

1 picture would not have been granted in his court. He said that if a picture was unduly
 2 gruesome or was not a fair representation of the Defendant, it would have been
 3 objectionable. But here, where there were no prison or jail markings on the picture, it
 4 would not be objectionable. Further, the defense would have an opportunity to show
 5 their own picture of Defendant. (AA, Volume II, page 000293). Therefore, appellate
 6 counsel was not ineffective in failing to raise this issue because it would likely have
 7 no probability of success on the merits.

8 Finally, the Defendant utterly fails to identify what photo he is objecting to. In
 9 fact, defense counsel admits he has not seen the actual photo⁶ (Id.), nor does he have it
 10 in his possession. (AA, Volume II, page 000321). No one was able to definitively
 11 testify as to what the photo looked like, whether Defendant was in prison clothes,
 12 whether it was a head shot, whether there was a plate number in front of him, whether
 13 it had been redacted in any way. Because the Defendant has not produced the photo
 14 nor produced any reliable testimony regarding what the photo looked like, there is no
 15 cognizable issue before this Court.

16 V.

17 **DEFENDANT DID NOT RECEIVE INEFFECTIVE** 18 **ASSISTANCE OF APPELLATE COUNSEL BECAUSE** 19 **APPELLATE COUNSEL FAILED TO RAISE** 20 **VARIOUS ALLEGATIONS THAT TRIAL COUNSEL** 21 **WAS DEFICIENT DURING THE PENALTY PHASE.**

22 In ground five, Defendant raises five distinct incidents of what he characterizes
 23 as ineffective assistance of counsel during the penalty phase. Defendant contends
 24 appellate counsel was similarly ineffective for either declining to raise the issues on
 25 appeal or completely assert all available arguments. As with Defendant's allegations
 26 in the guilt phase, and notwithstanding the *Gibbons* rule, each claim is addressed and
 27 its chances for success on appeal are refuted in turn.

28 A. No Objection to the Character Evidence Instruction

* At the evidentiary hearing on this matter, counsel for the State, Steve Owens, points out that none of the post-conviction petitions make it clear which photograph the Defendant objects to. (AA, Volume II, page 319).

In ground V(b), Defendant argues three distinct claims 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 VII. Again, the arguments set forth in both sections are refuted below in section VII.

C. Failure to Argue Specific Mitigating Circumstances or the Weighing Process Necessary before the Death Penalty May Be Considered During Closing Argument.

1 Defendant contends that trial counsel was ineffective because "not once during
2 closing argument at the penalty hearing did either trial counsel submit the existence of
3 any specific mitigating circumstances that existed on behalf of RIPPO." Again,
4 Defendant claims appellate counsel was ineffective for failing to raise this issue on
5 direct appeal. However, Defendant's claim is entirely belied by the record, and his
6 contention is without merit.

7 During closing argument trial counsel did indeed argue mitigating
8 circumstances including (1) that Defendant had an emotionally disturbed childhood
9 (2) that he got lost in the juvenile system (3) that Defendant is a person who needs
10 help which the prison system could provide and (4) that he has kept a clean record
11 history in prison (24 ROA 118-121). The role of a court in considering allegations of
12 ineffective assistance of counsel is "not to pass upon the merits of the action not taken
13 but to determine whether, under the particular facts and circumstances of the case,
14 trial counsel failed to render reasonably effective assistance." *Donovan v. State*, 94
15 Nev. 671, 675, 584 P.2d 708, 711 (1978)(citing, *Cooper v. Fitzharris*, 551 F.2d 1162,
16 1166 (9th Cir. 1977)).

17 In the nine mitigating factors Defendant claims in his appeal, he adds little to
18 the mitigating circumstances counsel did in fact raise to the jury, except perhaps that
19 Defendant was remorseful, that he was under the influence of drugs at the time of the
20 murders and that Diana Hunt had received favorable treatment after testifying against
21 Defendant. However, even these factors were clearly before the jury. Defendant
22 himself exercised his right to allocution to express his remorse and the jury heard that
23 he and one of the victims had injected morphine for recreational purposes. Defense
24 counsel also clearly established Diana Hunt's testimony was a product of her plea
25 agreement. Thus, trial counsel did not neglect to bring these factors to the jury's
26 attention but chose not to specifically address them in his closing argument.

27 In fact, under the particular facts of this case, during his final communication
28 with the jury, it was a sound strategy decision for trial counsel to avoid an overly

1 pretentious plea to save Defendant's life which could quite possibly result in
2 offending the jurors by attempting to portray this man as a victim himself. Indeed,
3 throughout the course of the trial, the jury had heard a plethora of evidence depicting
4 how Defendant brutally committed the gruesome murders of two young women in the
5 home of one of the victims. The jurors heard how Defendant planned to rob the
6 victims, how he repeatedly used a stun gun, forced them into a closet, bound and
7 gagged them and then ultimately strangled them to death. They heard how he then
8 systematically cleaned up the crime scene including removing one victim's boots and
9 pants to conceal his own blood. They heard how he told a friend that he had "choked
10 the two bitches to death." The jury learned that on the evening of the murder,
11 Defendant helped himself to one of the victims' car. He told a friend someone "had
12 died" for the car. Defendant went on a shopping spree using a credit card belonging
13 to one of the victims' boyfriend.

14 Thus, trial counsel was presented with an extremely delicate balancing act.
15 That he chose to illuminate some details in his summation and leave others to be
16 considered as part of the evidence as a whole was clearly a reasonable course. As
17 such, the likelihood of a claim of ineffective assistance of counsel based on this issue
18 would have scant chance of success on appeal. Therefore, appellate counsel was not
19 remiss for failing to raise the claim to this Court in Defendant's direct appeal.

20 **D. Failure to Object during the State's Closing Argument**

21 Defendant alleges that appellate counsel was ineffective for failing to raise on
22 appeal trial counsel's failure to object to a statement made by the prosecution during
23 its closing argument. The prosecutor stated, "And I would pose the question now: Do
24 you have the resolve, the courage, the intestinal fortitude, the sense of commitment to
25 do your legal duty?" (Appellant's Opening Brief, page 29).

26 Again, it should be repeated that, "as a general rule, the failure to object ... will
27 preclude appellate consideration." *Garner v. State*, supra, 78 Nev. at 373, 374 P.2d at
28 529. However, where the errors are patently prejudicial and inevitably inflame or

1 excite the passions of the jurors against the accused, the general rule does not apply.
 2 *Id.* The *Garner* Court further stated, "[i]f the issue of guilt or innocence is close, if
 3 the state's case is not strong, prosecutor misconduct will probably be considered
 4 prejudicial." *Lisle v. State*, supra, 113 Nev. at 552, 937 P.2d at 480-81 (1997) (*cf.*
 5 *Jones v. State*, 113 Nev. 454, 469, 937 P.2d 55, 65 (1997) (likening the defendant to a
 6 "rabid animal" during closing argument at the penalty phase was misconduct, but the
 7 misconduct was harmless error in light of the overwhelming evidence of the
 8 defendant's guilt.)).

9 As Defendant correctly points out, in *Evans v. State*, 117 Nev. 609, 28 P.3d 498
 10 (2001), this Court found that asking the jury if it had the "intestinal fortitude" to do its
 11 "legal duty" was highly improper.⁷ *Id.* at 515 (citing *United States v. Young*, 470 U.S.
 12 1, 18, 105 S.Ct. 1038 (1985) (to exhort the jury to "do its job"; that kind of pressure ...
 13 has no place in the administration of criminal justice)). However, the question is
 14 whether the prosecutor's improper remarks prejudiced the defendant by depriving him
 15 of a fair penalty hearing. *Id.* (citing *Jones v. State*, supra).

16 In *Evans*, the "intestinal fortitude" comment was not the only objectionable
 17 statement made during the State's closing argument. Additionally, the prosecutor also
 18 "deplored 'an era of mindless, indiscriminate violence' perpetrated by persons who
 19 'believe they're a law unto themselves.'" He continued to argue that the defendant "is
 20 one of these persons. This is his judgment day." *Evans*, 28 P.3d at 514. In
 21 determining whether the remarks so prejudiced the defendant that he was deprived a
 22 fair penalty hearing, the court found "considered alone, perhaps they did not, but the
 23

24 ⁷ Although this court noted and affirmed a similar argument in *Castillo v. State*, 114 Nev. 271, 279-80, 956 P.2d 103,
 25 109 (1998) corrected by *McKenna v. State*, 114 Nev. 1044, 1058 n. 4, 968 P.2d 739, 748 n. 4 (1998), when the
 26 prosecutor stated, "The issue is do you, as the trial jury, this afternoon have the resolve and the intestinal fortitude, the
 27 sense of commitment to do your legal and moral duty, for whatever your decision is today, and I say this based upon the
 28 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."

1 prosecutor erred further." *Id.* at 515. Indeed, it was not until the court determined the
2 prosecutor incorrectly informed the jurors that they did not "have to wait until a
3 certain point in the deliberation" to consider evidence other than aggravating and
4 mitigating circumstances to determine if the penalty of death was appropriate, did it
5 find prejudice. *Id.* at 516.

6 Clearly, unlike the compounded errors in *Evans*, in this case Defendant was not
7 so prejudiced that he was deprived of a fair penalty hearing. Indeed, even if the
8 statement was error, "any error caused by these comments was harmless in light of the
9 overwhelming evidence against Rippo." *Rippo*, 113 Nev. at 1255.

10 Further, at the evidentiary hearing on this matter, the district court judge
11 inquired "how would defense counsel know they would have a legal ground to object
12 without the benefit of the Supreme Court's determination?"⁸ (AA, page 000303).
13 The court further stated that objecting at closing argument is a rather dangerous
14 situation that looks like counsel is hiding the ball. (AA, page 000304). Therefore,
15 trial counsel was not ineffective for not objecting to this comment and certainly
16 appellate counsel was not ineffective for not raising this on direct appeal because of
17 its slight probability of success.

18 E. No Motion to Strike Two Aggravating Factors

19 Finally, Defendant argues that appellate counsel was ineffective for failing to
20 raise the issue that trial counsel should have moved to strike two aggravating
21 circumstances that were based on Defendant's 1982 conviction and sentence for the
22 sexual assault of Laura Martin. This claim is clearly frivolous because the record
23 reflects that trial counsel did in fact file a pre-trial motion to strike these two
24 aggravating factors. (2 ROA 213). Furthermore, even if Defendant's claim were

25
26
27 ⁸ There was a lengthy discussion regarding the *Evans* decision coming down in 2001, and Defendant's trial being held in
28 1996. Further, when Mr. Schieck testified, the court stated: "What you're saying is, that this was recognized as a
legitimate argument in 2001, why wasn't it recognized five years earlier. If that's going to be our standard we'll never
get anything accomplished, because every time there's a new decision or something, we can just roll it all back and say
'why didn't we think about this five years ago?' What kind of appellate issue is that?" (AA, pages 000350-000351).

1 based on any fact, the *Strickland* analysis does not mean that the court "should second
2 guess reasoned choices between trial tactics nor does it mean that defense counsel, to
3 protect himself against allegations of inadequacy, must make every conceivable
4 motion no matter how remote the possibilities are of success." *Donovan, supra*, 94
5 Nev. at 675, 584 P.2d at 711. As discussed below, there was little chance of
6 successfully striking these two aggravating factors. Indeed, even if Defendant's claim
7 were more properly framed in terms of claiming ineffective assistance of appellate
8 counsel for not raising this issue on direct appeal, Defendant's contention would still
9 fail because there was no reasonable probability the claim would survive review.

10 Defendant's allegation arises from Instruction No. 9, in which the jury was
11 instructed it may consider as aggravating circumstances:

12 One: The murder was committed by a person under
13 sentence of imprisonment, to wit: Defendant was on
14 parole for a Nevada conviction for the crime of sexual
assault in 1982;

15 Two: The murder was committed by a person who was
16 previously convicted of a felony involving the use of
17 threat or violence to a person of another. Defendant
was convicted of sexual assault, a felony, in the state
of Nevada in 1982.

18 Clearly appellate counsel was not remiss for declining to argue these
19 aggravators were improper. The court must "judge the reasonableness of counsel's
20 challenged conduct on the facts of the particular case, viewed as of the time of
21 counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. In this particular
22 case, at the time of Defendant's appeal, it was a wise tactic to omit this claim in lieu
23 of other issues that were raised.

24 First, there was clear evidence presented that Defendant was on parole for the
25 1982 sexual assault and from the brutal nature of the assault, it is entirely an
26 understatement to characterize Defendant's crime as merely "involving the use of
27 threat or violence to a person of another." Thus, there was no basis for such a motion.
28 While Defendant argues that defense counsel should have been compelled "to utilize

1 any avenue of attack available against the aggravators" surely he does not suggest
2 counsel must also pursue claims which have absolutely no basis in either law or fact.

3 However, Defendant appears to argue that the aggravators should have been
4 stricken because the guilty plea that led to Defendant's conviction was not voluntarily
5 and knowingly entered and involved a "woefully inadequate" plea canvass.⁹ Yet,
6 Defendant offers nothing more than his own bare allegation to support not only this
7 claim, but also his claim that he "brought this to the attention of trial counsel but no
8 effort was made to invalidate the two aggravators." Clearly, this is not a sufficient
9 showing. "It is the appellant's responsibility to provide the materials necessary for
10 this court's review." *Byford v. State*, 116 Nev. 215, 238, 994 P.2d 700 (2000) (citing
11 *Jacobs v. State*, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975)). Defendant here has
12 failed to meet his burden.¹⁰

13 And, even if appellate counsel did err, Defendant is nonetheless unable to
14 demonstrate prejudice.

15 NRS 175.554(3) provides:

16 The jury may impose a sentence of death only if it finds at least one
17 aggravating circumstance and further finds that there are no mitigating
18 circumstances sufficient to outweigh the aggravating circumstance or
19 circumstances found.

20 In this case, the jury found six aggravating and no mitigating circumstances
21 sufficient to outweigh the aggravators. Therefore, even if the two contested
22 aggravators were stricken, the result would not have been different. Defendant offers
23 nothing more than his own speculation that "[a]s the State improperly stacked
24 aggravating circumstances the removal of the prior conviction would have eliminated

25 ⁹ In *State v. Freese*, 116 Nev. 1097, 13 P.3d 442 (2000), the Nevada Supreme Court held that a failure to conduct a
26 ritualistic oral canvass does not mandate a finding of an invalid plea. Instead, the Court found that an appellate court
27 should not invalidate a plea as long as the totality of the circumstances, as shown by the record, demonstrates that the
28 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.

¹⁰ Further, Defendant has already attempted to appeal his plea canvass in the sexual assault case, and such attempt was
unsuccessful. 111 Nev. 1730, 916 P.2d 212 (1995), Docket #24687. See also, 2 ROA 424.

1 the two most damaging aggravators." The State disagrees. Clearly, the four
2 remaining aggravating circumstances were at least as "damaging":

3 Three: The murder was committed while the person was
4 engaged in the commission of and/or an attempt to
5 commit any burglary and the person charged (a)
6 killed the person murdered; or (b) knew that life
7 would be taken or lethal force used, or acted with
8 reckless indifference for human life.

9 Four: The murder was committed while the person was
10 engaged in the commission of and/or an attempt to
11 commit any kidnapping and the person charged (a)
12 killed the person murdered; or (b) knew that life
13 would be taken or lethal force used; or (c) acted with
14 reckless indifference for human life.

15 Five: The murder was committed while the person was
16 engaged in the commission of or in an attempt to
17 commit any robbery, and the person charged (a) killed
18 the person murdered; or (b) knew that life would be
19 taken by or lethal force used; or (c) acted with
20 reckless indifference for human life.

21 Six: The murder involved torture.

22 Thus, the record clearly belies Defendant's contention that "[t]he number of
23 aggravators ... unduly swayed the jury. If one aggravator was enough to impose the
24 death sentence, then surely six meant death was the only answer."

25 Further, at the evidentiary hearing in the matter, the district court judge stated
26 that it was his understanding you could use the same act to satisfy two aggravating
27 factors. He said, "If somebody throws a bomb at a fire truck while they are fighting a
28 fire there's an aggravator of acting in a way that could endanger more than one
person, two or more people, which is an aggravator. Attacking a fireman in the
performance of his duties is another aggravator. You've got one act." (AA, page
000305). Based on all of the foregoing reasons, appellate counsel was clearly not
ineffective for failing to raise Defendant's claim on direct appeal.

VI.

THE INSTRUCTION GIVEN AT THE PENALTY HEARING APPRAISED THE JURY OF THE PROPER USE OF CHARACTER EVIDENCE

1 Defendant asserts that appellate counsel was ineffective for declining to raise what
2 he characterizes as the unconstitutionality of the character evidence instruction.
3 Defendant attempts to establish that the error was so egregious that the failure to
4 object should not have precluded appellate counsel from raising the issue on direct
5 appeal. As discussed above, because both ground V(a) and ground VI effectively
6 raise the identical issue, both are refuted in this section.

7 Indeed, appellate counsel did not raise this issue on direct appeal. However, its
8 omission does not rise to the level of ineffective assistance because Defendant is
9 unable to demonstrate that had it been raised, there was a reasonable probability of
10 success.

11 First, trial counsel's failure to object precluded review on direct appeal. It is
12 well-settled that "[t]he failure to object or to request special instruction to the jury
13 precludes appellate consideration." *Etcheverry v. State*, 107 Nev. 782, 784-785, 821
14 P.2d 350, 351 (1991) (quoting *McCall v. State*, 91 Nev. 556, 557, 540 P.2d 95, 95
15 (1975)) (citing *State v. Fouquette*, 67 Nev. 505, 221 P.2d 404 (1950)); see also, *Clark*
16 *v. State*, 89 Nev. 392, 513 P.2d 1224 (1973); *Cook v. State*, 77 Nev. 83, 359 P.2d 483
17 (1961); *State v. Switzer*, 38 Nev. 108, 110, 145 P. 925 (1914); *State v. Hall*, 54 Nev.
18 213, 235, 13 P.2d 624 (1932); *State v. Lewis*, 59 Nev. 262, 91 P.2d 820, 823 (1939)
19 (If defendant had felt that a more particular instruction should have been given, he
20 should have requested it. This he did not do, and cannot now be heard to complain of
21 the lack of such instruction.).

22 Thus, in this case, appellate counsel's decision to forego raising a complaint
23 related to trial counsel's failure to object to the instruction, and perhaps diluting the
24 impact of the more meritorious claims that were raised, was clearly sound strategy.
25 This is especially true in light of the fact, and contrary to Defendant's claim in ground
26 VI, that there was nothing improper about the manner in which the jury was
27 instructed.
28

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 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.

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

1 constitutes aggravating circumstances. Then, and only then, was the jury directed to
2 consider "other matter" evidence.

3 As Defendant points out, because of the gravity of the circumstances
4 surrounding the imposition of a penalty of death, the Nevada Supreme Court, in *Evans*
5 v. *State, supra*, set forth specific language which it directed the district court to use
6 when instructing a jury during a capital sentencing proceeding. In *Evans*, the court
7 stated:

8 For future capital cases, we provide the following
9 instruction to guide the jury's consideration of evidence at
10 the penalty hearing: In deciding on an appropriate sentence
11 for the defendant, you will consider three types of evidence:
12 evidence relevant to the existence of aggravating
13 circumstances, evidence relevant to the existence of
14 mitigating circumstances, and other evidence presented
15 against the defendant. You must consider each type of
16 evidence for its appropriate purposes.

17 In determining unanimously whether any aggravating
18 circumstance has been proven beyond a reasonable doubt,
19 you are to consider only evidence relevant to that
20 aggravating circumstance. You are not to consider other
21 evidence against the defendant.

22 In determining individually whether any mitigating
23 circumstance exists, you are to consider only evidence
24 relevant to that mitigating circumstance. You are not to
25 consider other evidence presented against the defendant.

26 In determining individually whether any mitigating
27 circumstances outweigh any aggravating circumstances, you
28 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

1 sentence other than death, and you must decide on such a
2 sentence unanimously.

3 *Id.* at 516-17.

4 It cannot be overlooked that the *Evans* court specifically and unequivocally
5 intended only prospective application of the mandate. Furthermore, it is equally clear
6 that while the language of the instructions given in this case do not mimic the
7 instruction set forth by *Evans* precisely, the fundamental nature and directive of the
8 instruction is indeed covered and conveyed.

9 Finally, Defendant fails to demonstrate, by anything other than pure
10 speculation, that the jury did not in fact follow the court's instruction. Indeed, the
11 record reflects that the jurors found the State had established six aggravating
12 circumstances beyond a reasonable doubt and that these factors outweighed the
13 mitigating circumstances.

14 Therefore, because there was clearly no chance for success on appeal, appellate
15 counsel's decision to forego raising this issue was not only well within the realm of
16 "reasonably effective" assistance but was laudable.

17 VII.

18 **DEFENDANT'S SENTENCE IS VALID BECAUSE**
19 **THE JURY WAS GIVEN A STATUTORY LIST OF**
20 **MITIGATING CIRCUMSTANCES AND DESPITE**
21 **THE FACT THE JURY WAS NOT GIVEN A**
22 **SPECIAL VERDICT FORM TO LIST MITIGATING**
23 **FACTORS**

24 Defendant argues three distinct claims which he believes rise to the level of
25 ineffective assistance of appellate counsel for "failing to raise on appeal or completely
26 assert all the available arguments." First, Defendant claims that trial counsel should
27 have offered a jury instruction enumerating Defendant's "specific" mitigating
28 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.
Again, the arguments set forth in section V(b) and section VII are refuted below.

1 As a threshold matter, the principle that "[t]he failure to object or to request
2 special instruction to the jury precludes appellate consideration" *Etcheverry v.*
3 *State*, supra, 107 Nev. at 784-85, 821 P.2d at 351, is similarly applicable to each of
4 Defendant's claims in this section.

5 A. No offer of a jury instruction enumerating specific mitigating
6 circumstances.

7 Appellate counsel was judicious in not raising on direct appeal the issue of trial
8 counsel's declination to offer a jury instruction enumerating specific mitigating
9 factors based upon the chances that this issue would succeed on direct appeal.

10 The absence of instructions on particular mitigating factors does not violate the
11 Eighth and Fourteenth Amendments. *Buchanan v. Angelone*, 522 U.S. 269, 275, 118
12 S.Ct. 757, 761 (1998). In *Buchanan*, the United States Supreme Court noted that its
13 cases established that a sentencer may not be precluded from considering, and may
14 not refuse to consider, any constitutionally relevant mitigating evidence. *Id.* at 276-77,
15 118 S.Ct. at 761-62 (citing *Penry v. Lynaugh*, 492 U.S. 302, 317-18, 109 S.Ct. 2934,
16 2946-947 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77
17 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-965 (1978)).
18 However, the State may shape and structure the jury's consideration of mitigation so
19 long as it does not preclude the jury from giving effect to any relevant mitigating
20 evidence. *Id.*; see also, *Johnson v. Texas*, 509 U.S. 350, 362, 113 S.Ct. 2658, 2666
21 (1993); *Franklin v. Lynaugh*, 487 U.S. 164, 181, 108 S.Ct. 2320, 2331 (1988). The
22 "consistent concern" has been that restrictions on the jury's sentencing determination
23 not preclude the jury from being able to give effect to mitigating evidence. *Id.* But
24 there is no mandate that the state must affirmatively structure in a particular way the
25 manner in which juries consider mitigating evidence. *Id.* And indeed, the line of case
26 law addressing this issue suggests that complete jury discretion is constitutionally
27 permissible. See *Tuilaepa v. California*, 512 U.S. 967, 971, 978-79, 114 S.Ct. 2630,
28 2638-239 (1994) (noting that at the selection phase, the state is not confined to

1 submitting specific propositional questions to the jury and may indeed allow the jury
2 unbridled discretion); *Zant v. Stephens*, 462 U.S. 862, 875, 103 S.Ct. 2733, 2741-742
3 (1983), (rejecting the argument that a scheme permitting the jury to exercise
4 "unbridled discretion" in determining whether to impose the death penalty after it has
5 found the defendant eligible is unconstitutional).

6 This Court has adopted the United States Supreme Court's rationale without
7 imposing any higher constitutional hurdle to overcome. *See, Byford v. State*, 116 Nev.
8 215, 238, 994 P.2d 700, 715 (2000) (in the absence of a jury instruction which
9 includes specific mitigating circumstances, so long as the defendant is not precluded
10 from presenting his theories of mitigation, such as during closing argument, there is
11 no constitutional violation).

12 Therefore, because there was no proffered jury instruction and because there is
13 no authority supporting Defendant's claim he is constitutionally guaranteed an
14 instruction including the specific mitigating circumstances of his case, he fails to
15 demonstrate he was prejudiced by appellate counsel's decision not to raise this issue
16 on direct appeal.

17 At the evidentiary hearing on this matter, trial counsel stated that it was
18 absolute strategy to not give specific mitigating factors. He stated that he didn't want
19 to limit the jury in any way as to what a mitigating factor is, and if he gave them a list,
20 they may think those are the only mitigating factors. He wanted to keep the area of
21 mitigation wide open, so he felt an instruction that said *anything* could be a mitigating
22 factor was much better. (AA, page 000302). This is exactly the type of strategy
23 decision that cannot be questioned on a second look. Therefore, appellate counsel
24 was not ineffective for not raising it, as it had little probability of success on the
25 merits.

26
27 **B. No objection to the instruction given**
28

1 Similarly, there was no probability of success on direct appeal for the claim that
2 trial counsel's failure to object to the jury instruction enumerating statutory mitigating
3 circumstances equated to ineffective assistance of counsel. Thus, appellate counsel
4 was not remiss for failing to raise the issue.

5 The instruction given at trial mirrored the language of NRS 200.035 which
6 provides:

7 Murder of the first degree may be mitigated by any of the
8 following circumstances, even though the mitigating
9 circumstance is not sufficient to constitute a defense or
10 reduce the degree of the crime:

- 11 1. The defendant has no significant history of prior
12 criminal activity.
- 13 2. The murder was committed while the defendant was
14 under the influence of extreme mental or emotional
15 disturbance.
- 16 3. The victim was a participant in the defendant's
17 criminal conduct or consented to the act.
- 18 4. The defendant was an accomplice in a murder
19 committed by another person and his participation in
20 the murder was relatively minor.
- 21 5. The defendant acted under duress or under the
22 domination of another person.
- 23 6. The youth of the defendant at the time of the crime.
- 24 7. Any other mitigating circumstance.

25 The United States Supreme Court has held that, while the defendant is not
26 limited to the statutory mitigating circumstances, the "catchall" instruction as set forth
27 in NRS 200.035(7) is sufficient to protect a defendant's constitutional rights.

28 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).

1 As in this case, the *Buchanan* Court found no constitutional violation when,
2 even though specific mitigating circumstances were not enumerated in jury
3 instructions, but where the jury was instructed (1) it could base its decision on "all the
4 evidence" (2) that the jurors were informed that when they found an aggravating
5 factor proved beyond a reasonable doubt they *may* fix the penalty at death (3) but if
6 they found all the evidence justified a lesser sentence then they *shall* impose a life
7 sentence and (4) there were no express constraints on how they could consider
8 mitigating circumstances. *Id.* Moreover, in *Boyde*, the court considered the validity
9 of an instruction listing eleven factors the jury was to consider in determining
10 punishment and found a "catchall factor" allowing consideration of "[a]ny other
11 circumstance" to be sufficient. *Boyde v. California*, 494 U.S. 373-74, 870, 110 S.Ct.
12 1190, 1194-1195 (1990).

13 Similarly, while maintaining the mandates of NRS 175.554, which requires the
14 court "shall also instruct the jury as to the mitigating circumstances alleged by the
15 defense upon which evidence has been presented," this Court has recognized the
16 pertinent inquiry into the sufficiency of an instruction in a capital case is to be based
17 upon what the reasonable juror would understand. *See e.g., Riley v. State*, 107 Nev.
18 205, 217, 808 P.2d 551, 558- 59 (1991)(The word "may" in the context of a capital
19 sentencing instruction would be commonly understood by reasonable jurors as a
20 permissive word that does not mandate a particular action. Thus, the jury was properly
21 informed that the imposition of a death sentence was not compulsory, even if
22 aggravating circumstances outweighed mitigating circumstances).

23 In this case, when all of the instructions are taken together, including the
24 "catchall" that the jury could consider "any mitigating factor" it is highly improbable
25 that the reasonable juror would simply ignore Defendant's extensive proffer of
26 mitigating evidence during the penalty phase.

27 Moreover, in *Boyde*, *supra*, the United States Supreme Court held that the
28 appropriate standard for determining whether jury instructions satisfy constitutional

1 principles was "whether there is a reasonable likelihood that the jury has applied the
2 challenged instruction in a way that prevents the consideration of constitutionally
3 relevant evidence." *Id.*, at 380, 110 S.Ct., at 1198; *see also Johnson, supra*, 509 U.S.
4 at 367-368, 113 S.Ct., at 2669. In this case, the record clearly reflects that the jury
5 found the State had established six aggravating circumstances beyond a reasonable
6 doubt. The jurors were unequivocally instructed that no mitigating circumstance
7 could outweigh any aggravator and that there had to be unanimous agreement or else a
8 sentence of life must be imposed. Indeed, Defendant fails to demonstrate any
9 reasonable likelihood that the jury misapplied the contested instruction and did not
10 consider and weigh all mitigating circumstances.

11 Thus, there was no basis for an objection by trial counsel and indeed, appellate
12 counsel's strategy to forego this claim on direct appeal was a sound tactical decision.

13 **C. No submission of a special verdict form.**

14 Defendant's final claim on this issue is that appellate counsel failed to raise the
15 argument on direct appeal that trial counsel was ineffective for not submitting a
16 special verdict form listing mitigating circumstances found by the jury. However, this
17 claim likewise fails.

18 Defendant fails to cite any statutory or case law authority to support his
19 contention that trial counsel's decision not to submit a special verdict form for the
20 purpose of listing mitigating circumstances violated his Sixth Amendment guarantee
21 to effective assistance of counsel. Indeed, this Court has held that the trial court is not
22 obligated to grant a defendant's request for such a special verdict form and the
23 sentencer in a capital penalty hearing is not constitutionally or statutorily required to
24 make such specific findings. *Servin v. State*, 59 Nev. 262, 32 P.3d 1277, 1289 (2001)
25 (citing, NRS 175.554(4); *Rook v. Rice*, 783 F.2d 401, 407 (4th Cir.1986)); *see also*
26 *Rogers v. State*, 101 Nev. 457, 469, 705 P.2d 664, 672 (1985) (rejecting claim that
27 district court erred by not providing jury with form or method for setting forth
28 findings of mitigating circumstances).

1 Thus, trial counsel's performance can hardly be deemed to have fallen below
 2 the "reasonably effective" standard and as such, appellate counsel's decision to forego
 3 the claim on direct appeal was similarly reasonable.

