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because he did not match the description (A.A. Vol. 4, pp. 862). Four days later O'Brien was re-interviewed and she admitted that she had lied and that CASTILLO had come up with a plan whereby she would report a robbery and give the wrong description to the police (A.A. Vol. 4, pp. 864).

CASTILLO had told her that if she did not cooperate with the robbery she had better watch her back and that she would be shot and killed (A.A. Vol. 4, pp. 866). CASTILLO had not been charged with any involvement in the incident (A.A. Vol. 4, pp. 867).

On October 3, 1995, Jill Russell was living in a apartment complex on North Rainbow Boulevard and called the police because of a disturbance and when CASTILLO was arrested by the police he threatened to get her as he was taken away (A.A. Vol. 4, pp. 867-868). The next day CASTILLO forced his way into her apartment and the door hit her on the side of her face (A.A. Vol. 4, pp. 878). CASTILLO was charged with two counts of battery and the matter was still pending on December 17, 1995 (A.A. Vol. 4, pp. 880).

The granddaughter of Berndt, Lisa Keimach testified concerning the death of her grandmother and the impact on her life (A.A. Vol. 5, pp. 890). She would see her grandmother several times per year and on holidays (A.A. Vol. 5, pp. 891). Keimach also testified at some length concerning the quality of her grandmother's life and what she would do during the course of her days (A.A. Vol. 5, pp. 892-895).

Ronda, another granddaughter and the sister of Lisa was also called by the State (A.A. Vol. 5, pp. 901). She was a school teacher just like her grandmother and related a number of stories concerning becoming a school teacher and the value of her grandmother to her as a teacher (A.A. Vol. 5, pp. 901-904). She also talked about the effect of the death of her grandmother on her life (A.A. Vol. 5, pp. 904-919).

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Finally, the State recalled the daughter of Berndt, Jean Marie Hosking (A.A. Vol. 5, pp. 919). She told the jury about her early childhood and living with her mother and about how she had moved out west and then her mother had followed (A.A. Vol. 5, pp. 920-922). She also talked about the early years of Berndt's career as a school teacher (A.A. Vol. 5, pp. 923). Hosking concluded her testimony with a description of the impact on her life of the loss of a mother (A.A. Vol. 5, pp. 930-932).

CASTILLO called Dr. Lewis Etcoff to testify concerning his findings and opinions based on his examinations of CASTILLO (A.A. Vol. 5, pp. 938). Etcoff, was Board certified in neuropsychology and had testified as an expert in the Eighth Judicial District about two dozen times (A.A. Vol. 5, pp. 940). Etcoff had reviewed the available information concerning CASTILLO and had conducted a two and one half hour interview with him (A.A. Vol. 5, pp. 941-943).

During the first five years of life CASTILLO moved about twenty times thorough various states (A.A. Vol. 5, pp.943). There was an enormous amount of family dysfunction in the parents, and his father left his mother after placing a knife to her throat and threatening to kill her (A.A. Vol. 5, pp. 945). His mother was very young and suffered a sever depressive disorder for which she was eventually hospitalized and had to undergo electroconvulsive therapy (A.A. Vol. 5, pp. 945). CASTILLO was seriously disturbed emotionally, mentally, and behaviorally sufficient that he suffered a reactive attachment disorder which is a very serious psychiatric disorder (A.A. Vol. 5, pp. 946). By the age of five he was unable to formal normal human bonds and was doing some very significant violent misbehavior (A.A. Vol. 5, pp. 946).

Reactive attachment disorder is a type of disorder that can only rarely be overcome with treatment (A.A. Vol. 5, pp. 947). Such children can work in society and marry, but the chances

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of them being successfully employed or successful in normal social situation is very much reduced (A.A. Vol. 5, pp. 948). There were many components of CASTILLO'S history that validated the diagnosis (A.A. Vol. 5, pp. 949). To compound the problem at age nine or ten CASTILLO was diagnosed with Attention Deficit Hyperactivity Disorder (A.A. Vol. 5, pp. 950). ADHD is a neurological disturbance wherein, there is essentially a lack of one of the neurotransmitters in the brain, dopamine, reaching the frontal lobes (A.A. Vol. 5, pp. 951). The only way to successfully treat someone with the combination fo the two disorders found by Dr. Etcoff is a long term residential treatment center with a small number of other children until they are eighteen (A.A. Vol. 5, pp. 953). Such treatment is not available and was not available during the time that CASTILLO was involved with the juvenile system (A.A. Vol. 5, pp. 954).

