IN THE SUPREME COURT OF THE STATE OF NEVADA

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MICHAEL DAMON RIPPO, Appellant, vs. RENEE BAKER, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada, Respondents.	Supreme Court No. 53626 (Death Penalty Habeas Corpus Case)

PETITION FOR REHEARING

Appellant Michael Damon Rippo hereby petitions this Court for rehearing from its decision affirming the denial of post-conviction relief, filed on February 25, 2016. Rippo v. State, 132 Nev. Adv. Op. 11, 2016 WL 757510. On March 21, 2016, this Court granted Rippo's motion for an extension of time to file a petition for rehearing until April 4, 2016. Rippo petitions this Court for rehearing on the grounds that its decision overlooked material points of fact and law that would have required the Court to vacate Rippo's death sentences. NRAP 40(c)(2)(A).

A. Reconsideration is Required to Address Rippo's Arguments that Trial and Direct Appeal Counsel Were Ineffective in Failing to Challenge the Aggravating Circumstances Found by the Jury.

Rehearing is required because this Court overlooked Rippo's arguments of ineffective assistance of trial and direct appeal counsel as it related to his claim that the aggravating circumstances found by the jury in his case were invalid. This Court stated that Rippo's "claims are addressed [in its decision] only to the extent that they are the basis for Rippo's assertion of actual innocence as a gateway to consideration of his procedurally defaulted claims." Rippo, 2016 WL 757510, at *25 n.31. Rehearing is appropriate because this Court overlooked Rippo's arguments of cause-and-prejudice under Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997), which allow him to receive review of his underlying ineffective assistance of counsel claims.

1. Trial and Direct Appeal Counsel Unreasonably Failed to Challenge the Prior Conviction and Sentence of Imprisonment Aggravating Factors.

In his opening brief, Rippo argued that direct appeal counsel was ineffective in failing to attack the prior conviction and sentence of imprisonment aggravating factors in his case. OB at 65-67. During the

pre-trial proceedings, trial counsel filed a motion to strike the aggravating circumstances on the ground that the guilty plea canvass supporting the prior conviction was invalid, 35 JA 8406-8413, and counsel included as exhibits the plea hearings in the case. 36 JA 8610-8619, 8620-8626. However, appeal counsel did not include those documents in the appendix and he did not raise a claim challenging the jury's finding of the aggravating circumstances. Rippo suffered prejudice due to counsel's omission because it deprived this Court of the ability to determine whether the prior conviction was invalid during the course of conducting its mandatory review of Rippo's sentence and as part of a claim of constitutional error. See Rippo v. State, 113 Nev. 1239, 1265, 946 P.2d 1017, 1033 (1997); NRS 177.552(c).

There is a reasonable probability of a more favorable outcome on appeal if counsel had included the plea canvasses and argued that the prior conviction was invalid. This Court held that "[b]ased on our review of the record, we disagree that [Rippo's] guilty plea was involuntary or unknowingly entered." Rippo, 2016 WL 757510, at *25. However, the plea canvasses that were included with the instant petition show that the

trial court affirmatively misled a seventeen-year-old Rippo regarding the most important matters implicating the validity of his guilty plea – i.e., the minimum and maximum sentences that he could face.

Rippo's guilty plea was invalid because the trial court affirmatively misled him by stating that probation was an option when it was not. See former NRS 174.035(1); amended by 1995 Nev. Stat., ch. 480, § 2 at 1534. During the first aborted plea canvass, the trial court told Rippo that probation was a matter within the discretion of the court to impose. 36 JA 8614. The second plea canvass did not clarify this critical issue for Rippo. See 36 JA 8620-8626. However, the range of punishments for a sexual assault conviction did not allow for probation. See NRS 200.366; Aswegan v. State, 101 Nev. 760, 760-61, 710 P.2d 83, 83 (1985). At the time that Rippo's plea was entered state law required that the trial court correctly advise the defendant whether the offense allows for probation during the canvass. See Meyer v. State, 95 Nev. 885, 887-88, 603 P.2d 1066, 1067 (1979) ("Whether or not probation is available is critical to the defendant's understanding of the consequences of his guilty plea."); Aswegan, 101 Nev. at 760-61, 710 P.2d at 83; see also Heimrich v. State,

97 Nev. 358, 359-60, 630 P.2d 1224, 1224-25 (1981). This Court's decision denying Rippo's claim does not address how the plea canvasses for the prior conviction can be interpreted in any way other than that he was affirmatively misled by the trial court regarding the availability of probation.