4 VIII.

5 THE CONSTITUTIONALITY OF NEVADA'S 6 PROCEDURES FOR ADMISSION OF VICTIM 7 IMPACT TESTIMONY IS BARRED BY LAW OF THE 8 CASE

9 In ground VIII, Defendant alleges appellate counsel was ineffective for "failing
 10 to raise or assert all available arguments supporting constitutional issues raised" in his
 11 claim that Nevada's statutory scheme and case law fails to properly limit the
 12 introduction of victim impact testimony. However, this claim is barred by the
 13 doctrine of the law of the case and entirely belied by the record.

14 Where an issue has already been decided on the merits by this Court, the
 15 Court's ruling is law of the case, and the issue will not be revisited. *Pellegrini, supra*;
 16 see also, *McNelson, supra*; *Hall, supra*; *Valerio, supra*; *Hogan, supra*. The law of a
 17 first appeal is the law of the case in all later appeals in which the facts are
 18 substantially the same; this doctrine cannot be avoided by more detailed and precisely
 19 focused argument. *Hall, supra*; *McNelson, supra*; *Hogan, supra*.

20 In this case, on direct appeal, Defendant argued that the "cumulative and excess
 21 victim impact testimony should not have been allowed." This Court rejected the
 22 claim finding:

23 Questions of admissibility of testimony during the penalty
 24 phase of a capital trial are largely left to the trial judge's
 25 discretion and will not be disturbed absent an abuse of
 26 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).

1 Five witnesses testified as to the character of the victims and
2 the impact the victims' deaths had on the witnesses' lives
and the lives of their families.

3 We conclude that each testimonial was individual in nature,
4 and that the admission of the testimony was neither
5 cumulative nor excessive. Thus, we conclude that the
district court did not abuse its discretion in allowing all five
witnesses to testify. *Id.*

6 Because this issue was raised and rejected on direct appeal, Defendant's
7 complaint here appears to be that appellate counsel failed to "assert all available
8 arguments" supporting this claim. However, it must be noted that Defendant merely
9 sets forth various case law in his petition but he fails entirely to make any specific
10 factual allegations indicating where he believes appellate counsel's argument on direct
11 appeal fell short. As such, his bare allegations are not sufficient to entitle him to
12 relief.

13 Defendant does appear to imply that appellate counsel should be faulted for
14 failing to challenge the constitutionality of Nevada's death penalty scheme as failing
15 to limit the introduction of victim impact testimony during the penalty phase
16 proceedings. Clearly, this is the same issue appellate counsel did indeed raise on
17 direct appeal only here Defendant dresses it up "in different clothing." See, *Evans*,
18 *supra*.

19 However, even if the issue were validly raised in his instant petition,
20 Defendant's claim that Nevada law fails to limit the admission of victim impact
21 testimony lacks merit and as such, appellate counsel's strategy to limit the argument
22 to the particular facts of Defendant's case was reasonable.

23 For instance, in rejecting Defendant's claim, this Court further noted:

24 Three of the witnesses referred to the brutal nature of the
25 crime. *Rippo*, *supra* 113 Nev. at 1261, 946 P.2d at 1031.
26 The State instructed the family members not to testify about
27 how heinous the crimes were, and the district court
28 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).

1 Thus, clearly Defendant's claim that Nevada's capital sentencing scheme
 2 imposes "no limits on the presentation of victim impact testimony" is wholly without
 3 merit. Therefore, even if appellate counsel had delved further into the issue, claiming
 4 unconstitutionality of the sentencing structure in its entirety, there was scant chance
 5 such a claim would have survived appellate review.

IX.

THERE IS WELL-SETTLED PRECEDENT THAT NEVADA'S PREMEDITATION AND DELIBERATION INSTRUCTION IS CONSTITUTIONAL

10 In ground IX, Defendant alleges the "stock jury instruction given in this case
 11 defining premeditation and deliberation necessary for first degree murder" was
 12 constitutionally violative. Defendant contends that appellate counsel was ineffective
 13 for declining to raise the issue on direct appeal. However, Defendant's claim is
 14 without merit because based on well-settled precedent, there was no reasonable
 15 probability of success.

16 The contested instruction stated:

17 Premeditation is a design, a determination to kill, distinctly
 18 formed in the mind at any moment before or at the time of
 19 the killing. Premeditation need not be for a day, an hour or
 20 even a minute. It may be instantaneous as successive
 21 thoughts of the mind. For if a jury believes from the
 22 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.

23 As Defendant correctly points out, in *Byford*, supra, the propriety of a *Kazalyn*¹¹
 24 instruction was addressed. While this Court rejected the argument as a basis for any
 25 relief for the defendant ("We conclude that the evidence in this case is clearly
 26 sufficient to establish deliberation and premeditation on Byford's part.") this Court
 27

28 ¹¹ *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992).

1 recognized that the instruction itself raised a "legitimate concern." *Byford*, supra, 116
2 Nev. at 233, 994 P.2d at 712. The *Byford* Court stated:

3 The *Kazalyn* instruction and some of this court's prior
4 opinions have underemphasized the element of deliberation.
5 The neglect of "deliberate" as an independent element of the
6 *mens rea* for first-degree murder seems to be a rather recent
7 phenomenon. Before *Kazalyn*, it appears that "deliberate"
8 and "premeditated" were both included in jury instructions
9 without being individually defined but also without
10 "deliberate" being reduced to a synonym of "premeditated."
11 See, e.g., *State of Nevada v. Harris*, 12 Nev. 414, 416
12 (1877); *Scott v. State*, 92 Nev. 552, 554 n. 2, 554 P.2d 735,
13 737 n. 2 (1976). We did not address this issue in our
14 *Kazalyn* decision, but later the same year, this court
15 expressly approved the *Kazalyn* instruction, concluding that
16 "deliberate" is simply redundant to "premeditated" and
17 therefore requires no discrete definition. See *Powell v. State*,
18 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992),
19 *vacated on other grounds* by 511 U.S. 79, 114 S.Ct. 1280
20 (1994). Citing *Powell*, this court went so far as to state that
21 "the terms premeditated, deliberate and willful are a single
22 phrase, meaning simply that the actor intended to commit
23 the act and intended death as the result of the act." *Greene v.*
24 *State*, 113 Nev. 157, 168, 931 P.2d 54, 61 (1997). We
25 conclude that this line of authority should be abandoned. By
26 defining only premeditation and failing to provide
27 deliberation with any independent definition, the *Kazalyn*
28 instruction blurs the distinction between first- and second-
degree murder. *Id.* at 234-35, 994 P.2d at 713.

29 This court then proceed to set forth instructions for use by the district courts in
30 cases where defendants are charged with first-degree murder based on willful,
31 deliberate, and premeditated killing. *Id.* at 236, 994 P.2d at 714.

32 Now, Defendant appears to argue that even though at the time of his penalty
33 hearing, *Kazalyn* and its progeny were valid authority, appellate counsel was
34 nonetheless ineffective for failing to raise an issue that even this Court acknowledged
35 had been inconsistently interpreted and applied. *Id.* at 235, 994 P.2d at 713.
36 However, the *Byford* court made two specific findings which defy Defendant's claim.

37 First, under *Byford*, even an improper instruction will not justify reversal when
38 the evidence of guilt is overwhelming and second, the holding is to be applied
39 prospectively only. *Id.* at 233, 994 P.2d at 712; see also *Bridges v. State*, 116 Nev.
40 752, 762-63, 6 P.3d 1000, 1008 (2000); *Leonard v. State*, 117 Nev. 53, 74-76, 17 P.3d

1 397, 410 – 412 (2001); *Garner, supra*, 116 Nev. at 789, 6 P.3d at 1025, (overruled on
2 other grounds by *Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002)); *Evans, supra*.

3 Thus, because the evidence of Defendant's guilt was overwhelming (*see Rippo,*
4 *supra*, 113 Nev. at 1255, 946 P.2d at 1027) even if appellate counsel had raised the
5 issue, like the defendant in *Byford*, the claim would not have warranted relief.
6 Moreover, because Defendant's appeal was dismissed well before the *Byford* ruling,
7 he could not have benefited from this Court's ruling in any case. Therefore,
8 Defendant's claim that appellate counsel was ineffective for failing to raise this issue
9 on direct appeal is without merit and should be dismissed.

10
11 **X.**

12 **THIS COURT'S APPELLATE REVIEW OF DEATH
PENALTY CASES IS CONSTITUTIONAL**

13 In ground X, Defendant alleges that appellate counsel was ineffective for
14 failing to raise on appeal or assert all available arguments supporting his contention
15 that "the opinion affirming RIPPO's conviction and sentence provides no indication
16 that the mandatory review was fully and properly conducted in this case."

17 This claim is frivolous. There is absolutely no basis in either law or fact to
18 support an allegation that appellate counsel was deficient for not raising on direct
19 appeal this Court's alleged inadequate review of his direct appeal.

20
21 **XI.**

22 **THE RACIAL COMPOSITION OF DEFENDANT'S
JURY WAS CONSTITUTIONAL**

23 In ground XI, Defendant claims that appellate counsel was ineffective because
24 he failed to raise what he characterizes as the unconstitutional racial composition of
25 the jury. Clearly, this claim lacks merit because it had virtually no chance of success
26 on appeal.

27 Both the Fourteenth and the Sixth Amendments to the United States
28 Constitution guarantee a defendant the right to a trial before a jury selected from a

1 representative cross-section of the community. *Evans v. State, supra; Holland v.*
2 *Illinois*, 493 U.S. 474, 110 S.Ct. 803 (1990); *Taylor v. Louisiana*, 419 U.S. 522, 95
3 S.Ct. 692 (1975). "The fair-cross-section requirement mandates that 'the jury wheels,
4 pools of names, panels, or venires from which juries are drawn must not
5 systematically exclude distinctive groups in the community and thereby fail to be
6 reasonably representative thereof.'" *Id.* (quoting *Taylor, supra*, at 702). However,
7 there is "no requirement that petit juries actually chosen must mirror the community
8 and reflect the various distinctive groups in the population." *Id.* (quoting, *Holland,*
9 *supra* at 808).

10 The standard for a race-based challenge to the composition of a jury pool under
11 the Sixth Amendment was set by the United States Supreme Court in *Duren v.*
12 *Missouri*, 439 U.S. 357 (1979). To show a prima facie violation of the Constitution's
13 fair cross-section requirement in selecting a jury pool: the *defendant* must show (1)
14 that the group alleged to be excluded is a "distinctive" group in the community; (2)
15 that the representation of this group in venires from which juries are selected is not
16 fair and reasonable in relation to the number of such persons in the community; and
17 (3) that this under representation is due to systematic exclusion of the group in the
18 jury- selection process. *Id.* at 364. A "jury selection violates the Sixth Amendment
19 or the due process and equal protection clauses of the Fourteenth Amendment *only if*
20 it can be shown that members of the appellant's race were excluded systematically
21 from jury duty. '(P)urposeful discrimination may not be assumed or merely
22 asserted.'" *Bishop v. State*, 92 Nev. 510, 515, 554 P.2d 266, 270 - 270 (1976) (quoting
23 *Swain v. Alabama*, 380 U.S. 202, 205, 85 S.Ct. 824, 827 (1965). Such discrimination
24 must be proved. *Id.* (citing, *Tarrance v. Florida*, 188 U.S. 519, 23 S.Ct. 402 (1903)).
25 The federal courts have repeatedly held that the use of voter registration lists to
26 compile the jury pool is constitutionally acceptable. *See e.g., Taylor v. Louisiana*, 419
27 U.S. 522 (1975); *Watkins v. Commonwealth*, 385 S.E.2d 50, 53 (Va. 1989); *United*
28

1 *States v. Lewis*, 10 F.3d 1086, 1089-90 (4th Cir. 1993); *People v. Sanders*, 797 P.2d
2 561 (Cal. 1990)(*overruling People v. Harris*, 679 P.2d 433 (Cal. 1984)).

3 Defendant's claim here fails first because it must be the jury pool not the
4 individual jury that is representative of a fair cross section of the community, the fact
5 that Defendant's particular jury was entirely Caucasian does not support a prima facie
6 constitutional violation. Similarly, the county-wide practice of comprising jury pools
7 using voter registration rolls has been a long-standing constitutionally acceptable
8 practice. Moreover, Defendant's claim that the county fails to follow up on the jury
9 summons process hardly demonstrates "purposeful discrimination"; indeed, it is
10 highly doubtful "individuals who move fairly frequently or are too busy trying to earn
11 a living" would be considered a "distinctive" group for purposes of Sixth Amendment
12 analysis and able to withstand constitutional scrutiny.

13 Therefore, Defendant's claim of ineffective assistance of counsel is unfounded.

14 **XII.**

15 **NEVADA'S CAPITAL SENTENCING STATUTE**
16 **PROPERLY NARROWS THE CATEGORIES OF**
17 **DEATH ELIGIBLE DEFENDANTS**

18 Defendant's final claim in ground XII is that appellate counsel was ineffective
19 for failing to raise or completely assert the argument that Nevada's capital sentencing
20 statute, NRS 200.033, fails to properly narrow the categories of death eligible
21 defendants. However, as with Defendant's other claims, there was no reasonable
22 probability this claim would have succeeded on appeal.

23 NRS 200.033 provides:

24 The only circumstances by which murder of the first degree
25 may be aggravated are:

- 26 1. The murder was committed by a person under
27 sentence of imprisonment.
- 28 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:

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- 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.

- 1 9. The murder was committed upon one or more persons at
2 random and without apparent motive.
- 3 10. The murder was committed upon a person less than 14
4 years of age.
- 5 11. The murder was committed upon a person because of
6 the actual or perceived race, color, religion, national
7 origin, physical or mental disability or sexual
8 orientation of that person.
- 9 12. The defendant has, in the immediate proceeding, been
10 convicted of more than one offense of murder in the
11 first or second degree. For the purposes of this
12 subsection, a person shall be deemed to have been
13 convicted of a murder at the time the jury verdict of guilt
14 is rendered or upon pronouncement of guilt by a judge
15 or judges sitting without a jury.
- 16 13. The person, alone or with others, subjected or
17 attempted to subject the victim of the murder to
18 nonconsensual sexual penetration immediately before,
19 during or immediately after the commission of the
20 murder. For the purposes of this subsection:
21 a. "Nonconsensual" means against the victim's will or
22 under conditions in which the person knows or
23 reasonably should know that the victim is mentally or
24 physically incapable of resisting, consenting, or
25 understanding the nature of his conduct, including,
26 but not limited to, conditions in which the person
27 knows or reasonably should know that the victim is
28 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.

1 Defendant does not point to any particular portion of the statute he finds
2 objectionable, but rather, asserts, "[t]he factors listed in NRS 200.033, individually
3 and in combination fail to guide the sentencer's discretion and create an impermissible
4 risk of vaguely defined, arbitrarily and capriciously selected individuals upon whom
5 death is imposed." (Appellant's Opening Brief, pages 44-45). Defendant claims
6 further that "[i]t is difficult, if not impossible, under the factors of NRS 200.033 for
7 the perpetrator of a First Degree Murder not to be eligible for the death penalty at the
8 unbridled discretion of the prosecutor." (Id.) However, even under this sweeping
9 allegation, Defendant's claim that appellate counsel was ineffective for failing to raise
10 this issue on direct appeal fails.

11 This Court has specifically held that these statutory aggravators, even "in
12 combination," properly narrow the class of persons eligible for the death penalty.
13 *Gallego v. State supra*, 117 Nev. at 370, 23 P.3d at 242 (2001); *See also, Bennett v.*
14 *State*, 106 Nev. 135, 787 P.2d 797 (1990)(NRS 200.033 subdivision 4 is not
15 constitutionally overbroad or arbitrary¹²); *Smith v. State*, 114 Nev. 33, 953 P.2d 264
16 (1998) (subdivision 8 is not constitutionally vague and ambiguous); *Cambro v. State*,
17 114 Nev. 106, 952 P.2d 946 (1998) and *Geary v. State*, 112 Nev. 1434, 930 P.2d 719
18 (1996) (subdivision 9 is not constitutionally vague); *Leslie v. Warden*, 59 P.3d 440
19 (2002)(Defense counsel was not deficient in failing to argue that "at random and
20 without apparent motive" aggravator was not supported by evidence in penalty phase
21 of defendant's murder trial, where Supreme Court had consistently upheld that
22 aggravator when, as in defendant's case, killing was unnecessary to complete robbery,
23 and defense counsel, knowing that Supreme Court was required to independently
24 review all aggravating circumstances, may have chosen to focus on issues more likely
25 to yield results).

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27
28 ¹² One of the six aggravating factors the jury in this case found to be established beyond a reasonable doubt was pursuant to subdivision 4.

1 Defendant relies upon two United States Supreme Court cases to bolster his
2 contention. However, neither of these cases provides sufficient support for
3 Defendant's claim.

4 In *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980), the jury imposed
5 two sentences of death on the defendant. As to each, the jury specified that the single
6 aggravating circumstance they had found beyond a reasonable doubt was "that the
7 offense of murder was outrageously or wantonly vile, horrible and inhuman." *Id.* at
8 426, 100 S.Ct. 1759, 1764. The Court held the aggravator violated the Eighth and
9 Fourteenth Amendments. *Id.* at 428-28, 1765. The Court reasoned there was nothing
10 in the words "outrageously or wantonly vile, horrible or inhuman," standing alone that
11 implied any inherent restraint on the arbitrary and capricious infliction of a death
12 sentence. *Id.*

13 In *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130 (1992), after finding the
14 defendant guilty of capital murder, a Mississippi jury, in the sentencing phase of the
15 case, found that there were three statutory aggravating factors. One of these was the
16 murder was "especially heinous, atrocious or cruel," which had not been otherwise
17 defined in the trial court's instructions. *Id.* at 225-26, 112 S.Ct. 1130, 1134. The Court
18 reversed the defendant's conviction. *Id.* at 227, 112 S.Ct. at 1135. Although the
19 Court's decision was founded wholly on other grounds, it noted the
20 unconstitutionality of the vague aggravating factor was implicit in the Court's
21 opinion. *Id.* at 235, 112 S.Ct. at 1139.

22 Although Defendant does not specifically mention *Maynard v. Cartwright*, 486
23 U.S. 356, 108 S.Ct. 1853 (1988), that Court similarly held that the language of an
24 Oklahoma statute with an aggravating circumstance which read, "especially heinous,
25 atrocious, or cruel" gave no more guidance than the "outrageously or wantonly vile,
26 horrible or inhuman" language that the jury returned in its verdict in *Godfrey*. *Id.* at
27 363-64, 108 S.Ct. 1853, 1859.

28

1 Clearly, the Nevada statute does not employ any such vague or overly broad
2 language. On the contrary, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909
3 (1976)¹³, the United States Supreme Court upheld a Georgia sentencing scheme with
4 nearly the identical language as Nevada's, even when the defendant attacked each and
5 every aggravator individually and specifically. In upholding the sentencing statute,
6 the Court in *Gregg* stated:

7 While there is no claim that the jury in this case relied
8 upon a vague or overbroad provision to establish the
9 existence of a statutory aggravating circumstance, the
10 petitioner looks to the sentencing system as a whole (as the
11 Court did in *Furman* and we do today) and argues that it
12 fails to reduce sufficiently the risk of arbitrary infliction of
13 death sentences. Specifically, Gregg urges that the statutory
14 aggravating circumstances are too broad and too vague
15 *Id.* at 200, 96 S.Ct. at 2938.

16 Defendant here attempts to engage the same tactic as the defendant in *Gregg*.
17 Indeed, his claim similarly fails. Clearly there is no support for his claim that the
18 Nevada statute fails to limit the categories of death-eligible defendants to such a
19 degree that would warrant constitutional relief. As such, his claim of effective
20 assistance of appellate counsel must likewise fail because counsel was prudent to
21 forego this claim in lieu of others with a far greater probability of success.
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¹³ In his petition Defendant cites only to the dissenting opinion at 428 U.S. 238, 92 S.Ct. 2726 (1972).

1 CONCLUSION


2 Defendant has not shown why the district court's findings were in error. Based
3 on the aforementioned arguments, the State respectfully requests that the Order
4 Denying Defendant's Petition for Writ of Habeas Corpus be affirmed.

5 Dated this 17th day of June, 2005.

6 Respectfully submitted,

7 DAVID ROGER
8 Clark County District Attorney
9 Nevada Bar # 002781

10 BY


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CERTIFICATE OF COMPLIANCE


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

Dated this 17th day of June, 2005.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's
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EXHIBIT 138

EXHIBIT 138

MR1ppo-07016-0396

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RIPPO,

S.C. CASE NO. 44094

Appellant,

FILED

vs.

MAY 19 2005

THE STATE OF NEVADA,

Respondent.

JANETTE M. LUTON
CLERK OF SUPERIOR COURT
DEPUTY CLERK

APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE DONALD M. MOSLEY, PRESIDING

APPELLANT'S OPENING BRIEF

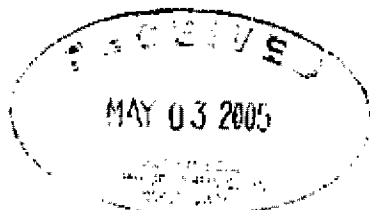
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MICHAEL RIPPO,

S.C. CASE NO. 44094

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE DONALD M. MOSLEY, PRESIDING

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ISSUES PRESENTED FOR REVIEW

- I. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE JURY WAS ALLOWED TO USE OVERLAPPING AGGRAVATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.
- II. RIPPO'S CONVICTION AND SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE RIPPO WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.
- III. TRIAL COUNSEL WOLFSON INSISTED THAT RIPPO WAIVE HIS RIGHT TO SPEEDY TRIAL AND THEN ALLOWED THE CASE TO LANGUISH FOR 46 MONTHS BEFORE PROCEEDING TO TRIAL.
- IV. THE PERFORMANCE OF TRIAL COUNSEL DURING THE GUILT PHASE OF THE TRIAL FELL BELOW THE STANDARD OF REASONABLY EFFECTIVE COUNSEL IN THE FOLLOWING RESPECTS:
 - a. Failure to Object to the Use of a Prison Photograph of Rippo as Being Irrelevant, Unduly Prejudicial and Evidence of Other Bad Acts.
- V. THE PERFORMANCE OF TRIAL COUNSEL DURING THE PENALTY PHASE OF THE TRIAL FELL BELOW THE STANDARD OF REASONABLY EFFECTIVE COUNSEL IN THE FOLLOWING RESPECTS:
 - (a.) Failure to Object to Unconstitutional Jury Instructions at the Penalty Hearing That Did Not Define and Limit the Use of Character Evidence by the Jury.
 - (b.) Failure to Offer Any Jury Instruction with Rippo's Specific Mitigating Circumstances and Failed to Object to an Instruction That Only Listed the Statutory Mitigators and Failed to Submit a Special Verdict Form Listing Mitigating Circumstances Found by the Jury.
 - (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.

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- (d). Failure to Object to Improper Closing Argument at the Penalty Hearing.
- (e). Trial Counsel Failed to Move to Strike Two Aggravating Circumstances That Were Based on Invalid Convictions.

VI. 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.

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 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.

VIII. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE NEVADA STATUTORY SCHEME AND CASE LAW FAILS TO PROPERLY LIMIT THE INTRODUCTION OF VICTIM IMPACT TESTIMONY AND THEREFORE VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT AND FURTHER VIOLATES THE RIGHT TO A FAIR AND NON-ARBITRARY SENTENCING PROCEEDING AND DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

IX. THE STOCK JURY INSTRUCTION GIVEN IN THIS CASE DEFINING PREMEDITATION AND DELIBERATION NECESSARY FOR FIRST DEGREE MURDER AS "INSTANTANEOUS AS SUCCESSIVE THOUGHTS OF THE MIND" INSTRUCTION VIOLATED THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION. WAS VAGUE AND RELIEVED THE STATE OF IT'S BURDEN OF PROOF ON EVERY ELEMENT OF THE CRIME. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTION 3, 6, 8, AND 14; ARTICLE IV, SECTION 21.

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- X. RIPPO'S CONVICTION AND SENTENCE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, AND RELIABLE SENTENCE DUE TO THE FAILURE OF This Court TO CONDUCT FAIR AND ADEQUATE APPELLATE REVIEW. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.
- XI. RIPPO'S CONVICTION AND SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, IMPARTIAL JURY FROM CROSS-SECTION OF THE COMMUNITY, AND RELIABLE DETERMINATION DUE TO THE TRIAL, CONVICTION AND SENTENCE BEING IMPOSED BY A JURY FROM WHICH AFRICAN AMERICANS AND OTHER MINORITIES WERE SYSTEMATICALLY EXCLUDED AND UNDER REPRESENTED. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.
- XII. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE NEVADA STATUTORY SCHEME AND CASE LAW WITH RESPECT TO THE AGGRAVATING CIRCUMSTANCES ENUNCIATED IN NRS 209.033 FAIL TO NARROW THE CATEGORIES OF DEATH ELIGIBLE DEFENDANTS.

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 (A.A. Vol. II, pp. 415). He was sentenced to death by lethal injection by the trial jury (A.A. Vol. II, pp. 415). 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 (A.A. Vol. II, pp. 378). RIPPO was arraigned on July 20, 1992, before the Honorable Gerard Bongiovanni and waived his right to a trial within sixty days (A.A. Vol. II, pp. 379). Oral requests for discovery and reciprocal discovery were granted by the Court (A.A. Vol. II, pp. 379). RIPPO'S formal Motion for Discovery was granted by the Court on November 4, 1992 (A.A. Vol. II, pp. 381).

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.

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 (A.A. Vol. II, pp. 382-383). 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 September 7th, notice of the State's

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1 intent to use at least two new expert witnesses and a number of jail house snitches and
 2 discovery had not yet been provided on any of the new witnesses (A.A. Vol. II, pp. 384). The
 3 Court granted the defense request to continue the trial date and same was reset to February 14,
 4 1994 (A.A. Vol. II, pp. 385).

5
 6 A status hearing on the trial date was held on January 31, 1994, at which time the
 7 defense indicated that subpoenas had been served on the two prosecutors on the case, John
 8 Lukens and Teresa Lowry, as they had participated in the service of a search warrant and had
 9 discovered evidence thereby making themselves witnesses in the case (A.A. Vol. II, pp. 387).
 10 A Motion to Disqualify the District Attorney's office was thereupon filed along with a Motion
 11 to Continue the Trial (A.A. Vol. II, pp. 388). At the hearing of the Motions the Court
 12 continued the trial date to March 28, 1994, in order to allow time for an evidentiary hearing on
 13 the disqualification request and because the court's calendar would not accommodate the trial
 14 date (A.A. Vol. II, pp. 389).

15
 16 The evidentiary hearing on the Motion to Disqualify the District Attorney's office was
 17 heard on March 7, 1994, and two days later the Court granted the motion and removed Lukens
 18 and Lowry from the case, but declined to disqualify the entire office and ordered that other
 19 district attorneys be assigned to the case (A.A. Vol. II, pp. 390-392). Prosecutors Mel
 20 Harmon and Dan Seaton were assigned the case. At a status hearing on March 18th defense
 21 counsel indicated that they had just been provided with a substantial amount of discovery that
 22 had been previously withheld and that the State had filed a motion to Amend the Indictment
 23 and that therefore the defense was again put in the position of having to ask the Court to
 24 continue the trial date. The Court granted the motion and reset the trial date for October 24,
 25 1994 (A.A. Vol. II, pp. 392-393).

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1 The October trial date was also vacated and reset based on representations made by the
2 District Attorney at the calendar call on October 21, 1994 (A.A. Vol. II, pp. 397). The date
3 was reset for August and September, 1995, however due to conflicting trial schedules, the date
4 was once again reset for January 29, 1996 (A.A. Vol. II, pp. 398). On January 3, 1996 the
5 State was allowed to file an Amended Indictment over the objection of RIPPO (A.A. Vol. II,
6 pp. 398).

7 Jury selection commenced on January 30, 1996, and the evidentiary portion of the trial
8 began on February 2, 1996 (A.A. Vol. II, pp. 400-403). An interruption of the trial occurred
9 between February 7th and February 26th based on the failure of the State to provide discovery
10 concerning a confession and inculpatory statements claimed to have been made by RIPPO to
11 one of the State's witnesses (A.A. Vol. II, pp. 405-412). The trial thereafter proceeded
12 without further interruption and final arguments were made to the jury on March 5, 1996.

13 Guilty verdicts were returned on two counts of first degree murder, and one count each
14 of robbery and unauthorized use of a credit card (A.A. Vol. II, pp. 412). The penalty hearing
15 commenced on March 12, 1996 and concluded on March 14, 1996 with verdicts of death on
16 both of the murder counts. On the remaining felony counts RIPPO was sentenced to a total of
17 twenty-five (25) years consecutive to the murder counts (A.A. Vol. II, pp. 417).

18 RIPPO pursued a direct appeal to this Court with the conviction and sentence being
19 affirmed on October 1, 1997. Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997). RIPPO
20 filed for Rehearing and on February 9, 1998, an Order was entered Denying Rehearing. A
21 Petition for Writ of Certiorari was filed with the United States Supreme Court and Certiorari
22 was denied on October 5, 1998. This Court issued it's Remittitur on November 3, 1998.
23 RIPPO timely filed the instant Petition for Writ of Habeas Corpus on December 4, 1998.
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On August 8, 2002, Mr. David Schieck filed a Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (A.A. Vol. I, pp. 001-104). On March 12, 2004, the undersigned was permitted to file a second Supplement Petition in Support of the Writ of Habeas Corpus (A.A. Vol. I, pp. 168-216).

On August 20, 2004, an evidentiary hearing was held wherein, trial attorneys, Mr. Steve Wolfson and Mr. Phillip Dunleavy testified (A.A. Vol. II, pp. 278-306). Thereafter, on September 10, 2004, the continuation of the evidentiary hearing was held wherein, Mr. David Schieck, appellate counsel testified (A.A. Vol. II, pp. 307-368). On December 1, 2004, the district court entered the written Findings of Fact and Conclusions of Law denying the Writ of Habeas Corpus (A.A. Vol. II, pp. 374-377). A timely notice of appeal was filed on October 12, 2004 (A.A. Vol. II, pp. 369-370). The instant appeal follows.

It is important to note, that in Mr. David Schieck's supplement filed on August 8, 2002, he included all of the issues that had previously been raised in this Court on direct appeal. Whereas, the undersigned supplement did not include those issues. For purposes of this appeal, Mr. Rippo will only include the issues from the post-conviction relief and not issues that were previously raised on direct appeal. However, Mr. Rippo will include his first issue in this appeal an issue that was considered on direct appeal but based on new case law he would respectfully request that this Court consider the issue.