The final factor found by Etcoff that contributed to the problems of CASTILLO was that his stepfather was physically and mentally abusive (A.A. Vol. 5, pp. 955). The instances of abuse, included locking him in his room and making him urinate in a pan, forced to each hot chilies until he vomited, and hitting him with a inch thick leather strap (A.A. Vol. 5, pp. 956). CASTILLO was so afraid of his stepfather that he would run away all of the time (A.A. Vol. 5, pp. 956).

As a result of all the factor, CASTILLO also developed a childhood onset conduct disorder (A.A. Vol. 5, pp. 958). This is an oppositional behavior that goes beyond having a chip on your shoulder and is a very serious pre-sociopathic behavior that has to be dealt with at some point or it worsens (A.A. Vol. 5, pp. 959). Most people who suffer the type of childhood as did CASTILLO either turn out to be criminals or very mentally ill or is some other ways so dysfunctional that their lives are wasted in comparison to the way their lives might have turned out (A.A. Vol. 5, pp. 960).

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Jerry Harring had worked at the Nevada Youth Training Center since November, 1974, (A.A. Vol. 5, pp. 993). At the time of his testimony he was a classification counselor (A.A. Vol. 5, pp. 993). He first met CASTILLO in 1982 when he was just twelve years old (A.A. Vol. 5, pp. 994). CASTILLO had written a letter to Harring to be read to the other kids that went through the program, telling them of all the mistakes that he had made and that they should listen to what the counselors told them (A.A. Vol. 5, pp. 995). The letter was to be read to the kids when they were being orientated through the Reception and Classification procedure (A.A. Vol. 5, pp. 997). The letter has had a very positive impact on the teaching of the classes (A.A. Vol. 5, pp. 999). CASTILLO was a very troubled child and the resources of the Elko facility were and are limited.(A.A. Vol. 5, pp. 999).

Sonny Carlman, a correctional officer with the Clark County Detention Center, was familiar with CASTILLO from inside of the jail (A.A. Vol. 5, pp. 1020). CASTILLO was a worker in the unit and had not given Carlman any problems during the two and one half months that he had been supervising him (A.A. Vol. 5, pp. 1028).

Tammy Bryant, testified concerning her relationship with CASTILLO (A.A. Vol. 5, pp. 1026). When she first met him he had no social skills and wouldn't really go anywhere (A.A. Vol. 5, pp. 1028). He was working everyday and then just basically coming home (A.A. Vol. 5, pp. 1028). CASTILLO talked about wanting to change his life, and she was the first person to ever really show him any attention and affection (A.A. Vol. 5, pp. 1029). CASTILLO did not even know how to cook such simple items as chilly hot dogs, and he was happy when she showed him how (A.A. Vol. 5, pp. 1030).

The last witness called by CASTILLO at the penalty hearing was his mother Barbra Sullivan (A.A. Vol. 5, pp. 1037). CASTILLO was born in St. Louis on December 28, 1972

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(A.A. Vol. 5, pp. 1038). She was only eighteen when he was born and at the time was floating back and forth between her mother's house and her in-laws (A.A. Vol. 5, pp. 1039). She got thrown out of both houses after CASTILLO was born and then left him with the in-laws and went to Lake Tahoe (A.A. Vol. 5, pp. 1041). She made a living for the first four years on Billy's life by working different waitress jobs (A.A. Vol. 5, pp. 1043). CASTILLO'S father was in the military and they were stationed oversea when she became pregnant and after she was thrown down a flight of stairs by the father she was returned to the States and the father was sent to the brig (A.A. Vol. 5, pp. 1045). The father, William Thorpe was a very violent individual that had numerous run-ins with the law for robbery and beating people (A.A. Vol. 5, pp. 1046). He even spent time in prison (A.A. Vol. 5, pp. 1047). All of Thorpe's brother's were also involved in criminal activities and were violent individuals (A.A. Vol. 5, pp. 1048). Thorpe's father had shot him with a shotgun on one occasion (A.A. Vol. 5, pp. 1049). Thorpe tried to kill Sullivan on three occasions and the last time he put a gun in her mouth and flipped out and ended up in an institution (A.A. Vol. 5, pp. 1057).

After Sullivan was thrown out of the residences available to her and CASTILLO, she turned to prostitution to support herself (A.A. Vol. 5, pp. 1049). After six months in Lake Tahoe she had gotten a job, married and a home and she returned to St. Louis and picked up CASTILLO and brought him to Nevada (A.A. Vol. 5, pp. 1052). She had to fight for custody in Missouri because CASTILLO'S grandmother's filed to get custody of him (A.A. Vol. 5, pp. 1053).