Rippo also has a constitutionally-protected liberty interest in the application of former NRS 174.035(1). See Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). At the time of his plea, former NRS 174.035(1) stated that the trial court "shall not accept such a plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily and with understanding of the nature of the charge and consequences of the plea." (Emphasis added; amended by 1995 Nev. Stat., ch. 480, § 2 at 1534). Given that the offense and guilty plea in Rippo's case occurred after December 13, 1979, he was entitled to the benefit of this Court's decision in Meyer. See Heimrich v. State, 97 Nev. 358, 359-60, 630 P.2d 1224, 1224-25 (1981). The statutory provision created a liberty interest in Rippo's favor that could not be

disregarded without violating federal due process and equal protection principles.

Rippo was also affirmatively misled by the trial court regarding what it meant to receive a sentence of life without the possibility of parole. At the first aborted plea canvass, the prosecutor announced that he intended to argue for life without the possibility of parole for the sexual assault conviction. 36 JA 8613. In its canvass, the trial court informed Rippo that "[i]f you are given life without the possibility of parole, it would mean that you would have to spend a minimum of twenty years before you will become eligible for parole . . . ." 36 JA 8615 (emphasis added). The court further advised Rippo that "life without the possibility of parole [ ] does not mean he is going to get out in twenty years. It only means he becomes eligible to have his case heard before the Parole Board; and they will decide whether or not they want to let him out." 36 JA 8616 (emphasis added). At the second plea canvass, the trial court again affirmatively misled Rippo by saying that he could be eligible for parole after twenty years:

> If the court should give you life without the possibility of parole, that would mean that you would be -- you would only become eligible for parole. It does not mean that you would get parole at the end of twenty years . . . .

36 JA 8622.

The district court's statements that Rippo would be eligible for parole into the community in twenty years if he received life without parole was incorrect. See former NRS 213.120(1) ("No prisoner imprisoned under a verdict or judgment and sentence of life without possibility of parole shall be eligible for parole."). For one, a sentence of life without parole can only be commuted to a sentence of life with parole by the Pardons Board, not the Parole Board. Nev. Const. art. 5, § 14. Moreover, "the Board of Pardon Commissioners did not have the power to parole" defendants at the time of Rippo's guilty plea. Sechrest v. Ignacio, 549 F.3d 789, 810 (9th Cir. 2008) (emphasis in original). "There is a radical difference between a pardon and a parole. A pardon is the exercise of the sovereign's prerogative of mercy." Pinana v. State, 76 Nev. 274, 282, 352 P.2d 824, 829 (1960) (citation omitted). "In conditioning grants of clemency, the Pardons Board has broad discretion." 2004 Nev.

Op. Atty. Gen. No. 04 (Nev. A.G.), 2004 WL 823719, at *4 (citing Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 282 (1998)).

The State has characterized a pardon as an "unsubstantiated hope that one day [a defendant's] sentence might be commuted to a sentence allowing parole and his further speculate hope that, if his sentence is commuted, the parole board might someday grant him parole." Miller v. Ignacio, 112 Nev. 930, 936 n.4, 921 P.2d 882, 936 n.4 (1996) (characterizing a pardon as "rare" and "speculative") (emphasis in original). Nor can the trial court's statements be accurately analogized to a pardon (as opposed to a commutation) because "not once during [the period from 1973 to 1996] has [the pardons board] granted a pardon to someone serving a sentence of life without the possibility of parole." Miller, 112 Nev. at 936, 921 P.2d at 885. The trial court's statement to Rippo that he would be eligible for parole into the community after twenty years if he received a sentence of life without the possibility of parole was therefore inaccurate.