STATEMENT OF FACTS

'On February 20, 1992, the apartment manager of the Katie Arms Apartment Complex

This Statement of Facts comes verbatim from this Court's statement of facts from Mr. Rippo's direct appeal opinion filed on October 1, 1997. The undersigned has previously raised a lengthy statement of facts that will not be included in the instant appeal (as this brief has a 30 page limit and the statement of facts is very lengthy, the undersigned cites this Court's statement of facts) but the full statement of facts is

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1 in Las Vegas discovered the bodies of Denise Lizzi and Lauri Jacobson in Jacobson's
2 apartment. Officers from the Las Vegas Metropolitan Police Department ("LVMPD") arrived
3 at the scene and recovered a clothing iron and a hair dryer, from which the electrical cords had
4 been removed, a black leather strip, a telephone cord, and two pieces of black shoelace. They
5 observed glass fragments scattered on the living room and kitchen floor areas.
6

7
8 In April 1992, the LVMPD arrested Diana Hunt and charged her with the killing and
9 robbery of Lizzi and Jacobson. As part of her plea agreement, Hunt agreed to testify at the
10 trial of Michael Rippo. Hunt testified to the following:

11 At the time of the murders, Hunt was Rippo's girlfriend. On February 18, 1992, she
12 and Rippo went to the Katie Arms Apartment Complex to meet Jacobson, who was home
13 alone. Rippo and Jacobson injected themselves with morphine for recreational purposes.
14 Shortly thereafter, Lizzi arrived, and she and Jacobson went outside for approximately twenty
15 minutes. While Jacobson and Lizzi were outside, Rippo closed the apartment curtain and the
16 window and asked Hunt to give him a stun gun she had in her purse. Rippo then made a
17 phone call.
18

19 When Jacobson and Lizzi returned to the apartment, they went into the bathroom.
20 Rippo brought Hunt a bottle of beer and told her that when Jacobson answered the phone,
21 Hunt should hit Jacobson with the bottle so that Rippo could rob Lizzi. A few minutes later
22 the phone rang, and Jacobson came out of the bathroom to answer it. Hunt hit Jacobson on
23 the back of her head with the bottle causing Jacobson to fall to the floor. Rippo and Lizzi
24 were yelling in the bathroom, and Hunt could hear the stun gun being fired. Hunt witnesses
25
26

27
28 included in the Appellant's Appendix in the undersigned's Supplemental Brief in
Support of Habeas Corpus for this Court's review in the event that they need an
extensive rendition of the statement of facts.

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1 Rippo wrestle Lizzi across the hall into a big closet. Hunt ran to the closet and observed
2
3 Rippo sitting on top of Lizzi and stunning her with the stun gun. Hunt then went to the living
4 room and helped Jacobson sit up. Rippo came out of the closet holding a knife which he had
5 used to cut the cords from several appliances, told Jacobson to lie down, tied her hands and
6 feet, and put a bandanna in her mouth.
7

8 Hunt next saw Rippo in the closet with Lizzie. Rippo had tied Lizzi's hands and feet.
9 At this point, a friend of Jacobson's approached the apartment, knocked on the door, and
10 called out for Jacobson. Rippo put a gag in Lizzi's mouth. Jacobson was sill gagged and
11 apparently unable to answer. After the friend left, Rippo began stunning Jacobson with the
12 stun gun. He placed a cord or belt-type object through the ties on Jacobson's feet and wrists,
13 and dragged her across the floor to the closet. As Rippo dragged her, Jacobson appeared to be
14 choking. Hunt began to vomit and next remembered hearing an odd noise coming from the
15 closet. She observed Rippo with his knee in the small of Lizzi's back, pulling on an object he
16 had placed around her neck.
17

18 When Hunt accused Rippo of choking the women, Rippo told her that he had only
19 temporarily cut off their air supply, and that Hunt and Rippo had to leave before the two
20 women woke up. Rippo then wiped down the apartment with a rag before leaving. While
21 cleaning up, Rippo went into the closet and removed Lizzi's boots and pants. He explained to
22 Hunt that he needed to remove Lizzi's pants because he had bled on them.
23

24 Later that evening, Rippo called Hunt and told her to meet him at a friend's shop.
25 When Hunt arrived, Rippo was there with Thomas Simms, the owner of the shop, and another
26 unidentified man. Rippo told Hunt that he had stolen a car for her and that she needed to
27 obtain some paperwork on it. Hun believed the car, a maroon Nissan, had belonged to Lizzi.
28

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1 The next day, on February 19, 1992, Hunt and Rippo purchased a pair of sunglasses
2 using a gold Visa card. Rippo told Hunt that he had purchased an air compressor and tools on
3 the Sears credit card that morning. Later that day, Hunt, who was scared of Rippo and wanted
4 to "get away from him" went through Rippo's wallet in search of money. Hunt was unable to
5 find any money, but she took a gold Visa card belonging to Denny Mason, Lizzi's boyfriend,
6 and Rippo's wallet. Hunt did not know who Mason was. Around February 29, 1992, Rippo
7 confronted Hunt. Hunt suggested to Rippo that they turn themselves into the LVMPD, but
8 Rippo refused, telling Hunt that he had returned to Jacobson's apartment, cut the women's
9 throats, and jumped up and down on them.
10

11 The medial examiner, Dr. Giles Sheldon Green, who performed autopsies on Lizzi and
12 Jacobson, also testified at Rippo's trial. Dr. Green testified that Lizzi had been found with a
13 sock in her mouth, secured by a gag that encircled her head. The sock had been pushed back
14 so far that part of it was underneath Lizzi's tongue, blocking her airway. Pieces of cloth were
15 found tied around each of her wrists. Dr. Green testified that Lizzi's numerous injuries were
16 consistent with manual and ligature strangulation.
17

18 Dr. Green testified that Jacobson died from asphyxiation due to manual strangulation
19 due to manual strangulation. Dr. Green found no traces of drugs in Jacobson's system.
20 Neither of the women's bodies revealed stun gun marks.
21

22 Thomas Sims also testified at trial the Rippo arrived at his shop on February 18, 1992,
23 with a burgundy Nissan. When Simms asked about the ownership of the car, Rippo
24 responded that someone had died for it. Rippo have Simms several music cassette tapes,
25 many bearing the initials D.L., and an empty suitcase with Lauri Jacobson's name tag. On
26 February 21, 1992, Simms heard a news report that two women had been killed and that one
27 of them was named Denise Lizzi. On February 26, 1992, Simms met Rippo in a parking lot to
28

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1 return a bottle of morphine that Rippo had left in Simms' refrigerator. When Simms inquired
2 about the murders, Rippo admitted that he had "choked those two bitches to death" and then
3 he had killed the first woman accidentally so he had to kill the other one.
4

5 On September 15, 1993, Deputy District Attorneys John Lukens and Teresa Lowry
6 accompanied two police officers in the execution of a search warrant on the home of Alice
7 Starr. Starr had testified on the State's behalf before the grand jury but subsequently was
8 identified by Rippo as an alibi witness. Officer Roy Chandler, one of the two officers present
9 at the scene, testified at an evidentiary hearing that Starr's sister responded to their knock on
10 the door, admitted the officers and the prosecutors, and told them that she and her two
11 children were the only ones in the house. Starr, however, suddenly came out of the kitchen
12 area. Surprised at Starr's presence, the officers checked the residence for other individuals.
13 The officers removed their guns from their holsters. Starr corroborated the officers' version
14 of the events, testifying that the officers did not draw their guns until she appeared from the
15 kitchen.
16

17 During the search, one of the officers found drugs and placed Starr under arrest.
18

19 Lukens testified that he told Starr:
20

21 I am concerned. When I was last here, you told me that your relationship with
22 Mr. Rippo was as an acquaintance. . . I don't think you were honest with me.
23 And if there was anything else that you weren't honest in telling me the truth
24 about, I'd like to give you a chance to tell me.

25 Starr testified that Lukens did not threaten her, but she stated, "[I]f [your] going to dangle on
26 [Rippo's] star, [you're] going to go down like he is." Upon motion by the defense, the district
27 court disqualified Lukens and Lowry as a result of their participation in the search and
28 requested the district attorney's office to transfer the case to different prosecutors.

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The jury found Rippo guilty of two counts of first-degree murder, and one count each of robbery and unauthorized use of a credit card. After the penalty hearing, the jury sentenced Rippo to death, finding six aggravating factors: (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; (4) the murders involved torture; (5) the murders were committed while the person was engaged in the commission of or an attempted to commit burglary; and (6) the murders were committed while the person was engaged in the commission of or an attempt to commit kidnapping.

ARGUMENT

1. 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.

This issue was raised on direct appeal. On direct appeal, this Court concluded that Mr. Rippo could have been prosecuted separately for each of the underlying felonies and therefore each crime was properly considered as an aggravating circumstance. However, based upon a new decision from this Court, Mr. Rippo would respectfully request that this Court revisit this issue.

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

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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. 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. The Amended Notice was filed after the original two prosecutors were removed from the case. The jury at the conclusion of the penalty hearing found the presence of all six (6) aggravating circumstances (A.A. Vol. II, pp. 414-415).

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 VI VII, XIV; Nevada Constitution, Article I, Section 8.

In December of 2004, this Court decided McConnell v. State, 120 Ad Op. 105, 102 P.3d 606 (December 29, 2004), in that case, this Court precluded the use of predicate felonies as aggravator in a felony murder case, as in Mr. Rippo's case.

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1 It appears that the rationale behind the McConnell decision comes from Eighth
2 Amendment, which prohibits the infliction of cruel and unusual punishment. In 1972 the
3 United States Supreme Court held that capital sentencing schemes which do not adequately
4 guide sentencers discretion and thus permit the arbitrary and capricious imposition of the
5 death penalty violates the Eighth and Fourteenth Amendments. As a result, the United States
6 Supreme Court has held that to be constitutional a capital sentencing scheme "must generally
7 narrow the class of persons eligible for the death penalty and must reasonably justify the
8 imposition of a more severe sentence on the defendant's compared to other found guilty of
9 murder." Vant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed 2d 235 (1983).

12 In McConnell, this Court concluded that Nevada's only constitutional ban against the
13 infliction of cruel or unusual punishment, and the deprivation of life without due process of
14 law requires the same narrowing the process. Nevada Constitution Article 1 § 68 (5).

16 This Court ruled in McConnell that Nevada's definition of capital felony murder did
17 not narrow enough and that the further narrowing of the death eligibility is needed. Further,
18 this Court stated that the aggravator does not provide sufficient narrowing to satisfy
19 constitutional requirements.

21 The McConnell court stated, "[N]evada's statutes defines felony murder broadly."
22 Under NRS 200.030(1)(d), felony murder is "one that is committed in the perpetration or
23 attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the
24 home, sexual abuse of a child, sexual molestation under the age under 14, or child abuse."
25 Further, in Nevada, all felony murder is first degree murder, and all first degree murder is
26 essentially capital murder. Felony murder in Nevada does not even require the intent to kill or
27 inflict great bodily harm. In Nevada, the intent simply to commit the underlying felony is
28 transferred to the implied malice necessary to characterize the death be murder. Ford v. State,

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99 Nev. 209, 215, 660 P.2d 992,995 (1983).

The McConnell court noted, "Nevada's current definition Nevada's current definition of felony murder is broader than the definition in 1972 when *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.ed 2d 346, which temporarily ended executions in the United States."

This Court further stated that, Nevada's definition of felony murder does not afford constitutional narrowing. The ultimate holding in McConnell is that this Court "deemed it impermissible under the United States and Nevada Constitution to place an aggravating circumstance in a capital prosecution on the felony on which the felony murder is predicated." Based upon McConnell, it was impermissible for the State to charge Mr. Rippo with felony capital murder because the State based the aggravating circumstances in a capital prosecution on two of those felonies upon which the State's felony murder is predicated. McConnell, further, held that, in cases like Mr. Rippo's, "where the State bases a first degree murder conviction in whole or part of felony murder, to seek a death sentence the State will have to prove an aggravator other than one based on the felony murder predicate felony." McConnell v. State, at 624.

In McConnell, the court showed evidence that Mr. McConnell repeatedly admitted to premeditating the murder. In open court Mr. McConnell stated that he "all of a sudden I became focused, and I did, and I just made the decision I'm going to do this. I'm going to retaliate against the people that ruined my life." This was a lengthy discussion in McConnell, because it showed premeditation, which always allow for a finding of first degree murder and imposition of the death penalty. Currently, McConnell, is the subject for a request for a rehearing by this court. The federal public defender's office requested clarification from the court to file an Amicus Curiae brief on February 28, 2005, in an effort to receive clarification.

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1 In a weighing jurisdiction such as Nevada, the scales of justice can not be
2 impermissibly skewed in favor of death. As the Mississippi Supreme Court, sitting En Banc,
3 declared, "when life is at stake, a jury can not be allowed the opportunity to doubly weigh the
4 commission of underlying felony and the motive behind the underlying felony as separate
5 aggravator." Willie v. State, 585 SO 2d 660, 681 (Miss. 1991). The Willie decision was
6 considered and adopted by this Court in McConnell.
7

8 Further, the Court must consider to obtain a death sentence, the State's must prove
9 beyond a reasonable doubt that at least one aggravating circumstance exists. Gallego v. State,
10 117 Nev. 348, 365, 23 P.3d 227, 239 (2001). If McConnell was to be applied retroactively to
11 the instant case (in the event that it is the announcement of a new rule), the State would be left
12 without three aggravating circumstances.
13

14 The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall
15 "be subject for the same offense to be twice put in jeopardy of life or limb." The traditional
16 test of the "same offense" for double jeopardy purposes is whether one offense requires proof
17 of an element which the other does not. Bockburg v. U.S., 284 U.S. 299, 304 (1932). This
18 test, does not apply, however, when one offense is an incident of another; that is, when one of
19 the offenses is a lesser included of the other. U.S. v. Dixon, 509 U.S. 688, 113 S.Ct. 2849,
20 2857 (1993); Illinois v. Vitale, 447 U.S. 410, 420 100 S.Ct. 2260 (1980).
21

22 Courts of other jurisdictions have found the use of such overlapping aggravating
23 circumstances to be improper. In Randolph v. State, 463 So.2d 186 (Fla. 1984) the court
24 found that the aggravating circumstances of murder while engaged in the crime of robbery and
25 murder for pecuniary gain to be overlapping and constituted only a single aggravating
26 circumstance. See also Provence v. State, 337 So.2d 783 (Fla. 1976) cert. denied 431 U.S.
27 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977).
28

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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. 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

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1 circumstances. Who can say whether the numerical stacking of aggravating circumstances was
2 the proverbial straw that broke the camel's back and tipped the scales of justice tempered by
3 compassion in favor of the death penalty?
4

5 When there is a 'reasonable possibility that the erroneous submission of an
6 aggravating circumstance tipped the scales in favor of the jury finding that the
7 aggravating circumstances were 'sufficiently substantial' to justify the
8 imposition of the death penalty,' the test for prejudicial error has been met.
9 (citation omitted) Because the jury arrived at a sentence of death based upon
10 weighing . . . and it is impossible now to determine the amount of weight
11 ascribed to each factor, we cannot hold the error of submitting both redundant
12 aggravating circumstances to be harmless.

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

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

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

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

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Mr. Rippo would respectfully request that this Court reverse his sentence of death and remand the case for a new penalty phase.

II. RIPPO'S CONVICTION AND SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE RIPPO WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

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 counsel's performance was deficient, the defendant must next show that, but for counsel's 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

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1 trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus
2 subject to independent review." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, at
3 2070, 80 L.Ed.2d 674 (1984). This Court reviews claims of ineffective assistance of counsel
4 under a reasonable effective assistance standard enunciated by the United States Supreme
5 Court in Strickland and adopted by this Court in Warden v. Lyons, 100 Nev. 430, 683 P.2d
6 504, (1984); See Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). Under this
7 two-prong test, a defendant who challenges the adequacy of his or her counsel's representation
8 must show (1) that counsel's performance was deficient and (2) that the defendant was
9 prejudiced by this deficiency. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

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

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

27 In keeping with the standard of effective assistance of counsel, the United States
28 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,

1 372 U.S. 353 (1963).

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

3 Strickland, Supra.

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

7
8
9 **III. TRIAL COUNSEL WOLFSON INSISTED THAT RIPPO WAIVE HIS RIGHT**
10 **TO SPEEDY TRIAL AND THEN ALLOWED THE CASE TO LANGUISH**
11 **FOR 46 MONTHS BEFORE PROCEEDING TO TRIAL.**

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

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

19
20 **IV. THE PERFORMANCE OF TRIAL COUNSEL DURING THE GUILT PHASE**
21 **OF THE TRIAL FELL BELOW THE STANDARD OF REASONABLY**
22 **EFFECTIVE COUNSEL IN THE FOLLOWING RESPECTS:**

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

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

28 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

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1 sometimes looked in prison which was absolutely not relevant to his appearance when not in
2 custody. In the photo RIPPO looked grungy and mean which was a stark contrast to his
3 appearance when not in custody and at trial. When RIPPO voiced concerns to his attorneys he
4 was told the photo didn't matter as the jury could see that RIPPO was clean cut during the
5 trial. The jury should not have been allowed to view RIPPO as he appeared in prison.
6

7
8 It is hornbook law that evidence of other criminal conduct is not admissible to show
9 that a defendant is a bad person or has a propensity for committing crimes. State v. Hines, 633
10 P.2d 1384 (Ariz. 1981); Martin v. People, 738 P.2d 789 (Col. 1987); State v. Castro, 756
11 P.2d 1033 (Haw. 1988); Moore v. State, 96 Nev. 220, 602 P.2d 105 (1980). Although it may
12 be admissible under the exceptions cited in NRS 48.045(2), the determination whether to
13 admit or exclude evidence of separate and independent criminal acts rests within the sound
14 discretion of the trial court, and it is the duty of that court to strike a balance between the
15 probative value of the evidence and its prejudicial dangers. Elsbury v. State, 90 Nev. 50, 518
16 P.2d 599 (1974)
17

18 The prosecution may not introduce evidence of other criminal acts of the accused
19 unless the evidence is substantially relevant for some other purpose than to show a probability
20 that the accused committed the charged crime because of a trait of character. Tucker v. State,
21 82 Nev. 127, 412 P.2d 970 (1966). Even where relevancy under an exception to the general
22 rule may be found, evidence of other criminal acts may not be admitted if its probative value
23 is outweighed by its prejudicial effect. Williams v. State, 95 Nev. 830, 603 P.2d 694 (1979).
24

25 The test for determining whether a reference to criminal history is error is whether "a
26 juror could reasonably infer from the facts presented that the accused had engaged in prior
27 criminal activity." Morning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) citing
28 Commonwealth v. Allen, 292 PA.2d 373, 375 (Pa. 1972). In a majority of jurisdiction

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1
2 improper reference to criminal history is a violation of due process since it affects the
3 presumption of innocence; the reviewing court must therefore determine whether the error
4 was harmless beyond a reasonable doubt. Porter v. State, 94 Nev. 142, 576 P.2d 275 (1978);
5 Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

6 The use of the prison photograph was for the sole purpose of attempting to portray
7 RIPPO as being of poor character and having committed other bad acts. Trial counsel clearly
8 should have objected and prevented the use of the photograph.
9

10 V. **THE PERFORMANCE OF TRIAL COUNSEL DURING THE PENALTY**
11 **PHASE OF THE TRIAL FELL BELOW THE STANDARD OF REASONABLY**
12 **EFFECTIVE COUNSEL IN THE FOLLOWING RESPECTS:**

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

16 (See argument VI. herein below)

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

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

24 (See argument VI. herein below)

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

- 28 (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.

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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.

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:

- (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).

1 In Lockett v. Ohio, 438 US 586, 98 S.Ct 2954, 57 L.Ed. 2d 973 (1978) the Court held
2
3 that in order to meet constitutional muster a penalty hearing scheme must allow consideration
4 as a mitigating circumstance any aspect of the defendant's character or record or any of the
5 circumstances of the offense that the defendant proffers as a basis for a sentence of less than
6 death. See also Hitchcock v. Duacier, 481 US 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and
7 Parker v. Duacer, 498 US 308, 111 S.Ct 731, 112 L.Ed.2d 812 (1991).
8

9 Incredibly, at no point did RIPPO'S attorneys urge the jury to find the existence of
10 mitigating circumstances and weigh them against the aggravators. This failure not only
11 prejudiced RIPPO at the penalty hearing, it also precludes any meaningful review of the
12 appropriateness of the jury's verdict of death.
13

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

15 Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing
16 to raise on appeal, or completely assert all the available arguments supporting constitutional
17 issues raised in this argument.
18

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

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

23 In Evans v. State, 117 Nev. Ad. Op. 50 (2002) this Court considered the exact same
24 comments and found:

25 Other prosecutorial remarks were excessive and unacceptable and should have
26 been challenged at trial and on direct appeal. In rebuttal closing, the prosecutor
27 asked, 'do you as a jury have the resolve, the determination, the courage, the
28 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

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1 in the administration of criminal justice' 'There should be no suggestion that a
2 jury has a duty to decide one way or the other; such an appeal is designed to
3 stir passion and can only distract a jury from it's actual duty: impartiality'. The
4 prosecutor's words here 'resolve,' 'determination,' 'courage,' 'intestinal
5 fortitude,' 'commitment,' 'duty' - were particularly designed to stir the jury's
6 passion and appeal to partiality.

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

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

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

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

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

24 The number of aggravators in this case unduly swayed the jury. If one aggravator was
25 enough to impose the death sentence, then surely six meant death was the only answer. This
26 should have compelled defense counsel to utilize any avenue of attack available against the
27 aggravators.
28

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VI. 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.

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.

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

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1
2 ©) Based upon these findings, whether a defendant should be sentenced to life
3 imprisonment or death.

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

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

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

17 The jury was also told in Instruction 20 that:

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

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

27 In Brooks v. Kemo, 762 F.2d 1383 (11th Cir. 1985) the Court described the procedure
28 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

1 discretion to decline to do so without giving any reason ... [citation omitted].
2 In making the decision as to the penalty, the fact finder takes into consideration
3 all circumstances before it from both the guilt-innocence and the sentence
4 phase of the trial. The circumstances relate to both the offense and the
5 defendant.

6 [citation omitted]. The United States Supreme Court upheld the
7 constitutionality of structuring the sentencing jury's discretion in such a
8 manner. Zanj
9 v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1963);
10 Brooks, 762 F.2d at 1405.

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

12 Under NRS 175.552, the trial court is given broad discretion on questions
13 concerning the admissibility of evidence at a penalty hearing. Guy, 108 Nev.
14 770, 839 P.2d 578. In Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990),
15 cert. denied, 499 U.S. 970 (1991), this court held that evidence of uncharged
16 crimes is admissible at a penalty hearing once any aggravating circumstance
17 has been proven beyond a reasonable doubt. Wittier, 112 Nev. at 916.

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

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

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

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

1 As the court failed to properly instruct the jury at the penalty hearing the sentence
2 imposed was arbitrary and capricious and violated RIPPO'S rights under the Eighth
3 Amendment to be free from cruel and unusual punishment and to Due Process under the
4 Fourteenth Amendment and must be set aside.
5

6
7 **VII. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL**
8 **CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL**
9 **PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL**
10 **AND RELIABLE SENTENCE BECAUSE THE JURY WAS NOT**
11 **INSTRUCTED ON SPECIFIC MITIGATING CIRCUMSTANCES BUT**
12 **RATHER ONLY GIVEN THE STATUTORY LIST AND THE JURY WAS**
13 **NOT GIVEN A SPECIAL VERDICT FORM TO LIST MITIGATING**
14 **CIRCUMSTANCES. UNITED STATES CONSTITUTION AMENDMENTS 5,**
15 **6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8;**
16 **ARTICLE IV, SECTION 21.**

17 Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing
18 to raise on appeal, or completely assert all the available arguments supporting constitutional
19 issues raised in this argument.
20

21 At the penalty hearing instruction number 17 given to the jury listed the seven
22 mitigating circumstances found in NRS 200.035. No other proposed mitigating
23 circumstances were given to the jury. The verdict forms given to the jury did not contain a list
24 of proposed mitigating circumstances to be found by the jury.
25

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

27 In Lockett v. Ohio, 438 US 586, 98 S.Ct 2954, 57 L.Ed. 2d 973 (1978) the Court held
28 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

1 circumstances of the offense that the defendant proffers as a basis for a sentence of less than
2 death. See also Hitchcock v. Duager, 481 US 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and
3 Parker v. Dupder, 498 US 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991).

4
5 NRS 175.554 (1) provides that in a capital penalty hearing before a jury, the court shall
6 instruct the jury on the relevant aggravating circumstances and "shall also instruct the jury as
7 to the mitigating circumstances alleged by the defense upon which evidence has been
8 presented during the trial or at the hearing". Byford v. State, 116 Nev. Ad. Op. 23 (2000). It
9 was a violation of the 14th and 8th Amendments to fail to instruct the jury on the defense
10 mitigators and further a 6th Amendment violation for counsel at trial not to submit a proper
11 instruction and special verdict form to the jury. This failure was especially harmful to RIPPO,
12 when just from a review of the closing arguments there were valid mitigating circumstances
13 that likely would have been found by one or more of the jurors. These are:
14

- 15 1. Accomplice and participant Diana Hunt received favorable treatment
- 16 and is already eligible for parole;
- 17 2. Rippo came from a dysfunctional childhood;
- 18 3. Rippo failed to receive proper treatment and counseling from the
- 19 juvenile justice system;
- 20 4. Rippo was certified as an adult and sent to adult prison because the
- 21 State of Nevada discontinued a treatment facility of violent juvenile
- 22 behaviors;
- 23 5. Rippo was an emotionally disturbed child that needed long term
- 24 treatment, which he never received;
- 25 6. Rippo never committed a serious disciplinary offense while in prison,
- 26 and is not a danger;
- 27 7. Rippo worked well in prison and has been a leader to some of the other
- 28 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:

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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.

VIII. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE NEVADA STATUTORY SCHEME AND CASE LAW FAILS TO PROPERLY LIMIT THE INTRODUCTION OF VICTIM IMPACT TESTIMONY AND THEREFORE VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT AND FURTHER VIOLATES THE RIGHT TO A FAIR AND NON-ARBITRARY SENTENCING PROCEEDING AND DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

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.

This 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

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1 notice of evidence to be presented at a penalty hearing and that one day's notice is not
2 adequate. In the context of a penalty hearing to determine whether the defendant should be
3 adjudged a habitual criminal the court has found that the interests of justice should guide the
4 exercise of discretion by the trial court. Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990)
5

6 In Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175
7 (1980), the United State Supreme Court held that state laws guaranteeing a defendant
8 procedural rights at sentencing may create liberty interests protected against arbitrary
9 deprivation by the due process clause of the Fourteenth Amendment. The procedures
10 established by the Nevada statutory scheme and interpreted by this Court have therefore
11 created a liberty interest in complying with the procedures and are protected by the Due
12 Process clause.
13

14 The Eighth Amendment to the United States Constitution requires that the sentence of
15 death not be imposed in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153
16 (1976). The fundamental respect for humanity underlying the Eighth Amendment requires
17 consideration of the character and record of the individual offender and the circumstances of
18 the particular offense as a constitutionally indispensable part of the process of inflicting the
19 penalty of death. Woodson v. North Carolina, 428 U.S. 280 (1976). Evidence that is of a
20 dubious or tenuous nature should not be introduced at a penalty hearing, and character
21 evidence whose probative value is outweighed by the danger of unfair prejudice, of confusion
22 of the issues or misleading the jury should not be introduced. Allen v. State, 99 Nev. 485, 665
23 P.2d 238 (1983).
24

25 The United States Supreme Court in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597,
26 115 L.Ed.2d 720 (1991) held that the Eighth Amendment erects no per se bar to the admission
27 of certain victim impact evidence during the sentencing phase of a capital case. The Court did
28

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1 acknowledge that victim impact evidence can be so unduly prejudicial as to render the
2 sentencing proceeding fundamentally unfair and violate the Due Process Clause of the
3 Fourteenth Amendment. Payne, 111 S.Ct at 2608, 115 L.Ed.2d at 735. In Homick v. State 108
4 Nev. 127, 136-137, 825 P.2d 600, 606 (1992) this Court embraced the holding in Payne, and
5 found that it comported fully with the intendment of the Nevada Constitution and declined to
6 search for loftier heights in the Nevada Constitution. In cases subsequent to Homick, the
7 Court has reaffirmed its position, finding that questions of admissibility of testimony during
8 the penalty phase of a capital murder trial are largely left to the discretion of trial court. Smith
9 v. State, 110 Nev. 1094, 1106, 881 P.2d 649 (1994). The Court has not however addressed the
10 issue of presentation of cumulative victim impact evidence or been presented with a situation
11 where the prosecution went beyond the scope of the order of the District Court restricting the
12 presentation of the evidence.

13
14 Some State courts have voiced disapproval over the admission of any victim impact
15 evidence at a capital sentencing hearing finding that such evidence is not relevant to prove any
16 fact at issue or to establish the existence of an aggravating circumstance. State v. Guzek, 906
17 P.2d (Or. 1995). In considering a claim that victim impact testimony violated due process and
18 resulting in a sentence imposed under the influence of passion, prejudice or other arbitrary
19 factors, the Kansas Supreme Court in State v. Gideon, 894 P.2d 850, 864 (Kan. 1995) issued
20 the following warning while affirming the sentence:

21
22 When victims' statements are presented to a jury, the trial court should exercise
23 control. Control can be exercised, for example, by requiring the victims'
24 statements to be in question and answer form or submitted in writing in
25 advance. The victims' statements should be directed toward information
26 concerning the victim and the impact the crime has on the victim and the
27 victims' family. Allowing the statement to range far afield may result in
28 reversible error.

In the case at bar the State called five separate victim impact witnesses to testify over

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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. This Court denied the claim. The ruling in this case and others establishes that this 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.

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

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 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

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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).

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.

X. RIPPO'S CONVICTION AND SENTENCE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, AND RELIABLE SENTENCE DUE TO THE FAILURE OF THIS COURT TO CONDUCT FAIR AND ADEQUATE APPELLATE REVIEW. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE 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.

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1 This Court's review of cases in which the death penalty has been imposed is
2
3 constitutionally inadequate. The opinions rendered by the Court have been consistently
4
5 arbitrary, unprincipled and result oriented. Under Nevada law, this Court had a duty to review
6
7 RIPPO'S sentence to determine (a) whether the evidence supported the finding of aggravating
8
9 circumstances; (b) whether the sentence of death was imposed under the influence of passion,
10
11 prejudice or other arbitrary factor; whether the sentence of death was excessive considering
12
13 both the crime and the defendant. NRS 177.055(2). Such appellate review was also required
14
15 as a matter of constitutional law to ensure the fairness and reliability of RIPPO'S sentence.

16 The opinion affirming RIPPO'S conviction and sentence provides no indication that
17
18 the mandatory review was fully and properly conducted in this case. In fact the opinion while
19
20 noting that no mitigating circumstances were found, failed to notice that there was no jury
21
22 verdict form for the jurors to find mitigating circumstances included in the record on appeal.
23
24 The statutory mechanism for review is also faulty in that the Court is not required to consider
25
26 the existence of mitigating circumstances and engage in the necessary weighing process with
27
28 aggravating circumstances to determine if the death penalty is appropriate.

29 RIPPO also again hereby adopts and incorporates each and every claim and issue
30
31 raised in his direct appeal as a substantive basis for relief in the Post Conviction Writ of
32
33 Habeas Corpus based on the inadequate appellate review.

