise's mouth that it actually forced Denise's tongue down her own throat, closing the epiglottis and blocking her airway. (17 ROA 66-68). Dr. Green further testified that pieces of cloth were used as restraints to bind her wrists and ankles. (17 ROA 59-68). Lividity of the body indicated that Denise had been lying face down after death. Very early decomposition changes had begun taking place.

Denise's injuries included: abrasions to her forehead, chin, and on her right cheek; stab wounds on her neck; and lines from a two-wire lamp cord being wrapped around her neck. (17 ROA 74-77). She also had tiny pinpoint hemorrhages in the insides of her eyelids and on the whites of her eyes. (17 ROA 74). Denise also suffered extensive internal injuries. There was a great deal of hemorrhaging in the deeper tissues of her neck and the ligaments that controlled her voice box. (17 ROA 89).

Dr. Green testified that his findings were indicative of both manual and ligature strangulation. (17 ROA 91). He testified that some effort had been made at manual strangulation and that the ligature strangulation probably came later on.

His conclusion was that Denise's death was due to asphyxia, or lack of oxygen, which Dr. Green opined could have come either from the gag or from the strangulation or both. Dr. Green was not able to testify as to whether the stab wounds or the ligature wounds occurred first. Both methamphetamine and amphetamine were found in Denise's system. Time of

death was determined to have been 36 to 48 hours earlier. (17 ROA 62-96).

As to Lauri Jacobson, Dr. Green testified that her state of decomposition was more advanced than that of Denise. He found a scratch on her neck, which went from about the midline toward the left, and ended in a very superficial penetrating stab wound. There was bruising behind her right ear with a quarter inch "V" shaped stab wound about a quarter of an inch deep. There were other stab wounds underneath her chin and in the middle of her neck, as well. There was also a two and a half inch scratch on her right forearm, which Dr. Green believed occurred after her death. (17 ROA 107).

Lauri's internal examination revealed a great deal of hemorrhage in the soft tissues around the muscles in her neck especially around her thyroid gland and also the presence of a fracture of the cartilage, which formed the larynx. (17 ROA 112).

Dr. Green testified that Lauri's injuries were consistent with manual strangulation. He deemed the cause of death to be asphyxiation, clearly due to the manual strangulation. (17 ROA 114). No drugs were identified in either her liver or kidneys.

Linda Errichetto, forensic analyst for the Las Vegas Metropolitan Police Department, testified that there was no evidence of sexual assault to either Lauri or Denise. (17 ROA 21-22).

The State presented the testimony of Diana Hunt, Defendant's girlfriend at the time of the killings, and who was present during the murders.[1]

Ms. Hunt established that she and Defendant had lived together in a house on Gowan Road in Las Vegas for about three weeks, but at the time of the murders they had moved in with a friend, Deidre D'Amore. (11 ROA 30-31). Defendant was acquainted with Lauri Jacobson and helped her move into her apartment. (11 ROA 33).

On the morning of February 18, 1992, Defendant woke Ms. Hunt and told her they "had to go." (11 ROA 36-38). Ms. Hunt accompanied Defendant to the Katie Arms Apartments where they found Lauri Jacobson at home alone. (11 ROA 40). Ms. Hunt

[1] Ms. Hunt was also arrested and charged with murder and robbery; she testified as part of her negotiated plea agreement. (11 ROA 162, 166).

testified that Defendant and Lauri injected themselves with morphine.

Denise Lizzi arrived and Lauri briefly left the apartment to go outside and speak to her. (11 ROA 46). While Lauri was out of the apartment, Defendant closed a window and then asked Ms. Hunt for the stun gun that was in her purse. Defendant then made a phone call. (11 ROA 47-49).

After a few minutes, Lauri and Denise returned to the apartment. Denise went into the bathroom and Lauri joined her. Defendant brought Ms. Hunt a bottle of beer and told her that when Lauri came out to answer the phone she should hit her with the bottle so that Defendant could rob Denise. When Ms. Hunt stated that she did not want to hit Lauri, Defendant ordered her to "do as she was told." (11 ROA 51).

A few minutes later, the phone rang. Lauri came out of the bathroom and answered the phone. Ms. Hunt hit Lauri with the bottle and she fell to the floor in a daze. Defendant then proceeded into the bathroom, to find Denise. (11 ROA 53-54).

Ms. Hunt testified that she heard the stun gun going off and heard Defendant and Denise yelling. (11 ROA 55). She saw that Defendant was fighting with Denise and was wrestling her across the hall into a big closet. The stun gun continued going off, and when Ms. Hunt ran to the closet, she saw Defendant sitting on top of Denise utilizing the weapon. Ms. Hunt testified that her pleas for Defendant to stop what he was doing were futile. (11 ROA 56).

Ms. Hunt went back out into the living room to assist Lauri. Defendant emerged from the closet with a knife in his hand. Ms. Hunt had never seen the knife before. Defendant proceeded to use the knife to cut the cords off various appliances in the apartment. (11 ROA 58-60).

Defendant ordered Lauri to lie down. Lauri argued with him but ultimately complied. Defendant then ordered Lauri to put her hands behind her back where he bound them. He then bound her feet. Defendant forced a purple bandana in Lauri's mouth and tied it around her head. (11 ROA 60-61).

Ms. Hunt could hear Denise, still in the closet, crying. When Defendant returned to

the closet, Ms. Hunt looked in and saw that Denise was bound in the same manner as Lauri. Defendant was asking her questions about where drugs and other things could be found. (11 ROA 62).

At that point, Wendy Liston came to the door of the apartment and was knocking and yelling for Lauri. Defendant stuffed something in Denise's mouth to keep her silent and Lauri was unable to respond so Ms. Liston left. Ms. Hunt begged Defendant to just leave the apartment, but he shoved her and told her not to tell him what to do. (11 ROA 63-64).

Ms. Hunt testified that at this point, Defendant's attitude changed. He said that he was sorry that he lost control and assured her that if everyone cooperated everything would be all right. Defendant then went over to where Lauri was lying bound on the floor and began stunning her with the stun gun. Ms. Hunt testified she was unsuccessful in her attempts to get stun gun away from Defendant. (11 ROA 64-68).

Defendant then took out another cord (or belt-type object) and put it through the ties on Lauri's feet and wrists and then around her back, which enabled him to "pick her up like a suitcase and drag her across the floor." Defendant dragged her in that fashion across the floor and into the closet. Lauri was obviously choking as Defendant dragged her. (11 ROA 68-69).

Ms. Hunt followed Defendant to the closet and saw him with his knee in the small of Denise's back, choking her by pulling on an object he had placed around her neck. (11 ROA 69). Ms. Hunt stated that Defendant was pulling so hard that the entire front of Denise's body was up off of the ground and she could see that Defendant's arms were straining. Denise was making was a noise that Ms. Hunt had never heard before, and what she described at trial as "an animal noise." (11 ROA 69-70).

Ms. Hunt testified that she apparently passed out because the next thing she recalled was Defendant shaking her, telling her that they needed to go. Ms. Hunt accused Defendant of choking the women but he told her that he had just cut off their air so they would pass out and that they had to hurry up and leave before they woke up. Both of the women were lying face down and they were both still tied up. Defendant told Ms. Hunt to put everything into a

gym bag he was holding. Defendant also wiped the apartment down with a rag. (11 ROA 70-73). Diana testified that at one point during the "clean up" of the apartment, Defendant went into the closet, took off Denise's boots, rolled her over, undid her pants and pulled them off. Ms. Hunt asked Defendant what he was doing and he stated that he had bled on her pants and that he had to remove them. Defendant also untied Lauri's hands and feet before he left the apartment. (11 ROA 82).

Ms. Hunt and Defendant left the apartment and Defendant closed the door and locked the deadbolt lock. Defendant walked Ms. Hunt to the Pinto they were driving and told her to stop crying and go home and wait for him. (11 ROA 79). He told her that nobody had gotten hurt and that nobody had to. However, Ms. Hunt testified that after hearing the noise coming from Denise, she knew that the women were not alive. (11 ROA 80-83).

Later that evening, Defendant called Ms. Hunt at Deidre's house. He told her to meet him at his friend's shop and gave her directions. She then went to the shop, which belonged to Tom Sims. When she arrived, Defendant was there with Sims and another man. He told her that he had a car for her and showed her a maroon Nissan that she believed belonged to Denise, although Defendant would not make that admission. Defendant told her that he stole the car from some people who would be out of town and instructed her to get some paperwork for the car. Ms. Hunt believed she could get the paperwork from her friend, Tom Christos. (11 ROA 84-88). On Defendant's orders, Ms. Hunt drove the Nissan to Tom Christos' residence. (11 ROA 88).

On February 19, 1992, Ms. Hunt met Defendant and they went to the Meadows Mall. On the way, Defendant told Diana that he had purchased an air compressor and some tools on a credit card earlier that morning. They then went to a shop in the mall and purchased sunglasses. Defendant paid for the glasses using a gold Visa card. (11 ROA 90-92).

Later that day, upon returning to Deidre's house, Ms. Hunt went into Defendant's wallet to take some money and try to get away from him because she was scared. (11 ROA 93-96). Ms. Hunt stated that she was too scared to call the police, because Defendant had threatened to kill Deidre and her little girl if she did. Ms. Hunt did not find any money in

Defendant's wallet but she took a gold Visa card belonging to Denny Mason. (11 ROA 96).

Diana then went back to Christos' house where she was supposed to pick up the paperwork for the car, but the paperwork was not ready. However, it was Christos' girlfriend Teresa's birthday, so she and Ms. Hunt went out. Because they were dressed up, they took the Nissan. (11 ROA 99).

They started to go back to Christos' after picking up the Nissan, but Teresa was crying and stated that Christo had been beating her and that she did not want to go back there. Instead, they went to a bar called Marker Downs. They also went to the shopping mall. (11 ROA 101-102).

By this time, Defendant had discovered that the credit card was missing and was calling around to find Ms. Hunt to get it back. When she spoke to Defendant she told him that she would meet him at the mall to give the card back but that Defendant had to bring her some money. Defendant never showed up at the mall so Ms. Hunt used the credit card to purchase Teresa a birthday gift. (11 ROA 102).

After leaving Marker Downs, Teresa and Ms. Hunt went to another bar, Club Rock. (11 ROA 103). Ms. Hunt called Christos from the bar and told her that Teresa was drunk and that she needed to bring her home. Christos was angry and told her that he did not want Teresa back. Ms. Hunt then got a room at the Gold Coast also paid for with Denny Mason's credit card. (11 ROA 104).

Sometime during the night Ms. Hunt went to a friend's house to get some spray paint and primer to disguise the Nissan. While there, she learned the murders had been discovered. Ms. Hunt testified that she knew for sure then that she was driving Denise's car so she abandoned it in an Albertson's parking lot on Rainbow Boulevard. (11 ROA 112-113).