Even using a totality of the circumstances approach, there is nothing showing that Rippo was correctly advised by the trial court or

his counsel of the minimum and maximum sentence that he faced for the sexual assault conviction. See, e.g., Little v. Warden, 117 Nev. 845, 847, 850-51, 34 P.3d 540, 542-44 (2001). As this Court noted in Little, "a defendant's actual awareness of the ineligibility for probation must appear affirmatively in the record." Id. at 854, 34 P.3d at 546. There is nothing in the record affirmatively showing that Rippo was correctly made aware of the minimum or maximum sentences he could face. Rippo's claim was therefore not belied by the record and he should have received an evidentiary hearing to show that the prior conviction was invalid. Id. at 852-854, 34 P.3d at 545-46.

The plea canvasses contain further indications that Rippo did not enter a knowing, voluntary, and intelligent guilty plea. The aborted canvass showed that defense counsel did not come to the hearing with a copy of the charging document. 36 JA 8611. Rippo was sixteen years old at the time of the offense and had only turned seventeen a month before the plea hearing. 36 JA 8617. When the court heard that trial counsel had not discussed available defenses with Rippo, he continued the matter for a week as "[t]his young man is only seventeen, just having turned

seventeen." 36 JA 8618. When trial counsel requested that "I think we could just pass this a few minutes so I could talk to him" the court said "[n]o. I am going to continue this, sir. This is serious – very serious." 36 JA 8618. Even after the court accepted Rippo's guilty plea, there were further misstatements of law by the trial court as to the maximum sentence, 36 JA 8623-8624, and Rippo's ineligibility for probation was never clarified. Moreover, the canvasses still showed that Rippo did not admit to an essential element of the offense, i.e., sexual penetration. 36 JA 8625. In such circumstances, this Court cannot conclude that the guilty plea for the prior conviction is valid without requiring the district court to conduct an evidentiary hearing.

Finally, trial counsel were ineffective in failing to renew their motion to strike the prior conviction and sentence of imprisonment aggravating factors. At the hearing on the motion, trial counsel represented that the public defender's office had filed a motion to withdraw the guilty plea in the sexual assault case, and counsel's position was "that if the Nevada Supreme Court grants relief, then we should be allowed to ask this Court to revisit our motion." 3 JA 598. However, trial

counsel unreasonably failed to renew their motion to strike the aggravating circumstances, because counsel erroneously believed that they needed to vacate the underlying conviction before the trial court could strike the aggravators. But see Dressler v. State, 107 Nev. 686, 694 n.3 819 P.2d 1288, 1293 n.3 (1991) ("a defendant must be afforded an opportunity in any proceeding in which a prior judgment of conviction is offered for enhancement purposes to challenge the constitutional validity of the prior conviction."). Trial counsel's misunderstanding of the law was not a strategic decision, see Hinton v. Alabama, 134 S. Ct. 1081, 1088-89 (2014), and Rippo can demonstrate prejudice from trial counsel's failure to renew the motion to strike as explained above.

2. Trial and Direct Appeal Counsel Unreasonably Failed to Adequately Litigate the Validity of the Torture Aggravating Circumstance.

In his opening brief, Rippo argued that trial and direct appeal counsel were ineffective in failing to adequately litigate the admissibility of, and the jury's finding of, the torture aggravating circumstances as to both victims. OB at 4-5, 9, 63-64. This Court rejected Rippo's argument solely based upon the evidence showing that the victims had been

stunned with a stun gun. Rippo, 2016 WL 757510, at *25. Rehearing is required because this Court's decision overlooked the ineffective assistance of trial and direct appeal counsel components of Rippo's claim, id. at *25 n.31, which would have required the Court to invalidate the torture factor.

In his opening brief, Rippo explained that the only evidence showing that a stun gun was used on the victims came from Diana Hunt's testimony. OB at 63. Hunt was an accomplice in the offense and therefore her testimony had to be corroborated under NRS 175.291(1). However, not only was there no corroboration of Hunt's testimony, the only witness who could have supported Hunt was the medical examiner, Sheldon Greene, M.D., and Greene testified that there were no stun marks on either victim. 10 JA 2362-2363, 2382-2383. This Court noted that "the medical examiner [ ] testified that neither body revealed stun gun marks." Rippo, 2016 WL 757510, at *2. However, this Court never reconciled this fact with its ruling sustaining the jury's finding of the torture aggravating circumstance, which was based solely on the accomplice's testimony as to the purported use of a stun gun.