34 XI. RIPPO'S CONVICTION AND SENTENCE IS INVALID UNDER THE STATE
35 AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS,
36 EQUAL PROTECTION, IMPARTIAL JURY FROM CROSS-SECTION OF
37 THE COMMUNITY, AND RELIABLE DETERMINATION DUE TO THE
38 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.

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1 Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing
2 to raise on appeal, or completely assert all the available arguments supporting constitutional
3 issues raised in this argument.
4

5 RIPPO is not an African American, however was tried by a jury that was under
6 represented of African Americans and other minorities. Clark County has systematically
7 excluded from and under represented African Americans and other minorities on criminal jury
8 pools. According to the 1990 census, African Americans - a distinctive group for purposes of
9 constitutional analysis - made up approximately 8.3 percent of the population of Clark
10 County, Nevada. A representative jury would be expected to contain a similar proportion of
11 African Americans. A prima facie case of systematic under representation is established as an
12 all white jury and all white venire in a community with 8.3 percent African American cannot
13 be said to be reasonably representative of the community.
14

15 The jury selection process in Clark County is subject to abuse and is not racially
16 neutral in the manner in which the jury pool is selected. Use of a computer database compiled
17 by the Department of Motor Vehicles, and or the election department results in exclusion of
18 those persons that do not drive or vote, often members of the community of lesser income and
19 minority status. The computer list from which the jury pool is drawn therefore excludes lower
20 income individuals and does not represent a fair cross section of the community and
21 systematically discriminates.
22

23 The selection process for the jury pool is further discriminatory in that no attempt is
24 made to follow up on those jury summons that are returned as undeliverable or are delivered
25 and generate no response. Thus individuals that move fairly frequently or are too busy trying
26 to earn a living and fail to respond to the summons and thus are not included within the
27 venire. The failure of County to follow up on these individuals results in a jury pool that does
28

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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.

XII. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE NEVADA STATUTORY SCHEME AND CASE LAW WITH RESPECT TO THE AGGRAVATING CIRCUMSTANCES ENUNCIATED IN NRS 200.033 FAIL TO NARROW THE CATEGORIES OF DEATH ELIGIBLE DEFENDANTS.

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

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1 was vague and failed to provide sufficient guidance to allow a jury to distinguish between
2 proper death penalty cases and non-death penalty cases. The Court held that under Georgia
3 law, "[t]here is no principled way to distinguish this case, in which the death penalty was
4 imposed, from the many cases in which it was not." at 877, 103 S.Ct. at 2742.
5

6 Recent decisions of the United States Supreme Court demonstrate that all the factors
7 listed in the Nevada Capital Sentencing Statute (NRS 200.033) are subject to challenge on the
8 grounds of 8th Amendment Prohibition against vagueness and arbitrariness, for both on its
9 face and as applied in RIPPON'S case.
10

11 In Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130 (1992) the United States Supreme
12 Court noted that where the sentencing jury is instructed to weigh aggravating and mitigating
13 circumstances, the factors guiding the jury's discretion must be objectively and precisely
14 defined:
15

16 Although our precedence do not require the use of aggravating factors they
17 have not permitted a state in which aggravated factors are decisive to use
18 factors of vague or imprecise content. A vague aggravated factor employed for
19 the purpose of determining whether defendant is eligible for the death penalty
20 fails to channel the sentencers discretion. A vague aggravating factor used in
21 the weighing process is in essence worst, for it creates the risk that the jury will
22 treat the defendant as more deserving of the death penalty and he might
23 otherwise be by relying upon the existence of illusory circumstance. *Id.* at
24 382."

25 Among the risk the court identified as arising from the vague aggravating factors are
26 randomness in sentence decision making and the creation of a bias in favor of death. (*Ibid.*)
27 Each of the factors contained in NRS 200.033 is subject to the prescription against vague and
28 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

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1 capriciously selected individuals upon whom death is imposed. It is difficult, if not
2 impossible, under the factors of NRS 200.033 for the perpetrator of a First Degree Murder not
3 to be eligible for the death penalty at the unbridled discretion of the prosecutor.
4

5 The Supreme Court in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980)
6 reversed under the 8th Amendment a sentence of death obtained under Georgia Capital
7 Murder Statute but permitted such a sentence for an offense that was found beyond a
8 reasonable doubt to have been "outrageously and wantonly vile, horrible or inhuman in that it
9 involved torture, depravity of mind, or an aggravated battery to the victim." (Id. at 422).
10 Despite the prosecutor's claim that the Georgia courts had applied a narrowing construction to
11 the statute (Id. at 429-430), the plurality opinion recognized that:
12

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

16 There is nothing in these words, standing alone, that implies any inherent restraint
17 on the arbitrary and capricious infliction of the death sentence. A person of ordinary
18 sensibility can fairly characterize almost every murder as "outrageously or wantonly vile,
19 horrible and inhuman." Id. at 428-429).
20

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

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1 The Nevada Statutory scheme is so broad as to make every first degree murder case
2 into a death penalty case. The Statute does not narrow the class of murderers that are eligible
3 for the death penalty. The scheme leaves the decision when to seek death solely in the
4 unbridled discretion of prosecutors. Such a scheme violates the mandates of the United States
5 Supreme Court.
6

7 CONCLUSION

8 Therefore, based upon the arguments herein, Mr. Rippo would respectfully request the
9 reversal of his sentence of death and convictions based upon appellate counsel failing to raise
10 the necessary arguments on direct appeal and for violations of the United States Constitutions
11 Amendments Fourteen, Eight, Five, and Six.
12

13 DATED this 2, dated this May, 2005.
14

15 Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that
on the 2 day of May, 2005, I did deposit in the United States Post Office, at Las Vegas,
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EXHIBIT 139

EXHIBIT 139

IN THE DISTRICT COURT OF THE STATE OF NEVADA

MICHAEL RIPPO,

Appellant,

Case No. A00064

THE STATE OF NEVADA,

Respondent.

RESPONDENT'S ANSWERING BRIEF

Appeal From Order Denying Motion for Writ of Habeas Corpus
(Post-Conviction)
Eighteenth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RIPPO,

Appellant,

v.

Case No. 44094

THE STATE OF NEVADA,

Respondent.

RESPONDENT'S ANSWERING BRIEF

**Appeal From Order Denying Petition for Writ of Habeas Corpus
(Post-Conviction)
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IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RIPPO,

Appellant,

v.

Case No. 44094

THE STATE OF NEVADA,

Respondent.

RESPONDENT'S ANSWERING BRIEF

**Appeal from Denial of Petition for Writ of Habeas Corpus
(Post-Conviction)
Eighth Judicial Court, Clark County**

STATEMENT OF THE ISSUES

1. Whether there was illegal or improper stacking of aggravators, making Defendant's sentence unconstitutional.
2. Whether Defendant received ineffective assistance of counsel.
3. Whether Defendant received ineffective assistance of appellate counsel because appellate counsel failed to raise that trial counsel allowed Defendant to waive his right to a speedy trial.
4. Whether Defendant received ineffective assistance of appellate counsel because appellate counsel failed to raise an allegation that trial counsel was deficient during the guilt phase for failing to object to the use of a photograph of the Defendant.
5. Whether Defendant received ineffective assistance of appellate counsel because appellate counsel failed to raise various allegations that trial counsel was deficient during the penalty phase.
6. Whether the instruction given at the penalty hearing adequately apprised the jury of the proper use of character evidence.
7. Whether Defendant's sentence is valid because the jury was given the statutory list of mitigating factors but was not given a special verdict form to list mitigating factors.
8. Whether Nevada's procedure for admission of victim impact testimony is Constitutional.
9. Whether Nevada's premeditation and deliberation instruction is Constitutional.
10. Whether this Court's appellate review of death penalty cases is Constitutional.
11. Whether the racial composition of Defendant's jury was Constitutional.
12. Whether Nevada's capital sentencing statute properly narrows the categories of death eligible defendants.

STATEMENT OF THE 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. (Appellant's Appendix, hereinafter AA, Volume II, page 000379). 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. (AA, Volume II, pages 000379-000380).

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 pursuant to a search warrant and that in the process of seizing items in the search, the attorneys became witnesses for the defense. Counsel

1 for Defendant further argued that the entire District Attorney's Office should be
2 disqualified from the prosecution of this case. The Court ordered that the motion be
3 submitted in writing and supported by an affidavit. (AA, Volume II, pages 000387-
4 000388).

5 On March 7, 1994, an evidentiary hearing was held regarding Defendant's
6 Motion to Disqualify the District Attorney's Office. Deputy District Attorney Chris
7 Owens represented the State. Two days later the motion to remove Chief Deputy
8 District Attorney Lukens and Deputy District Attorney Lowry from the case was
9 granted. The Court, however, refused to disqualify the entire District Attorney's
10 Office and ordered the appointment of new District Attorneys. The Court was
11 informed that Chief Deputy District Attorneys Dan Seaton and Mel Harmon were
12 going to replace Lukens and Lowry on March 11, 1994. (AA, Volume II, pages
13 000390-000393).

14 A status hearing was held on March 18, 1994 and was continued on the basis of
15 the State's request to amend the indictment and new discovery provided to the
16 defense. (AA, Volume II, pages 000393-000394). The District Court denied the
17 State's request to amend the indictment. (AA, Volume II, page 000397). The State
18 filed for a Writ of Mandamus, which was granted on April 27, 1995. An amended
19 indictment was filed on January 3, 1996, including felony murder and aiding and
20 abetting. (AA, Volume II, page 000398).

21 Jury selection began on January 30, 1996 (AA, Volume II, pages 000400-
22 000402), and the trial commenced on February 2, 1996. (AA, Volume II, page
23 000403). A continuance was granted for Defendant to interview witnesses from
24 February 8, 1996, to February 20, 1996. (AA, Volume II, page 000406). The trial
25 commenced again on February 26, 1996. (AA, Volume II, page 000407).

26 Final arguments were made on March 5, 1996 (AA, Volume II, pages 000411-
27 000412), and guilty verdicts were returned on March 6, 1992, of two counts of first
28 degree murder, and one count each of robbery and unauthorized use of a credit card.

1 (AA, Volume II, page 000412). The penalty hearing was held from March 12, 1996
2 to March 14, 1996. (AA, Volume II, pages 000413-000415). The jury found the
3 presence of all six aggravating factors and returned with a verdict of death. (AA,
4 Volume II, page 000415).

5 On May 17, 1996, Defendant was sentenced to: Count I - Death; Count II -
6 Death; Count III -Fifteen (15) years for Robbery to run consecutive to Counts I and II;
7 and Count IV- Ten (10) years for Unauthorized Signing of Credit Card Transaction
8 Document, to run consecutive to Counts I, II, and III; and pay restitution in the
9 amount of \$7,490.00 and an Administrative Assessment Fee. (AA, Volume II, page
10 000417).

11 A direct appeal to the Nevada Supreme Court was filed challenging the
12 conviction and sentence and on October 1, 1997 an opinion was issued affirming the
13 judgment of conviction and the sentence of death. *Rippo v. State*, 113 Nev. 1239, 946
14 P.2d 1017 (1997). A Petition for Rehearing was filed October 20, 1997, and an Order
15 Denying Rehearing was filed February 9, 1998. A Petition for Writ of Certiorari was
16 filed with the United States Supreme Court and was denied on October 5, 1998.

17 Defendant filed a Petition of Writ of Habeas Corpus (Post Conviction) on
18 December 4, 1998. On August 8, 2002, Defendant filed a Supplemental Points and
19 Authorities in Support of Petition for Writ of Habeas Corpus. (AA, Volume I, pages
20 000001-000104). On October 14, 2002, the State filed an opposition. (AA, Volume I,
21 pages 000105-000153). On February 10, 2004, Defendant filed a Supplemental Brief
22 in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).
23 (AA, Volume II, pages 000168-000208). On March 12, 2004, Defendant filed an
24 ERRATA to Supplemental Brief in Support of Defendant's Petition for Writ of
25 Habeas Corpus (Post-Conviction). (AA, Volume I, pages 000209-000216). On April
26 6, 2004, the State filed a response. (AA, Volume II, page 000217-000273).

27 On August 20, 2004, an evidentiary hearing was held. Defendant's trial
28 attorneys, Steve Wolfson and Phillip Dunleavy testified. At that hearing, the district

1 court ruled that Defendant had not received ineffective assistance of trial counsel.
2 (AA, Volume II, pages 000278-000306).

3 On September 10, 2004, the evidentiary hearing continued. On that day,
4 Defendant's appellate counsel, David Schieck testified. The district court ruled that
5 Defendant had not received ineffective assistance of appellate counsel. (AA, Volume
6 II, pages 000307-000368). On October 12, 2004, Defendant filed an appeal. (AA,
7 Volume II, pages 000369-000371). An order denying the Petition for Writ of Habeas
8 Corpus (Post-Conviction) was filed on December 1, 2004. (AA, Volume II, pages
9 000374-000377).

10 STATEMENT OF THE FACTS

11 For purposes of this Answering Brief, the State adopts the Statement of the
12 Facts set forth in Appellant's Opening Brief.

13 ARGUMENT

14 I.

15 **DEFENDANT'S SENTENCE IS VALID BECAUSE** 16 **THERE WAS NO ILLEGAL OR IMPROPER** 17 **STACKING OF AGGRAVATORS**

18 Defendant alleges that "it was impermissible for the State to charge Mr. Rippo
19 with felony capital murder because the State based the aggravating circumstances in a
20 capital prosecution on two of those felonies upon which the State's felony murder is
21 predicated." (Appellant's Opening Brief, page 19). The Defendant bases this on the
22 December 2004 decision of *McConnell v. State*, 120 Nev. Adv. Op. 105, 102 P.3d
23 606 (2004). This argument fails for several reasons.

24 First, this argument is barred by the law of the case doctrine. Where an issue
25 has already been decided on the merits by this Court, the Court's ruling is law of the
26 case, and the issue will not be revisited. *Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519
27 (2001); *see also*, *McNilton v. State*, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); *Hall*
28 *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 fact that he was not charged with either burglary or kidnapping prevented these crimes from being offered as aggravating circumstances. With regard to that argument, this Court said:

"If a defendant can be prosecuted for each crime separately, each crime can be used as an aggravating circumstance. *Bennett*, 106 Nev. at 142, 787 P.2d at 801. Upon review, we conclude that Rippo could have been prosecuted separately for each of the underlying felonies, and therefore each crime was properly considered as an aggravating circumstance."

Therefore, the issue of whether aggravators were improperly stacked has already been addressed by this Court. As such, it is law of the case and this Court will not revisit the issue.

Further, the issue was not briefed in the Defendant's petition for writ of habeas corpus in the district court below. In fact, it could not have been briefed because the findings of fact, conclusions of law and order from Defendant's petition was filed on December 1, 2004. The *McConnell* decision was not reached until December 29, 2004. Therefore, the retroactivity of the *McConnell* decision is not properly before this court.¹ Because the district court did not look at the issue, this Court should not consider the issue.

Even in the event that this Court decides to look at the retroactivity issue,² applying the *McConnell* decision retroactively is something this Court appears to be unwilling to do. In *McConnell*, this Court stated:

... in cases where the State bases a first-degree murder conviction in whole or in part on felony murder, to seek the death sentence the State will have to prove an aggravator other than the one based on the felony

¹ "Before deciding retroactivity, we prefer to await the appropriate post-conviction case that presents and briefs the issue." *McConnell v. State*, 107 P.3d 1287, 1290 (2005). Here, Defendant did not brief the retroactivity issue below, therefore this is not the appropriate post-conviction petition this Court is waiting for.

² The Defendant recognizes this case has in no way been held to be retroactive. He states "If *McConnell* was to be applied retroactively to the instant case...the State would be left without three aggravating circumstances. (Appellant's Opening Brief, page 20).

murder's predicate felony. We advise the State, therefore, that if it charges alternative theories of first-degree murder intending to seek a death sentence, jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both. Without the return of such a form showing that the jury did not rely on felony murder to find first-degree murder, the State cannot use aggravators based on felonies which could support the felony murder.

McConnell, 606 P.3d at 624.

First, this Court's prospective language ("will have to prove" and "we advise the State") strongly indicates this Court's intent for its decision to not be applied retroactively. Moreover, in its published opinion denying rehearing, this Court clarified this intent by stating, "[o]ur case law makes it clear that new rules of criminal law or procedure apply to convictions which are not final." [Emphasis added] *McConnell*, 107 P.3d at 1290 (citing *Clem v. State*, 119 Nev. 615, 627-628, 81 P.3d 521, 530-531 (2003)).

A conviction is final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for the petition has expired. *Cotwell v. State*, 118 Nev. 807, 59 P.3d 463 (2002).

In the instant case, Judgment of Conviction was entered on May 31, 1996. Defendant exhausted his direct appeal on or about November 3, 1998, and his petition for writ of certiorari was denied on October 5, 1998. Defendant's conviction is, and has for over six years, been final. Thus, the "new rule" set forth in *McConnell* does not apply to this case.

Even if the decision applied to this case, it still would not afford relief as there is ample evidence of premeditation and deliberation, just as there was in *McConnell*. In charging *McConnell* with first-degree murder, the State alleged two theories: deliberate, premeditated murder and felony murder during the perpetration of a burglary. *McConnell*, 102 P.3d at 620. This Court noted that during his testimony, *McConnell* admitted that he had premeditated the murder. *Id.* Therefore, his

1 conviction for first-degree murder was soundly based on a theory of deliberate,
2 premeditated murder. *Id.*

3 Similarly, in this case, the State alleged the same two theories with the broad
4 language "without authority of law, with malice aforethought, willfully and
5 feloniously kill..." There is ample evidence of premeditated murder. First, Mr.
6 Donald Hill testified that he and the Defendant were in custody together in California
7 in an unrelated matter. He stated that Defendant said he planned for the crime for
8 several days, and he did so because he had been burned in a drug deal by one of the
9 victims. He further testified that the Defendant stated he killed the other victim
10 because she was there and he had to keep her from testifying. (21 ROA 81-82).³

11 When one of the victims went downstairs to speak to the other victim and both
12 were out of the house, the Defendant pulled the shades in the apartment down. (21
13 ROA 91). Defendant made a telephone call to a friend, asking the friend to call one of
14 the victims so that she would be distracted. (*Id.*) The Defendant told his girlfriend to
15 hit one of the victims on the head while she was distracted by the telephone call. (21
16 ROA 91-92).

17 Defendant used a serrated kitchen knife to cut cords of various appliances so he
18 could use them to tie the victims up. (21 ROA 92). Defendant placed a sock into one
19 of the victim's mouth, pushing it back so far that the victim's own tongue went down
20 her throat, and tied a bra around her mouth. (17 ROA 66-68). The coroner testified
21 that both victims had died of strangulation, which takes several minutes to occur. (*See*
22 *generally*, 17 ROA 66-114, Dr. Green's testimony). Therefore, as in *McConnell*,
23 there is ample evidence that this conviction of first-degree murder was based on
24 premeditation and deliberation.

25 Finally, even if the decision applied to this case and there was not ample
26 evidence of premeditation and deliberation, Defendant would still not be afforded
27

28 ³ Hereinafter, ROA indicates the Record on Appeal, previously on file with the Court. The first number refers to the
volume, the last number refers to the page.

1 interpretation of murder perpetrated by means of torture, to
2 support a jury finding that there was, as an inseparable
3 ingredient of these murders, a 'continuum' or pattern of
4 sadistic violence that justified the jury in concluding that
5 these two murders were 'perpetrated by means
6 of...torture.'"

7 *Rippo*, 113 Nev. at 1264.

8 Therefore, the torture aggravator would stand.

9 Even if three aggravators were to be struck, there remain three aggravating
10 circumstances. This court recognized that the jury, during the penalty phase, found *no*
11 mitigating circumstances. *Id.* at 1265. Weighing three aggravators against no
12 mitigating circumstances would produce the same penalty the jury found with six
13 aggravators. Therefore, Defendant's argument affords him no relief.

14 II.

15 DEFENDANT'S COUNSEL WAS NOT INEFFECTIVE

16 Defendant alleges numerous instances for which he contends "appellate counsel
17 failed to provide reasonably effective assistance ... by failing to raise on appeal, or
18 completely assert, all the available arguments supporting constitutional issues." Each
19 will be addressed individually below. However, in Argument II of his Opening Brief,
20 Defendant recites the burden of proof for a claim of ineffective assistance of counsel.
21 The same will be addressed here.

22 The United States Supreme Court has held that there is a constitutional right to
23 effective assistance of counsel in a direct appeal from a judgment of conviction. *Evitts*
24 *v. Lucey*, 469 U.S. 395, 397, 105 S.Ct. 830, 836 837 (1985); *see also, Burke v. State*,
25 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In order to demonstrate ineffective
26 assistance of appellate counsel, the defendant must satisfy the two-prong test set forth
27 by *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2065, 2068
28 (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

1 deficient and that the deficiency resulted in prejudice. *Strickland*, 466 U.S. at 687-
2 688 and 694, 104 S.Ct. at 2065 and 2068. *Warden, Nevada State Prison v. Lyons*, 100
3 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the *Strickland* two-part test in
4 Nevada). "Effective counsel does not mean errorless counsel, but rather counsel
5 whose assistance is '[w]ithin the range of competence demanded of attorneys in
6 criminal cases.'" *Jackson v. Warden, Nevada State Prison*, 91 Nev. 430, 432, 537
7 P.2d 473, 474 (1975) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct.
8 1441, 1449 (1970)). There is however a strong presumption that counsel's
9 performance was reasonable and fell within "the wide range of reasonable
10 professional assistance." See, *United States v. Aguirre*, 912 F.2d 555, 560 (2nd Cir.
11 1990) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065).

12 While the defendant has the ultimate authority to make fundamental decisions
13 regarding his case, there is no constitutional right to "compel appointed counsel to
14 press non-frivolous points requested by the client, if counsel, as a matter of
15 professional judgment, decides not to present those points." *Jones v. Barnes*, 463
16 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). In reaching this conclusion, the United
17 States Supreme Court has recognized the "importance of winnowing out weaker
18 arguments on appeal and focusing on one central issue if possible, or at most on a few
19 key issues." *Id.* at 751, 752, 103 S.Ct. at 3313. In particular, a "brief that raises every
20 colorable issue runs the risk of burying good arguments . . . in a verbal mound made
21 up of strong and weak contentions." *Id.* 753, 103 S.Ct. at 3313. "For judges to second
22 guess reasonable professional judgments and impose on appointed counsel a duty to
23 raise every 'colorable' claim suggested by a client would disserve the very goal of
24 vigorous and effective advocacy." *Id.* at 754, 103 S.Ct. at 3314.

25 Finally, in order to demonstrate that appellate counsel's alleged error was
26 prejudicial; the defendant must show that the omitted issue would have had a
27 reasonable probability of success on appeal. See *Duhamel v. Collins*, 955 F.2d 962,
28 967 (5th Cir. 1992); *Heath, supra*, 941 F.2d at 1132.

1 Using this standard as a benchmark, it is clear that Defendant's instant claims are
2 unfounded.

3 **A. Counsel's Performance was not Deficient**

4 This Court has held that all appeals must be "pursued in a manner meeting high
5 standards of diligence, professionalism and competence." *Burke v. State*, 110 Nev.
6 1366, 1368, 887 P.2d 267, 268 (1994). Indeed, on direct appeal in this case
7 Defendant's counsel met this standard. Counsel filed a timely, comprehensive
8 Opening Brief, supplemented by an equally substantive Reply, in which appellate
9 counsel raised various meritorious claims including:

- 10 1. The trial court's failure to recuse itself and disclose a
11 conflict of interest which allegedly tainted the proceedings.
- 12 2. The State's alleged failure to provide exculpatory
13 information to the defense in a timely fashion.
- 14 3. Numerous instances of alleged prosecutorial misconduct.
- 15 4. Allegations that amendments of the charging document
16 improperly prejudiced Defendant.
- 17 5. The allegation that the trial court improperly admitted
18 evidence that a witness was threatened.
- 19 6. Allegations that the trial court improperly allowed
20 admission of "bad acts" evidence.
- 21 7. Allegations that improper statements by the prosecution
22 during closing argument in the guilt phase warranted
23 reversal of Defendant's conviction.
- 24 8. A claim that cumulative error was sufficient to warrant a
25 new trial.
- 26 9. Allegations that the use of overlapping and multiple use of
27 the same facts as separate aggravating circumstances was
28 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.

1 12. Claims that the district court allowed improper admission of
cumulative victim impact testimony.

2 13. Assertions that the district court utilized improper jury
3 instructions.

4 14. Allegations that there was insufficient evidence to support a
finding of "torture" as an aggravating circumstance.

5 Clearly, under the standards enunciated in both *Burke* and *Jones v. Barnes*,
6 Defendant cannot demonstrate deficient performance simply because he now points to
7 a number of claims he alleges appellate counsel *could* also have raised. While it is
8 true this Court ultimately rejected Defendant's appeal (*See Rippo*, 113 Nev. 1239)
9 merely because Defendant did not receive the favorable outcome he preferred, this
10 result cannot be attributed to any deficiency on counsel's part. Clearly, Defendant's
11 Opening and Reply Briefs contained what counsel considered the most meritorious of
12 issues available for appeal and each was argued extensively and rigorously.
13 Therefore, Defendant fails to demonstrate that counsel's performance was not
14 reasonably effective.

15 **B. Defendant Fails to Demonstrate Prejudice**

16 Neither can Defendant demonstrate the alleged errors resulted in "prejudice"
17 because none of the "omitted" issues Defendant now raises would have had a
18 reasonable probability of success on appeal.

19
20 **1. Claims of ineffective assistance of counsel are
generally not appropriately raised on direct appeal**

21 Although each of Defendant's claims is addressed and refuted in turn in the
22 following sections, Defendant's allegations in grounds three, four, and five are based
23 upon claims that appellate counsel was ineffective for "failing to raise or completely
24 assert" on direct appeal numerous instances of ineffective assistance of trial counsel.
25 However, each of these allegations fails because there was no reasonable probability
26 that, even if appellate counsel had raised these issues, this Court would have
27 entertained these claims on direct appeal.

28

1 This Court has generally declined to address claims of ineffective assistance of
2 counsel on direct appeal unless there has already been an evidentiary hearing or where
3 an evidentiary hearing would be unnecessary. *Pellegrini v. State, supra*; See also,
4 *Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995); *Mazzan v. State*, 100
5 Nev. 74, 80, 675 P.2d 409, 413 (1984). Even when it is difficult to conceive of a
6 reason for any of trial counsel's actions which would be consistent with effective
7 advocacy, this Court has been hesitant to draw any final conclusions on the question
8 of effectiveness of counsel on the basis of examination of the trial record alone.
9 *Gibbons v. State*, 97 Nev. 520, 522, 634 P.2d 1214 (1981).

10 In *Gibbons*, the Court noted that trial counsel took numerous questionable
11 actions which included, *inter alia*, waiving four of eight preemptory challenges which
12 resulted in four jurors remaining seated who had expressed opinions concerning the
13 defendant's guilt; failing to move for a change of venue under circumstances that
14 appeared to call for such a motion; failing to object to the admission of the
15 defendant's confession though there appeared to be substantial grounds for such an
16 objection; calling the defendant to testify knowing he was taking a heavy dose of an
17 anti-depressant drug; stating on the record, "we don't have a prayer in the world ... to
18 fully cross examine the State's expert without our own expert" yet, after the court
19 authorized employment and payment of a defense expert, counsel failed to employ
20 such an expert; failing to proffer any ascertainable theory of defense; stating during
21 the preliminary hearing that the defendant admitted shooting his father in law. *Id.* at
22 521-523. Yet, even in light of this record, the Court held the appropriate vehicle for
23 the claim of ineffective assistance of counsel would be through post-conviction relief
24 and not through appeal of judgment of conviction. *Id.* The court reasoned that it is
25 possible that counsel could rationalize his performance at an evidentiary hearing and
26 that if there is an evidentiary hearing there would be something more than conjecture
27 for the Court to review. *Id.*

28

1 Therefore, because there had neither been an evidentiary hearing nor a showing
2 that trial counsel's alleged errors were so egregious that an evidentiary hearing would
3 have been unnecessary, each and every one of Defendant's instant claims that
4 appellate counsel was ineffective for "failing to raise or completely assert" instances
5 of alleged ineffective assistance of counsel on direct appeal are specious. Indeed all
6 would have had virtually no reasonable probability of success.

7 While maintaining this position, each of the grounds raised by Defendant are
8 nonetheless addressed in turn below as if this Court had set aside its long-standing
9 rule and been inclined to entertain Defendant's claims of ineffective assistance of
10 appellate counsel premised upon claims of ineffective assistance of trial counsel. Yet,
11 even if Defendant's claims had survived the threshold barrier as set forth in *Gibbons*,
12 none are successful on their merits.

13 III.

14 APPELLATE COUNSEL WAS NOT INEFFECTIVE 15 FOR NOT RAISING THAT TRIAL COUNSEL 16 ALLOWED DEFENDANT TO WAIVE HIS RIGHT 17 TO A SPEEDY TRIAL

18 In ground three of his petition, Defendant claims appellate counsel should have
19 raised the issue that trial counsel was ineffective for first, "insisting" that Defendant
20 should waive his right to a speedy trial and then second, allowing some forty-six
21 months to elapse prior to the commencement of trial. Defendant alleges that based on
22 this delay, numerous witnesses were able to attain information about his crimes and in
23 turn, fabricate evidence against him.

24 Clearly, this is not a claim that has a reasonable probability of success on
25 appeal. Indeed, waiving the right to speedy trial in a capital murder case is a sound
26 tactical decision on counsel's part as sixty days to prepare for trial would hardly be
27 sufficient. This is especially true considering the substantial evidence the State
28 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

1 rigorous and effective defense. Furthermore, Defendant fails to support his contention
2 that counsel "insisted" he waive his right to a speedy trial (and its inherent implication
3 that Defendant wished to do otherwise) with anything other than his own self-serving
4 allegations. *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). And, in
5 fact, the record reflects that if any party was concerned over prejudice due to the
6 delay, it was the State as demonstrated by its filing of a motion to expedite trial.

7 Moreover, Defendant similarly offers nothing more than his own speculation to
8 bolster his contention that the delay resulted in numerous witnesses attaining
9 information about his crimes which they subsequently used to fabricate evidence at
10 trial. He does not point to any specific witnesses other than categorically complaining
11 about "jailhouse snitches." Defendant does not recite any specific instances of
12 conduct or any particular testimony that he demonstrates was fabricated. Most
13 significantly, Defendant fails entirely to connect the witnesses' knowledge of his
14 crimes with any cause or source other than he himself proffering the information to
15 his fellow inmates. Clearly, Defendant's own mistake in judgment cannot be
16 rationally translated into counsel's error. As the United States Supreme Court has
17 articulated, "[i]nescapably, one contemplating illegal activities must realize and risk
18 that his companions may be reporting to the police. If he sufficiently doubts their
19 trustworthiness, the association will very probably end or never materialize. But if he
20 has no doubts, or allays them, or risks what doubt he has, the risk is his." *United*
21 *States v. White*, 401 U.S. 745, 752, 91 S.Ct. 1122, 1126 (1971).