Around February 29, 1992, with Deidre's help, Ms. Hunt attempted to get in touch with Kyle Edwards of the Las Vegas Metropolitan Police Department, however when she finally reached him, Defendant had returned to Deidre's apartment. Ms. Hunt fled. Either that same day, or the next, Ms. Hunt called Deidre to ask if Defendant was there and when she was told he was not, Ms. Hunt returned to the house to retrieve the rest of her

belongings. However, Defendant was there waiting. (11 ROA 115-118).

Ms. Hunt attempted to leave, but as she got in her car, Defendant jumped in and refused to get out. Ms. Hunt started driving to a friend's house and Defendant told her that he wanted to "kill a lot of people," including her, and proceeded to tell Ms. Hunt what he would do to her if she left. During the conversation, Defendant told Ms. Hunt that he had cut Lauri and Denise's throats and had jumped up and down on them. He also described setting up the phone call to distract Lauri with his friend "Alice."

Ms. Hunt stated that Defendant had been upset with Lauri and Denise for "burning" him in a drug deal. She further testified that prior to the murders Defendant had used her to demonstrate to his friends how to restrain someone by tying her hands and feet with a karate belt. (11 ROA 162-168).

At some point, the car ran out of gas and Ms. Hunt ran out of the car and flagged down a passing car. She went to a gas station and called her friend Doug. When she got back to the car, some of the belongings were missing and Defendant had fled. (11 ROA 120-121).

Ms. Hunt went to a home on Nelson Street owned by her friend Brenda's uncle. Defendant later appeared at the residence. Ms. Hunt did not expect him and did not want to see him again. (11 ROA 154-155). Defendant began yelling at Ms. Hunt and she responded by yelling that he had "killed those girls" and that she could prove it. Defendant began punching Ms. Hunt in the face. Others, including Michael Beaudoin and Brenda witnessed the fight. Defendant continued to hit Ms. Hunt in the face as well as "stunning" her with a stun gun. (11 ROA 159). Defendant proceeded to choke Ms. Hunt and banging her head against a car. When Ms. Hunt became aware that she was passing out, she looked at Michael Beaudoin and told him that she could "prove it." With that, Beaudoin pulled Defendant off of her. Ms. Hunt suffered black eyes and a split lip. The police arrived but Defendant had fled. (11 ROA 159-161).

Ms. Hunt gave a statement to the police the next morning. Out of fear for her safety, she did not tell the officers what she knew about the murders. She informed the officers that she was leaving town for Yerington, Nevada. She was arrested in Yerington on April 21,

1992. (11 ROA 162-168).

Defense counsel's near full day of cross-examination of Ms. Hunt adept and thorough. Defense counsel particularly focused upon issues relating to her veracity, the fact that her testimony was pursuant to a negotiated plea and her own participation in the robbery. (12 ROA 5-162).

Tom Christos corroborated Ms. Hunt's claims that she had gone to him regarding altering the color and acquiring paperwork for a maroon Nissan 300ZX. He further testified that on February 20, 1992, Defendant called his house looking for Ms. Hunt. Defendant left a message for Ms. Hunt that "The cat is out of the bag."

Michael Beaudoin testified that he had met with Defendant, who showed him Denise's empty wallet and one of her garage door openers. He also stated that on February 29, Defendant was fighting with Ms. Hunt, punching her and stunning her.

David Levine, a friend of Defendant's in jail, testified that he had a lot of conversations with Defendant while they were incarcerated. (19 ROA 145). Defendant told him that he had killed the two women. At one point, Defendant wrapped a sheet around the veins in his arm, and then wrapped a three pronged extension cord around his arm and tapped his veins. Defendant stated that was how he "did" Denise. (19 ROA 150-153)

Denny Mason testified that Denise Lizzi was his girlfriend off and on for four or five years. (16 ROA 38). He testified that about a week before the murders he gave Denise his credit card to buy some things for his house. (16 ROA 48-49). When shown charge slips, he could not account for charges on his bill to: SunTeleGuide, Gold Coast Hotel and Casino; The Sunglasses Company; 7-Eleven; and Texaco, Inc. He could also not account for charges made on his Dillards Card on Feb. 19, 1992. (16 ROA 59-61). Mason further testified that the charge slip from Sears was not in the handwriting of Denise Lizzi.

Tom Sims testified that Defendant showed up at his shop on February 18, 1992 with the maroon Nissan. Defendant offered to sell the car to Sims. (14 ROA 28-30). When Sims asked about the ownership of the car, Defendant told him that "someone had died for it." (14 ROA 32). Sims told Defendant that he wanted nothing to do with the car and to get it away

from his shop. (14 ROA 33).

Sims testified that Defendant left his shop and the car for a brief period and returned with Diana Hunt. (14 ROA 41). Defendant had a great deal of money with him that he said he had obtained by winning a royal flush. Sims told Defendant that he wanted the car gone by the next morning and it was. (14 ROA 42).

On February 21, 1992, Sims heard a report that two women had been killed and one of them was named Denise Lizzi. This struck Sims because Defendant had given Sims tapes with the initials D.L. on them. Sims then became suspicious and looked at a suitcase Defendant had left with him. The nametag on the suitcase indicated that it belonged to Lauri Jacobson. (14 ROA 36-37; 46-47).

Sims next came into contact with Defendant on February 26, 1992, when Defendant called and asked to come by and pick up some morphine that he had left in Sims' refrigerator. (14 ROA 49-50). Sims did not want to meet with Defendant at his shop, so he met him in a K-Mart parking lot. (14 ROA 55-56). When Sims asked about the murders, Defendant confessed to them. Defendant told Sims that he had "choked those two bitches to death." He added that he had killed the first one accidentally so he had to kill the other. (14 ROA 56-57).

Defendant also told Sims that as he was carrying one of the girls into the back her face hit the coffee table. He informed Sims that Diana Hunt had been with him at the apartment. Sims asked Defendant if he thought he could trust Ms. Hunt and Defendant replied that she had "hit one with a bottle" and that he trusted her. (14 ROA 57-58).

Sims asked Defendant why one of the girls had been found without pants on and Defendant replied that he had bled on the girl during the murders and bled on her pants so he had to dispose of them. Defendant told Sims that the "girls were both 'fine'" and that he could have "fucked both of them" but he did not, which meant that he was "cured." (14 ROA 61-63).

Carlos Caipa, an employee of Sears, testified that in February, 1992, he was employed in the hardware department at Sears. He identified Defendant as the man who

purchased a compressor, sander, spray gun, and couplings, all with extended warranties, with a credit card. (18 ROA 176-183). He stated that the name on the card was Denise Lizzi and the signature on the card was that of Denny Mason. (18 ROA 184-185).

William Leaver, document examiner with the Las Vegas Metropolitan Police Department, testified that he had examined documents identified with The Sunglasses Company and Sears which were signed "D. Mason." He stated that there were similarities between the signatures on the slips and the known writing of Defendant. (19 ROA 14-16).

The jury found Defendant guilty of two counts of first-degree murder, and one count each of robbery and unauthorized use of a credit card.

During the three day penalty hearing, numerous witnesses came forward to testify about the Defendant's past criminal conduct and about the impact the murder of these two women had on family and friends.

Laura Conrady testified Defendant brutally raped her in January 1982. She recounted how she awoke to find Defendant sitting on top of her with one hand over her mouth and the other holding a butcher knife to her throat. (22 ROA 42-43, 45-46). Laura clearly identified Defendant as the man who raped her. During the attack, Defendant asked her where her money was but she did not have any. (22 ROA 45-46).

Defendant bound Laura's hands with her the belt from her bathrobe and restrained her feet with cords that she believed Defendant cut off of her vacuum cleaner. (22 ROA 47-48). When Laura asked Defendant who he was and how he got there, he hit her and told her to shut up. (12 ROA 48). Defendant cut the sweatshirt off of Laura with his knife by slitting it down the back. At that point, Laura was naked from the waist up, so she asked Defendant if she could put some clothes on. Defendant went to her drawer, threw everything out, and told her to put on a tube top that he found. (22 ROA 50-52). Soon after, Defendant cut off Laura's sweat pants. He asked her if "she wanted to fuck." (22 ROA 52). Laura testified that she became hysterical began begging Defendant not to do anything. Defendant laughed at her. (22 ROA 54). Defendant asked Laura if she had any scissors and she told him they were in the living room. Defendant retrieved the scissors, placed Laura, still tied up, in a chair and

cut off her hair.

Defendant then used the scissors to cut the cords off Laura's legs. Defendant used another cord secured around Laura's neck to drag her into the bathroom. Defendant then took Laura into the bedroom, told her that he wanted to fuck and put her on the bed. Defendant cut off her panties with the knife, spread her legs and repeated: "I want to fuck." Defendant removed his pants and raped her, although he was unable to ejaculate. (22 ROA 58-59).

Defendant then got up and pulled Laura into the other room by her tube top while he continued fondling her breasts. Defendant placed Laura on a sofa, cut off the tube top and used it to gag her mouth. Defendant used the knife to trace around the nipples of Laura's breasts. He told Laura that he had cut a girl's nipples off, but she was already dead. As this torment continued, Defendant took a fountain pen and inserted it into Laura's vagina. (22 ROA 59-62).

As Laura became more upset, Defendant got more violent. He pushed her onto the floor face down and kicked her while she was on the ground. Laura was lying naked on the floor, in a crouched position and Defendant began to beat her with nunchucks. (22 ROA 62-66). Laura felt that she was about to pass out but believed that if she did, she was going to die. She worked the tube top out of her mouth and begged Defendant not to hurt her anymore. Laura even offered Defendant her car if he would just leave.

Defendant told Laura that he could not leave because she knew what he looked like. As he said this, Defendant was pointing the knife at her back. Laura said that she would not tell anyone and Defendant told her that if she did, he would come back and kill her. (22 ROA 66).

But Defendant was not finished. He unwound wire hangers to make them into one long piece. He then wrapped the wire around Laura's neck and began pulling. Laura could not breathe and believed she was going to die. (22 ROA 67). Defendant fled in Laura's car. (22 ROA 67-70).

As a result of the attack, Laura received fifteen stitches behind her ear, a concussion,

black, swollen eyes and a huge bump on her leg that might have been the result of a bone chip. Laura never went back to the apartment. She testified that even to this day, she is never alone, and watches carefully over her children. (22 ROA 74-75).

Las Vegas Metropolitan Police Officer, Jack Hardin testified about his 1981 investigation of the burglary of a Radio Shack. (22 ROA 109). Defendant and another individual were identified as the suspects. Hardin responded to the address belonging to the other individual's father. As Hardin introduced himself to Mr. Stevenson, the father, the boys (Defendant and the other individual) fled. Officers pursued the boys and they were apprehended. Inside the residence, Officer Hardin found a great deal of property belonging to various Radio Shack stores. Hardin also recovered a .22 caliber blue steel Luger, a .22 caliber Luger revolver; a .357 Luger and a .25 caliber Bauer. (22 ROA 110-115).