This Court also overlooked the ineffective assistance of counsel component of Rippo's claim which would have required that the torture aggravating circumstance be stricken. At the grand jury hearing, Dr. Greene testified that the stun gun would have left marks on the victims even if they were wearing clothing at the time. 1 JA 224-225. However, trial counsel unreasonably failed to cross-examine Greene at trial with his grand jury testimony that would have repelled the State's evidentiary presentation regarding the purported use of the stun gun. Trial counsel had actual notice of the importance of this issue because they were notified before trial that the prosecutor intended to obtain an expert witness to testify regarding the existence of stun marks, 2 JA 308, presumably because Dr. Greene would not do so. Trial counsel did not have a strategic justification for failing to adequately cross-examine Dr. Greene at trial in order to rebut the State's evidentiary presentation, and Rippo suffered prejudice as a result because the prosecutor falsely argued to the jury in closing argument that the reason that the victims did not have stun marks was because they were wearing clothing. 14 JA 3337-3338.

Trial counsel also did not have a strategic justification for failing to adequately litigate the admissibility of the torture aggravating circumstance before trial. In a pre-trial motion, trial counsel moved the court to require the prosecution to provide more specificity as to the grounds for the torture aggravating circumstance. 35 JA 8413. In response to the motion, the prosecutor argued only "torture to victim DENISE LIZZI by repeated shock with a stun gun." 35 JA 8416. Notably, the prosecutor did not argue the existence of torture as to Jacobson. However, trial counsel did not pose any objection to the submission of a special verdict form wherein the prosecutor asked the jury to find the existence of torture as to Jacobson. 16 JA 3838-3839. Cf. former SCR 250(II)(A)(3) (requiring notice of intent to be filed not "less than fifteen (15) days prior to the date set for commencement of trial") (effective August 17, 1993; repealed December 30, 1998). Trial counsel did not have a strategic justification for failing to object to the submission of the torture factor as to Jacobson.

Rehearing is also required because trial and direct appeal counsel failed to argue that the torture aggravating circumstance was invalid in

light of Dr. Greene's testimony that the victims did not have stun marks. This Court did not address Rippo's argument, but instead rejected his claim by referring to its decision on direct appeal. See Rippo, 2016 WL 757510, at *25. However, this Court's "finding" on direct appeal that Rippo shocked the victims "for the purpose of causing them pain and terror and for no other purpose," Rippo, 113 Nev. at 1264, 946 P.2d at 1033, finds no support in Diana Hunt's testimony, as Hunt testified that Rippo shocked the victims so that The victims could be subdued so that Rippo and Hunt could take their possessions. 5b JA 1401-047-48, 052, 055-56, 065-66. The facts of Rippo's case do not approach those of other cases where this Court has found insufficient evidence of torture. See, e.g., Dominguez v. State, 112 Nev. 683, 702-03, 917 P.2d 1364, 1378 (1996). In combination, the facts above require that this Court strike the torture aggravating circumstance as to both victims.

B. Reconsideration is Required as Intervening Authority Requires this Court to Provide Close Appellate Scrutiny of Rippo's Eligibility for the Death Penalty.

The United States Supreme Court recently held that state courts are required to provide "consideration of [a] juvenile's special

circumstances" on collateral review under the Eighth Amendment. Montgomery v. Louisiana, 136 S. Ct. 718, 725 (2016). In its decision, this Court rejected Rippo's claim "that the prior conviction could not be used as an aggravating circumstance for death penalty eligibility because he was only 16 years old at the time of the prior offense." Rippo, 2016 WL 757510, at *25. Whether considered in the context of reweighing after striking an invalid aggravating circumstance, see Clemons v. Mississippi, 494 U.S. 738, 748-49 (1990), or merely considering the weight to be properly ascribed to Rippo's prior conviction, Montgomery requires that this Court reconsider its decision in order to provide close appellate scrutiny of Rippo's death sentence.