22 Thus, counsel's strategy to waive the right to a speedy trial was sound and
23 Defendant cannot shift accountability for what he told other inmates to counsel. As
24 such, Defendant's claim that appellate counsel was remiss for failing to bring the
25 claim on direct appeal is clearly without merit.

26 Further, at the evidentiary hearing on this matter, the district court judge stated
27 that "you're asking defense counsel to be clairvoyant when they waived the 60-Day
28 Rule. How are they going to anticipate there will be jailhouse snitches developed if

1 there is a delay?" (AA, page 000283). He goes on to say "to try to prepare a case, a
2 defense for murder within 60 days is just rarely, if ever, done." (Id.) Therefore,
3 appellate counsel was not ineffective for not raising this issue on appeal.

4 IV.

5 APPELLATE COUNSEL WAS NOT INEFFECTIVE 6 FOR FAILING TO RAISE AN ALLEGATION THAT 7 TRIAL COUNSEL WAS DEFICIENT DURING THE 8 GUILT PHASE FOR FAILING TO OBJECT TO THE 9 USE OF A PHOTOGRAPH OF DEFENDANT

10 In ground IV(a), Defendant claims appellate counsel was ineffective for failing
11 to "raise or completely assert all the available arguments" surrounding trial counsel's
12 failure to object to the State's use of an "in custody" photograph of Defendant during
13 the guilt phase of the trial. However, precisely because of trial counsel's decision not
14 to object to the admission of the photograph, Defendant's claim had little chance of
15 success on appeal.

16 "As a general rule, the failure to object, assign misconduct, or request an
17 instruction, will preclude appellate consideration." *Garner v. State*, 78 Nev. 366, 373,
18 374 P.2d 525, 529 (1962); *Cook v. State*, 77 Nev. 83, 359 P.2d 483; *O'Briant v. State*,
19 72 Nev. 100, 295 P.2d 396 (1956); *Kelley v. State*, 76 Nev. 65, 348 P.2d 966 (1960);
20 *State v. Moore*, 48 Nev. 405, 233 P. 523 (1925); *State v. Boyle*, 49 Nev. 386, 248 P.
21 48 (1926). However, where the errors are patently prejudicial and inevitably inflame
22 or excite the passions of the jurors against the accused, the general rule does not
23 apply. *Id.*; see also *Gallego v. State*, 117 Nev. 348, 23 P.3d 227, 239 (2001). The
24 *Garner* Court further stated, "[i]f the issue of guilt or innocence is close, if the state's
25 case is not strong, prosecutor misconduct will probably be considered prejudicial."
26 *Lisle v. State*, 113 Nev. 540, 552, 937 P.2d 473, 480 - 481 (1997) (quoting *Garner*, 78
27 Nev. at 374, 374 P.2d at 530)(cf. *Lay v. State*, 110 Nev. 1189, 1194, 886 P.2d 448,
28 451 (1994) ("[W]here evidence of guilt is overwhelming, prosecutorial misconduct
may be harmless error.")).

1 Here, the admission of the photograph was neither plain error nor does
2 Defendant establish prejudice and appellate counsel's decision to forego raising the
3 claim on direct appeal was not unreasonable.

4 Defendant complains that the photograph was impermissible evidence of "prior
5 bad acts." This is simply not the case. Introducing a picture of Defendant is not
6 consistent with showing a prior criminal act, or criminal conduct, or even an act. It
7 simply depicts how Defendant looked on a certain day and in this case, Defendant's
8 appearance had changed considerably since the time of the murders.

9 NRS 48.045 provides, "[e]vidence of other crimes, wrongs or acts is not
10 admissible to prove the character of a person in order to show that he acted in
11 conformity therewith. It may, however, be admissible for other purposes, such as
12 proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or
13 absence of mistake or accident." Thus, contrary to Defendant's contention that there
14 was no relevant purpose for introduction of the photograph, clearly it was properly
15 admitted for the purpose of identification.

16 Further, trial counsel was not ineffective for failing to object to admitting the
17 photograph. Counsel's strategy decision is a "tactical" decision and will be "virtually
18 unchallengeable absent extraordinary circumstances." *Doleman v. State*, 112 Nev.
19 843, 846, 921 P.2d 280 (1996); *see also Howard v State*, 106 Nev. 713, 722, 800 P.2d
20 175, 180 (1990); *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066; *State v. Meeker*, 693
21 P.2d 911, 917 (Ariz. 1984). Indeed, it is common trial strategy to withhold an
22 objection when counsel does not wish to draw attention to a particular fact in
23 evidence. Under these particular circumstances, clearly drawing attention to
24 Defendant's more "dangerous" look and away from his clean-cut appearance in court
25 would have served little value in ascertaining a favorable result from the jury. As
26 such, trial counsel cannot be deemed ineffective for a reasonable tactical decision and
27 it follows that this claim would have had little chance of success on appeal.

28 The district court judge stated at the evidentiary hearing that an objection to the

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RIPPO,
Appellant,
-vs-
E.K. McDANIEL, et al.,
Respondent.

No. 53626

FILED

OCT 19 2009

TRACEY L. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

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EXHIBIT 125

EXHIBIT 125

COPY

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK ROGERS A/K/A MARK JOSEPH
HEYDUK A/K/A TEEPEE FOX,
Appellant,

vs.

WARDEN, ELY STATE PRISON, E.K.
MCDANIEL AND DIRECTOR, NEVADA
DEPARTMENT OF PRISONS, ROBERT
BAYER,
Respondents.

No. 36137

FILED

MAY 13 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. In 1981 appellant Mark Rogers was convicted of three counts of first-degree murder and two other felonies and sentenced to death.¹

In February 1986, Rogers in proper person filed his first state petition for post-conviction relief, under NRS Chapter 177. As mandated by former NRS 177.345(1),² the district court appointed counsel for Rogers, and counsel filed a supplemental petition. After an evidentiary hearing on the petitions, the court denied them. Rogers appealed, and this court dismissed the appeal in June 1987.

¹Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985).

²In 1986, NRS 177.345(1) provided that an indigent petitioner for post-conviction relief was entitled to appointed counsel. Crump v. Warden, 113 Nev. 293, 297 n.2, 934 P.2d 247, 249 n.2 (1997).

In October 1987, Rogers filed a federal petition for a writ of habeas corpus. Almost two years later the federal court granted Rogers's motion to stay proceedings to give him an opportunity to exhaust his unexhausted claims in state court. In October 1990, Rogers filed his second state post-conviction petition, seeking a writ of habeas corpus. Appointed counsel filed a supplement to the petition. The district court denied the petition. Rogers appealed, and in June 1993, this court dismissed the appeal.

In December 1993, Rogers filed his second federal habeas petition. The petition was amended and supplemented the next year. In 1997, he voluntarily dismissed the petition to return to state court, again to exhaust unexhausted claims. Rogers then filed his third state post-conviction petition, initiating the instant habeas proceedings. In July 1999, the district court entered an order dismissing the majority of Rogers's claims. After further briefing, the court entered an order dismissing the remaining claims in April 2000. We agree with the district court that Rogers's claims are untimely and procedurally barred.

Rogers's habeas petition was filed more than one year after this court issued its remittitur on direct appeal. Therefore, absent a showing of good cause for this delay, the entire petition is untimely.³ In regard to any new claims he raises, Rogers must show cause for not raising them in earlier proceedings.⁴ However, Rogers does not seriously address the issue of untimeliness and procedural default. On occasion he asserts that his earlier counsel were ineffective in failing to raise issues,

³See NRS 34.726(1).

⁴NRS 34.810(2).

apparently assuming that this constitutes cause for his untimely filing, for raising new claims, and even for reraising claims presented earlier. This assumption is incorrect.

Ineffective assistance of counsel can in some cases constitute cause to overcome procedural default.⁵ However, in post-conviction proceedings there is no right to effective assistance of counsel under either the Sixth Amendment or the Nevada Constitution.⁶ A post-conviction petitioner has a right to effective assistance of counsel only when a statute requires appointment of counsel for the petitioner.⁷ When appointment of counsel is discretionary, the petitioner has no right to effective assistance by that counsel.⁸

Rogers was entitled to effective assistance of counsel in his first post-conviction petition in 1986 because at that time NRS 177.345(1) required the appointment of counsel for indigent petitioners for post-conviction relief.⁹ But he was not entitled to effective assistance of counsel for his second post-conviction petition filed in 1990. Although he was represented by the State Public Defender, no statute required the appointment of counsel. Rather, such appointment was discretionary

⁵See Crump, 113 Nev. at 304, 934 P.2d at 253 (citing Coleman v. Thompson, 501 U.S. 722, 753-54 (1991)).

⁶McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 257-58 (1996).

⁷Id. at 165 n.5, 912 P.2d at 258 n.5; Crump, 113 Nev. at 303, 934 P.2d at 253.

⁸Bejarano v. Warden, 112 Nev. 1466, 1470 & n.1, 929 P.2d 922, 925 & n.1 (1996).

⁹See Crump, 113 Nev. at 297 n.2, 934 P.2d at 249 n.2.

under NRS 34.750(1), which provides that a court "may appoint counsel" for an indigent habeas petitioner.¹⁰ Because this is Rogers's third post-conviction petition, he must show cause for not raising any new claims in his second post-conviction petition as well as for not timely filing the third petition.¹¹ Any claims that counsel were ineffective during his trial, direct appeal, or first post-conviction proceeding should have been raised in his second post-conviction petition. Any claim that his second post-conviction counsel was ineffective does not constitute cause because Rogers was not entitled to effective assistance by that counsel, who was a discretionary appointment.

Additionally, Rogers demonstrates no cause for reraising claims already decided by this court in earlier proceedings. Under the doctrines of abuse of the writ and the law of the case, we will not reconsider such claims.¹²

Absent a showing of good cause to overcome procedural default, this court will consider claims only if the petitioner demonstrates that failure to consider them will result in a fundamental miscarriage of

¹⁰Rogers is sentenced to death, but appointment of counsel for a habeas petitioner sentenced to death is mandatory under NRS 34.820(1)(a) only if "the petition is the first one challenging the validity of the petitioner's conviction or sentence."

¹¹In referring to Rogers's second and third post-conviction petitions, we do not include his federal petitions.

¹²See NRS 34.810(2); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

justice.¹³ Although Rogers does not raise this issue, we have considered his petition in light of this standard. We conclude that none of his claims establishes a fundamental miscarriage of justice. Thus, we conclude that all of the claims presented in Rogers's petition are procedurally barred, and we affirm the district court's order on this independent ground.¹⁴

Two claims warrant some additional discussion, however. First, Rogers contends that the district court did not allow his trial counsel to ask prospective jurors whether they would automatically impose the death penalty on someone convicted of first-degree murder and that five jurors who were ultimately empaneled believed that conviction for first-degree murder called for mandatory imposition of death. The record belies this claim.

Rogers is correct that a district court should excuse for cause any prospective juror who would always impose a sentence of death on a defendant convicted of first-degree murder.¹⁵ Here, the district court expressly granted defense counsel's request to question jurors on this topic, and during voir dire of the five jurors in question, defense counsel explored this topic and passed all five for cause. Neither the district court nor the State recognized that the facts belied this claim. Nevertheless,

¹³See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); see also Pellegrini v. State, 117 Nev. ____ 34 P.3d 519, 537 (2001).

¹⁴See Harris v. Reed, 489 U.S. 255, 261-62 (1989) (discussing necessity of a plain statement indicating that the state court actually relied on a procedural bar as an independent basis for disposition of the case).

¹⁵See Morgan v. Illinois, 504 U.S. 719 (1992).

this court will affirm the district court if it reached the correct result for different reasons.¹⁶

Second, Rogers challenges the sufficiency of the evidence for the aggravating circumstance that he had been previously convicted of a felony involving the use or threat of violence to another person. At trial, the prosecution argued that Rogers had two prior felony convictions in Ohio for aggravated assault, and on direct appeal this court referred to his prior felony "convictions."¹⁷ Rogers claims that this was erroneous because he had only one prior conviction for aggravated assault occurring in 1976. Although he was also charged with two counts of felonious assault in 1977 and pled guilty to one count of aggravated assault, he later failed to appear and was never sentenced on the reduced charge. Thus he contends that no conviction ever resulted because a valid conviction requires that a sentence be imposed. He cites NRS 176.105, which requires that a judgment of conviction set forth among other things the sentence. The district court concluded that only the 1976 conviction had been entered but that evidence of the 1977 offense was nevertheless admissible, so trial counsel's failure to challenge the evidence was of no consequence. Also, the 1976 conviction alone was sufficient basis for the aggravator. We agree with the district court's reasoning, but there is a more basic reason why Rogers's claim has no merit.

Imposition of a sentence is not required for a conviction under NRS 200.033(2). Neither the district court nor the parties addressed this statute, which provides that "a person shall be deemed to have been

¹⁶Rosenstein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987).

¹⁷Rogers, 101 Nev. at 466, 470, 705 P.2d at 670, 673.

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." We conclude that the trial court makes a pronouncement of guilt once it accepts a defendant's guilty plea as valid. This is the point in the proceedings which is equivalent to a jury's rendering of a guilty verdict. Thus, under NRS 200.033(2) a valid conviction existed for Rogers's 1977 offense. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young J.
Young

Agosti J.
Agosti

Leavitt J.
Leavitt

cc: Hon. Michael P. Gibbons, District Judge
Mary Beth Gardner
Attorney General/Carson City
Pershing County District Attorney
Pershing County Clerk

EXHIBIT 126

EXHIBIT 126

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKY DAVID SECHREST,

No. 29170

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

NOV 20 1997

JANETTE N. BLOOM
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court dismissing a second post-conviction petition for writ of habeas corpus.

Appellant Ricky David Sechrest was convicted, pursuant to a jury verdict, of two counts of murder and two counts of kidnapping. He was sentenced to death on each of the murder convictions and to life without the possibility of parole for each of the kidnapping convictions. He appealed to this court, and we affirmed the judgment below. See Sechrest v. State, 101 Nev. 360, 705 P.2d 626 (1985).

Subsequently, Sechrest filed a petition for post-conviction relief, which the district court denied. Sechrest again appealed to this court. We concluded no error existed and affirmed the district court's order. See Sechrest v. State, 108 Nev. 158, 826 P.2d 564 (1992).

On October 27, 1995, Sechrest filed a petition for a writ of habeas corpus in the United States District Court for the District of Nevada, alleging a multitude of claims. In the federal petition, Sechrest alleged some errors that he had previously raised in prior state proceedings, as well as errors that he had never brought in state court. On July 27, 1996, the federal court dismissed the petition on the ground that Sechrest failed to exhaust his state remedies. Accordingly, on August 29, 1996, Sechrest filed a petition for a writ of habeas corpus

in state district court incorporating by reference all claims from the federal petition.

To determine whether the petition should be dismissed as procedurally barred pursuant to NRS 34.810, on September 3, 1996, the state district court conducted an in-chambers hearing. This hearing provided Sechrest's counsel an opportunity to allege sufficient cause and prejudice to prevent a procedural default. Counsel informed the court that he utilized a strategic decision in not bringing the new claims in the prior state court petition. He concluded that this was a mistake and that he should have brought all his claims earlier.¹

On September 4, 1996, the district court issued its order determining that Sechrest failed to demonstrate cause and prejudice pursuant to NRS 34.810 and dismissed the petition as procedurally barred. Sechrest now appeals.

In the instant petition, Sechrest reasserts many claims that have already been decided by this court in previous proceedings.² As these issues have already been decided, they are the law of the case. *Partgen v. State*, 110 Nev. 554, 557-58, 875 P.2d 361, 363 (1994); *Bejarano v. State*, 106 Nev. 840, 841, 801 P.2d 1388, 1389 (1990); see also NRS 34.810(2). Therefore, we conclude that the district court properly

¹We note that it is not error for counsel to decide not to raise meritless claims on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996).

²These claims include: (1) whether the prosecutor committed misconduct by commenting on a jury instruction regarding the Pardon Board, see *Sechrest v. State*, 101 Nev. 360, 368, 705 P.2d 626, 632 (1985); (2) whether it was an abuse of discretion to deny Sechrest's request for additional counsel, see id. at 367-68, 705 P.2d at 631-32; (3) whether Sechrest's confession was properly admitted, see id. at 363-67, 705 P.2d at 629-31; (4) whether the testimony of Dr. Lynn Gerow, Sechrest's psychiatrist, violated Sechrest's Fifth Amendment right not to incriminate himself, see *Sechrest v. State*, 108 Nev. 158, 160-61, 826 P.2d 564, 565-66 (1992); and (5) whether trial counsel provided ineffective assistance for failure to investigate and interview Dr. Gerow, see id. at 161-63, 826 P.2d at 566-67.

dismissed the repetitive claims.

With respect to the issues not asserted in prior proceedings, we conclude the district court properly applied the procedural bar in NRS 34.810, which provides that the court shall dismiss a petition if the court determines that the grounds for the petition could have been raised in an earlier proceeding unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

Good cause has been defined by this court as "any impediment external to the defense" which prevents the petitioner from bringing the claim earlier. *Passanisi v. Director, Dep't Prisons*, 105 Nev. 53, 65, 769 P.2d 72, 74 (1989). Additionally, "prejudice" requires the petitioner to show "not merely that the errors of trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions." *Hegen v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 714 (1993) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)).


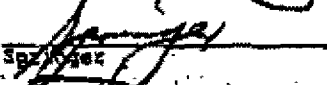



Here, Sechrest's counsel admitted that the reason he did not put forth the new issues in the prior petition was purely a tactical decision. This cannot constitute good cause as it is not "external to the defense," nor has Sechrest demonstrated that the claims have merit and that failure to raise them prejudiced him. Therefore, because Sechrest has failed to allege good cause or actual prejudice for not bringing these claims earlier, we conclude he is procedurally barred from bringing them in this second petition.

Sechrest further argues that he was not provided an "informative hearing" when he brought his first petition, as required by NRS 34.820(4). In 1985, when Sechrest brought his first petition, this provision (then codified as NRS 34.820(3)) instructed the district court to personally address the

petitioner to inform him that he must raise all issues in single petition or else any new claims in a subsequent petition will not be considered.

After a thorough review of the record, we conclude that Sechrest was not prejudiced by this error. Therefore, he is not entitled to any relief. Accordingly, we conclude that the district court did not err in dismissing the instant petition based on procedural default.³ We

ORDER this appeal dismissed.

 Shearing	C.J.
 Spry	J.
 Rose	J.
 Young	J.
 Maupin	J.

cc: Hon. Charles M. McGee, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Richard A. Gemmick, District Attorney
Robert Bruce Lindsay
Judi Bailey, Clerk

³Sechrest further contends that this court applies procedural default rules inconsistently. We conclude that this argument has no merit. See *Valerie v. State*, 112 Nev. 381, 389-90; 915 P.2d 874, 878 (1996). Additionally, in his reply brief, Sechrest raised for the first time the issue of ineffective assistance of counsel during his first post-conviction petition proceedings. We conclude that this issue is inappropriately raised, and therefore, we need not consider it. See NRS 28(c) (issues in the reply brief shall be limited to responding to new matters brought in the opposing brief); *Old Artee Mine, Inc. v. Brown*, 97 Nev. 49, 52-53, 623 P.2d 981, 983-84 (1981) (this court need not consider issues not raised below). Accordingly, we deny as moot both the state's motion to strike Sechrest's reply brief and Sechrest's motion to file an untimely opposition to the state's motion.

EXHIBIT 127

EXHIBIT 127

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY FRANK SMITH,

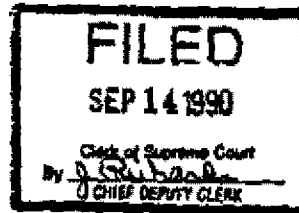
Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 20959



ORDER OF REMAND

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

Appellant was charged by way of indictment with nine counts of sexual assault upon a minor under the age of 14. NRS 200.364, 200.366. Pursuant to a jury trial, a judgment of conviction was entered for all nine counts on August 25, 1983. Appellant was sentenced to nine life terms with the possibility of parole, with the first two terms to run consecutively and the other seven terms to run concurrently with the second term. On August 23, 1983, appellant filed a notice of appeal. This court affirmed appellant's conviction. State v. Smith, 100 Nev. 570, 688 P.2d 326 (1984). Appellant did not file a petition for post-conviction relief.

On November 1, 1989, appellant filed the instant petition for a writ of habeas corpus. The state opposed the petition and on January 2, 1990, the district court filed findings of fact, conclusions of law and an order denying appellant's petition. This appeal followed.

Our preliminary review of the record indicated that the district court may have erred in dismissing appellant's petition for a writ of habeas corpus. Accordingly, we ordered the state to show cause why this matter should not be remanded to the district court for proper consideration of appellant's

petition. Smith v. State, Docket No. 20959 (Order, July 17, 1990). In that order, we noted that the district court relied on NRS 34.725 in dismissing appellant's petition. NRS 34.725 requires a petitioner to seek post-conviction relief pursuant to NRS 177.315 before filing a post-conviction petition for a writ of habeas corpus. We noted that, while appellant was convicted in 1983, NRS 34.725 was not enacted until 1987. Because a petition for post-conviction relief must be filed within one year after the entry of a judgment of conviction or after the final decision on appeal, the procedural default created by NRS 34.725 did not come into existence until well after the expiration of the time within which appellant could overcome that default. See NRS 177.315(3).

In response to our order to show cause, the state does not dispute that the district court's reliance on the procedural default of NRS 34.725 was erroneous. The state urges, however, that this court may still affirm the district court's order on the basis of laches. This contention is without merit.

Dismissal for laches is controlled by NRS 34.800. That statute indicates that "the State of Nevada must specifically plead laches. The petitioner must be given an opportunity to respond to the allegations in the pleading before a ruling on the motion is made." NRS 34.800(2). A review of the record on appeal reveals that the state did not plead laches in the district court. Accordingly, we vacate the order of the district court denying appellant's petition for a writ of habeas corpus and remand this case to the district court for proper consideration of appellant's petition. On remand, the state shall be permitted to file a supplemental motion to dismiss in which laches may be specifically pleaded.

Appellant shall be afforded an opportunity to respond to that motion pursuant to NRS 34.800.

It is so ORDERED.

Young, C.J.
Young
Steffen, J.
Steffen
Springer, J.
Springer
Mowbray, J.
Mowbray
Rae, J.
Rae

cc: Hon. Donald M. Moeley, District Judge
Hon. Brian McKay, Attorney General
Hon. Rex Bell, District Attorney
Jerry Frank Smith
Loretta Bowman, Clerk

EXHIBIT 128

EXHIBIT 128

DEWAYNE DEREK STEVENS,

No. 24113

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JUL 08 1994

CLERK OF DISTRICT COURT
CLERK OF DISTRICT COURT
CLERK OF DISTRICT COURT

ORDER OF REMAND

This is an appeal from an order of the district court denying appellant's petition for post-conviction relief in a death penalty case.

On April 14, 1986, Dewayne Derek Stevens was convicted, pursuant to a jury verdict, of one count each of first-degree murder, robbery with the use of a deadly weapon, possession of a stolen credit card and grand larceny auto. Stevens was sentenced by the jury to death by lethal injection on the first-degree murder charge. He also was sentenced by the district court to fifteen years for the robbery conviction, a consecutive fifteen years for use of a deadly weapon, a consecutive six years on the possession of a stolen credit card conviction, and a consecutive ten years for the grand larceny auto conviction.

Stevens proceeded in proper person throughout both the guilt and penalty phase of his trial. While the public defender characterized Stevens as a "jailhouse attorney" to the district court in presenting Stevens' motion to proceed in proper person, Stevens actually was twenty years old at the time of his trial and had only completed the sixth grade. The State and Stevens both requested the appointment of standby counsel. The public defender, however, objected to serving as standby counsel, and the district court denied the State's and Stevens' request.

Stevens appealed his conviction with the assistance of court-appointed counsel. This court dismissed Stevens' appeal.

Stevens v. State, Case No. 17390 (Order Dismissing Appeal, October 21, 1988).

On May 10, 1989, Stevens filed a proper person petition for post-conviction relief (the "first petition") in the district court pursuant to NRS 177.315 - NRS 177.323.¹ Included among Stevens' claims for post-conviction relief was an allegation of ineffective assistance of appellate counsel. Accordingly, Stevens requested the appointment of counsel other than his appellate counsel to assist him in the prosecution of his post-conviction claims. The district court failed to address Stevens' request for appointed counsel (despite NRS 177.343's dictate to assess the need to appoint counsel within ten days after the filing of a petition for post-conviction relief). In addition, the state filed no response in opposition to Stevens' first petition (in contravention of NRS 177.335 which required the state to respond within fifty days after the filing of the petition).

Stevens' first petition then lay dormant for almost six months (a violation of NRS 177.380(6) which required the district court to "make all reasonable efforts to expedite" petitions for post-conviction relief). At that point, out of frustration with the inactivity on his first petition, Stevens moved to withdraw his petition so that he could pursue federal habeas corpus relief. The district court allowed Stevens to withdraw his first petition. In doing so, the district court did not canvass Stevens regarding his request for the appointment of new counsel.

Stevens thereafter pursued federal relief, but was required to return to state court to exhaust the issues raised in his first petition. Thus, on September 3, 1991, almost three years after his direct appeal had been dismissed, Stevens filed

¹These sections were repealed effective January 1, 1991.

a second proper motion petition for post-conviction relief (the "second petition"). The district judge denied Stevens' second petition on the ground that Stevens had not shown "good cause" for failing to file the petition within one year after the dismissal of his direct appeal as required by NRS 177.315(3).¹ This appeal followed.

Stevens claims that the district court erred in finding no good cause existed for his failing to file timely the second petition. We agree under the extremely unusual circumstances presented in this case and conclude that good cause did exist for Stevens' failure to file his second petition within one year after the dismissal of his direct appeal. The error in this case dates back to Stevens' withdrawal of his first petition and the district court's failure to address Stevens' request for new counsel. In short, the district court erred in allowing Stevens' to withdraw the first petition without first appointing Stevens independent counsel to advise him with respect to the first petition.

Stevens was entitled to counsel in this case. Although Stevens' did not have the automatic right to counsel, see NRS 177.345,² it would have been an abuse of discretion for

¹NRS 177.315(3) provided:

Unless there is good cause shown for delay, a proceeding under NRS 177.315 to 177.345, inclusive, must be filed within 1 year after the entry of judgment of conviction or, if an appeal has been taken from such judgment, within 1 year after the final decision upon or pursuant to the appeal.

²NRS 177.345(1) provided:

1. The petitioner may allege that the petitioner is unable to pay the costs of the proceeding or to employ counsel. If the court is satisfied that the allegation of indigency is true, the court may appoint counsel for him (or her) within 10 days after the filing of the petition. In making its determination, the court may consider whether:

(continued...)

the court to have d Stevens counsel given that Stevens was under a penalty of death and had alleged an arguably colorable ineffective assistance of counsel claim in his first petition.

Moreover, it was very apparent that Stevens needed independent advice with respect to his first petition. [The record demonstrates that at the time Stevens dismissed his first petition, he was laboring under mistaken impressions of law which were clearly disclosed to the district court. Specifically, Stevens informed the district court that he believed state post-conviction proceedings were undertaken for the sole purpose of making a record, which he felt he had done, and that he believed he could not get a fair proceeding in state court because he and his co-defendant had a conflict and thus he would "go through Federal Court and allow [his co-defendant] to do the post-conviction." No one disabused him of these mistaken impressions, and no one informed him that consideration of his post-conviction claims by a federal court was in fact dependant upon those claims being considered initially by the state court. Instead, the district court merely advised Stevens that he would "probably give[] up" the ability to pursue state post-conviction relief if he withdrew his petition. While laboring under mistaken impressions of law does not of itself constitute good cause for filing a late petition, had counsel been appointed as it should have been, counsel would have had the obligation to explain to Stevens the ramifications of dismissing his first petition, and Stevens would either have pursued the first petition or knowingly waived pursuit of the first petition. In light of the foregoing, we conclude that the district court

³(...continued)

- (a) The issues presented by the petition are difficult;
- (b) The petitioner is unable to comprehend the proceedings; or
- (c) Counsel is necessary in order to proceed with discovery.

erred in finding no good cause existed for failure to file timely the second petition for post-conviction relief.⁴

Our interest in this matter, however, does not end here. Given the extremely unique circumstances of this case, we are compelled to conclude that Stevens did not receive a fair trial, and thus, rather than remanding this case to the district court for further post-conviction proceedings, we remand to the district court for a new trial.

There are several irregularities in this case that give us reason to conclude that Stevens has not received due process. We need only address one in this order: One of the claims Stevens makes in his second petition for post-conviction relief is that the hearing at which the trial judge allowed Stevens to dismiss counsel and represent himself was inadequate to determine whether or not Stevens was making a knowing and intelligent waiver of counsel.⁵ We have reviewed the record with respect to this issue and agree with Stevens.

While a criminal defendant has a Sixth Amendment right to represent him- or herself and thus may waive his or her right to counsel, the waiver of that right to counsel must be knowing and intelligent. *Faretta v. California*, 422 U.S. 806 (1975).

⁴For the reasons described above, this case is also distinguishable from our holding in *Colley v. State*, 103 Nev. 235, 773 P.2d 1229 (1989).

⁵Stevens' appellate counsel failed to raise this issue on direct appeal. Stevens argues that the "cause and prejudice" standard of NRS 177.375(2) is satisfied by virtue of the ineffective assistance of appellate counsel under which he labored. It is well-established that ineffective assistance of counsel which rises to the level of a constitutional violation establishes the "cause and prejudice" sufficient to overcome a waiver. See, e.g., *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986); *Encininger v. Iowa*, 385 U.S. 748, 751 (1967); *Strimze v. Warden*, 94 Nev. 520, 521 (1978); *Stewart v. Warden*, 92 Nev. 348, 389 (1976). In this instance, we agree that Stevens' appellate counsel was ineffective in failing to raise the issue of the knowingness and intelligence of Stevens' waiver of his Sixth Amendment right to counsel. Accordingly, Stevens has established the requisite cause and prejudice to overcome the apparent waiver of this issue.

The standard for testing the validity of a waiver of the right to counsel in Nevada was originally set forth in *Garnick v. Miller*, 81 Nev. 372, 376, 403 P.2d 850, 853 (1965):

"To discharge (the duty of determining whether a waiver is knowing and intelligent) in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."