Defendant was eventually booked for three counts of burglary and two counts of possession of stolen property. At a plea hearing, Defendant admitted committing the burglaries. (22 ROA 119-120). Defendant was committed to Spring Mountain Youth Camp on April 29, 1981 and released on August 26, 1981. (22 ROA 136).

Las Vegas Metropolitan Police Officer, John Hunt, testified that on December 18, 1981, he was called to the home of JoAnne Pinther who reported that her son had information about burglaries in the area, including one at her own home. Officer Hunt learned about a person dealing in stolen property and that he received it from Defendant and another boy. Defendant was a runaway at the time, so officers went to the other boy's home to investigate. Inside the attic of that home officers found two rifles, a shotgun and four handguns. The other boy in the burglaries implicated Defendant.

On January 20, 1982, Defendant was in juvenile custody for a different charge and was served with the burglary warrants. Defendant admitted to the burglaries but refused to cooperate with the officers.

The reason Defendant was in custody on January 20, 1982, was because he had been arrested outside the home of Katherine Smith on January 18, 1982. (23 ROA 10-11). Defendant was waving a handgun around and trying to gain entry into Ms. Smith's home.

(23 ROA 28).

Other witnesses were presented both by the State and by Defendant. Defendant called a prison minister who knew Defendant well, his step father, and his sister. Defendant also exercised his right of allocution. (24 ROA 6-79) After all the witnesses and closing arguments were heard, the jury returned verdicts of death, finding all six aggravating factors established beyond a reasonable doubt. (24 ROA 109-161 and 27 ROA 1154-1162)

ARGUMENT

APPELLATE COUNSEL WAS NOT INEFFECTIVE.

Defendant alleges numerous instances for which he contends "appellate counsel failed to provide reasonably effective assistance ... by failing to raise on appeal, or completely assert, all the available arguments supporting constitutional issues." However, Defendant fails to meet his requisite burden of proof on each of his claims and as such, this petition should be denied.

The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 395, 397, 105 S.Ct. 830, 836 837 (1985); *see also,* Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In order to demonstrate ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test set forth by Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2065, 2068 (1984); Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991); Thomas v. State, 120 Nev.Adv.Op. 7, 5-6, 83 P.3d 818, 823 (2004). Under this standard, the defendant must establish both that counsel's performance was deficient and that the deficiency resulted in prejudice. Strickland, 466 U.S. at 687-688 and 694, 104 S.Ct. at 2065 and 2068. Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d

473, 474 (1975) (*quoting* McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)). There is however a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." *See*, United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990) (*citing* Strickland, 466 U.S. at 689, 104 S.Ct. at 2065).

While the defendant has the ultimate authority to make fundamental decisions regarding his case, there is no constitutional right to "compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). In reaching this conclusion, the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751, 752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. 753, 103 S.Ct. at 3313. "For judges to second guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

Finally, in order to demonstrate that appellate counsel's alleged error was prejudicial; the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. *See* Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

Using this standard as a benchmark, it is clear that Defendant's instant claims are unfounded.

I. COUNSEL'S PERFORMANCE WAS NOT DEFICIENT.

The Nevada Supreme Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). Indeed, on direct appeal in this case

Defendant's counsel met this standard. Counsel filed a timely, comprehensive Opening Brief, supplemented by an equally substantive Reply, in which appellate counsel raised various meritorious claims including:

1. The trial court's failure to recuse itself and disclose a conflict of interest which allegedly tainted the proceedings.
2. The State's alleged failure to provide exculpatory information to the defense in a timely fashion.
3. Numerous instances of alleged prosecutorial misconduct.
4. Allegations that amendments of the charging document improperly prejudiced Defendant.
5. The allegation that the trial court improperly admitted evidence that a witness was threatened.
6. Allegations that the trial court improperly allowed admission of "bad acts" evidence.
7. Allegations that improper statements by the prosecution during closing argument in the guilt phase warranted reversal of Defendant's conviction.
8. A claim that cumulative error was sufficient to warrant a new trial.
9. Allegations that the use of overlapping and multiple use of the same facts as separate aggravating circumstances was reversible error.
10. Claims that improper statements by the prosecution during opening statement in the penalty phase warranted reversal.
11. Allegations that improper statements by the prosecution during closing argument in the penalty phase entitled Defendant to reversal.
12. Claims that the district court allowed improper admission of cumulative victim impact testimony.
13. Assertions that the district court utilized improper jury instructions.
14. Allegations that there was insufficient evidence to support a finding of "torture" as an aggravating circumstance.

Clearly, under the standards enunciated in both Burke v. State and Jones v. Barnes, Defendant cannot demonstrate deficient performance simply because he now points to a number of claims he alleges appellate counsel *could* also have raised. While it is true the

Nevada Supreme Court ultimately rejected Defendant's appeal (*see*, Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997)) merely because Defendant did not receive the favorable outcome he preferred, this result cannot be attributed to any deficiency on counsel's part. Clearly, Defendant's Opening and Reply Briefs contained what counsel considered the most meritorious of issues available for appeal and each was argued extensively and rigorously. Therefore, Defendant fails to demonstrate that counsel's performance was not reasonably effective.

II. DEFENDANT FAILS TO DEMONSTRATE PREJUDICE.

Neither can Defendant demonstrate the alleged errors resulted in "prejudice" because none of the "omitted" issues Defendant now raises would have had a reasonable probability of success on appeal.

1. CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE GENERALLY NOT APPROPRIATELY RAISED ON DIRECT APPEAL

Although each of Defendant's claims is addressed and refuted in turn in the following sections, Defendant's allegations in Grounds Two, Three, and Four[2] are based upon claims that appellate counsel was ineffective for "failing to raise or completely assert" on direct appeal numerous instances of ineffective assistance of trial counsel. However, each of these allegations fails because there was no reasonable probability that, even if appellate counsel had raised these issues, the Nevada Supreme Court would have entertained these claims on direct appeal.

The Nevada Supreme Court has generally declined to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 534-35 (2001); *See also,* Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995); Mazzan v. State, 100 Nev. 74, 80, 675 P.2d 409, 413 (1984). Even when it is difficult to conceive of a reason for any of trial counsel's actions which would be consistent

[2] Ground One of Defendant's petition merely sets forth what he alleges is the appropriate standard of review for a claim of ineffective assistance of counsel.

with effective advocacy, the Nevada Supreme Court has been hesitant to draw any final conclusions on the question of effectiveness of counsel on the basis of examination of the trial record alone. Gibbons v. State, 97 Nev. 520, 522, 634 P.2d 1214 (1981).

In Gibbons, the Court noted that trial counsel took numerous questionable actions which included, *inter alia,* waiving four of eight preemptory challenges which resulted in four jurors remaining seated who had expressed opinions concerning the defendant's guilt; failing to move for a change of venue under circumstances that appeared to call for such a motion; failing to object to the admission of the defendant's confession though there appeared to be substantial grounds for such an objection; calling the defendant to testify knowing he was taking a heavy dose of an anti-depressant drug; stating on the record, "we don't have a prayer in the world ... to fully cross examine the State's expert without our own expert" yet, after the court authorized employment and payment of a defense expert, counsel failed to employ such an expert; failing to proffer any ascertainable theory of defense; stating during the preliminary hearing that the defendant admitted shooting his father in law. Id. at 521-523. Yet, even in light of this record, the Court held the appropriate vehicle for the claim of ineffective assistance of counsel would be through post-conviction relief and not through appeal of judgment of conviction. Id. The court reasoned that it is possible that counsel could rationalize his performance at an evidentiary hearing and that if there is a evidentiary hearing there would be something more than conjecture for the Court to review. Id.

> Therefore, because there had neither been an evidentiary hearing nor a showing that trial counsel's alleged errors were so egregious that an evidentiary hearing would have been unnecessary, each and every one of Defendant's instant claims that appellate counsel was ineffective for "failing to raise or completely assert" instances of alleged ineffective assistance of counsel on direct appeal are specious. Indeed all would have had virtually no reasonable probability of success and should thus be dismissed.

While maintaining this position, each of the grounds raised in Defendant's instant petition are nonetheless addressed in turn below as if the Nevada Supreme Court had set aside its long-standing rule and been inclined to entertain Defendant's claims of ineffective assistance of appellate counsel premised upon claims of ineffective assistance of trial

counsel. Yet, even if Defendant's claims had survived the threshold barrier as set forth in Gibbons, none are successful on their merits.

2. DECLINING TO RAISE THE ISSUE OF TRIAL COUNSEL'S PRE-TRIAL CONDUCT.

In Ground Two of his petition, Defendant claims appellate counsel should have raised the issue that trial counsel was ineffective for first, "insisting" that Defendant should waive his right to a speedy trial and then second, allowing some forty-six (46) months to elapse prior to the commencement of trial. Defendant alleges that based on this delay, numerous witnesses were able to attain information about his crimes and in turn, fabricate evidence against him.

Clearly, this is not a claim that has a reasonable probability of success on appeal. Indeed, waiving the right to speedy trial in a capital murder case is a sound tactical decision on counsel's part as sixty days to prepare for trial would hardly be sufficient. This is especially true considering the substantial evidence the State maintained of Defendant's guilt. While it is true counsel sought several continuances, each instance was for a valid reason and calculated to assure Defendant received a rigorous and effective defense. Furthermore, Defendant fails to support his contention that counsel "insisted" he waive his right to a speedy trial (and it's inherent implication that Defendant wished to do otherwise) with anything other than his own self-serving allegations. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). And, in fact, the record reflects that if any party was concerned over prejudice due to the delay, it was the State as demonstrated by its filing of a motion to expedite trial.

Moreover, Defendant similarly offers nothing more than his own speculation to bolster his contention that the delay resulted in numerous witnesses attaining information about his crimes which they subsequently used to fabricate evidence at trial. In Hargrove, the Nevada Supreme Court held that claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled

by the record. Id.

Defendant here offers no such specific factual allegations. He does not point to any specific witnesses other than categorically complaining about "jailhouse snitches." Defendant does not recite any specific instances of conduct or any particular testimony that he demonstrates was fabricated. Most significantly, Defendant fails entirely to connect the witnesses' knowledge of his crimes with any cause or source other than he himself proffering the information to his fellow inmates. Clearly, Defendant's own mistake in judgment cannot be rationally translated into counsel's error. As the United States Supreme Court has articulated, "[i]nescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his." U.S. v. White, 401 U.S. 745, 752, 91 S.Ct. 1122, 1126 (1971).

Thus, counsel's strategy to waive the right to a speedy trial was sound and Defendant cannot shift accountability for what he told other inmates to counsel. As such, Defendant's claim that appellate counsel was remiss for failing to bring the claim on direct appeal is clearly without merit.

3. DECLINING TO RAISE THE ISSUE OF TRIAL COUNSEL FAILING TO OBJECT TO THE STATE'S USE OF AN "IN CUSTODY" PHOTOGRAPH DURING THE GUILT PHASE OF TRIAL.

In Ground III, Defendant claims appellate counsel was ineffective for failing to "raise or completely assert all the available arguments" surrounding trial counsel's failure to object to the State's use of an "in custody" photograph of Defendant during the guilt phase of the trial. However, precisely because of trial counsel's decision not to object to the admission of the photograph, Defendant's claim had little chance of success on appeal.