The procedural history in this case shows that this Court has never properly considered Rippo's youth as a circumstance mitigating his culpability in the prior conviction. In its opinion on direct appeal, this Court erroneously found that the jury found "no mitigating circumstances." Rippo, 113 Nev. at 1265, 946 P.2d at 1033. However, the verdict form given to the jury did not allow this Court to render that conclusion because the jury was not asked to designate the mitigating

circumstances found, only whether they were outweighed by the aggravating circumstances. 16 JA 3835, 3840.

This Court has recognized that it is error to construe verdict forms like the one used in Rippo's case as a finding that the jury found no mitigation. See Lane v. State, 114 Nev. 299, 305, 956 P.2d 88, 92 (1998); accord McKenna v. McDaniel, 65 F.3d 1483, 1490 (9th Cir. 1995). This Court's misunderstanding regarding the jury's verdict form prevented it from adequately considering Rippo's youth at the time of the prior conviction and tainted its ability to conduct its mandatory review under NRS 177.055(2) on direct appeal. Cf. Burnside v. State, 131 Nev. __, 352 P.3d 627, 652 (2015) (considering defendant's "credible mitigation evidence" in a case where the jury found no mitigating circumstances). The result of this Court's decision is that it failed to provide close appellate scrutiny as required under the Eighth Amendment. Parker v. Dugger, 498 U.S. 308, 313 (1991).

This Court also failed to provide close appellate scrutiny of Rippo's eligibility for the death penalty on the first post-conviction appeal. In that decision, this Court invalidated three of the aggravating

circumstances found by the jury involving the circumstances of the murders. See Rippo v. State, 122 Nev. 1086, 1093, 146 P.3d 279, 284 (2006). However, this Court still found Rippo eligible for the death penalty based in substantial part on the aggravating circumstances resulting from his prior conviction. See id. Specifically, four members of this Court found the invalid aggravating circumstances harmless even though the jury was given an instruction at the penalty hearing requiring that they must be unanimous to find that Rippo was not eligible for the death penalty. See id. at 1095, 146 P.3d at 285; 36 JA 8633. This instruction violated Rippo's Sixth Amendment right to a jury verdict, Andres v. United States, 333 U.S. 740, 746-52 (1948), and his Eighth Amendment right to a reliable sentence. Davis v. Mitchell, 318 F.3d 682, 689 (6th Cir. 2003). The invalid instruction also prevented the Court from finding the invalid aggravating circumstances harmless, see Murtishaw v. Woodford, 255 F.3d 926, 973-74 (9th Cir. 2001), because the harm from the instruction tainted the outweighing element of the eligibility determination, not the jury's finding of mitigating circumstances as this Court found in its prior decision.

In the instant petition, Rippo presented compelling mitigation evidence that would have diminished his moral culpability in connection with instant offense and the prior conviction in particular. See Rippo, 2016 WL 757510, at *27 (Cherry, J., dissenting). However, this Court only considered the prejudice resulting from trial counsel's failure to present additional mitigation evidence as set forth in the declarations of family members, id. at *22, without also considering the mitigating weight of the mental health evidence and the evidence rebutting the State's presentation of future dangerousness at the penalty hearing. See id. at 20. This "Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the mitigating evidence – both that adduced at trial, and the evidence adduced at the habeas proceeding in reweighing it against the evidence of aggravation." Williams v. Taylor, 529 U.S. 362, 397-98 (2000) (citing Clemons). This Court must therefore reconsider its decision in order to provide Rippo with an individualized sentencing determination as required by the Eighth Amendment.

For the foregoing reasons, Rippo respectfully requests that this Court reconsider its decision and reweigh his death sentence by considering the totality of the evidence in mitigation against whatever aggravating circumstance(s) remain, and vacate his death sentence. In the alternative, Rippo requests that this Court grant his petition for rehearing and remand his case for an evidentiary hearing.

DATED this 4th day of April, 2016.

Respectfully submitted,

/s/ David Anthony

DAVID ANTHONY
Assistant Federal Public Defender
Nevada State Bar No.
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
702-388-6577

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the April 4, 2016, electronic service of the foregoing PETITION FOR REHEARING shall be made in accordance with the Master Service List as follows:

Steve S. Owens, Chief Deputy District Attorney

Adam Paul Laxalt, Attorney General

/s/ Felicia Darensbourg
An Employee of the Federal Public Defender