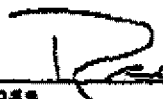
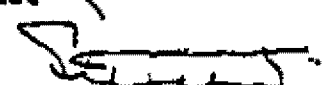

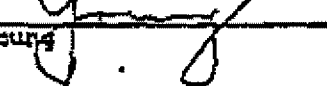
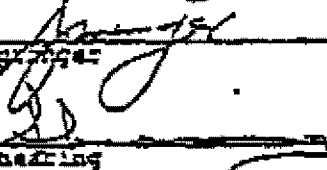
(quoting *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948) (plurality) (emphasis added)); accord *Reynolds v. Warden*, 86 Nev. 941, 944, 478 P.2d 574, 576 (1970) ("In each case the 'intelligent waiver' must be tested in light of the particular circumstances surrounding the case, including the background, experience, and conduct of the accused."); *Anderson v. State*, 98 Nev. 339, 654 P.2d 1026 (1982); *Cohen v. State*, 97 Nev. 166, 623 P.2d 1170 (1981); *Sundrانت v. Fogliani*, 82 Nev. 188, 419 P.2d 293 (1966).

Having reviewed the district court's canvass of Stevens with respect to Stevens' professed desire to proceed in proper person, we conclude it was inadequate to determine whether Stevens' waiver of his sixth Amendment right to counsel was knowing and intelligent given that this is a death penalty case and Stevens was a twenty-year-old, seventh grade drop-out at the time of the trial court's canvass. The court's canvass of Stevens fell far short of a "penetrating and comprehensive

examination" (indeed the trial court did not ask for any information regarding Stevens' age or education) and we cannot assert with any confidence that Stevens' waiver of his right to counsel was valid. Accordingly, Stevens' conviction must be reversed.

For the foregoing reasons, we reverse the judgment of conviction against Stevens and remand this case to the district court for a new trial.

It is so ORDERED.

 C.J.
Rose
 J.
Staffan
 J.
Young
 J.
Springer
 J.
Shearing

cc: Hon. Gerard Bongiovanni, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hager, Atchason & Hausert
Rex Bell, District Attorney, Clark County
Loretta Bowman, Clerk

EXHIBIT 129

EXHIBIT 129

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY FRANK WADE,

No. 37467

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

OCT 11 2001

CLERK OF SUPREME COURT
BY: [Signature] DEPUTY CLERKORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.

On August 23, 1998, appellant was convicted of one count of conspiracy to sell a controlled substance and one count of trafficking in a controlled substance. The district court sentenced appellant to life in prison with the possibility of parole after ten years. Appellant filed a direct appeal, and this court affirmed appellant's judgment of conviction.¹ Thereafter, appellant filed a petition for rehearing, which was also denied.² The remittitur issued on October 27, 1999.

On October 4, 2000, appellant filed a post-conviction petition for a writ of habeas corpus, arguing that his counsel was ineffective. The district court ordered the State to file a response. In its response, the State argued that appellant's petition should be dismissed, in part, because it was not verified as required by NRS 34-730.

In an attempt to cure this procedural deficiency, on December 12, 2000, appellant filed a first amended post-conviction petition for a writ of habeas corpus containing a verification from counsel. The State filed a motion to strike appellant's first amended petition, arguing that it was procedurally improper. The district court granted the State's motion to strike. Appellant then filed a motion to amend his post-conviction petition for a writ of habeas corpus. The district court denied appellant's motion to

¹Wade v. State, 114 Nev. 914, 946 P.2d 160 (1998).

²Wade v. State, 115 Nev. 230, 986 P.2d 438 (1999) (denying rehearing and modifying prior opinion).

01-17147

amend. Additionally, the district court denied appellant's post-conviction petition for a writ of habeas corpus, finding that it was not cognizable because it was unverified. Appellant filed the instant appeal.

First, appellant argues that the district court erred in denying his petition because counsel's signature under NRCP 11 satisfied the verification requirement contained in NRS 34.730. We disagree. The district court did not err in dismissing appellant's petition because an unverified petition is not cognizable.³ An attorney's signature pursuant to NRCP 11 is not equivalent to a verification under NRS 34.730 because the latter requires counsel to verify that "the petitioner personally authorized him to commence the action."⁴ NRCP 11 contains no such requirement. Further, this court applies the rules of civil procedure only when statutes governing habeas corpus do not address the matter at issue.⁵ Here, because a statute governing habeas corpus, particularly NRS 34.730, addresses the verification requirement at issue, this statute is dispositive.

Second, appellant argues that the district court "waived" the verification requirement by ordering the State to respond to his petition. We conclude that this contention lacks merit because counsel's verification is a statutory requirement that cannot be waived by counsel or the court.⁶

Third, appellant argues that the district court erred in striking his first amended petition. We disagree. The district court did not err in striking the first amended petition because appellant was prohibited, by statute, from filing an amended petition. Indeed, NRS 34.730 authorizes a supplemental petition only where the district court has determined that counsel shall be appointed to represent a petitioner acting in proper person, or where a supplemental petition is ordered by

³See NRS 34.730(1) ("A petition must be verified by petitioner or his counsel."); see also *Sheriff v. Scalia*, 96 Nev. 776, 616 P.2d 402 (1980); *Sheriff v. Churchill*, 96 Nev. 518, 603 P.2d 690 (1979); *Sheriff v. Arvey*, 93 Nev. 72, 560 P.2d 153 (1977).

⁴NRS 34.730(1).

⁵See *Reata v. State*, 110 Nev. 339, 871 P.2d 357 (1994); *Marran v. State*, 109 Nev. 1067, 863 P.2d 1036 (1993).

⁶See NRS 34.730.

the court.⁹ Here, the district court neither appointed counsel to represent appellant acting in proper person nor authorized an amended petition. Accordingly, the district court did not err in striking appellant's first amended petition because appellant had no statutory right to amend.

Finally, appellant argues that the district court abused its discretion in denying appellant's motion for leave to amend his post-conviction petition because: (1) the amendment would have been timely since it related back to his original petition; (2) the lack of verification was corrected as soon as it was brought to petitioner's attention; and (3) there is United States Supreme Court precedent holding that cases should be decided on their merits, rather than dismissed based on "mere technicalities." We conclude that the district court acted within its discretion in denying appellant's motion to amend because appellant was not entitled to amend his post-conviction petition as a matter of right.

In affirming the district court's order, we address *sua sponte* another issue of great importance. The record reveals that appellant's counsel represented him at trial, on appeal, and on post-conviction, resulting in an actual conflict of interest. In fact, in the original unverified post-conviction petition, counsel for appellant argued his own ineffectiveness.

Trial counsel may not represent appellant in a post-conviction proceeding where appellant claims ineffective assistance of counsel because the ethical code of conduct prohibits an attorney from representing a client in a matter where he is likely to be a witness.¹⁰ Although a petitioner may waive this existing actual conflict, in so doing, a petitioner would be limiting his potential claims because his trial counsel may not present a claim of his own ineffectiveness. Accordingly, prior to allowing trial counsel to represent a particular petitioner in a post-conviction proceeding, the district court should, on the record, explain the nature of the conflict, the disabilities this would place on potential claims,

⁹NRS 34.750(3)(b) provides, "After appointment by the court, counsel for the petitioner may file and serve supplemental pleadings . . . within 30 days after . . . the date of his appointment." NRS 34.750(5) provides, "No further pleadings may be filed except as ordered by the court."

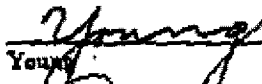


¹⁰See SCR 178 ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness").

and the nature of any potential claims that the petitioner would be waiving.⁹ Prior to affirmatively waiving this actual conflict on the record, the district court should inform the petitioner that he would giving up his right to raise the issue of ineffective assistance of counsel.

In the instant case, there is no indication that appellant was advised, on the record, about the nature and consequences of retaining counsel with an actual conflict and no indication that appellant waived this conflict. Further, the record reveals that appellant's counsel's inability to argue his own ineffectiveness actually prejudiced appellant and contributed to counsel's failure to verify the post-conviction petition. Accordingly, in affirming the order of the district court, we emphasize that appellant has good cause and actual prejudice for the filing of a successive untimely petition, and we instruct the district court to allow appellant to file such a petition for consideration on the merits.¹⁰ Should appellant continue to retain trial counsel in future post-conviction proceedings, the district court should elicit, on the record, appellant's affirmative and informed waiver of this actual conflict.

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

 J.
Young
 J.
Agosti
 J.
Leavitt

⁹See *Hayes v. State*, 106 Nev. 543, 556-57, 797 P.2d 962, 970 (1990).

¹⁰See NRS 34.810(3) (providing that the district court will consider a second or successive petition if appellant shows good cause for failure to present the claim and actual prejudice).

cc: Hon. Steven P. Elliott, District Judge
Attorney General
Washoe County District Attorney
John B. Routsis
William J. Routsis, II
Washoe County Clerk

EXHIBIT 130

EXHIBIT 130

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARY WALLACE WILLIAMS,

No. 20732

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JUL 18 1990

Clerk of Supreme Court
By *[Signature]*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying appellant's petition for post-conviction relief.

Appellant was convicted, pursuant to a guilty plea, of murder in the first degree. A three judge panel sentenced appellant to death. Appellant unsuccessfully pursued post-conviction relief. In a consolidated opinion, this court affirmed his judgment of conviction, sentence of death, and the denial of his post-conviction petition. See Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987).

Appellant subsequently filed a petition for a writ of habeas corpus in the federal district court. On May 25, 1988, the federal district court dismissed the petition without prejudice based on appellant's representation that his state post-conviction remedies had not been exhausted. On July 6, 1988, appellant filed a second petition for post-conviction relief pursuant to NRS Chapter 177 in the Second Judicial District Court and requested a stay of execution of his sentence pending the court's review of that petition. On July 8, 1988, the district court denied appellant's motion for a stay, concluding that all of the issues presented had been previously raised and resolved against him or should have been raised in his direct appeal and previous post-conviction proceeding. Appellant filed a notice of appeal from this order on July 9, 1988.

Also, on July 8, 1988, appellant filed a post-conviction petition for a writ of habeas corpus in the First Judicial District Court pursuant to NRS Chapter 34, and requested a stay of execution of his death sentence. On July 11, 1988, the district court denied appellant's motion for a stay, concluding that each of the issues raised in this petition had been previously resolved against appellant by this court. On July 12, 1988, appellant filed a notice of appeal from the district court's order. We combined the appeals from the first and second district courts under a single docket number, and ordered those appeals dismissed. *Williams v. State*, Docket No. 19172 (Order Dismissing Appeal, July 12, 1988).

Appellant filed his third petition for post-conviction relief on July 17, 1989. In that petition, appellant alleged that his guilty plea was involuntary. Specifically, appellant alleged that a potential codefendant, Harvey Young, had made false statements to the police which inculpated appellant. Appellant alleged that he pleaded guilty because he feared that Young would provide inculpatory testimony at appellant's trial consistent with Young's statements to the police. Appellant provided affidavits showing that Young has, after telling numerous versions of his story, recanted his claim that appellant killed the victim in this case. Appellant's petition was denied by the district court without a hearing in an order filed December 29, 1989. This appeal followed.

Appellant contends that the district court erred in denying his petition without a hearing. Specifically, appellant argues that Young's recantation of his claim that appellant was the killer demonstrates that appellant's guilty plea was involuntary.

This contention is without merit. This court has already determined that appellant's plea was voluntary. *Williams v. State*, 103 Nev. 227, 737 P.2d 508 (1987). That holding is now the law of the case. *See Hall v. State*, 91 Nev. 314, 535 P.2d 797 (1975). Young has made up a number of versions of his story, and we are not inclined to reconsider our holding based on the latest fabrication from a man who, by his own admission, has no regard for the truth. As the district court correctly noted, appellant confessed to killing the victim in this case. At his penalty hearing, at a time when Young's statements had been excluded and appellant had nothing to fear from Young, appellant testified that he killed the victim. At his plea canvass, appellant clearly indicated that his plea was voluntary and free from coercion. Accordingly, we conclude that the record clearly refutes appellant's post-conviction claims.

Appellant's contentions lacking merit, we

ORDER this appeal dismissed.

Young C.J.
Young
Steffen J.
Steffen
Springer J.
Springer
Howrey J.
Howrey
Rose J.
Rose

cc: Hon. Robert L. Schaeffler, District Judge
Hon. Brian McKay, Attorney General
Hon. Mills Lane, District Attorney
Marc Picker
Judi Bailey, Clerk

EXHIBIT 131

EXHIBIT 131

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARY WALLACE WILLIAMS,

No. 19084

Appellant,

vs.

WARDEN, ELY STATE PRISON,
SHERMAN HATCHER,

Respondent.

FILED

AUG 29 1997

JANETTE L. BLACK
CLERK OF SUPREME COURT
By [Signature]
CLERK OF SUPREME COURT

ORDER DISMISSING APPEAL

This is an appeal from an order dismissing a petition for writ of habeas corpus.

The facts of this case are set out in Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987). In August 1982, appellant Cary Wallace Williams ("Williams") confessed to murdering Katherine Carlson and her unborn child and to burglarizing the Carlson home. Williams was charged with murder, manslaughter and burglary, and he pled guilty to all three charges. Following a penalty hearing, a three-judge panel sentenced Williams to death and to two consecutive ten-year terms. Williams appealed his conviction and sentences and petitioned the district court for post-conviction relief, which was denied. This court consolidated Williams' direct appeal and appeal from the denial of post-conviction relief. On May 23, 1987, this court affirmed Williams' conviction and sentences. Id.

In December 1992, Williams filed the underlying petition for writ of habeas corpus in the Seventh Judicial District Court in White Pine County ("habeas court"). Williams filed an amended petition in July 1993.

After an evidentiary hearing, the habeas court issued an order dismissing Williams' petition. The habeas court stated that the issue of ineffective assistance of counsel had been

finally resolved by this court; therefore, the habeas court was bound by the doctrine of the law of the case as to seven of the claims. Pursuant to NRS 34.810(1)(a), the district court dismissed the remaining claims, which addressed issues other than those permitted in habeas corpus petitions. Williams now appeals.

Williams argues that the lower court erred in summarily dismissing his original and amended petitions on the grounds that this court had already decided the issues. The State argues that the habeas court properly applied a procedural bar to Williams' petition and that the instant petition is an abuse of the writ.

"The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975); *Accord Marzan v. Warden*, 112 Nev. 838, 842-43, 921 P.2d 920, 922 (1996). In *Hall*, this court stated, "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." 91 Nev. at 315, 535 P.2d at 799.

In *Williams*, Williams contended that he received ineffective assistance of counsel at trial because his trial counsel failed to request an independent hearing to assess the voluntariness of his confession, and allowed him to plead guilty without first securing the State's promise not to seek the death penalty. 103 Nev. at 229, 737 P.2d at 510. This court held that Williams received effective assistance of counsel. *Id.* at 230, 737 P.2d at 510. This court further held that Williams failed to demonstrate prejudice resulting from ineffective assistance of counsel. *Id.* Additionally, this court determined that the district court did not err in accepting Williams' pleas

of guilty. *Id.* at 330, 737 P.2d at 510-11.

Given this court's conclusions in *Williams*, we now hold that the law of the case precludes Williams' present claims that he lacked effective assistance of counsel at trial and at the penalty hearing. In addition, a post-conviction petition following a plea of guilty must be based upon an allegation that the plea was involuntarily or unknowingly entered, or entered without effective assistance of counsel. NRS 34.810(1)(a). Thus, the habeas court properly dismissed claims which were unrelated to these two issues.

Williams argues that the present petition contains new and different grounds for relief. We conclude that Williams has not met his burden of proving that "good cause exists for his failure to raise any grounds in an earlier petition and that he will suffer actual prejudice if the grounds are not considered." *Crump v. Warden*, 113 Nev. ___, ___, 934 P.2d 147, 252 (1997) (quoting *Phelps v. Director, Prisons*, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988)); see NRS 34.810(1).

Finally, absent good cause, a court may hear the merits of successive claims if failure to do so would result in a miscarriage of justice. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). This exception for "actual innocence" has a narrow scope. *Id.* at 340. A showing of "actual innocence" must focus on the elements that make the petitioner eligible for death, and cannot include additional mitigating evidence that was not introduced because of claimed constitutional errors. *Id.* at 347; see *Hogan v. Warden*, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993), cert. denied, __ U.S. __, 117 S.Ct. 334 (1996). Thus, Williams' claims that trial counsel failed to present mitigating evidence are not relevant.

Williams claims that his trial counsel failed to rebut aggravating evidence. Specifically, Williams contends that his counsel failed to rebut testimony that the murder involved

torture and was similar to a gang slaying.

Williams confessed to murdering Mrs. Carlson, and this court has previously held that this confession was knowing and voluntary. Furthermore, in addition to torture, the three-judge panel found three other aggravating circumstances, but only one mitigating circumstance. Given these facts, we conclude that Williams has failed to prove actual innocence.

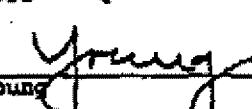
We conclude that the lower court properly dismissed Williams' petition based upon the doctrine of the law of the case. In light of Williams' confession and the three-judge panel's finding of four aggravating circumstances, failure to address any purportedly new grounds of error on their merits did not result in a miscarriage of justice. Accordingly, we

ORDER this appeal dismissed.


_____, C.J.
Sheering


_____, J.
Springer


_____, J.
Rowe


_____, J.
Young


_____, J.
Maupin

cc: Hon. Marilyn H. Hoyt, Judge
Hon. Frankie Sue Del Papa, Attorney General
Marc P. Picker
Donna Bath, Clerk

EXHIBIT 132

EXHIBIT 132

ROBERT YBARRA,

Appellant,

vs.

DIRECTOR, NEVADA STATE PRISON,

Respondent.

No. 19705

FILED

JUN 29 1989

CLERK OF SUPREME COURT
By
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus.

On July 23, 1981, appellant was convicted, pursuant to a jury verdict, of several felony offenses, including first-degree murder, arising out of the death of Nancy Griffith in September of 1979. Appellant was sentenced to death.

This court affirmed appellant's conviction and sentence. See Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). Appellant subsequently filed in the Seventh Judicial District Court a petition for post-conviction relief pursuant to NRS 177.315. On July 9, 1988, however, the district court denied appellant's petition. Again, this court affirmed the judgment of the district court. See Ybarra v. State, 103 Nev. 8, 731 P.2d 353 (1987).

On March 14, 1987, appellant filed in the federal district court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On September 9, 1987, the federal district judge entered a minute order which noted that the first count in appellant's habeas petition alleged that the M'Naghten test for sanity should not have been used in appellant's trial. The federal judge observed that appellant had raised this same issue in his direct appeal, and also noted that Nevada's choice of the M'Naghten test for sanity did not

implicate the federal question. The federal court concluded that appellant's argument regarding the M'Naghten test failed to state a claim upon which relief could be granted. The court went on to note, nevertheless, that appellant never argued in any of his prior state proceedings that the M'Naghten test violates the federal constitution. Therefore, the federal court determined that appellant had not yet exhausted his state remedies regarding this issue, and dismissed appellant's petition without prejudice to allow him to pursue the issue in state court.

On March 10, 1988, appellant filed in the First Judicial District Court the instant post-conviction petition for a writ of habeas corpus. The only argument presented in that petition concerned the constitutionality of the M'Naghten test for sanity. The state opposed appellant's petition, and also filed a motion to dismiss that petition. On December 30, 1988, the district court entered an order dismissing appellant's habeas corpus petition. This appeal followed.

In its order dismissing appellant's petition, the district court determined, among other things, that the use of the M'Naghten test for sanity during the guilt phase of appellant's trial did not violate appellant's rights under the United States Constitution. We agree. The United States Supreme Court has held that the use of the M'Naghten test does not violate the constitutional rights of a criminal defendant. See Leland v. Oregon, 343 U.S. 790 (1952). This court has long adhered to the M'Naghten test for sanity, see, e.g., Kuk v. State, 80 Nev. 291, 299, 392 P.2d 630, 634 (1964); State v. Lewis, 20 Nev. 333, 351, 22 P. 241, 247 (1889), and we decline to depart from the M'Naghten test at this time.

The district court also determined that the use of the M'Naghten test at appellant's penalty hearing did not violate

appellant's constitutional rights. We initially, we note that appellant has failed to cite any authority to this court which demonstrates that the use of the M'Naghten test at his penalty hearing was improper in any way. We need not consider arguments that are not supported by relevant legal authority. See Cunningham v. State, 94 Nev. 129, 575 P.2d 936 (1978). Moreover, appellant has wholly failed to demonstrate that the use of the M'Naghten test during the penalty phase of his trial deprived him of an individualized assessment of his mental state in that proceeding. Thus, the M'Naghten test was used properly in appellant's penalty hearing.

In light of the above, we conclude that the district court did not err when it denied appellant's habeas corpus petition. Accordingly, we

ORDER this appeal dismissed.

Young C.J.
Young
Steffen J.
Steffen
Spencer J.
Spencer
Howe J.
Howe
Ross J.
Ross

cc: Hon. Michael E. Fendi, District Judge
Hon. Brian McKay, Attorney General
Crowell, Susich, Owen & Tackes
Alan Glover, Clerk

EXHIBIT 133

EXHIBIT 133

RYbarra-05365-00000040

RECEIVED

NOV 30 2005

Federal Public Defender
Las Vegas, Nevada

COPY

MR. SA, ST. BH, ZSTC

IN THE SUPREME

COURT OF NEVADA

ROBERT YBARRA, JR.,

Appellant,

vs.

WARDEN, ELY STATE PRISON, E.K.

MCDANIEL,

Respondent.

No. 43981

FILED

NOV 28 2005

JANETTE M. GLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

On July 28, 1981, the district court convicted appellant Robert Ybarra, Jr., pursuant to a jury verdict, of first-degree murder, first-degree kidnapping with substantial bodily harm, battery with the intent to commit sexual assault with substantial bodily harm, and sexual assault with substantial bodily harm. Ybarra was sentenced to death for first-degree murder. The district court also sentenced him to three consecutive terms of life in prison without the possibility of parole on the remaining counts. This court dismissed Ybarra's direct appeal.¹ The remittitur issued on March 4, 1985.

Subsequently, Ybarra filed a petition for post-conviction relief, pursuant to former NRS Chapter 177, which the district court denied after

¹Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984).

an evidentiary hearing on July 11, 1986. This court dismissed Ybarra's appeal on January 21, 1987.³ On March 10, 1988, Ybarra filed a post-conviction petition for habeas relief, which the district court dismissed on December 30, 1988. This court dismissed Ybarra's appeal on June 29, 1989.⁵ On April 26, 1998, Ybarra filed a second post-conviction habeas petition. The district court granted the State's motion to dismiss the petition on June 29, 1998. This court dismissed Ybarra's appeal on July 6, 1999.⁴

On March 6, 2003, Ybarra filed the instant habeas petition, his fourth state post-conviction petition. The district court granted the State's motion to dismiss the petition on July 20, 2004, concluding that it was procedurally barred. This appeal followed.

Ybarra filed his petition approximately 18 years after this court issued the remittitur from his direct appeal. Thus, Ybarra's petition was untimely filed.⁶ Moreover, his petition was successive because he had previously filed three post-conviction petitions in the district court.⁷ Ybarra's petition was procedurally barred absent a demonstration of good

³Ybarra v. State, 103 Nev. 8, 731 P.2d 353 (1987).

⁵Ybarra v. Director, Docket No. 19705 (Order Dismissing Appeal, June 29, 1989).

⁴Ybarra v. State, Docket No. 32762 (Order Dismissing Appeal, July 6, 1999).

⁶See NRS 34.726(1).

⁷See NRS 34.810(1)(b), (2).

cause and prejudice.⁷ Further, because the State specifically pleaded laches, Ybarra was required to overcome the presumption of prejudice to the State.⁸ Ybarra argues that the district court erred in several ways in concluding that his habeas petition was procedurally barred. We conclude that the district court properly dismissed the petition except in regard to one issue.

Ybarra initially claims that this court treats the application of procedural default rules as discretionary and has inconsistently applied them. He lists a host of this court's published and unpublished decisions to support his contention. Ybarra asserts that based on this alleged inconsistent application of procedural bar rules, this court must reverse the district court's order dismissing his petition and remand the matter for a hearing on his substantive claims. However, we considered and rejected a similar claim in State v. Dist. Ct. (Riker).⁹ We are not persuaded by Ybarra's argument to abandon the mandatory procedural bar rules. Accordingly, we conclude that the district court did not err in denying his petition on this basis.

Second, Ybarra argues that he is "innocent" of aggravating circumstances found at trial and that refusing consideration of his claims would result in manifest injustice. The jury found as aggravating

⁷See NRS 34.726(1); NRS 34.810(1)(b), (3).

⁸See NRS 34.800(2).

⁹121 Nev. ___, ___, 112 P.3d 1070, 1076-82 (2005); see Pellegrini v. State, 117 Nev. 860, 879-80, 34 P.3d 519, 532 (2001).

circumstances that Ybarra murdered his teenage victim during the commission of a sexual assault and a kidnapping. Ybarra contends that these two aggravators must be vacated as violative of double jeopardy principles because he was convicted of sexual assault and kidnapping and had punishment imposed "before the same offenses were re-prosecuted as aggravating factors and additional punishment was imposed because of them." We disagree. The death penalty is a permissible punishment if one or more aggravating circumstances, including those at issue in this case, are found and not outweighed by any mitigating circumstances.¹⁰ Double jeopardy concerns are not implicated in this instance.¹¹

Ybarra also argues that these aggravating circumstances implicate the reasoning in McConnell v. State.¹² He acknowledges that McConnell does not expressly apply here, as the State did not seek the first-degree murder conviction on a felony-murder theory. But he explains that the sexual assault and kidnapping aggravators are nonetheless improper because he received punishment for these offenses and that basing death eligibility on these offenses affronts the spirit of McConnell. However, we specifically stated in McConnell that our decision had no effect in cases where the State relies solely on a theory of deliberate,

¹⁰See NRS 200.030(4)(a).

¹¹See McKenna v. State, 114 Nev. 1044, 1058-59, 968 P.2d 739, 748-49 (1998).

¹²120 Nev. ___, 102 P.3d 606 (2004).

premeditated murder to secure a first-degree murder conviction.¹³ We are not persuaded by Ybarra's attempted analogy to McConnell. Therefore, we conclude that the district court did not err in concluding that Ybarra failed to demonstrate good cause to excuse his procedural bars on this basis.

Third, Ybarra asserts that the previous-conviction aggravating circumstance is factually and legally insufficient. He contends that the district court erred in admitting a California order of probation as proof of a prior conviction for a felony involving the use or threat of violence to the person of another. This court previously concluded that this evidence was proper proof of an aggravating circumstance.¹⁴ The doctrine of the law of the case bars further consideration of this claim, and Ybarra cannot avoid this doctrine by raising a "more detailed and precisely focused argument."¹⁵ To the extent that Ybarra's instant claim might be considered distinct from his earlier one, he has not provided good cause for his failure to raise it previously.

Based on the foregoing discussion and the record presented, we conclude that Ybarra has not demonstrated good cause to overcome the procedural bars to his habeas petition and therefore the district court did

¹³Id. at ___, 102 P.3d. at 624.

¹⁴See Ybarra, 100 Nev. at 177, 679 P.2d at 808. Specifically, Ybarra contended that the California probation order was inadmissible because it did not reflect on its face that counsel had represented him.

¹⁵Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

not err in denying his petition on this basis. Moreover, as we explain, we largely affirm the district court's order on a number of other bases, including that Ybarra has failed to demonstrate actual prejudice pursuant to NRS 34.810(3).

Ybarra raises, among others, the following claims in his appeal: jury misconduct requires reversal of his conviction and sentence; the conviction and sentence are invalid because a juror refused to consider all sentencing options provided by law; the district court erred in refusing to excuse a juror for cause; the jury was not impartial; the district court erred in failing to conduct a competency hearing; Ybarra was improperly sentenced to consecutive terms for sexual assault and battery with the intent to commit sexual assault; the prosecutor committed a pattern of misconduct, rendering Ybarra's trial fundamentally unfair; the district court improperly instructed the jury on the defense of insanity; the statutorily mandated reasonable doubt instruction improperly minimized the State's burden of proof; his death sentence is invalid because of the reduced standard of reliability for admission of evidence at the penalty phase; his death sentence constitutes cruel and unusual punishment; execution by lethal injection constitutes cruel and unusual punishment; and the cumulative effect of the errors alleged mandate reversal of his conviction and sentence. However, these claims could have been raised on direct appeal.¹⁸ Nothing in Ybarra's submissions demonstrates good cause

¹⁸See NRS 34.810(1)(b)(2) (providing that the court shall dismiss a post-conviction petition for a writ of habeas corpus when the petitioner's
continued on next page . . .

for failing to raise these claims earlier or actual prejudice from the district court's refusal to consider them.

Ybarra also argues that his death sentence must be reversed because the jury was not instructed that to impose death it had to find beyond a reasonable doubt that the aggravating circumstances were not outweighed by the mitigating circumstances. This claim also could have been raised on direct appeal. Although Ybarra cites recent decisions by the Supreme Court¹⁷ and this court¹⁸ to support this claim, the claim could also have been raised at the time of his trial.¹⁹ Moreover, Ybarra failed to include in his appendix the instructions provided to the jury during the penalty phase. Thus, he failed to include critical documentation supporting his claim despite his submission of several thousand pages of documentation in his appendix. Therefore, Ybarra has not demonstrated good cause for failing to raise the claim earlier, nor does he show that he suffered actual prejudice.

... continued

conviction was the result of a trial and the claims could have been raised on direct appeal).

¹⁷Ring v. Arizona, 536 U.S. 584 (2002).

¹⁸Johnson v. State, 118 Nev. 787, 800-03, 59 P.3d 450, 460-61 (2002) (applying Ring, 536 U.S. 584, to Nevada statutory law).

¹⁹See NRS 200.030(4); Witter v. State, 112 Nev. 908, 923, 921 P.2d 886, 896 (1996); 1977 Nev. Stat., ch. 585, § 1, at 1542, and § 13, at 1546. Further, even if Ring, 536 U.S. 584, created the basis for this claim, Ring does not apply retroactively. See Colwell v. State, 118 Nev. 807, 921-22, 59 P.3d 463, 472-73 (2002).

Ybarra also re-raises the following claims: (counsel was ineffective for failing to object to and in some instances inviting prosecutorial misconduct;²⁰) (counsel was ineffective for failing to investigate and object to the admission of the victim's statements about the attack;²¹) (counsel was ineffective for failing to question the jurors regarding their opinions on an insanity defense;²²) and (the district court erred in denying his motion for a change of venue.²³) As we have previously considered and rejected these claims, they warrant no further consideration.²⁴

Ybarra also claims that his counsel was ineffective for failing to investigate and develop facts respecting his mental state and mitigation and that psychotropic medication rendered him incompetent throughout the trial and prejudicially altered his demeanor. He raised these claims in his third habeas petition, which the district court denied as procedurally barred. On appeal, we concluded that the district court did not err in denying Ybarra's petition. Based on the record we conclude that Ybarra has not demonstrated actual prejudice in this regard.

²⁰See Ybarra, 103 Nev. at 14-16, 731 P.2d at 357-58.

²¹See id., at 13-14, 731 P.2d at 357.

²²See id., at 14, 731 P.2d at 357.

²³See Ybarra v. State, Docket No. 12624 (Order Dismissing Appeal, October 10, 1980).

²⁴See Hall, 91 Nev. at 316, 535 P.2d at 799.