"As a general rule, the failure to object, assign misconduct, or request an instruction, will preclude appellate consideration." Garner v. State, 78 Nev. 366, 373, 374 P.2d 525, 529 (1962); Cook v. State, 77 Nev. 83, 359 P.2d 483; O'Briant v. State, 72 Nev. 100, 295 P.2d 396; Kelley v. State, 76 Nev. 65, 348 P.2d 966; State v. Moore, 48 Nev. 405, 233 P.

523; State v. Boyle, 49 Nev. 386, 248 P. 48. However, where the errors are patently prejudicial and inevitably inflame or excite the passions of the jurors against the accused, the general rule does not apply. Id.; *see also* Gallego v. State, 117 Nev. 348, 23 P.3d 227, 239 (2001). The Garner Court further stated, "[i]f the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial." Lisle v. State, 113 Nev. 540, 552, 937 P.2d 473, 480 - 481 (1997) (*quoting* Garner, 78 Nev. at 374, 374 P.2d at 530)(*cf.* Lay v. State, 110 Nev. 1189, 1194, 886 P.2d 448, 451 (1994) ("[W]here evidence of guilt is overwhelming, prosecutorial misconduct may be harmless error.").

Here, the admission of the photograph was neither plain error nor does Defendant establish prejudice and appellate counsel's decision to forego raising the claim on direct appeal was not unreasonable.

Defendant complains that the photograph was impermissible evidence of "prior bad acts." This is simply not the case. Introducing a picture of Defendant is not consistent with showing a prior criminal act, or criminal conduct, or even an act. It simply depicts how Defendant looked on a certain day and in this case, Defendant's appearance had changed considerably since the time of the murders.

NRS 48.045 provides, "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Thus, contrary to Defendant's contention that there was no relevant purpose for introduction of the photograph, clearly it was properly admitted for the purpose of identification.

Further, trial counsel was not ineffective for failing to object to admitting the photograph. Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; *see also* Howard v State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984). Indeed,

it is common trial strategy to withhold an objection when counsel does not wish to draw attention to a particular fact in evidence. Under these particular circumstances, clearly drawing attention to Defendant's more "dangerous" look and away from his clean-cut appearance in court would have served little value in ascertaining a favorable result from the jury. As such, trial counsel cannot be deemed ineffective for a reasonable tactical decision and it follows that this claim would have had little chance of success on appeal.

4. PENALTY PHASE ALLEGATIONS

In Ground Four, Defendant raises six distinct incidents of what he characterizes as ineffective assistance of counsel during the penalty phase. Defendant contends appellate counsel was similarly ineffective for either declining to raise the issues on appeal or completely assert all available arguments. As with Defendant's allegations in the pre-trial and guilt phase, and notwithstanding the Gibbons rule, each claim is addressed and its chances for success on appeal are refuted in turn.

i. No Objection to the Character Evidence Instruction.

In Ground IV(a), Defendant asserts that trial counsel was ineffective for failing to object to a jury instruction that he alleges, was unconstitutional in that it "did not define and limit the use of character evidence by the jury." In turn, Defendant claims, albeit cursorily, that appellate counsel was ineffective for declining to raise the issue on appeal or "completely assert all available arguments." Similarly, in Ground V, Defendant also asserts that appellate counsel was ineffective for declining to raise what he characterizes as the unconstitutionality of the character evidence instruction. In the latter section, Defendant takes the opportunity to greatly elaborate on his claim, apparently attempting to establish that the error was so egregious, the failure to object should not have precluded appellate counsel from raising the issue on direct appeal. Because both Ground IV(a) and Ground V effectively raise the identical issue, both are refuted in this section.

Indeed, appellate counsel did not raise this issue on direct appeal. However, its omission does not rise to the level of ineffective assistance because Defendant is unable to

demonstrate that had it been raised, there was a reasonably probability of success.

First, trial counsel's failure to object precluded review on direct appeal. It is well-settled that "[t]he failure to object or to request special instruction to the jury precludes appellate consideration." Etcheverry v. State, 107 Nev. 782, 784-785, 821 P.2d 350, 351 (1991) (*quoting* McCall v. State, 91 Nev. 556, 557, 540 P.2d 95, 95 (1975)) (*citing* State v. Fouquette, 67 Nev. 505, 221 P.2d 404 (1950)); *see also*, Clark v. State, 89 Nev. 392, 513 P.2d 1224 (1973); Cook v. State, 77 Nev. 83, 359 P.2d 483 (1961); State v. Switzer, 38 Nev. 108, 110, 145 P. 925; State v. Hall, 54 Nev. 213, 235, 13 P.2d 624; State v. Lewis 91 P.2d 820, 823 (1939) (If defendant had felt that a more particular instruction should have been given, he should have requested it. This he did not do, and cannot now be heard to complain of the lack of such instruction.).

Thus, in this case, appellate counsel's decision to forego raising a complaint related to trial counsel's failure to object to the instruction, and perhaps diluting the impact of the more meritorious claims that were raised, was clearly sound strategy. This is especially true in light of the fact, and contrary to Defendant's claim in Ground V, that there was nothing improper about the manner in which the jury was instructed.

During the penalty phase, the jury was instructed as follows:

> Instruction No. 6
> In the penalty hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense and any other evidence that bears on the defendant's character. Hearsay is admissible in a penalty hearing.
>
> Instruction No. 7
> 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
> C: 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:**
> One: The jurors unanimously ... find at least one aggravating circumstance has been established beyond a reasonable doubt; and

Two: 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 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 of the other jurors. The entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances.

Instruction No. 8

The law does not require the jury to impose the death penalty under any circumstances, even when the aggravating circumstances outweigh the mitigating circumstances; nor is the defendant required to establish any mitigating circumstances in order to be sentenced to less than death.

Instruction No. 9

You are instructed that **the following factors are circumstances by which murder of the first degree may be aggravated:**

One: The murder was committed by a person under sentence of imprisonment, to wit: Defendant was on parole for a Nevada conviction for the crime of sexual assault in 1982;

Two: The murder was committed by a person who was previously convicted of a felony involving the use of threat or violence to a person of another. Defendant was convicted of sexual assault, a felony, in the state of Nevada in 1982.

Three: The murder was committed while the person was engaged in the commission of and/or an attempt to commit any burglary and the person charged (a) killed the person murdered; or (b) knew that life would be taken or lethal force used, or acted with reckless indifference for human life.

Four: The murder was committed while the person was engaged in the commission of and/or an attempt to commit any kidnapping and the person charged (a) killed the person murdered; or (b) knew that life would be taken or lethal force used; or (c) acted with reckless indifference for human life.

Five: The murder was committed while the person was engaged in the commission of or in an attempt to commit any robbery, and the person charged (a) killed the person murdered; or (b) knew that life would be taken by or lethal force used; or (c) acted with reckless indifference for human life.

Six: The murder involved torture.

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Additionally, Instructions Numbers 16 and 17 explained that mitigating circumstances need not rise to the level of a legal justification and also enumerated seven (7) circumstances which could be considered mitigating factors. Number 7 on this list was a "catch all" circumstance allowing the jury to consider *any* mitigating circumstance. Instruction 18 provided that the State has the burden to establish any aggravating factors beyond a reasonable doubt. Instruction 19 then defined reasonable doubt. It was only then that Instruction 20, which Defendant now contests, was given:

> 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.

(24 ROA 81-95).

Thus, the jury was indeed instructed to first consider and weigh only the aggravating and mitigating circumstances prior to determining if death was an appropriate sentence. The jurors were further instructed as to what statutorily constitutes aggravating circumstances. Then, and only then, was the jury to directed to consider "other matter" evidence.

As Defendant points out, because of the gravity of the circumstances surrounding the imposition of a penalty of death, the Nevada Supreme Court, in Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001) set forth specific language which it directed the district court to use when instructing a jury during a capital sentencing proceeding. In Evans, the court stated:

> For future capital cases, we provide the following instruction to guide the jury's consideration of evidence at the penalty hearing: In deciding on an appropriate sentence for the defendant, you will consider three types of evidence: evidence relevant to the existence of aggravating circumstances, evidence relevant to the existence of mitigating circumstances, and other evidence presented against the defendant. You must consider each type of evidence for its appropriate purposes.
>
> In determining unanimously whether any aggravating circumstance has been proven beyond a reasonable doubt, you are to consider only evidence relevant to that aggravating circumstance. You are not to consider other evidence against the defendant.

> In determining individually whether any mitigating circumstance exists, you are to consider only evidence relevant to that mitigating circumstance. You are not to consider other evidence presented against the defendant.
>
> In determining individually whether any mitigating circumstances outweigh any aggravating circumstances, you are to consider only evidence relevant to any mitigating and aggravating circumstances. You are not to consider other evidence presented against the defendant.
>
> If you find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists and each of you determines that any mitigating circumstances do not outweigh the aggravating, the defendant is eligible for a death sentence. At this point, you are to consider all three types of evidence, and you still have the discretion to impose a sentence less than death. You must decide on a sentence unanimously.
>
> If you do not decide unanimously that at least one aggravating circumstance has been proven beyond a reasonable doubt or if at least one of you determines that the mitigating circumstances outweigh the aggravating, the defendant is not eligible for a death sentence. Upon determining that the defendant is not eligible for death, you are to consider all three types of evidence in determining a sentence other than death, and you must decide on such a sentence unanimously.

Id. at 516-17.

It cannot be overlooked that the Evans court specifically and unequivocally intended only prospective application of the mandate. Furthermore, it is equally clear that while the language of the instructions given in this case do not mimic the instruction set forth by Evans precisely, the fundamental nature and directive of the instruction is indeed covered and conveyed.

Finally, Defendant fails to demonstrate, by anything other than pure speculation, that the jury did not in fact follow the court's instruction. Indeed, the record reflects that the jurors found the State had established six aggravating circumstances beyond a reasonable doubt and that these factors outweighed the mitigating circumstances.

Therefore, because there was clearly no chance for success on appeal, appellate counsel's decision to forego raising this issue was not only well within the realm of "reasonably effective" assistance but was laudable.

ii. Mitigating Factors In The Jury Instructions.

In Ground IV(b), Defendant argues three distinct claims in which he believes rise to the level of ineffective assistance of appellate counsel for "failing to raise on appeal or completely assert all the available arguments." First, Defendant claims that trial counsel should have offered a jury instruction enumerating Defendant's "specific" mitigating circumstances. Second, trial counsel should have objected to the instruction given which listed the statutory mitigating factors. Third, that trial counsel should have submitted a special verdict form listing the mitigating factors found by the jury. As with the preceding section, Defendant merely sets forth a cursory allegation that appellate counsel was ineffective for failing to raise the issue and elaborates upon this argument in Ground VI. Again, the arguments set forth in both sections are refuted here.