With respect to the early years of CASTILLO'S life, Sullivan admitted that she didn't love him like she should have and like she did her later born children (A.A. Vol. 5, pp. 1057). This was because she hated his father so much, she saw to his needs but didn't give him any love,

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she just didn't have it in her during that period of her life (A.A. Vol. 5, pp. 1059).

CASTILLO had his first contact with the authorities when he was five years of age and Sullivan just was not equipped to deal with it (A.A. Vol. 5, pp. 1059-1060).

CASTILLO gave an unsworn statement to the jury explaining some of his feelings, regrets, and expressing remorse for his conduct.

ARGUMENT

I. MR. CASTILLO IS ENTITLED TO HAVE HIS SENTENCE OF DEATH AND CONVICTIONS REVERSED BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.

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

1. counsel's performance fell below an objective standard of reasonableness,
2. counsel's errors were so severe that they rendered the verdict unreliable.

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

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II. MR. CASTILLO WAS DENIED DUE PROCESS BY THE IMPROPER ARGUMENT AT THE PENALTY HEARING WHEREIN THE PROSECUTOR ASKED THE JURY TO VOTE AGAINST MR. CASTILLO AND IN FAVOR OF FUTURE INNOCENT VICTIMS PURSUANT TO THE JURY'S DUTY.

During the penalty hearing the prosecutor was permitted by the trial court to engage in an argument that has been disapproved for many years. The objectionable argument during the penalty hearing was as follows:

> The issue is to you, as the trial jury, this afternoon have the resolve and the courage, the determination, the intestinal fortitude, the sense of commitment to do you legal and moral duty, for what ever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets, I say it based upon the testimony of Dr. Etcoff and correctional officer Berg about the threat he is to other inmates, and I say it based upon the analysis of his inherent future dangerousness, whatever the decision is, you will be imposing a judgement of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant.
> Mr. Schieck: I am going to object your honor to this argument of future victims.

Mr. Schieck objected to this argument. On direct appeal appellate counsel raised this exact issue. On April 2, 1998, this Court specifically rejected this argument. This Court only addressed the argument of appellate counsel regarding the future dangerousness contention made by the prosecutor. This Court held that,

> In Howard v. State, we held that it is also improper to ask the jury to vote in favor of future victims and against the defendant. 106 Nev. 713, 719, 800 P.2d 175, 178 (1990) (Supreme Court Decision pp. 12). In the instant case the prosecutor presented to the jurors just a choice when he said "You will be imposing a judgment of death and it is just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for the future victim of this defendant This language improperly suggests that the jury must decide whether to execute the defendant or bear responsibility for the death of an innocent future victim. Presenting the jury's decision as a choice between killing a guilty person or an innocent person will likely result in jurors decision to impose the death penalty more often then if the jury's decision had been portrayed in it's proper light.

This Court then rejected Mr. Castillo's argument based upon the prosecutor's statement of future dangerousness. This Court found the prosecutor's statements were improper, however,

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they did not rise to the level of reversible error. It is important to note, that the prosecutor that made this argument against Mr. Castillo was Chief Deputy District Attorney Mel Harmon. It is also important to note, that appellate counsel only argued that the prosecutor's comments should be reversed based upon future dangerousness. Appellate counsel failed to make any argument regarding the prosecutor's reference to the jury's legal and moral duty. It is Mr. Castillo's contention that appellate counsel was ineffective for failing to raise the argument that Mr. Mel Harmon's statements resulted in reversible error based upon advising the jury that they had legal and moral duty to execute.

As was previously stated, this Court issued an opinion affirming Mr. Castillo's sentence of death in 1998.

On July 24, 2001, this Court decided the case of Vernell Ray Evans v. State of Nevada, 117 Nev. Ad.Op. 50. In Evans, the defendant had been sentenced to die as a result of being convicted of four counts of first degree murder.

The facts surrounding Mr. Evan's case are horrendous. Apparently, Mr. Evans entered an apartment seeking revenge against a lady who had assisted the authorities on a drug investigation. Id. As a result, Mr. Evans and a cohort proceeded to shoot and kill four human beings. The intended target was in fact tortured in her bathtub. A four year old child was present in the apartment and hiding in the closet. She testified that it was the defendant who had committed the murders. Id. pp.3.