Ybarra also argues that the jury and the district court were not impartial due to the district court's comment, "Ladies and gentlemen, unfortunately with respect to all of the counts read to you in open court, the defendant has pled not guilty and not guilty by reason of insanity." However, this claim was appropriate for direct appeal.²⁵ Moreover, Ybarra previously raised this matter in his third habeas petition, which the district court denied as procedurally barred. Finally, Ybarra has neglected to include relevant portions of the trial transcript in his voluminous appendix. Thus, even if we deemed it appropriate to consider the merits of this claim, Ybarra has failed to substantiate it. Therefore, we conclude that he failed to show actual prejudice in this regard.

Ybarra further claims that his conviction and sentence must be reversed because his trial and direct appeal were "conducted before judicial officers whose tenure in office was not during good behavior but whose tenure is dependent on popular election." However, he wholly fails to substantiate this claim with any specific factual allegations demonstrating actual prejudice.

Ybarra next asserts that his death sentence must be reversed due to cruel and unusual punishment suffered during his incarceration. However, he has not substantiated this claim with sufficient factual allegations demonstrating that the conditions of his confinement are so severe as to warrant reversal of his death sentence.

²⁵See NRS 34.810(1)(b)(2).

Ybarra also argues that this court failed to conduct a fair and adequate appellate review because this court's opinion respecting his direct appeal failed to explain how the mandatory review pursuant to NRS 177.055(2) was conducted in his case. However, this court conducted the mandatory review of Ybarra's death sentence in accordance with the law,²⁶ and he has failed to show that it was inadequate. Therefore, we conclude that he has not demonstrated actual prejudice on this basis.

Ybarra next asserts that his counsel failed to provide effective assistance on direct appeal. Specifically, he alleges that his counsel was remiss in failing to adequately frame certain direct appeal claims as federal constitutional issues. Ybarra speculates that he would have secured a more favorable outcome had counsel "federalized his claims." However, this speculation fails to demonstrate actual prejudice.

Ybarra also claims that he is incompetent to be executed. We conclude that the record before us belies this claim. He also asserts that he cannot be executed because he is mentally retarded. It appears that this issue has never been decided. The Supreme Court has held that the Eighth Amendment prohibits the execution of mentally retarded criminals.²⁷ And NRS 176.554(5) provides that a person sentenced to death may move to set his sentence aside on the grounds that he is mentally retarded if the matter has not been previously determined. The statute further provides that upon such a motion, the district court shall

²⁶See Ybarra, 100 Nev. at 176, 879 P.2d at 802-03.

²⁷Atkins v. Virginia, 536 U.S. 304 (2002).

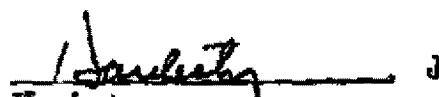
RYBARRA-05365-00000050

conduct a hearing pursuant to NRS 174.098 to determine the matter. Given this law, we conclude that this issue is not procedurally barred and remand to the district court for appropriate proceedings. In all other respects, we conclude that the district court properly dismissed Ybarra's petition.²⁵ Accordingly, we

ORDER the judgment of the district court **AFFIRMED IN PART AND REVERSED IN PART AND REMAND** this matter to the district court for proceedings consistent with this order.


Maupin


Gibbons J.


Hardesty J.

cc: Hon. Steve L. Dobrescu, District Judge
Federal Public Defender/Las Vegas
Attorney General George Chao/Carson City
Attorney General George Chao/Reno
White Pine County District Attorney
White Pine County Clerk

²⁵Ybarra also claims that the district court erred in striking exhibits supporting his petition. In light of our order, we conclude that no relief is warranted on this claim.

EXHIBIT 134

EXHIBIT 134

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT YBARRA, JR.,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 43981

FILED

FEB 02 2006

ORDER DENYING REHEARING

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is a petition for rehearing of this court's decision in Ybarra v. Warden.¹

A rehearing may be warranted when the court has overlooked or misapprehended a material fact or question of law or has overlooked, misapplied, or failed to consider controlling authority.² However, a petitioner may neither reargue matters that have been presented in previous briefs nor raise points for the first time.³

Ybarra argues that rehearing is warranted for several reasons. First, he contends that this court overlooked or misapprehended his claim that his mental disability precluded his execution. This contention lacks merit. This court considered Ybarra's assertion and rejected it, concluding that the record belied his claim. Here, Ybarra

¹Docket No. 43981 (Order Affirming in Part, Reversing in Part and Remanding, November 28, 2005).

²See NRAP 40(c)(2).

³See NRAP 40(c)(1).

merely reargues this matter and offers no basis for this court's further consideration of it. Therefore, we conclude that rehearing is not warranted on this claim.

Ybarra next argues that this court overlooked controlling federal constitutional authority cited in his opening brief in rejecting his claim that judges who preside over capital cases cannot be impartial because they are subject to removal for unpopular decisions. The only federal case to which Ybarra cited was Tumey v. Ohio.⁴ However, Tumey is inapposite here. And he has not proffered any evidence of partiality by any judges due to their election by popular vote. Therefore, we reject this claim as a basis for rehearing.

Ybarra further asserts that this court erred in rejecting his claims in part because he submitted an inadequate appendix on appeal. Although Ybarra's failure to provide pertinent records was not central to our rejection of his claims as procedurally barred, we will address his argument, which is two-fold. First, he contends that NRAP 10(a)(1) recognizes that this court has access to district court records and that NRAP 30(g)(2) contemplates that we will order supplementation of the appendix or will review the original record if justice requires. He argues that no rule exists placing counsel on notice that rejection of a claim could be based on an inadequate record and, thus, he had no opportunity to be heard respecting the new rule this court applied in his case.

Contrary to Ybarra's assertion, we did not institute a new rule in his case. Although NRAP 10(a)(1) and NRAP 30(g)(2) may contemplate

⁴273 U.S. 510 (1927).

in exceptional cases this court's intervention in securing an adequate record with which to review claims on appeal, this court has long held that the appellant bears the responsibility of providing the materials necessary for this court's review.⁵ Moreover, NRAP 30(a) and (b) plainly require an appellant to provide this court with an appendix that includes a number of enumerated items "and any other portions of the record essential to determination of issues raised in appellant's appeal."⁶ The rules upon which Ybarra relies in no way abrogate his obligation in this regard.

Second, Ybarra's counsel contends that this court has been vague and contradictory respecting his obligations under the rules relating to the content of appendices. Specifically, he points to this court's opinion in State v. Haberstroh wherein this court admonished counsel for submitting a lengthy appendix and only relying on a few pages to support his claims.⁷ We concluded that the several thousands of irrelevant pages submitted in that case violated NRAP 30(b) and cautioned counsel against engaging in similar conduct in the future.⁸

Our guidance in Haberstroh is clear—only documentation cited and relied upon in appellant's opening brief should be included in the

⁵See Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004); see also Byford v. State, 116 Nev. 215, 238, 994 P.2d 700, 715 (2000).

⁶NRAP 30(b)(3).

⁷119 Nev. 173, 69 P.3d 676 (2003).

⁸Id. at 179, 69 P.3d at 680-81.

appendix. Additionally, NRAP 30(b) places counsel on notice of what materials are not appropriate for the appendix.⁹

Here, Ybarra complained in his habeas petition that the district court committed an instructional error and made improper comments to the jury. However, despite submitting more than 5,000 pages in his appendix, he failed to include a copy of the challenged instruction or the relevant portion of the transcript so that this court could verify the challenged comments and place them in context. Furthermore, counsel's arguments and actions in seeking rehearing do not even speak to the actual merit of these claims. Were there such merit, this court would expect that counsel would have requested leave on rehearing to supplement the record and proffered the missing documents to substantiate the claims. No rehearing is warranted on these claims.

Finally, Ybarra complains that this court misapprehended his argument respecting the application of procedural default rules. Specifically, he argues that this court overlooked controlling due process and equal protection authority, alleged flaws in this court's analysis in State v. Dist. Ct. (Riker),¹⁰ and cases which he claims demonstrate that

⁹ NRAP 30(b) provides:

Except as otherwise required by this Rule, all matters not essential to the decision of issues presented by the appeal shall be omitted. Brevity is required; the court may impose costs upon parties or attorneys who unnecessarily enlarge the appendix.

¹⁰121 Nev. ___, 112 P.3d 1070 (2005).

this court continues to apply procedural default rules inconsistently and at our discretion. However, this court considered and simply rejected Ybarra's contention that alleged inconsistencies in this court's application of procedural default rules were routine and warranted abandonment of the rules entirely. Moreover, in Riker we explained that "any prior inconsistent application of statutory default rules would not provide a basis for this court to ignore the rules, which are mandatory."¹¹ Accordingly, we conclude that rehearing is not warranted on this claim.

For the above reasons, we deny the petition for rehearing.

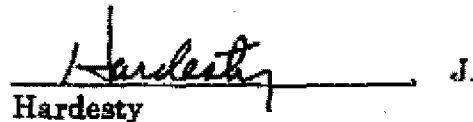
It is so ORDERED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Steve L. Dobrescu, District Judge
Federal Public Defender/Las Vegas
Attorney General George Chanos/Reno
White Pine County District Attorney
White Pine County Clerk

¹¹Id. at ___, 112 P.3d at 1077.

EXHIBIT 135

EXHIBIT 135

RECEIVED

MAR 20 2006

Federal Public Defender
Las Vegas, Nevada

IN THE SUPREME COURT OF THE STATE

MICHAEL RIPPO,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 44094

JOHN BEJARANO A/K/A JUAN
MUNOZ A/K/A JOHN BEJARNO,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 44297

FILED

MAR 16 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERKORDER DIRECTING ORAL ARGUMENT

This court has determined that oral argument will be of assistance in resolving these appeals. Accordingly, we hereby consolidate these appeals for the limited purpose of hearing oral argument. The clerk of this court shall schedule the appeals for oral argument before the en banc court in June 2006 in Carson City. The oral argument shall be limited to a total of 60 minutes.

The parties shall be prepared at oral argument to focus on the following three issues: (1) whether this court's decision in McConnell v. State¹ should be applied retroactively to the appellants

¹(McConnell I), 120 Nev. 1043, 102 P.3d 606 (2004) rehearing denied by McConnell v. State (McConnell II), 121 Nev. ___, 107 P.3d 1287 (2005).

on collateral review so as to invalidate the robbery aggravator found in both cases, i.e. that the murders were committed during the commission of a robbery;² (2) whether the "receiving money" aggravator³ found in appellant Bejarano's case is invalid under this court's decision in Lane v. State (Lane II);⁴ and (3) whether jury instruction no. 7, in appellant Rippo's case, improperly advised the jury that "[t]he entire jury must agree unanimously . . . as to whether . . . the mitigating circumstances outweigh the aggravating circumstances."⁵

²See NRS 200.033(4).

³See NRS 200.033(6).

⁴114 Nev. 299, 304, 956 P.2d 88, 91 (1998).

⁵More specifically, jury instruction no. 7 provided in pertinent part:

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 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 jurors. The entire jury must agree unanimously, however, as to

continued on next page . . .

It is so ORDERED.

Rau C.J.

cc: Federal Public Defender/Las Vegas
Christopher R. Oram
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Washoe County District Attorney Richard A. Gammick

... continued

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

EXHIBIT 136

EXHIBIT 136

MR1ppo-07016-1921

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1 SUPP
2 CHRISTOPHER R. ORAM, ESQ.
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7 Attorney for Petitioner
8 MICHAEL DAMON RIPPO

FILED
Feb 10 4 03 PM '04
Shirley L. Smith
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA

13 Plaintiff,

14 vs.

16 MICHAEL DAMON RIPPO,

17 Defendant.

CASE NO.: C106784
DEPT. NO.: XIV

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

22 COMES NOW, the Defendant, MICHAEL DAMON RIPPO, by and through his counsel
23 of record, CHRISTOPHER R. ORAM, ESQ. and does hereby submit his supplemental brief in
24 support of Defendant's Writ of Habeas Corpus filed with this Honorable Court.
25
26
27
28

///

000168


MR1ppo-07016-1922

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1 This supplement is made and based upon the pleadings and papers on file herein, the
2 foregoing Memorandum of Points and Authorities, and any oral argument adduced at the time of
3 hearing.
4

5 DATED this 10 day of February, 2004.

6 Respectfully submitted by:

7
8 
9 CHRISTOPHER R. ORAM, ESQ.
10 Nevada Bar No. 004349
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14 Attorney for Petitioner
15 MICHAEL DAMON RIPPO
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1 I. STATEMENT OF THE CASE

2 MICHAEL DAMON RIPPO (hereinafter referred to as RIPPO) stands convicted of a
3 number of felonies, including two counts of First Degree Murder. He was sentenced to death by
4 lethal injection by the trial jury. RIPPO was represented by Steve Wolfson and Phil Dunleavy at
5 trial.
6

7 RIPPO was indicted by the Clark County Grand Jury on June 5, 1992, on charges of
8 Murder, Robbery, Possession of Stolen Vehicle, Possession of Credit Cards Without the
9 Cardholder's Consent and Unauthorized Signing of Credit Card Transaction Document (1 ROA
10 1-4). RIPPO was arraigned on July 20, 1992, before the Honorable Gerard Bongiovanni and
11 waived his right to a trial within sixty days (5 ROA 18-23). Oral requests for discovery and
12 reciprocal discovery were granted by the Court (5 ROA 18-23). RIPPO'S formal Motion for
13 Discovery was granted by the Court on November 4, 1992 (5 ROA 1113-1125).
14

15 Prior to the District Court arraignment, the State filed a Notice of Intent to Seek the Death
16 Penalty alleging the existence of four aggravating circumstances, to wit: (1) the murders were
17 committed by a person under a sentence of imprisonment; (2) the murders were committed by a
18 person who had been previously convicted of a felony involving violence, (3) the murders were
19 committed during the perpetration of a robbery, and (4) the murders involved torture or
20 mutilation of the victims (1 ROA 7-8).
21

22 The trial date was continued several times, the first being at the request of defense
23 counsel on February 5, 1993, due to a scheduling conflict and the case was reset for trial for
24 September 13, 1993. On September 2, 1993, RIPPO filed a Notice of Alibi (2 ROA 284-286).
25 On September 10, 1993, the date set for the hearing of a number of pretrial motions the defense
26 moved to continue the trial date based on having just received from prosecutor John Lukens, on
27
28

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1 September 7th, notice of the State's intent to use at least two new expert witnesses and a number
2 of jail house snitches and discovery had not yet been provided on any of the new witnesses (2
3 ROA 295-306) . The Court granted the defense request to continue the trial date and same was
4 reset to February 14, 1994 (2 ROA 304)
5

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

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

25 The October trial date was also vacated and reset based on representations made by the
26 District Attorney at the calendar call on October 21, 1994 (4 ROA 828—829) . The date was
27
28

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

5 Jury selection commenced on January 30, 1996, and the evidentiary portion of the trial
6 began on February 2, 1996. An interruption of the trial occurred between February 7th and
7 February 26th based on the failure of the State to provide discovery concerning a confession and
8 inculpatory statements claimed to have been made by RIPPO to one of the State's witnesses. The
9 trial thereafter proceeded without further interruption and final arguments were made to the jury
10 on March 5, 1996.
11

12 Guilty verdicts were returned on two counts of first degree murder, and one count each of
13 robbery and unauthorized use of a credit card (5 ROA 1001). The penalty hearing commenced
14 on March 12, 1996 and concluded on March 14, 1996 with verdicts of death on both of the
15 murder counts. On the remaining felony counts RIPPO was sentenced to a total of twenty-five
16 (25) years consecutive to the murder counts (Minutes page 40).
17

18 RIPPO pursued a direct appeal to the Nevada Supreme Court with the conviction and
19 sentence being affirmed on October 1, 1997. Rippo v. State, 113 Nev. 1239, 946 P.2d 1017
20 (1997). RIPPO filed for Rehearing and on February 9, 1998, an Order was entered Denying
21 Rehearing. A Petition for Writ of Certiorari was filed with the United States Supreme Court and
22 Certiorari was denied on October 5, 1998. The Nevada Supreme Court issued it's Remittitur on
23 November 3, 1998. RIPPO timely filed the instant Petition for Writ of Habeas Corpus on
24 December 4, 1998.
25

26 **II. STATEMENT OF THE FACTS**

27 **A. TRIAL TESTIMONY**
28

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

7 On the 20th of February, Hooper became concerned because the overdue rent still hadn't
8 been paid and Jacobson's car hadn't been moved for a couple of days and the keys were in the
9 car, so he decided to check the apartment (10 ROA 101; 103; 122). Hooper used his master key
10 to get into the apartment which appeared to have been ransacked, with beer bottles on the floor,
11 the phone laying in the middle of the floor with the receiver off the hook and clothes everywhere
12 (10 ROA 104-106) After walking into the apartment Hooper observed two persons laying face
13 down in the walk-in closet (10 ROA 106-107). The police were then called (10 ROA 110)

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

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

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

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

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

27 Denise Lizzi arrived at the apartment complex and Jacobson went down and talked with
29

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

12 Hunt, after hitting Lauri with the bottle, could hear the stun gun going off in the bathroom
13 and RIPPO and Denise arguing (11 ROA 55). RIPPO wrestled Denise out of the bathroom and
14 into a big closet across the hall (11 ROA 55) . Hunt ran to the closet and observed RIPPO sitting
15 on top of Denise and still stunning her with the stun gun (11 ROA 56) . Hunt went back to where
16 Lauri was located and helped her sit up and RIPPO came out of the closet with a knife in his
17 hand and cut the cords off of appliances (11 ROA 58—59) . The cords were then used to tie the
18 hands and the feet of Lauri (11 ROA 60) . A bandana was then used to gag her mouth (11 ROA
19 61).

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

27 Hunt's story continued with RIPPO allegedly putting another cord between the ones on
28

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1 Lauri's hands and feet and picking her up and dragging her across the floor with it (11 ROA 68).
2 Lauri was choking (11 ROA 68). Hunt threw up and then went and looked in the closet and saw
3 RIPPO with his knee in the small of Denise's back with something around her neck and pulling
4 real hard and choking her (11 ROA 69). RIPPO started grabbing all kinds of things putting them
5 into a bag and told Hunt to clean up everything and put everything into the bag (11 ROA 71-72).
6 RIPPO wiped down everything in the apartment (11 ROA 73). At one point RIPPO untied
7 Denise's feet and removed her pants stating that he had bled on her pants (11 ROA 82).
8

9
10 When they left the apartment RIPPO had two bags with him and told Hunt to just go
11 home and wait and that nobody got hurt (11 ROA 79). Later that evening RIPPO called and told
12 her to meet him at a friend's shop (11 ROA 84). Hunt drove to the shop of Tom Sims and met
13 RIPPO who told her that he had a car for her, which was a maroon Nissan (11 ROA 84-85).
14 Hunt had a friend, Tom Christos, who could get paperwork on the car and RIPPO asked her to do
15 so (11 ROA 86). She therefore drove the car over to Christos' house (11 ROA 88).
16

17 The following day RIPPO told her that he had purchased an air compressor and some
18 tools at Service Merchandise that morning with a credit card (11 ROA 90-91). At the Meadows
19 Mall, Hunt and RIPPO purchased two pair of sunglasses for \$160.00 using a Gold Visa credit
20 card (11 ROA 92-93; 12 ROA 163). The credit card was presented and signed in the name of
21 Denny Mason (12 ROA 173-174). Upon returning to Deidre's residence, Hunt got into RIPPO'S
22 wallet because she wanted to get away from him and took the Visa card (11 ROA 93-96). The
23 credit card was in the name of Denny Mason (11 ROA 96).
24

25 According to Hunt after stealing the credit card, she went to the residence of Christos and
26 he told her to go get the maroon car (11 ROA 97-98). February 19, 1992 was the birthday of
27 Teresa Perillo and she was living with her boyfriend Tom Christos at that time, and she
28

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1 complained to Hunt that Christos had been beating her and that she didn't want to go back to the
2 house (11 ROA 99) . The two went to a shopping mall and on the way RIPPO beeped Hunt and
3 he wanted the credit card back and arrangements were made to meet at the mall, but RIPPO did
4 not show up (11 ROA 101-102) . While they were at the mall, Hunt bought cologne for Teresa
5 (11 ROA 102), and the pair went to several bars (11 ROA 103) and then got a room at the Gold
6 Coast using the Denny Mason credit card (11 ROA 104) . During the evening Hunt stopped at a
7 friend's house and got some primer paint and sprayed the car because she knew it was stolen and
8 wanted to change the appearance of the car (11 ROA 105).

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

20 In the early morning hours of March 1, 1992, Hunt had further contact with RIPPO at a
21 house in North Las Vegas (11 ROA 154-155) . As RIPPO was getting out of his car he was
22 saying that she had killed the two girls and he had proof (12 ROA 92). A confrontation occurred
23 and Hunt yelled back that he had killed those girls and she could prove it, and RIPPO ran around
24 the front of the car and started punching her in the face (11 ROA 156) . He also stunned her with
25 the stun gun and when he got her down on the ground started choking her and banging her head
26 into the pavement (11 ROA 159) . Other individuals pulled RIPPO off of Hunt and the police
27
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1 were called, but RIPPO left before the police arrived (11 ROA 159- 161).

2 Hunt was arrested for the killing and robbery of Lizzi and Jacobson on April 21, 1992 in
3 Yerington, Nevada (11 ROA 162). On June 2, 1992, she entered in to a plea agreement whereby
4 she wouldn't be prosecuted for the murders if she cooperated with the police and testified against
5 RIPPO (11 ROA 166). She pled guilty to robbery and was sentenced to fifteen years in prison
6 (11 ROA 168). Also part of the plea agreement was that Hunt would not be prosecuted for any
7 other uncharged conduct, including credit card fraud, selling drugs and stealing cars (12 ROA 9).
8 While in prison Hunt asked the District Attorney's Office to help her get reclassified to a
9 minimum facility and such a letter was written by Deputy District Attorney Dan Seaton (12 ROA
10 105-106). At the time of her testimony she had already been before the parole board and been
11 denied parole (12 ROA 120).

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

20 Teresa Perillo had lived with Tom Christos for about a year and was acquainted with
21 Hunt through Hunt's cousin Carrie Burns (13 ROA 7-9). On the way to the Mall, Hunt stopped
22 at an apartment complex and removed the car cover from a maroon Nissan and stated that
23 because it was Perillo's birthday she deserved to drive in a better car (13 ROA 10-12). Hunt told
24 her that she had repossessed the car from a bad drug deal (13 ROA 12). They then went to
25 Dillards in the mall and Hunt purchased perfume using a credit card (13 ROA 13). It was Hunt
26 that rented the motel room at the Gold Coast (13 ROA 18) Sometime after their arrival at the
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1 Gold Coast, Hunt left to go to Perillo's residence to pick up a phone book that had some
2 paperwork for the car in it (13 ROA 19). While Hunt was gone, Perillo checked the billing
3 information on the television and observed that the name on the room was Denny Mason (13
4 ROA 20) Perillo also observed Hunt to have identification belonging to other persons with her,
5 and remembered seeing the name Denise Lizzi (13 ROA 36). At nine o'clock the following
6 evening they took a gentleman that they had picked up at the Club Rock back to the bar and went
7 to the house of a friend of Hunt's so that Hunt could purchase a gun (13 ROA 21). There was no
8 transaction for a gun, but Hunt did ask for primer paint so that she could change the appearance
9 of the car (13 ROA 22). Hunt then took Perillo back to her residence and Perillo did not see
10 Hunt again after February 20, 1992 (13 ROA 25-26).

11
12 RIPPO had called the house of Christos on the 20th in the early evening hours looking for
13 Hunt and left a message with Christos that "the cat is out of the bag" (19 ROA 48-49). Hunt had
14 previously talked with Christos about his experience with stolen vehicles and she had come to
15 him looking for a way to get rid of the stolen car (19 ROA 52). Christos wasn't surprised when
16 she showed up on his doorstep with a stolen car (19 ROA 55).

17
18 Laurie Jacobson had worked at a bar called Tramps with Wendy Liston (13 ROA 43).
19 They had lived together in 1990 and 1991 (13 ROA 45). When Laurie started doing drugs a rift
20 arose between the two of them and Laurie was asked to move out (13 ROA 46-47). Liston was
21 trying to get her off of drugs but Lizzi kept coming over and trying to get her to continue to use
22 drugs (14 ROA 15). Liston had met Lizzi on only couple of occasions (13 ROA 49). Laurie
23 would obtain her drugs from Lizzi or through a friend associated with Lizzi known to her as
24 RIPPO (13 ROA 52). After Laurie moved into the Katie Arms apartments, Liston would go by
25 the apartment during her lunch hour take her food or money or anything she needed and at the
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1 same time was trying to convince her to move (13 ROA 54).

2 Liston had last seen Jacobson the Monday before she died; February 17, 1992 (13 ROA
3 58-59). On the evening before Jacobson had asked her to come over, and when she got there
4 Jacobson and RIPPO were discussing some morphine that she had (13 ROA 61). RIPPO and
5 Jacobson went into the bathroom and intravenously used the morphine (13 ROA 63). Liston also
6 went over to the apartment on her lunch hour on the 17th and RIPPO was also present at said
7 time (13 ROA 64). Jacobson needed the tire fixed on her car and Liston followed her to
8 Discount Tire in her car and then dropped her back off at her apartment (13 ROA 64-67).

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

14 Thomas Sims had operated a maintenance company since 1989 in Las Vegas (14 ROA
15 27). Sims had known RIPPO since 1985 and on February 18th, RIPPO entered his office early in
16 the afternoon and said that he had a car that he wanted Sims to look at and wanted to know if he
17 wanted to buy it or knew someone that would want to buy the car (14 ROA 28-30). RIPPO
18 brought a suitcase and perhaps a box with him and started going through the items on the couch
19 (14 ROA 31). Sims asked where the car had come from and RIPPO told him that someone had
20 died for the car (14 ROA 32). The car was a Nissan 300ZX and Sims told him that he did not
21 want the car there and to get it away from his shop (14 ROA 33). RIPPO wanted \$2,000.00 for
22 the car because he wanted to leave town (14 ROA 35). RIPPO gave Sims a number of tapes and
23 the suitcase (14 ROA 36-37). RIPPO left the car behind and was gone for about an hour and a
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1 half and came back around closing time with Diana Hunt (14 ROA 442) RIPPO had a stack of
2 one hundred dollar bills and stated that he had just won a royal flush, and Sims emphasized to
3 him that he wanted the car gone by the time he came to work the next morning (14 ROA 42).
4 When Sims came to work the next morning at 7:30 AM the car was gone (14 ROA 45).
5
6 On the 21st of February, Sims saw a broadcast that two women had been killed and that
7 one of them was named Denise Lizzi and realized that was the same name that was on a number
8 of the tapes that had been given to him by RIPPO (14 ROA 46- 47). On February 26th RIPPO
9 called Sims and wanted to come by and pick up a bottle of morphine he had left in a refrigerator
10 at the office (14 ROA 49-50). Sims didn't want RIPPO coming to his shop and agreed to meet
11 him somewhere to deliver it to him (14 ROA 53) . Sims eventually met RIPPO at a K-Mart
12 parking lot because RIPPO'S car had broken down and gave him the bottle (14 ROA 55-56) .
13 According to Sims, he asked RIPPO about the murders and RIPPO said that he had choked those
14 two bitches to death and that he had accidentally killed the one girl so he had to kill the other (14
15 ROA 56; 62) . Sims then drove RIPPO to the Stardust Hotel and on the way RIPPO told him that
16 he was carrying or dragging one of the girls to the back and her face hit the coffee table, and that
17 Diana Hunt was with him and had participated in the murders (14 ROA 57-58) . When asked if
18 he trusted Hunt, RIPPO replied that Hunt had hit the girl over the head with a beer bottle and that
19 he trusted her fully (14 ROA 59) . Sims also asked why one of the girls had no pants on and
20 RIPPO told him that he had cut his finger during the incident and dropped blood on her pants so
21 he had to take the pants and dispose of them (14 ROA 61) . Finally, RIPPO indicated that he
22 could have fucked both of the girls and that he didn't and that meant that he was cured (14 ROA
23 63).
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Sims had been interviewed by the police and only answered the specific questions that

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

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

9
10 The autopsies of Lizzi and Jacobson occurred on February 21, 1992, and were performed
11 by Dr. Sheldon Green (17 ROA 59). Initial observations of Lizzi revealed that a sock had been
12 pushed into her mouth and secured by a gag that encircled her head (17 PCA 62) Upon opening
13 the mouth to recover the sock, Green noted that the sock had been pushed in so that the tongue
14 was forced into the back of the throat, completely blocking off the airway (17 ROA 66; 68)
15 Pieces of cloth were tied around each wrist (17 ROA 68) Two ligature marks were completely
16 circling the neck that were consistent with an electrical type of cord (17 ROA 73; 81) There were
17 a few tiny pinpoint hemorrhages in the inside of the eyelids and on the white part of the eye (17
18 ROA 74) These are commonly found in situations where there is an acute asphyxial death (17
19 ROA 74) There was scarring in the left arm that was typical of people who have used intravenous
20 drugs (17 ROA 77) There were modest abrasions or scraping injuries of the skin on the forehead
21 and under the chin (17 ROA 77) Located in the neck area were two small stab wounds which
22 went through the skin into the band of muscle that comes from a point behind the ear to the top
23 of the breastbone (17 ROA 83) At the time of the autopsy there were no ligatures around the
24 ankle, however there were marks that would strongly suggest that there had been something tied
25 there following death (17 ROA 86) Internal examination showed a lot of hemorrhage in the
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1 deeper tissues and the ligaments that control the voice box and the thyroid gland that were typical
2 of strangulation (17 ROA 89) Green believed that there was a combination of manual and
3 ligature strangulation involved in the death of Lizzi (17 ROA 91) Toxicology revealed
4 methamphetamine in the blood and the urine in the amount of 5,288 nanograms which is
5 unusually high (17 ROA 95; 96).

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

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

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

26 The torso of Lauri Jacobson had glass shards from about the waist to the neck (17 ROA
27 31).

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

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

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

7 Carlos Ciapa, the sales manager at Sears in the Boulevard Mall was working in the
8 hardware department on February 19, 1992, and sold a compressor, a spray gun, an air sander,
9 couplings and a warranty to RIPPO (18 ROA 17 6—183). The items were paid for with a Sears
10 credit card in the name of Denise Lizzi and signed in the name of Denny Morgan (18 ROA 184-
11 185).