As a threshold matter, the principle that "[t]he failure to object or to request special instruction to the jury precludes appellate consideration" Etcheverry v. State, supra, 107 Nev. at 784-85, 821 P.2d at 351, is similarly applicable to each of Defendant's claims in this section.

1. No offer of a jury instruction enumerating specific mitigating circumstances.

Appellate counsel was judicious in not raising on direct appeal the issue of trial counsel's declination to offer a jury instruction enumerating specific mitigating factors based upon the chances this issue would succeed on direct appeal.

The absence of instructions on particular mitigating factors does not violate the Eighth and Fourteenth Amendments. Buchanan v. Angelone, 522 U.S. 269, 275, 118 S.Ct. 757, 761 (1998). In Buchanan, the United States Supreme Court noted that its cases established that a sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. Id. at 276-77, 118 S.Ct. at 761- 62 (*citing* Penry v. Lynaugh, 492 U.S. 302, 317-18, 109 S.Ct. 2934, 2946-947 (1989); Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77 (1982); Lockett v. Ohio, 438 U.S.

586, 604, 98 S.Ct. 2954, 2964-965 (1978)). However, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. Id.; *see also,* Johnson v. Texas, 509 U.S. 350, 362, 113 S.Ct. 2658, 2666 (1993); Franklin v. Lynaugh, 487 U.S. 164, 181, 108 S.Ct. 2320, 2331 (1988). The "consistent concern" has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence. Id. But there is no mandate that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence. Id. And indeed, the line of case law addressing this issue suggests that complete jury discretion is constitutionally permissible. *See* Tuilaepa v. California, 512 U.S. 967, 971, 978-79, 114 S.Ct. 2630, 2638-239 (1994) (noting that at the selection phase, the state is not confined to submitting specific propositional questions to the jury and may indeed allow the jury unbridled discretion); Zant v. Stephens, 462 U.S. 862, 875, 103 S.Ct. 2733, 2741-742 (1983), (rejecting the argument that a scheme permitting the jury to exercise "unbridled discretion" in determining whether to impose the death penalty after it has found the defendant eligible is unconstitutional).

The Nevada Supreme Court has adopted the United States Supreme Court's rationale without imposing any higher constitutional hurdle to overcome. *See,* Byford v. State, 116 Nev. 215, 238, 994 P.2d 700, 715 (2000) (in the absence of a jury instruction which includes specific mitigating circumstances, so long as the defendant is not precluded from presenting his theories of mitigation, such as during closing argument, there is no constitutional violation).

Therefore, because there was no proffered jury instruction and because there is no authority supporting Defendant's claim he is constitutionally guaranteed an instruction including the specific mitigating circumstances of his case, he fails to demonstrate he was prejudiced by appellate counsel's decision not to raise this issue on direct appeal.

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2. No objection to the instruction given

Similarly, there was no probability of success on direct appeal for the claim that trial counsel's failure to object to the jury instruction enumerating statutory mitigating circumstances equated to ineffective assistance of counsel. Thus, appellate counsel was not remiss for failing to raise the issue.

The instruction given at trial mirrored the language of NRS 200.035 which provides:

> Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:
>
> 1. The defendant has no significant history of prior criminal activity.
> 2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> 3. The victim was a participant in the defendant's criminal conduct or consented to the act.
> 4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.
> 5. The defendant acted under duress or under the domination of another person.
> 6. The youth of the defendant at the time of the crime.
> 7. *Any other mitigating circumstance.*

The United States Supreme Court has held that, while the defendant is not limited to the statutory mitigating circumstances, the "catchall" instruction as set forth in NRS 200.035(7) is sufficient to protect a defendant's constitutional rights.

In Buchanan v. Angelone, *supra*, the Court held that the entire context in which the instructions are given must be considered in determining whether reasonable jurors would be led to believe that all evidence of petitioner's background and character could be considered in mitigation. Id. at 277-78, 118 S.Ct at 762; *see also*, Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 1197-198 (1990).

As in this case, the Buchanan Court found no constitutional violation when, even though

specific mitigating circumstances when not enumerated in jury instructions, but where the jury was instructed (1) it could base its decision on "all the evidence" (2) that the jurors were informed that when they found an aggravating factor proved beyond a reasonable doubt they *may* fix the penalty at death (3) but if they found all the evidence justified a lesser sentence then they *shall* impose a life sentence and (4) there were no express constraints on how they could consider mitigating circumstances. Id. Moreover, in Boyde, the court considered the validity of an instruction listing eleven factors the jury was to consider in determining punishment and found a "catchall factor" allowing consideration of "[a]ny other circumstance" to be sufficient. Boyde, 494 U.S. at 373-74, 110 S.Ct., at 1194-1195.

Similarly, while maintaining the mandates of NRS 175.554, which requires the court "shall also instruct the jury as to the mitigating circumstances alleged by the defense upon which evidence has been presented," the Nevada Supreme Court has recognized the pertinent inquiry into the sufficiency of an instruction in a capital case is to be based upon what the reasonable juror would understand. *See e.g.,* Riley v. State, 107 Nev. 205, 217, 808 P.2d 551, 558- 59 (1991)(The word "may" in the context of a capital sentencing instruction would be commonly understood by reasonable jurors as a permissive word that does not mandate a particular action. Thus, the jury was properly informed that the imposition of a death sentence was not compulsory, even if aggravating circumstances outweighed mitigating circumstances).

In this case, when all of the instructions are taken together, including the "catchall" that the jury could consider "any mitigating factor" it is highly improbable that the reasonable juror would simply ignore Defendant's extensive proffer of mitigating evidence during the penalty phase.

Moreover, in Boyde, *supra,* the United States Supreme Court held that the appropriate standard for determining whether jury instructions satisfy constitutional principles was "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Id., at 380, 110 S.Ct., at 1198; *see also* Johnson, *supra,* 509 U.S. at 367-368, 113 S.Ct., at 2669. In this

case, the record clearly reflects that the jury found the State had established six aggravating circumstances beyond a reasonable doubt. The jurors were unequivocally instructed that no mitigating circumstance could outweigh any aggravator and that there had to be unanimous agreement or else a sentence of life must be imposed. Indeed, Defendant fails to demonstrate any reasonable likelihood that the jury misapplied the contested instruction and did not consider and weigh all mitigating circumstances.

Thus, there was no basis for an objection by trial counsel and indeed, appellate counsel's strategy to forego this claim on direct appeal was a sound tactical decision.

3. No submission of a special verdict form.

Defendant's final claim on this issue is that appellate counsel failed to raise the argument on direct appeal that trial counsel was ineffective for not submitting a special verdict form listing mitigating circumstances found by the jury. However, this claim likewise fails.

Defendant fails to cite any statutory or caselaw authority to support his contention that trial counsel's decision not to submit a special verdict form for the purpose of listing mitigating circumstances violated his Sixth Amendment guarantee to effective assistance of counsel. Indeed, the Nevada Supreme Court has held that the trial court is not obligated to grant a defendant's request for such a special verdict form and the sentencer in a capital penalty hearing is not constitutionally or statutorily required to make such specific findings. Servin v. State, 32 P.3d 1277, 1289 (2001) (*citing*, NRS 175.554(4); Rook v. Rice, 783 F.2d 401, 407 (4th Cir.1986)); *see also* Rogers v. State, 101 Nev. 457, 469, 705 P.2d 664, 672 (1985) (rejecting claim that district court erred by not providing jury with form or method for setting forth findings of mitigating circumstances).

Thus, trial counsel's performance can hardly be deemed to have fallen below the "reasonably effective" standard and as such, appellate counsel's decision to forego the claim on direct appeal was similarly reasonable.

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ii. Failure to Argue Specific Mitigating Circumstances or the Weighing Process Necessary Before the Death Penalty May Be Considered During Closing Argument.

Defendant contends that trial counsel was ineffective because "not once during closing argument at the penalty hearing did either (sic) trial counsel submit the existence of any specific mitigating circumstances that existed on behalf of RIPPO." Again, Defendant claims appellate counsel was ineffective for failing to raise this issue on direct appeal. However, because Defendant's claim is entirely belied by the record, under the Hargrove standard, as discussed above, his contention is without merit.

During closing argument trial counsel did indeed argue mitigating circumstances including (1) that Defendant had an emotionally disturbed childhood (2) that he got lost in the juvenile system (3) that Defendant is a person who needs help which the prison system could provide and (4) that he has kept a clean record history in prison (24 ROA 118-121). The role of a court in considering allegations of ineffective assistance of counsel, is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978)(*citing*, Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In the nine mitigating factors Defendant claims in his instant petition, he adds little to the mitigating circumstances counsel did in fact raise to the jury, except perhaps that Defendant was remorseful, that he was under the influence of drugs at the time of the murders and that Diana Hunt had received favorable treatment after testifying against Defendant. However, even these factors were clearly before the jury. Defendant himself exercised his right to allocution to express his remorse and the jury heard of that he and one of the victims had injected morphine for recreational purposes. Defense counsel also clearly established Diana Hunt's testimony was a product of her plea agreement. Thus, trial counsel did not neglect to bring these factors to the jury's attention but chose not to specifically address them in his closing argument.

In fact, under the particular facts of this case, during his final communication with the jury, it was a sound strategy decision for trial counsel to avoid an overly pretentious plea to save Defendant's life which could quite possibly result in offending the jurors by attempting to portray this man as a victim himself. Indeed, throughout the course of the trial, the jury had heard a plethora of evidence depicting how Defendant brutally committed the gruesome murders of two young women in the home of one of the victims. The jurors heard how Defendant planned to rob the victims, how he repeatedly used a stun gun, forced them into a closet, bound and gagged them and then ultimately strangled them to death. They heard how he then systematically cleaned up the crime scene including removing one victim's boots and pants to conceal his own blood. They heard how he told a friend that he had "choked the two bitches to death." The jury learned that on the evening of the murder, Defendant helped himself to one of the victim's car. He told a friend someone "had died" for the car. Defendant went on a shopping spree using a credit card belonging to one of the victim's boyfriend.

Thus, 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. As such, the likelihood of a claim of ineffective assistance of counsel based on this issue would have scant chance of success on appeal. Therefore, appellate counsel was not remiss for failing to raise the claim to the Nevada Supreme Court in Defendant's direct appeal.

iii. Failure to Object During the State's Closing Argument.

Defendant alleges that appellate counsel was ineffective for failing to raise on appeal trial counsel's failure to object to a statement made by the prosecution during its closing argument. The prosecutor stated, "And I would pose the question now: Do you have the resolve, the courage, the intestinal fortitude, the sense of commitment to do your legal duty?" (3/14/96, 108).

Again, it should be repeated that, "as a general rule, the failure to object ... will preclude appellate consideration." Garner v. State, supra, 78 Nev. at 373, 374 P.2d at 529.