This Court reversed Mr. Evans' sentence of death based in part upon the improper argument of the prosecutor during closing arguments. The following is an excerpt of the prosecutor's improper argument during Mr. Evans' penalty phase, it is important to note, that the prosecutor who made the argument was again Chief Deputy District Attorney Mel Harmon. It is

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also important to compare the improper arguments made by Mr. Harmon in Mr. Evans' case to the arguments made in Mr. Castillo's. The arguments in question are almost identical. Moreover, the Court will find that the arguments in Mr. Castillo's are slightly more egregious than the arguments made against Mr. Evans by the same prosecutor. In Evans, during rebuttal closing the prosecutor stated,

> Do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of commitment to do you legal duty? pp. 14-15. The Nevada Supreme Court explained, " Asking the jury if it had the intestinal fortitude to do it's legal duty was highly improper the United States Supreme Court held that a prosecutor erred in trying to exhort the jury to it's job; that kind of pressure. . . has no place in the administration of criminal justice. There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir the passion and can only distract a jury from it's actual duty; impartiality. The prosecutor's words here "resolve", "determination", "courage", "intestinal fortitude", "commitment", "duty", were particularly designed to stir the jury's passion and appeal to partiality. Id.

This Court then held,

> Although this Court noted a similar argument in Castillo v. State, 114 Nev. 271, 279, 280, 959 P.2d 103, 109,(corrected by McKenna v. State, 114 Nev. 1044, 1058, 968 P.2d 739, 748 (1998), it addressed only the prosecutor's argument on future dangerousness, not the reference to the jury's duty. Id

This Court specifically stated in Evans, that, Appellate counsel for Castillo only argued future dangerousness regarding his comment and did not raise the issue of the jury's duty. It appears that this Court had indicated that the remarks made by Mr. Harmon in Evans, were improper and resulted in a reversal of a death sentence based upon his argument regarding the jury's duty portion of Mr. Harmon's argument. This Court specifically states, " that we considered a similar type argument by Mr. Castillo however, he only argued future dangerousness and not the jury's duty." Therefore, it seems obvious that Mr. Castillo's appellate counsel was ineffective for failing to raise the correct issue regarding Mr. Harmon's statements.

It is important to compare Mr. Harmon's statements in both Evans and Castillo to

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demonstrate the identical nature of his arguments. In Castillo, Mr. Harmon states, "The issue is to you, as the trial jury, this afternoon have the resolve, and the courage, the determination, the intestinal fortitude, the sense of commitment to do your legal and moral duty, for what ever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets. . ." In Evans, Mr. Harmon stated "Do you as a jury have the resolve the determination, the intestinal fortitude, the sense of commitment to do your legal duty?"

This Court specifically held in Evans that it was improper for the prosecutor to use such word to as resolve, determination, courage, intestinal fortitude, commitment, and duty. In Mr. Castillo's case the prosecutor used the word resolve, courage, determination, intestinal fortitude, and went one step further by saying the commitment legal and moral duty.

In Evans, Mr. Harmon simply stated, "Do you have the commitment to do your legal duty." In Castillo, Mr. Harmon went one step further and asked the jury regarding their commitment to their legal and moral duty. Subsequently, the Evans case demonstrates that Mr. Harmon's argument's in Castillo were more egregious than the Evans case based upon his question regarding the jurors legal and moral duty. However, it appears that the arguments by Mr. Harmon in both cases are identical. The arguments appear to come from the same script. However, this Court has determined that Mr. Evans should receive a new penalty phase for the horrendous and brutal murder of four innocent people whereas, Mr. Castillo was not entitled to a new penalty phase based upon the same identical argument.

This Court specifically, addressed the comparison of Evans to Castillo and determined that unfortunately, appellate counsel only raised the argument regarding Mr. Harmon's statement of future dangerousness. Therefore, Mr. Castillo now contents that appellate counsel was ineffective pursuant to the Strickland standard. Had appellate counsel raised the argument that

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the prosecutor had violated his constitutional rights based upon his arguments to the jury regarding their legal and moral duty that the outcome of the case would have resulted in a new penalty phase.

At the evidentiary hearing of August 02, 2002, appellate counsel, Mr. Schieck explained that he had raised the issue on the grounds of future dangerousness and did not raise it on the grounds of the jury's moral and legal duty. (A.A. Vol. 6, pp. 1320). The comparison of the argument's made by Mr. Harmon in both cases is remarkably similar. However, that the argument made in Mr. Castillo's case is somewhat more egregious. In fact, this Court explained in Evans , the prosecutor's words, "resolve", "determination", "courage", "intestinal fortitude", "commitment", "duty" – were particularly designed to stir the jury's passion and appeal to partiality. Id. page 15 .