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

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

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1 Hunt had conversations with D'Amore wherein Hunt indicated that she had a romantic
2 interest in Michael Beaudoin and that Beaudoin hated Denise Lizzi and that Hunt was "psyching
3 out" Denise because Beaudoin had asked her to. Hunt told her that she like to beat up Denise.
4

5 D'Amore was not fond of Hunt and had told RIPPO that she wanted her out of the house.
6 Hunt had been stealing items out of her house, and D'Amore had caught her and confronted her
7 about it.
8

9 David Levine was in custody in the Southern Desert Correctional Center with RIPPO in
10 January, 1993 (19 ROA 145). Levine was a porter on the floor and had the opportunity to play
11 cards and talk with RIPPO (19 ROA 146). RIPPO had Levine call his girlfriend and give her
12 messages to handle things for him and to give messages to his attorney (19 ROA 150).
13 According to Levine, RIPPO confessed to him that he had killed the two women and that after
14 killing them he went and played video poker and hit a royal flush (19 ROA 153). RIPPO also
15 tried to figure out if Levine and he were on the street at the same time in order to use him as an
16 alibi witness and then a character witness (19 ROA 157).
17

18 **B. PENALTY HEARING TESTIMONY**

19 Laura Martin lived in an apartment in Las Vegas on January, 1982 (22 ROA 37; 39). She
20 had gone to bed at about midnight on the 15th and to the best of her knowledge the doors and
21 windows were locked when she went to bed (22 ROA 40-41). She was awakened at about 7:30
22 AM with RIPPO sitting on top of her with a knife to her throat (22 ROA 42-43) asking where her
23 money was kept (22 ROA 45-46). RIPPO tied her hands with her bathrobe tie and then tied her
24 feet with electrical cords (22 ROA 47-48). Five cut sections of electrical cord were found in the
25 apartment (22 ROA 97). When Martin asked questions he hit her and told her to shut up (22
26 ROA 48). RIPPO cut her clothes off with the knife, and then allowed her to put a tube top on (22
27
28

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1 ROA 50—52). He was just mumbling and moving around the apartment (22 ROA 52). RIPPO
2 just paced around the apartment and pretty much talking or mumbling the whole time that he was
3 there (22 ROA 86). She was asked if she wanted to engage in sex and when she begged him not
4 to do so, he just laughed (22 ROA 54). At one point RIPPO got her down on the bed and spread
5 her legs apart and raped her, although he did not ejaculate (22 ROA 59). At one point he placed
6 the knife in the area of her breasts and said that he was going to cut her nipples off and that he
7 had done it before, but that girl was dead (22 ROA 62).
8

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

16 On April 1, 1981, Metro Officer Jack Hardin became involved in the investigation of a
17 burglary of a Radio Shack in the area of Nellis and the Boulder Highway (22 ROA 109). Sixteen
18 year old RIPPO was identified as a suspect and Hardin therefore went to an apartment on East
19 Tropicana and made contact with the occupant and located a great deal of electronic equipment
20 (22 ROA 110-113). Also recovered were four firearms (22 ROA 115). RIPPO was arrested for
21 the burglary of the Radio Shack and of Holman's of Nevada and taken to the Clark County
22 Juvenile facility (22 ROA 119). He was also booked as a runaway (22 ROA 120). It was his
23 mother's request that he be committed to Spring Mountain Youth Camp (22 ROA 136).
24

25 RIPPO was committed to the Spring Mountain Youth Camp on April 29, 1981 and
26 remained there until August 26, 1981 when he was released to his parents (22 ROA 130). During
27
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1 his stay at SMYC RIPPO was under the supervision of Mr. Carriaga who died and the State
2 therefore called Robert Sergi who remembered RIPPO as pleasant to be around, but that he gave
3 the impression of just shining him on (22 ROA 152). Sergi never got the impression that he
4 intended to end his criminal lifestyle (22 ROA 161).

5
6 In December, 1981, two rifles and four handguns were recovered in the attic of a home
7 wherein RIPPO was living (23 ROA 10). RIPPO had run away from home and had stolen the
8 guns in residential burglaries according to a friend of RIPPO'S (23 ROA 11). On January 20,
9 1982, RIPPO was taken into custody on other charges and the burglary warrants were served at
10 the same time (23 ROA 12-13). When interviewed RIPPO couldn't remember most of the
11 burglaries because he was high on drugs (23 ROA 16). RIPPO had been arrested in front of an
12 apartment waving a gun and trying to gain entrance (23 ROA 28).

13
14 Tom Maroney was the juvenile parole officer for RIPPO and prepared the certification
15 report to the juvenile court recommending that RIPPO be certified as an adult on the charges of
16 sexual assault, burglary and others (23 ROA 40). After his arrest RIPPO escaped from the
17 Juvenile Detention Center (23 ROA 43). Maroney believed that RIPPO was very bright and
18 knew the difference between right and wrong (23 ROA 48). Psychologist Joanna Triggs
19 evaluated RIPPO while he was in the juvenile system and found that his memory was intact and
20 had no hallucinations and no evidence of paranoia or delusions (23 ROA 75). He had average to
21 above average intelligence, was not depressed, not suicidal, and had good social skills meaning
22 that he related very well and had good charisma (23 ROA 75).

23
24
25 On the sexual assault case, RIPPO was sentenced to life in prison with the possibility of
26 parole (23 ROA 101). RIPPO had told his Parole and Probation officer that he was under the
27 influence of phencyclidine which had been added to a marijuana cigarette when he committed the
28

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1 crime (23 ROA 108). RIPPO paroled from the prison sentence on October 24, 1989 (23 ROA
2 120). The parole was revoked on April 30, 1992 (23 ROA 125). He was therefore under a
3 sentence of imprisonment on February 18, 1992 (23 ROA 125).
4

5 Correctional Officer Eric Karst testified that in March, 1986 at Southern Nevada
6 Correctional Center in Jean, Nevada he searched the cell of RIPPO and located a nine inch buck
7 knife, a pair of nunchuks, a compass, money and a wrench (23 ROA 147) Also found was a brass
8 smoking pipe (23 ROA 149). RIPPO carried some status with him in prison such that he was
9 known as a stand up convict that carried his own and was very seldom challenged to fight
10 because his reputation was that he would not back down from any fights (23 ROA 151).
11

12 Victim impact testimony was offered from the father and mother-in-law of Lauri
13 Jacobson (23 ROA 175-183; 184-188). Also offering victim impact testimony were the mother,
14 brother and the father of Denise Lizzi (23 ROA 189-207).
15

16 James Cooper was employed as a vocational education instructor in laundry and dry
17 cleaning with the Nevada Prison system in the early 1980's and later became involved with a
18 prison ministry (24 ROA 6-7). Cooper first met RIPPO at the prison in Jean, Nevada in 1982 (24
19 ROA 7). RIPPO looked like an eighth grader and shaved his head to try and make himself look
20 tougher (24 ROA 8). RIPPO worked in the laundry and never caused any problems and was one
21 of the inmate workers that Cooper could leave unsupervised (24 ROA 9). Cooper had
22 maintained contact with RIPPO and believed that he was reaching out for the Lord as he grew
23 older (24 ROA 12). Cooper was of the opinion that RIPPO would not be a problem to the prison,
24 but would rather be an asset (24 ROA 13).
25

26 RIPPO'S stepfather, Robert Duncan, told the jury about his contact with RIPPO after he
27 had already reached the prison system (24 ROA 23). While he was incarcerated Duncan supplied
28

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

8
9 The younger sister of RIPPO, Stacie Rotterdam, told the jury about her relationship with
10 her brother and the early years of their lives (24 ROA 41) . RIPPO was the family clown,
11 whenever anyone was down or something was going on around the house he was there to make
12 them laugh (24 ROA 42) . When the parents would fight he would comfort his sisters and tell
13 them that it would be OK (24 ROA 42).

14
15 A letter from RIPPO'S mother was read to the jury because she could not come to Court
16 to testify based on orders of her doctor as she was suffering from acute anxiety reaction and
17 anxiety depression (24 ROA 63) . She described her son and the difficulties he encountered while
18 growing up and how he first got into trouble (24 ROA 61-67).

19
20 RIPPO exercised his right to allocution and told the jury that the reason that he pled guilty
21 to the sexual assault charge was to spare the victim the anguish of testifying (24 ROA 74) . He
22 further expressed his sorrow for the families of the two victims (24 ROA 75—76).

23
24 **III. ARGUMENT**

25 **I. RIPPO'S CONVICTION AND SENTENCE ARE INVALID UNDER THE**
26 **STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE**
27 **PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE**
28 **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. Starg, 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 counsel's performance was deficient, the defendant must next show that, but for counsel's 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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1 counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency.
2 Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

3
4 Under Strickland, defense counsel has a duty to make reasonable investigations or to
5 make a reasonable decision that makes particular investigations unnecessary. *Id.* at 691, 104
6 S.Ct. at 2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's
7 representation of the defendant fell below an objective standard of reasonableness. *Id.* at 688,
8 104 S.Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the
9 defendant must next show that, but for counsel's errors, the result of the trial probably would
10 have been different. *Id.* at 694, 104 S.Ct. at 2068.

11
12 The United States Constitution guarantees the Defendant the right to counsel for the
13 defense and has pronounced that the assistance due is the "Reasonably Effective Assistance of
14 Counsel During the Trial". See, Strickland v. Washington, 104 S. Ct. 2052 (1984).
15 Whereby, the Nevada Supreme Court adopted the Two Prong Standard of Strickland in Warden
16 v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).
17

18 In keeping with the standard of effective assistance of counsel, the United States Supreme
19 Court extended the right to counsel to include a convicted defendant's first appeal. See, Evitts v.
20 Lucey, 469 U. S. 387, 105 S.Ct. 830 (1985); See also, Douglas v. California, 372 U.S. 353
21 (1963).
22

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

25 Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to
26 raise on appeal, or completely assert all the available arguments supporting constitutional issues
27 raised herein. These issues include the following:
28

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

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

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

11 **III. THE PERFORMANCE OF TRIAL COUNSEL DURING THE GUILT**
12 **PHASE OF THE TRIAL FELL BELOW THE STANDARD OF**
13 **REASONABLY EFFECTIVE COUNSEL IN THE FOLLOWING**
14 **RESPECTS:**

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

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

20 Prosecutor Harmon described RIPPO to the jury as looking like a "choir boy". In order to
21 prejudice RIPPO in the eyes of the jury, the State showed the jury a picture of RIPPO as he
22 sometimes looked in prison which was absolutely not relevant to his appearance when not in
23 custody. In the photo RIPPO looked grungy and mean which was a stark contrast to his
24 appearance when not in custody and at trial. When RIPPO voiced concerns to his attorneys he
25 was told the photo didn't matter as the jury could see that RIPPO was clean cut during the trial.
26 The jury should not have been allowed to view RIPPO as he appeared in prison.
27
28

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1 It is hornbook law that evidence of other criminal conduct is not admissible to show that a
2 defendant is a bad person or has a propensity for committing crimes. State v. Hines, 633 P.2d
3 1384 (Ariz. 1981); Martin v. People, 738 P.2d 789 (Col. 1987); State v. Castro, 756 P.2d 1033
4 (Haw. 1988); Moore v. State, 96 Nev. 220, 602 P.2d 105 (1980). Although it may be admissible
5 under the exceptions cited in NRS 48.045(2), the determination whether to admit or exclude
6 evidence of separate and independent criminal acts rests within the sound discretion of the trial
7 court, and it is the duty of that court to strike a balance between the probative value of the
8 evidence and its prejudicial dangers. Elsbury v. State, 90 Nev. 50, 518 P.2d 599 (1974)

11 The prosecution may not introduce evidence of other criminal acts of the accused unless
12 the evidence is substantially relevant for some other purpose than to show a probability that the
13 accused committed the charged crime because of a trait of character. Tucker v. State, 82 Nev.
14 127, 412 P.2d 970 (1966). Even where relevancy under an exception to the general rule may be
15 found, evidence of other criminal acts may not be admitted if its probative value is outweighed
16 by its prejudicial effect. Williams v. State, 95 Nev. 830, 603 P.2d 694 (1979).

18 The test for determining whether a reference to criminal history is error is whether "a
19 juror could reasonably infer from the facts presented that the accused had engaged in prior
20 criminal activity." Morning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) citing
21 Commonwealth v. Allen, 292 PA.2d 373, 375 (Pa. 1972). In a majority of jurisdiction improper
22 reference to criminal history is a violation of due process since it affects the presumption of
23 innocence; the reviewing court must therefore determine whether the error was harmless beyond
24 a reasonable doubt. Porter v. State, 94 Nev. 142, 576 P.2d 275 (1978); Chanman v. California,
25 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

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

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1 have objected and prevented the use of the photograph.

2
3 **IV. THE PERFORMANCE OF TRIAL COUNSEL DURING THE PENALTY**
4 **PHASE OF THE TRIAL FELL BELOW THE STANDARD OF**
5 **REASONABLY EFFECTIVE COUNSEL IN THE FOLLOWING**
6 **RESPECTS:**

- 7
8 a.) **Failure to Object to Unconstitutional Jury Instructions at the Penalty**
9 **Hearing That Did Not Define and Limit the Use of Character Evidence by**
10 **the Jury.**

11 (See argument V. herein below)

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

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

19 (See argument V. herein below)

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

- 23 (c.) **Failure to Argue the Existence of Specific Mitigating Circumstances During**
24 **Closing Argument at the Penalty Hearing or the Weighing Process Necessary**
25 **Before the Death Penalty Is Even an Option for the Jury.**

26 Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to
27 raise on appeal, or completely assert all the available arguments supporting constitutional issues
28 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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1 closing argument at the penalty hearing did either trial counsel submit the existence of any
2 specific mitigating circumstance that existed on behalf of RIPPO. A close reading of the
3 arguments reveals the existence of a number of mitigators that should have been urged to be
4 found by the jury. These were:

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

20 Death penalty statutes must be structured to prevent the penalty being imposed in an
21 arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d
22 859 (1976); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2126, 33 L.Ed.2d 346 (1972). A capital
23 defendant must be allowed to introduce any relevant mitigating evidence regarding his character
24 and record and circumstance of the offense. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct.
25 2978, 49 L.Ed.2d 944 (1976); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1
26 (1982).

27 In Lockett v. Ohio, 438 US 586, 98 S.Ct 2954, 57 L.Ed. 2d 973 (1978) the Court held that
28 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. Duncier, 481 US 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and

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

2
3 Incredibly, at no point did RIPPO'S attorneys urge the jury to find the existence of
4 mitigating circumstances and weigh them against the aggravators. This failure not only
5 prejudiced RIPPO at the penalty hearing, it also precludes any meaningful review of the
6 appropriateness of the jury's verdict of death.

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

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

11
12 During closing argument at the penalty hearing the prosecutor made the following
13 improper argument to the jury to which there was no objection by trial counsel:

14 "And I would pose the question now: Do you have the resolve, the courage, the
15 intestinal fortitude, the sense of commitment to do your legal duty? (3/14/96 page
16 108).

17 In Evans v. State, 117 Nev. Ad. Op. 50 (2002) the Nevada Supreme Court considered the
18 exact same comments and found:

19 "Other prosecutorial remarks were excessive and unacceptable and should have
20 been challenged at trial and on direct appeal. In rebuttal closing, the prosecutor
21 asked, 'do you as a jury have the resolve, the determination, the courage, the
22 intestinal fortitude, the sense of legal commitment to do your legal duty?' Asking
23 the jury if it had the 'intestinal fortitude' to do its 'legal duty' was highly
24 improper. The United States Supreme Court held that a prosecutor erred in trying
25 'to exhort the jury to do its job'; that kind of pressure . . . has no place in the
26 administration of criminal justice' 'There should be no suggestion that a jury has a
27 duty to decide one way or the other; such an appeal is designed to stir passion and
28 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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1 (e) Trial Counsel Failed to Move to Strike Two Aggravating Circumstances
2 That Were Based on Invalid Convictions.

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

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

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

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

20
21
22
23 V. THE INSTRUCTION GIVEN AT THE PENALTY HEARING FAILED TO
24 APPRAISE JURY OF THE PROPER USE OF CHARACTER EVIDENCE
25 AND AS SUCH THE IMPOSITION OF THE DEATH PENALTY WAS
26 ARBITRARY NOT BASED ON VALID WEIGHING OF AGGRAVATING
27 AND MITIGATING CIRCUMSTANCES IN VIOLATION OF THE FIFTH,
28 SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE
CONSTITUTION.

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

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

3
4 NRS 200.030 provides the basic scheme for the determination of whether an individual
5 convicted of first degree murder can be sentenced to death and provides in relevant portion:

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

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

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

18 The State has alleged that aggravating circumstances are present in this case.
19 The defendants have alleged that certain mitigating circumstances are present in this case.

20 It shall be your duty to determine:

- 21 (a) Whether an aggravating circumstance or circumstances are found to exist; and
22 (b) Whether a mitigating circumstance or circumstances are found to exist; and
23 (c) Based upon these findings, whether a defendant should be sentenced to life
24 imprisonment or death.

25 The jury may impose a sentence of death only if (1) the jurors unanimously find at
26 least one aggravating circumstance has been established beyond a reasonable
27 doubt and (2) the jurors unanimously find that there are no mitigating
28 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 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:

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 reposed 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 it 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 RIPP0'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 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.

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1 Appellate counsel failed to provide reasonably effective assistance to RIPPO by failing to
2 raise on appeal, or completely assert all the available arguments supporting constitutional issues
3 raised in this argument.
4

5 At the penalty hearing Instruction number 17 given to the jury listed the seven mitigating
6 circumstances found in NRS 200.035. No other proposed mitigating circumstances were given
7 to the jury. The verdict forms given to the jury did not contain a list of proposed mitigating
8 circumstances to be found by the jury.
9

10 In every criminal case a defendant is entitled to have the jury instructed on any theory of
11 defense that the evidence discloses, however improbable the evidence supporting it may be.
12 Allen v. State, 97 Nev. 394, 632 P.2d 1153 (1961); Williams v. State, 99 Nev. 530, 665 P.2d 260
13 (1983).
14

15 In Lockett v. Ohio, 438 US 586, 98 S.Ct 2954, 57 L.Ed. 2d 973 (1978) the Court held that
16 in order to meet constitutional muster a penalty hearing scheme must allow consideration as a
17 mitigating circumstance any aspect of the defendant's character or record or any of the
18 circumstances of the offense that the defendant proffers as a basis for a sentence of less than
19 death. See also Hitchcock v. Duager, 481 US 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and
20 Parker v. Dunder, 498 US 308, 111 S.Ct 731, 112 L.Ed.2d 812 (1991).
21

22 NRS 175.554 (1) provides that in a capital penalty hearing before a jury, the court shall
23 instruct the jury on the relevant aggravating circumstances and "shall also instruct the jury as to
24 the mitigating circumstances alleged by the defense upon which evidence has been presented
25 during the trial or at the hearing". Byford v. State, 116 Nev. Ad. Op. 23 (2000). It was a
26 violation of the 14th and 8th Amendments to fail to instruct the jury on the defense mitigators
27 and further a 6th Amendment violation for counsel at trial not to submit a proper instruction and
28 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. RIPPO 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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1 death not be imposed in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153
2 (1976). The fundamental respect for humanity underlying the Eighth Amendment requires
3 consideration of the character and record of the individual offender and the circumstances of the
4 particular offense as a constitutionally indispensable part of the process of inflicting the penalty
5 of death. Woodson v. North Carolina, 428 U.S. 280 (1976). Evidence that is of a dubious or
6 tenuous nature should not be introduced at a penalty hearing, and character evidence whose
7 probative value is outweighed by the danger of unfair prejudice, of confusion of the issues or
8 misleading the jury should not be introduced. Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983).

9
10 The United States Supreme Court in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597,
11 115 L.Ed.2d 720 (1991) held that the Eighth Amendment erects no per se bar to the admission of
12 certain victim impact evidence during the sentencing phase of a capital case. The Court did
13 acknowledge that victim impact evidence can be so unduly prejudicial as to render the sentencing
14 proceeding fundamentally unfair and violate the Due Process Clause of the Fourteenth
15 Amendment. Payne, 111 S.Ct. at 2608, 115 L.Ed.2d at 735. In Homick v. State 108 Nev. 127,
16 136-137, 825 P.2d 600, 606 (1992) this Court embraced the holding in Payne, and found that it
17 comported fully with the intentment of the Nevada Constitution and declined to search for loftier
18 heights in the Nevada Constitution. In cases subsequent to Homick, the Court has reaffirmed its
19 position, finding that questions of admissibility of testimony during the penalty phase of a capital
20 murder trial are largely left to the discretion of trial court. Smith v. State, 110 Nev. 1094, 1106,
21 881 P.2d 649 (1994). The Court has not however addressed the issue of presentation of
22 cumulative victim impact evidence or been presented with a situation where the prosecution went
23 beyond the scope of the order of the District Court restricting the presentation of the evidence.

24
25 Some State courts have voiced disapproval over the admission of any victim impact
26 evidence at a capital sentencing hearing finding that such evidence is not relevant to prove any
27
28

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1 fact at issue or to establish the existence of an aggravating circumstance. State v. Guzek, 906
2 P.2d (Or. 1995). In considering a claim that victim impact testimony violated due process and
3 resulting in a sentence imposed under the influence of passion, prejudice or other arbitrary
4 factors, the Kansas Supreme Court in State v. Gideon, 894 P.2d 850, 864 (Kan. 1995) issued the
5 following warning while affirming the sentence:
6

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

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

20 **VIII. THE STOCK JURY INSTRUCTION GIVEN IN THIS CASE DEFINING**
21 **PREMEDITATION AND DELIBERATION NECESSARY FOR FIRST**
22 **DEGREE MURDER AS "INSTANTANEOUS AS SUCCESSIVE**
23 **THOUGHTS OF THE MIND" INSTRUCTION VIOLATED THE**
24 **CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL**
25 **PROTECTION, WAS VAGUE AND RELIEVED THE STATE OF IT'S**
26 **BURDEN OF PROOF ON EVERY ELEMENT OF THE CRIME. UNITED**
27 **STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA**
28 **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.

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

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

12 "... To the extent that our criticism of the Kazalyn instruction in Byford means that
13 the instruction was in effect to some degree erroneous, the error was not plain.

14 Therefore, under Byford, no plain or constitutional error occurred here.
15 Independently of Byford, however, Garner argues that the Kazalyn instruction
16 caused constitutional error. We are unpersuaded by his arguments and conclude
17 that giving the Kazalyn instruction was not constitutional error.

18 "... Therefore, the required use of the Byford
19 instruction applies only prospectively. Thus, with convictions predating Byford,
20 neither the use of the Kazalyn instruction nor the failure to give instructions
21 equivalent to those set forth in Byford provides grounds for relief." Garner, 116
22 Nev. Ad. Op. 85 at 15.

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

25 Premeditation need not be for a day, an hour or even a minute. It may be as
26 instantaneous as successive thoughts of the mind.

27 How quick is that?

28 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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1 It is respectfully urged that trial counsel was ineffective in failing to object to the
2 premeditation and deliberation instruction and that RIPPO was prejudiced by the failure.

3
4 IX. RIPPO'S CONVICTION AND SENTENCE INVALID UNDER THE
5 STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE
6 PROCESS, EQUAL PROTECTION OF THE LAWS, AND RELIABLE
7 SENTENCE DUE TO THE FAILURE OF THE NEVADA SUPREME
8 COURT TO CONDUCT FAIR AND ADEQUATE APPELLATE REVIEW,
9 UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14;
10 NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8;
11 ARTICLE IV, SECTION 21.

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

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

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

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

3
4 RIPPO also again hereby adopts and incorporates each and every claim and issue raised in
5 his direct appeal as a substantive basis for relief in the Post Conviction Writ of Habeas Corpus
6 based on the inadequate appellate review.

7 X. RIPPO'S CONVICTION AND SENTENCE IS INVALID UNDER THE
8 STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE
9 PROCESS, EQUAL PROTECTION, IMPARTIAL JURY FROM CROSS-
10 SECTION OF THE COMMUNITY, AND RELIABLE DETERMINATION
11 DUE TO THE TRIAL, CONVICTION AND SENTENCE BEING
12 IMPOSED BY A JURY FROM WHICH AFRICAN AMERICANS AND
13 OTHER MINORITIES WERE SYSTEMATICALLY EXCLUDED AND
14 UNDER REPRESENTED. UNITED STATES CONSTITUTION
15 AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I,
16 SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

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

20 RIPPO is not an African American, however was tried by a jury that was under
21 represented of African Americans and other minorities. Clark County has systematically
22 excluded from and under represented African Americans and other minorities on criminal jury
23 pools. According to the 1990 census, African Americans - a distinctive group for purposes of
24 constitutional analysis - made up approximately 8.3 percent of the population of Clark County,
25 Nevada. A representative jury would be expected to contain a similar proportion of African
26 Americans. A prima facie case of systematic under representation is established as an all white
27 jury and all white venire in a community with 8.3 percent African American cannot be said to be
28 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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1 in the manner in which the jury pool is selected. Use of a computer database compiled by the
2 Department of Motor Vehicles, and or the election department results in exclusion of those
3 persons that do not drive or vote, often members of the community of lesser income and minority
4 status. The computer list from which the jury pool is drawn therefore excludes lower income
5 individuals and does not represent a fair cross section of the community and systematically
6 discriminates.
7

8 The selection process for the jury pool is further discriminatory in that no attempt is made
9 to follow up on those jury summons that are returned as undeliverable or are delivered and
10 generate no response. Thus individuals that move fairly frequently or are too busy trying to earn a
11 living and fail to respond to the summons and thus are not included within the venire. The failure
12 of County to follow up on these individuals results in a jury pool that does not represent a fair
13 cross section of the community and systematically discriminates.
14

15 RIPPO was denied his Sixth Amendment right to a jury drawn from a fair cross-section of
16 the community, his right to an impartial jury as guaranteed by the Sixth Amendment, and his
17 right to equal protection under the 14th Amendment. The arbitrary exclusion of groups of
18 citizens from jury service, moreover, violates equal protection under the state and federal
19 constitution. The reliability of the jurors' fact finding process was compromised. Finally, the
20 process used to select RIPPO'S jury violated Nevada's mandatory statutory and decisional laws
21 concerning jury selection and RIPPO'S right to a jury drawn from a fair cross-section of the
22 community, and thereby deprived RIPPO of a state created liberty interest and due process of law
23 under the 14th Amendment.
24

25
26 XI. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL
27 CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL
28 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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1 on the arbitrary and capricious infliction of the death sentence. A person of
2 ordinary sensibility can fairly characterize almost every murder as "outrageously
3 or wantonly vile, horrible and inhuman." *Id.* at 428-429).

4
5 To be consistent with the 8th Amendment, Capital Murder must take into account the
6 concepts that death is different (California v. Ramos, 463 U.S. 992, 103 S. Ct. 3445 (1983)), in
7 that the death penalty must be reserved for those killings which society views as the most
8 "egregious . . . affronts to humanity." (Zant v. Stephens, 462 U.S. at 877, Footnote 15 (citing
9 Gregg v. Georgia, (1976) 428 U.S. 153, 184.)) Across the board eligibility for the death penalty
10 also fails to account for the different degrees of culpability attendant to different types of
11 murders, enhancing the possibility that sentencing will be imposed arbitrarily without regard for
12 the blameworthiness of the defendant or his act.

13
14 The Nevada Statutory scheme is so broad as to make every first degree murder case into a
15 death penalty case. The Statute does not narrow the class of murderers that are eligible for the
16 death penalty. The scheme leaves the decision when to seek death solely in the unbridled
17 discretion of prosecutors. Such a scheme violates the mandates of the United States Supreme
18 Court.
19

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MRIPPO-07016-1965

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Attorney for Petitioner
 MICHAEL DAMON RIPPO

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

12 day of March, 2004.

DAVID ROGER, DISTRICT ATTORNEY

By


 DEPUTY DISTRICT ATTORNEY
 200 S. Third Street, 7th Floor
 Las Vegas, Nevada 89155

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CONCLUSION

Therefore, based upon the arguments herein, Mr. Rippo would respectfully request the reversal of his sentence of death and convictions based upon appellate counsel failing to raise the necessary arguments on direct appeal and for violations of the United States Constitutions Amendments Fourteen, Eight, Five, and Six. In the alternative the Mr. Rippo would respectfully request and evidentiary hearing to establish the level of ineffective assistance of counsel.

DATED this 10 dated this February, 2004.

Respectfully submitted:



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EXHIBIT 137

EXHIBIT 137

FILE

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Shirley W. King
CLERK

1 **ORDR**
2 **DAVID ROGER**
3 **Clark County District Attorney**
4 **Nevada Bar #002781**
5 **STEVEN S. OWENS**
6 **Chief Deputy District Attorney**
7 **Nevada Bar #004352**
8 **200 South Third Street**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 455-4711**
11 **Attorney for Plaintiff**

**DISTRICT COURT
CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**
10 **Plaintiff,**

11 **-vs-**

12 **MICHAEL DAMON RIPPO,**
13 **#0619119**

14 **Defendant.**

CASE NO: C106784

DEPT NO: XIV

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

**DATE OF HEARING: 9/10/04
TIME OF HEARING: 9:00 P.M.**

20 **THIS CAUSE** having come on for hearing before the Honorable Donald M. Mosley,
21 **District Judge**, on the 10th day of September, 2004, the Petitioner being present, represented
22 **by CHRISTOPHER R. ORAM, ESQ.**, the Respondent being represented by **DAVID**
23 **ROGER**, District Attorney, by and through **STEVEN S. OWENS**, Chief Deputy District
24 **Attorney**, and the Court having considered the matter, including briefs, transcripts,
25 **arguments of counsel**, and documents on file herein, now therefore, the Court makes the
26 **following findings of fact and conclusions of law:**

27 **///**

28 **///**

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FINDINGS OF FACT

Defendant filed a Petition of Writ of Habeas Corpus (Post Conviction) on December 4, 1998, followed by attorney David Schieck's Supplemental Points and Authorities in Support of the Petition on August 8, 2002, alleging ineffective assistance of counsel at trial. The State filed its Opposition on October 14, 2002. Thereafter, attorney Chris Oram was appointed and filed a Supplemental Brief on February 10, 2004, alleging ineffective assistance of counsel on appeal. The State filed its Response on April 6, 2004. Affidavits were filed on behalf of trial counsel Steven Wolfson and Philip Dunleavy and appellate counsel David Schieck. An evidentiary hearing was held on August 20, 2004 and continued on September 10, 2004, at which all three attorneys gave testimony.

The performance of trial counsel did not fall below a standard of reasonable effectiveness under the Strickland test. With hindsight there are things that could be said about a trial that could be done differently, but counsel is not clairvoyant and can not know what the law will be in the future except through the benefit of hindsight. Defendant is entitled to a fair trial, but not a perfect trial. Trial counsel worked diligently and covered all the bases and did not fall below the Strickland standard.

Appellate counsel did not include certain issues in the appeal for three valid reasons: one, the issues were not preserved by contemporaneous objection and none of the alleged errors were so absolute that they would have been entertained without such preservation in the record; two, some of the issues were for ineffective assistance of counsel and are better left to be reviewed through the writ process; and three, many of the issues only arise through the perspective of hindsight. Appellate counsel was not remiss in any way and for credibility purposes concentrated on some very valid issues rather than raising every conceivable issue and risk alienating the court.

WHEREFORE, the Petition for Writ of Habeas Corpus (Post-Conviction) is denied.

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ORDER


THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 18TH day of November, 2004


DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY


STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

kjk

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