However, where the errors are patently prejudicial and inevitably inflame or excite the passions of the jurors against the accused, the general rule does not apply. Id. The Garner Court further stated, "[i]f the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial." Lisle v. State, supra, 113 Nev. at 552, 937 P.2d at 480-81 (1997) (*cf.* Jones v. State, 113 Nev. 454, 469, 937 P.2d 55, 65 (1997) (likening the defendant to a "rabid animal" during closing argument at the penalty phase was misconduct, but the misconduct was harmless error in light of the overwhelming evidence of the defendant's guilt.)).

As Defendant correctly points out, in Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001), the Nevada Supreme Court found that asking the jury if it had the "intestinal fortitude" to do its "legal duty" was highly improper.[3] Id. at 515 (*citing* United States v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038 (1985) (to exhort the jury to "do its job"; that kind of pressure ... has no place in the administration of criminal justice)). However, the question is whether the prosecutor's improper remarks prejudiced the defendant by depriving him of a fair penalty hearing. Id. (*citing* Jones v. State, *supra*).

In Evans, the "intestinal fortitude" comment was not the only objectionable statement made during the State's closing argument. Additionally, the prosecutor also "deplored 'an era of mindless, indiscriminate violence' perpetrated by persons who 'believe they're a law unto themselves.'" He continued to argue that the defendant "is one of these persons. This is his judgment day." Evans, 28 P.3d at 514. In determining whether the remarks so prejudiced the defendant that he was deprived a fair penalty hearing, the court found

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[3] Although this court noted and affirmed a similar argument in Castillo v. State, 114 Nev. 271, 279-80, 956 P.2d 103, 109 (1998) *corrected by* McKenna v. State, 114 Nev. 1044, 1058 n. 4, 968 P.2d 739, 748 n. 4 (1998), when the prosecutor stated, "The issue is do you, as the trial jury, this afternoon have the resolve and the intestinal fortitude, the sense of commitment to do your legal and moral duty, for whatever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets..." it addressed only the prosecutor's argument on future dangerousness, not the reference to the jury's "duty."

"considered alone, perhaps they did not, but the prosecutor erred further." Id. at 515. Indeed, it was not until the court determined the prosecutor incorrectly informed the jurors that they did not "have to wait until a certain point in the deliberation" to consider evidence other than aggravating and mitigating circumstances to determine if the penalty of death was appropriate, did it find prejudice. Id. at 516.

Clearly, unlike the compounded errors in Evans, in this case Defendant was not so prejudiced that he was deprived of a fair penalty hearing. Indeed, even if the statement was error, "any error caused by these comments was harmless in light of the overwhelming evidence against Rippo." Rippo v. State, 113 Nev. 1239, 1255, 946 P.3d 1017, 1027 (1997).

Therefore, the chances of this claim succeeding on appeal were slight and appellate counsel was not imprudent for failing to raise the claim on direct appeal.

iv. No Motion to Strike Two Aggravating Factors.

Finally, Defendant argues that appellate counsel was ineffective for failing to raise the issue that trial counsel should have moved to strike two aggravating circumstances that were based on Defendant's 1982 conviction and sentence for the sexual assault of Laura Martin. This claim is clearly frivolous because the record reflects that trial counsel did in fact file a pre-trial motion to strike these two aggravating factors. Furthermore, even if Defendant's claim were based on any fact, the Strickland analysis does not mean that the court "should second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, *supra*, 94 Nev. at 675, 584 P.2d at 711. As discussed below, there was little chance of successfully striking these two aggravating factors. Indeed, even if Defendant's claim were more properly framed in terms of claiming ineffective assistance of appellate counsel for not raising this issue on direct appeal, Defendant's contention would still fail because there was no reasonable probability the claim would survive review.

Defendant's allegation arises from Instruction No. 9, in which the jury was instructed it may consider as aggravating circumstances:

One: The murder was committed by a person under sentence of imprisonment, to wit: Defendant was on parole for a Nevada conviction for the crime of sexual assault in 1982;

Two: The murder was committed by a person who was previously convicted of a felony involving the use of threat or violence to a person of another. Defendant was convicted of sexual assault, a felony, in the state of Nevada in 1982.

Clearly appellate counsel was not remiss for declining to argue these aggravators were improper. The court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. In this particular case, at the time of Defendant's appeal, it was a wise tactic to omit this claim in lieu of other issues that were raised.

First, there was clear evidence presented that Defendant was on parole for the 1982 sexual assault and from the brutal nature of the assault, it is entirely an understatement to characterize Defendant's crime as merely "involving the use of threat or violence to a person of another." Thus, there was no basis for such a motion. While Defendant argues that defense counsel should have been compelled "to utilize any avenue of attack available against the aggravators" surely he does not suggest counsel must also pursue claims which have absolutely no basis in either law or fact.

However, Defendant appears to argue that the aggravators should have been stricken because the guilty plea that led to Defendant's conviction was not voluntarily and knowingly entered and involved a "woefully inadequate" plea canvass.[4] Yet, Defendant offers nothing more than his own bare allegation to support not only this claim, but also his claim that he "brought this to the attention of trial counsel but no effort was made to invalidate the two

[4] In State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000), the Nevada Supreme Court held that a failure to conduct a ritualistic oral canvass does not mandate a finding of an invalid plea. Instead, the Court found that an appellate court should not invalidate a plea as long as the totality of the circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea. Id. at 448.

aggravators." Clearly, this is not a sufficient showing. "It is the appellant's responsibility to provide the materials necessary for this court's review." Byford v. State, supra, 116 Nev. at 238, 994 P.2d at 715 (*citing* Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975)). Defendant here has himself "woefully" failed to meet his burden.

And, even if appellate counsel did err, Defendant is nonetheless unable to demonstrate prejudice.

NRS 175.554(3) provides:

> The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

In this case, the jury found six aggravating and no mitigating circumstances sufficient to outweigh the aggravators. Therefore, even if the two contested aggravators were stricken, the result would not have been different. Defendant offers nothing more than his own speculation that "[a]s the State improperly stacked aggravating circumstances the removal of the prior conviction would have eliminated the two most damaging aggravators." The State disagrees. Clearly, the four remaining aggravating circumstances were at least as "damaging":

> Three: The murder was committed while the person was engaged in the commission of and/or an attempt to commit any burglary and the person charged (a) killed the person murdered; or (b) knew that life would be taken or lethal force used, or acted with reckless indifference for human life.
>
> Four: The murder was committed while the person was engaged in the commission of and/or an attempt to commit any kidnapping and the person charged (a) killed the person murdered; or (b) knew that life would be taken or lethal force used; or (c) acted with reckless indifference for human life.
>
> Five: The murder was committed while the person was engaged in the commission of or in an attempt to commit any robbery, and the person charged (a) killed the person murdered; or (b) knew that life would be taken by or lethal force used; or (c) acted with reckless indifference for human life.

Six: The murder involved torture.

Thus, the record clearly belies Defendant's contention that "[t]he number of aggravators ... unduly swayed the jury. If one aggravator was enough to impose the death sentence, then surely six meant death was the only answer."

Based on all of the foregoing reasons, appellant counsel was clearly not ineffective for failing to raise Defendant's claim on direct appeal.

5. CONSTITUTIONALITY OF NEVADA'S PROCEDURES FOR ADMISSION OF VICTIM IMPACT TESTIMONY.

In Ground VII, Defendant alleges appellate counsel was ineffective for "failing to raise or assert all available arguments supporting constitutional issues raised" in his claim that Nevada's statutory scheme and case law fails to properly limit the introduction of victim impact testimony. However, this claim is barred by the doctrine of the law of the case and entirely belied by the record.

Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001); *see also*, McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument. Hall, *supra*; McNelton, *supra*; Hogan, *supra*.

In this case, on direct appeal, Defendant argued that the "cumulative and excess victim impact testimony should not have been allowed." The Nevada Supreme Court rejected this claim finding:

> Questions of admissibility of testimony during the penalty phase of a capital trial are largely left to the trial judge's discretion and will not be disturbed absent an abuse of discretion. Rippo v. State, *supra* 113 Nev. at 1261, 946 P.2d at 1031 (*citing* Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649, 656 (1994)). A jury considering the death penalty may consider victim-impact evidence as it relates to the victim's character and the emotional

> impact of the murder on the victim's family. Id. (*citing*, Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991); Homick v. State, 108 Nev. 127, 136, 825 P.2d 600, 606 (1992); *also* NRS 175.552).
>
> Five witnesses testified as to the character of the victims and the impact the victims' deaths had on the witnesses' lives and the lives of their families.
>
> We conclude that each testimonial was individual in nature, and that the admission of the testimony was neither cumulative nor excessive. Thus, we conclude that the district court did not abuse its discretion in allowing all five witnesses to testify. Id.

Because this issue was raised and rejected on direct appeal, Defendant's complaint here appears to be that appellate counsel failed to "assert all available arguments" supporting this claim. However, it must be noted that Defendant merely sets forth various caselaw in his petition but he fails entirely to make any specific factual allegations indicating where he believes appellate counsel's argument on direct appeal fell short. As such, his bare allegations are not sufficient to entitle him to relief. *See* Hargrove, *supra* 100 Nev. at 502, 686 P.2d at 225.

Defendant does appear to imply that appellate counsel should be faulted for failing to challenge the constitutionality of Nevada's death penalty scheme as failing to limit the introduction of victim impact testimony during the penalty phase proceedings. Clearly, this is the same issue appellate counsel did indeed raise on direct appeal only here Defendant dresses it up "in different clothing." *See*, Evans v. State, 117 Nev. 609, 28 P.3d 498, 521 (2001).

However, even if the issue were validly raised in his instant petition, Defendant's claim that Nevada law fails to limit the admission of victim impact testimony lacks merit and as such, appellate counsel's strategy to limit the argument to the particular facts of Defendant's case was reasonable.

For instance, in rejecting Defendant's claim, the Nevada Supreme Court further noted:

> Three of the witnesses referred to the brutal nature of the crime. Rippo, *supra* 113 Nev. at 1261, 946 P.2d at 1031. The State instructed the family members not to testify about how heinous the crimes were, and the district court apparently relied, in part,

> on these instructions in allowing the victim-impact testimony. Thus, the testimony, insofar **as it described the nature of the victims' deaths went beyond the boundaries set forth by the State.** Id. at 1262, 946 P.2d at 1031 (emphasis added).

Thus, clearly Defendant's claim that Nevada's capital sentencing scheme imposes "no limits on the presentation of victim impact testimony" is wholly without merit. Therefore, even if appellate counsel had delved further into the issue, claiming unconstitutionality of the sentencing structure in its entirety, there was scant chance such a claim would have survived appellate review.

6. CONSTITUTIONALITY OF THE "PREMEDITATION AND DELIBERATION" INSTRUCTION

In Ground VIII, Defendant alleges the "stock jury instruction given in this case defining premeditation and deliberation necessary for first degree murder" was constitutionally violative. Defendant contends that appellate counsel was ineffective for declining to raise the issue on direct appeal. However, Defendant's claim is without merit because based on well-settled precedent, there was no reasonable probability of success.

The contested instruction stated:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing. Premeditation need not be for a day, an hour or even a minute. It may be instantaneous as successive thoughts of the mind. For if a jury believes from the evidence that the act constituting the killing had been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

As Defendant correctly points out, in Byford, supra, the propriety of a *Kazalyn*[5] instruction was addressed. While the Nevada Supreme Court rejected the argument as a basis for any relief for the defendant ("We conclude that the evidence in this case is clearly sufficient to establish deliberation and premeditation on Byford's part.") the Court recognized that the instruction itself raised a "legitimate concern." Byford, supra, 116 Nev.

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[5] Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

at 233, 994 P.2d at 712. The Byford Court stated:

> The *Kazalyn* instruction and some of this court's prior opinions have underemphasized the element of deliberation. The neglect of "deliberate" as an independent element of the *mens rea* for first-degree murder seems to be a rather recent phenomenon. Before *Kazalyn*, it appears that "deliberate" and "premeditated" were both included in jury instructions without being individually defined but also without "deliberate" being reduced to a synonym of "premeditated." *See, e.g.*, State of Nevada v. Harris, 12 Nev. 414, 416 (1877); Scott v. State, 92 Nev. 552, 554 n. 2, 554 P.2d 735, 737 n. 2 (1976). We did not address this issue in our *Kazalyn* decision, but later the same year, this court expressly approved the *Kazalyn* instruction, concluding that "deliberate" is simply redundant to "premeditated" and therefore requires no discrete definition. *See* Powell v. State, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992), *vacated on other grounds by* 511 U.S. 79, 114 S.Ct. 1280 (1994). *Citing* Powell, this court went so far as to state that "the terms premeditated, deliberate and willful are a single phrase, meaning simply that the actor intended to commit the act and intended death as the result of the act." Greene v. State, 113 Nev. 157, 168, 931 P.2d 54, 61 (1997). We conclude that this line of authority should be abandoned. By defining only premeditation and failing to provide deliberation with any independent definition, the *Kazalyn* instruction blurs the distinction between first- and second-degree murder. Id. at 234-35, 994 P.2d at 713.

The court then proceed to set forth instructions for use by the district courts in cases where defendants are charged with first-degree murder based on willful, deliberate, and premeditated killing. Id. at 236, 994 P.2d at 714.

Now, Defendant appears to argue that even though at the time of his penalty hearing, Kazalyn and its progeny were valid authority, appellate counsel was nonetheless ineffective for failing to raise an issue that even the Supreme Court acknowledged had been inconsistently interpreted and applied. Id. at 235, 994 P.2d at 713. However, the Byford court made two specific findings which defy Defendant's claim.

First, under Byford, even an improper instruction will not justify reversal with the evidence of guilt is overwhelming and second, the holding is to be applied prospectively only. Id. at 233, 994 P.2d at 712; *see also* Bridges v. State, 116 Nev. 752, 762-63, 6 P.3d 1000, 1008 (2000); Leonard v. State, 117 Nev. 53, 74-76, 17 P.3d 397, 410 - 412 (2001); Garner v. State, 116 Nev. 770, 789, 6 P.3d 1013, 1025 (2000)(*overruled on other grounds by*

Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002)); Evans v. State, 117 Nev. 609, 28 P.3d 498, 521 (2001).

Thus, because the evidence of Defendant's guilt was overwhelming (*see* Rippo, *supra*, 113 Nev. at 1255, 946 P.2d at 1027) even if appellate counsel had raised the issue, like the defendant in Byford, the claim would not have warranted relief. Moreover, because Defendant's appeal was dismissed well before the Byford ruling, he could not have benefited from the Supreme Court's ruling in any case. Therefore, Defendant's claim that appellate counsel was ineffective for failing to raise this issue on direct appeal is without merit and should be dismissed.

7. CONSTITUTIONALITY OF THE NEVADA SUPREME COURT'S APPELLATE REVIEW OF DEATH PENALTY CASES.

In Ground Nine, Defendant alleges that appellate counsel was ineffective for failing to raise on appeal or assert all available arguments supporting his contention that "the opinion affirming RIPPO's conviction and sentence provides no indication that the mandatory review was fully and properly conducted in this case."

This claim is frivolous. There is absolutely no basis in either law or fact to support an allegation that appellate counsel was deficient for not raising on direct appeal the Supreme Court's alleged inadequate review of his direct appeal.

8. DEFENDANT CANNOT RE-LITIGATE ISSUES RAISED AND DECIDED ON DIRECT APPEAL.

In the final paragraph of Ground Nine, Defendant states, "RIPPO also again hereby adopts and incorporates each and every claim and issue raised in his direct appeal as a substantive basis for relief in the Post Conviction Writ of Habeas Corpus based on the inadequate appellate review." However, Defendant's assertion is entirely improper.

i. Review is Precluded By the Law of the Case Doctrine.

Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001); *see,* McNelton v. State, 115 Nev. 396, 990 P.2d 1263,

1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); *see also,* Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument. Hall, *supra*; *see also* McNelton, *supra;* Hogan, *supra.*

In the present case, there is no dispute the Supreme Court has reviewed the issues and ruled on the merits. Therefore, re-asserting these issues in the present pleading is precluded by the law of the case doctrine.

ii. The District Court Does Not Have Jurisdiction to Overrule The Supreme Court.

Article 6, Section 6 of the Nevada Constitution sets forth the proper jurisdiction of the district courts:

> The District Courts in the several Judicial Districts of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts. They also have final appellate jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be established by law. The District Courts and the Judges thereof have power to issue writs of Mandamus, Prohibition, Injunction, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction. The District Courts and the Judges thereof shall also have power to issue writs of Habeas Corpus on petition by, or on behalf of any person who is held in actual custody in their respective districts, or who has suffered a criminal conviction in their respective districts and has not completed the sentence imposed pursuant to the judgment of conviction.

Thus, because this court lacks jurisdiction to overrule the findings of the Supreme Court, Defendant's request must be denied.

9. DECISION NOT TO RAISE THE RACIAL COMPOSITION OF THE JURY ON DIRECT APPEAL.

In Ground Ten, Defendant claims that appellate counsel was ineffective because he failed to raise what he characterizes as the unconstitutional racial composition of the jury. Clearly, this claim lacks merit because it had virtually no chance of success on appeal.

Both the Fourteenth and the Sixth Amendments to the United States Constitution

guarantee a defendant the right to a trial before a jury selected from a representative cross-section of the community. Evans v. State,112 Nev. 1172, 1186, 926 P.2d 265 (1996); Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803 (1990); Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975). "The fair-cross-section requirement mandates that 'the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" Id. (*quoting* Taylor, *supra*, at 702). However, there is "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." Id. (*quoting*, Holland, *supra* at 808).

The standard for a race-based challenge to the composition of a jury pool under the Sixth Amendment was set by the United States Supreme Court in Duren v. Missouri, 439 U.S. 357 (1979). To show a prima facie violation of the Constitution's fair cross-section requirement in selecting a jury pool: the *defendant* must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury- selection process. Id. at 364. A "jury selection violates the Sixth Amendment or the due process and equal protection clauses of the Fourteenth Amendment *only if* it can be shown that members of the appellant's race were excluded systematically from jury duty. '(P)urposeful discrimination may not be assumed or merely asserted.'" Bishop v. State, 92 Nev. 510, 515, 554 P.2d 266, 270 - 270 (1976) (*quoting* Swain v. Alabama, 380 U.S. 202, 205, 85 S.Ct. 824, 827 (1965). Such discrimination must be proved. Id. (*citing*, Tarrance v. Florida, 188 U.S. 519, 23 S.Ct. 402 (1903)). The federal courts have repeatedly held that the use of voter registration lists to compile the jury pool is constitutionally acceptable. *See e.g.*, Taylor v. Lousiana, 419 U.S. 522 (1975); Watkins v. Commonwealth, 385 S.E.2d 50, 53 (Va. 1989); United States v. Lewis, 10 F.3d 1086, 1089-90 (4th Cir. 1993); People v. Sanders, 797 P.2d 561 (Cal. 1990)(*overruling* People v. Harris, 679 P.2d 433 (Cal. 1984)).

Defendant's claim here fails first, because it must be the jury pool not the individual jury that is representative of a fair cross section of the community, the fact that Defendant's particular jury was entirely Caucasian does not support a prima facie constitutional violation. Similarly, the county-wide practice of comprising jury pools using voter registration rolls has been a long-standing constitutionally acceptable practice. Moreover, Defendant's claim that the county fails to follow up on the jury summons process hardly demonstrates "purposeful discrimination"; indeed, it is highly doubtful "individuals who move fairly frequently or are too busy trying to earn a living" would be considered a "distinctive" group for purposes of Sixth Amendment analysis and able to withstand constitutional scrutiny.

Therefore, Defendant's claim of ineffective assistance of counsel is unfounded.

10. DECLINING TO RAISE THE ISSUE OF WHETHER NEVADA'S STATUTES AND CASELAW RELATED TO AGGRAVATING CIRCUMSTANCES ENUNCIATED IN NRS 200.033 FAIL TO NARROW THE CATEGORIES OF DEATH ELIGIBLE DEFENDANTS.

Defendant's final claim in Ground Eleven is that appellate counsel was ineffective for failing to raise or completely assert the argument that Nevada's capital sentencing statute, NRS 200.033, fails to properly narrow the categories of death eligible defendants. However, as with Defendant's other claims, there was no reasonable probability this claim would have succeeded on appeal.

NRS 200.033 provides:

> The only circumstances by which murder of the first degree may be aggravated are:
>
> 1. The murder was committed by a person **under sentence of imprisonment.**
>
> 2. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, **is or has been convicted of:**
>
> a. **Another murder** and the provisions of subsection 12 do not otherwise apply to that other murder; or
>
> b. **A felony involving the use or threat of violence** to the person of another and the provisions of subsection 4 do not otherwise apply to that felony.
>
> For the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered or upon pronouncement of

guilt by a judge or judges sitting without a jury.

3. The murder was committed by a person who **knowingly created a great risk of death to more than one person** by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

4. The murder was committed while the person was engaged, alone or with others, **in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged**:
   a. Killed or attempted to kill the person murdered; or
   b. Knew or had reason to know that life would be taken or lethal force used.

5. The murder was committed **to avoid or prevent a lawful arrest or to effect an escape** from custody.

6. The murder was committed by a person, for himself or another, **to receive money or any other thing of monetary value.**

7. The murder was committed **upon a peace officer** or fireman who was killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or fireman. For the purposes of this subsection, "peace officer" means:
   a. An employee of the Department of Corrections who does not exercise general control over offenders imprisoned within the institutions and facilities of the Department, but whose normal duties require him to come into contact with those offenders when carrying out the duties prescribed by the Director of the Department.
   b. Any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, inclusive, when carrying out those powers.

8. The murder involved **torture or the mutilation** of the victim.

9. The murder was committed upon one or more persons **at random and without apparent motive.**

10. The murder was committed upon a person **less than 14 years of age.**

11. The murder was committed upon a person because of the **actual or perceived race, color, religion, national origin, physical or mental disability or sexual orientation** of that person.

12. The defendant has, in the immediate proceeding, **been convicted of more than one offense of murder in the first**

or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

13. The person, alone or with others, **subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration** immediately before, during or immediately after the commission of the murder. For the purposes of this subsection:
    a. "Nonconsensual" means against the victim's will or under conditions in which the person knows or reasonably should know that the victim is mentally or physically incapable of resisting, consenting or understanding the nature of his conduct, including, but not limited to, conditions in which the person knows or reasonably should know that the victim is dead.
    b. "Sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of the victim's body or any object manipulated or inserted by a person, alone or with others, into the genital or anal openings of the body of the victim, whether or not the victim is alive. The term includes, but is not limited to, anal intercourse and sexual intercourse in what would be its ordinary meaning.

14. The murder was committed on the property of a **public or private school**, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person. For the purposes of this subsection, "school bus" has the meaning ascribed to it in NRS 483.160.

15. The murder was committed with the intent to commit, cause, aid, further or conceal an **act of terrorism.** For the purposes of this subsection, "act of terrorism" has the meaning ascribed to it in NRS 202.4415.

Defendant does not point to any particular portion of the statute he finds objectionable, but rather, asserts, "[t]he factors listed in NRS 200.033, individually and in combination fail to guide the sentencer's discretion and create an impermissible risk of vaguely defined, arbitrarily and capriciously selected individuals upon whom death is imposed." Defendant claims further that "[i]t is difficult, if not impossible, under the factors of NRS 200.033 for the perpetrator of a First Degree Murder not to be eligible for the death penalty at the unbridled discretion of the prosecutor." However, even under this sweeping allegation,

Defendant's claim that appellate counsel was ineffective for failing to raise this issue on direct appeal fails.

The Nevada Supreme Court has specifically held that these statutory aggravators, even "in combination," properly narrow class of persons eligible for death penalty. Gallego v. State, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001); *See also*, Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990)(NRS 200.033 subdivision 4 is not constitutionally overbroad or arbitrary[6]); Smith v. State, 114 Nev. 33, 953 P.2d 264 (1998) (subdivision 8 is not constitutionally vague and ambiguous); Cambro v. State, 114 Nev. 106, 952 P.2d 946 (1998) and Geary v. State, 112 Nev. 1434 (1996)(subdivision 9 is not constitutionally vague); Leslie v. Warden, 59 P.3d 440 (2002)(Defense counsel was not deficient in failing to argue that "at random and without apparent motive" aggravator was not supported by evidence in penalty phase of defendant's murder trial, where Supreme Court had consistently upheld that aggravator when, as in defendant's case, killing was unnecessary to complete robbery, and defense counsel, knowing that Supreme Court was required to independently review all aggravating circumstances, may have chosen to focus on issues more likely to yield results).

Defendant relies upon two United States Supreme Court cases to bolster his contention. However, neither of these cases provides sufficient support for Defendant's claim.

In Godfrey v. Georgia, 446 U.S. 420 (1980), the jury imposed two sentences of death on the defendant. As to each, the jury specified that single the aggravating circumstance they had found beyond a reasonable doubt was "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." Id. at 426, 100 S.Ct, 1759, 1764. The Court held the aggravator violated the Eighth and Fourteenth Amendments. Id. at 428-28, 1765. The Court reasoned since there was nothing in the words "outrageously or wantonly vile, horrible or inhuman," standing alone, that implied any inherent restraint on the arbitrary and capricious infliction of death sentence. Id.

In Stringer v. Black, 503 U.S. 222 (1992), after finding the defendant guilty of capital murder, a Mississippi jury, in the sentencing phase of the case, found that there were three

[6] One of the six aggravating factors the jury in this case found to be established beyond a reasonable doubt was pursuant to subdivision 4.

statutory aggravating factors. These included the factor the murder was "especially heinous, atrocious or cruel," which had not been otherwise defined in the trial court's instructions. Id. at 225-26, 112 S.Ct. 1130, 1134. The Court reversed the defendant's conviction. Id. at 227, 112 S.Ct. at 1135. Although the Court's decision was founded wholly on other grounds, it noted the unconstitutionality of the vague aggravating factor is implicit in the Court's opinion. Id. at 235, 112 S.Ct. at 1139.

Although, Defendant does not specifically mention Maynard v. Cartwright, 486 U.S. 356 (1988), that Court similarly held that the language of an Oklahoma statute with an aggravating circumstance which read, "especially heinous, atrocious, or cruel" gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. Id. at 363-64, 108 S.Ct. 1853, 1859.

Clearly, the Nevada statute does not employ any such vague or overly broad language. On the contrary, in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976)[7], the United States Supreme Court upheld a Georgia sentencing scheme with nearly the identical language as Nevada's, even when the defendant attacked each and every aggravator individually and specifically. In upholding the sentencing statute, the Court in Gregg stated:

> While there is no claim that the jury in this case relied upon a vague or overbroad provision to establish the existence of a statutory aggravating circumstance, the petitioner looks to the sentencing system as a whole (as the Court did in Furman and we do today) and argues that it fails to reduce sufficiently the risk of arbitrary infliction of death sentences. Specifically, Gregg urges that the statutory aggravating circumstances are too broad and too vague .... Id. at 200, 96 S.Ct. at 2938.

Defendant here attempts to engage the same tactic as the defendant in Gregg. Indeed, his claim similarly fails. Clearly there is no support for his claim that the Nevada statute fails to limit the categories of death-eligible defendants to such a degree that would warrant constitutional relief. As such, his claim of effective assistance of appellate counsel must likewise fail because counsel was prudent to forego this claim in lieu of others with a far greater probability of success.

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[7] In his petition Defendant cites only to the dissenting opinion at 428 U.S. 238, 92 S.Ct. 2726 (1972).

MR;app-070196-0730

CONCLUSION

Based on the foregoing, the State respectfully submits Defendant's Petition for Writ of Habeas Corpus (Post Conviction) be denied.

DATED this 21st day of March, 2004.

Respectfully submitted,
STEWART L. BELL
Clark County District Attorney
Nevada Bar #000477

BY _____
CLARK PETERSON
Chief Deputy District Attorney
Nevada Bar #006088

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MRIPPO-07016-0731

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 6th day of April, 2004, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

CHRISTOPHER R. ORAM, ESQ.
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101

BY Kathleen J. Karstedt
Secretary for the District Attorney's Office

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Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA, Plaintiff, vs. MICHAEL RIPPO, Defendant.	CASE NO. C 106784 DEPT. NO. XIV DATE: 8-20-04 TIME: 9:00 a.m.

AFFIDAVIT OF DAVID M. SCHIECK
REGARDING SUPPLEMENTAL BRIEF IN
SUPPORT OF WRIT OF HABEAS CORPUS

STATE OF NEVADA)
) cc:
COUNTY OF CLARK)

DAVID M. SCHIECK, being first duly sworn, deposes and says:

Affiant is an attorney licensed in the State of Nevada in 1982 and appointed to represent MICHAEL RIPPO on the direct appeal of his conviction and sentence.

Subsequent to the conclusion of the direct appeal, Affiant also was appointed to represent RIPPO on his Writ of Habeas Corpus (Post-conviction) and prepared and filed the initial Petition and a Supplemental Petition and Points and Authorities

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in Support thereof.

Pursuant to the Order of the District Court, Affiant submits this Affidavit as an initial response to the allegation of ineffective appellate counsel on direct appeal as raised in the second Supplemental Petition filed on behalf of RIPPO solely addressing appellate effectiveness issues.

The first issue raised challenges the failure to raise on direct appeal the prejudicial impact of the 46 month delay between arrest and trial, during which a number of jailhouse snitches materialized. To the extent that Affiant did not address this issue in the direct appeal, Affiant believes that the delay was the result of ineffectiveness of trial counsel and best not addressed in the direct appeal to avoid possible procedural bars. To the extent that the delays were caused by the conduct and misconduct of the prosecutors, Affiant believes that same was addressed in the direct appeal. If it was not, it should have been, as it was clearly prejudicial to RIPPO'S defense.

The second issue concerns failure to fully and adequately brief in the direct appeal the use of the prison photograph of RIPPO at trial. Affiant believes that the failure to prevent admission of the photograph by trial counsel was ineffective assistance of trial counsel. Once the photograph was used it became subject to harmless error analysis on direct appeal, a much higher standard than a probative versus prejudicial test by the trial court. The failure of trial counsel to object

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made any success on the merits highly unlikely, however, Affiant should have raised the issue to fully preserve the record.

The next two claims of ineffective appellate counsel relate to jury instructions at the penalty hearing concerning mitigation and character evidence. Trial counsel failed to object and offer alternative instructions and thus the issue was not preserved for appellate review. Nonetheless, Affiant believes he should have raised the failure to properly instruct the jury as a violation of the right to Due Process and further as a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to preserve the issue for future review. To the extent that Affiant prejudiced RIPPO by the failure, he was ineffective on the direct appeal.

The next claim (IV, C) concerns the failure of trial counsel to argue mitigating circumstances or the weighing process at the penalty hearing. Affiant believes that the failure of trial counsel precluded appellate review of the issue. Nonetheless, Affiant should have raised general constitutional challenges to the process utilized in sentencing RIPPO to death.

With respect to the failure to raise improper closing argument set forth in claim (IV, D) Affiant believes he should have raised the issue in light of the subsequent ruling in Evans v. State. The failure to do so was not for any strategic or tactical reason but rather due to existing precedent at the

time and failure to recognize possible changes in the law.

The allegations set forth in claims V and VI were dressed above regarding jury instructions.

Affiant did raise on direct appeal the failure to limit use of victim impact evidence. To the extent that Affiant failed to fully challenge the admission on federal constitutional grounds, Affiant was ineffective.

Affiant's failure to challenge the premeditation and deliberation instruction was due to a long line of cases rejecting said argument. To preserve the issue Affiant should have raised the issue despite existing president.

Claim IX is an issue that should not be raised on direct appeal, but rather as a post-conviction claim after the direct appeal is concluded.

Claims X and XI were not preserved at the trial court level and therefore Affiant did not believe that they were ripe for appellate review on direct appeal. Nonetheless, Affiant should have raised the issues to preserve them for future review.

FURTHER, Affiant sayeth naught.

DAVID M. SCHIECK

SUBSCRIBED AND SWORN to before me

this 17 day of August, 2004.

NOTARY PUBLIC

Notary Public-State Of Nevada
COUNTY OF CLARK
KATHLEEN FITZGERALD
My Appointment Expires
December 24, 2005

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL D. RIPPO,

Defendant.

No. C106784
Dept. No. XIV

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD M. MOSLEY

August 20, 2004
11:00 a.m.
Department XIV

APPEARANCES:

For the State:
MR. STEVEN S. OWENS
Deputy District Attorney

For the Defendant:
MR. CHRISTOPHER ORAM
Attorney-at-Law

For Parole and Probation:
NO APPEARANCE

Reported by:
Joseph A. D'Amato
Nevada CCR #17