Surely, the State of Nevada can not argue that somehow Mr. Castillo who is convicted of the murder of one individual is somehow presents a more egregious case then Mr. Evans who brutally murdered and tortured at least one of the four victims. The evidence in Mr. Evans' case appears to be overwhelming. Hence, an argument that the evidence in Mr. Castillo's case is overwhelming is of no bearing.

Additionally, it should be noted that Mr. Castillo is a white man. Mr. Evans is a African American man. The similarities in the case are apparent. Mr. Harmon was a prosecutor in both cases. Mr. Evans, a African American man, was convicted of the heinous murder of four innocent individuals. Mr. Castillo, a white man has been convicted of murdering one individual. The same prosecutor has made an identical argument in both Mr. Evans and Mr. Castillo's penalty phase. Mr. Evans' has had his sentence of death reversed. Mr. Castillo has not.

It would be Mr. Castillo's contention that the State of Nevada has clearly treated him

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differently that Mr. Evans. The State can contend that there is overwhelming evidence against Mr. Castillo. It is obvious that there was overwhelming evidence over Mr. Evans. A young child was able to identify Mr. Evans as the person she saw in the apartment committing those brutal acts. The question then becomes why has the Court determined that Mr. Evans is entitled to a new hearing based in part upon the arguments of Mr. Harmon, yet, determined that Mr. Castillo is not entitled to a new penalty phase with the identical argument made by the same prosecutor. The Fourteenth Amendment of the Untied States Constitution section one states,

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state in wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the law. emphasis added.

In Regents of the University of California v. Bakke, 438 U.S. 265; 98 S.ct. 2733; 57 L.Ed. 2d 750, (1978), the United States Supreme Court reasoned that, "[P]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." Id. at headnote 12. Additionally, the U.S. Supreme Court explained that,

> Without findings of Constitutional or Statutory violations, it can not be said that the Governments has any greater interest in helping one individual than in refraining from harming another. Thus, the Government has no compelling justification for inflicting such harm. Id. at headnote 13.

A review of Mr. Evans case compared to Mr. Castillo' s case demonstrates that Mr. Castillo is absolutely entitled to a reversal of his death sentence based upon the improper comments of the prosecutor. In the event he is not entitled to a new penalty phase Mr. Castillo specifically raises the argument that the State of Nevada has violated the equal protection clause and protected the rights of Mr. Evans, a African American, over the rights of Mr. Castillo, a white man. The State of Nevada has denied Mr. Castillo equal protection of the laws based

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upon his race.

Based upon the foregoing argument Mr. Castillo demands that this Court reverse his sentence of death and permit him a new penalty phase based upon the violations Mr. Castillo's rights under the United States Constitution, Amendments Fourteen, Eight, Five, and Six.

III. MR. CASTILLO'S SENTENCE OF DEATH FOR THE USE OF A DEADLY WEAPON IN COMBINATION WITH HIS FIRST DEGREE MURDER CONVICTION MUST BE OVERTURNED BASED UPON A CROWBAR NOT BEING A DEADLY WEAPON.

On September 4, 1996, the jury returned guilty verdicts as to all counts. Specifically, Mr. Castillo was found guilty of first degree murder with the use of a deadly weapon. As was outlined in the statement of facts, the State alleged that Mr. Castillo attacked the victim with a tire iron which Mr. Castillo allegedly brought into the house. The coroner testified that the victim died as a result of a intracranial hemorrhage due to blunt force trauma to the face and head. The coroner further testified that these injuries were consistent with blows from a crow bar or tire iron. A crow bar or tire iron does not amount to a deadly weapon.

It is important to note that the Nevada Legislature appears to have attempted to overrule Zgombic v. State, 106 Nev. 571, 578, 598 P.2d 548 (1990), when the Nevada Legislature enacted what NRS 193.165(b) which states:

> Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

This Court has addressed this issue on a number of occasions. In Milton v. State, 908 P.2d 684 (1995), this Court considered whether there was a use of a deadly weapon when a knife was used to kill the victim. This Court indicated that District Court must determine, as a matter of law, whether the instrument is an inherently dangerous weapon. Specifically, this Court held:

> [F]inally, Gregory contends that there is no basis in the

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> record to support his enhanced sentences for use of a deadly weapon in the commission of the crimes. We are forced to agree. In Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990), this court overruled the functional test and applied the inherently dangerous weapon test for determining whether an instrumentality is a deadly weapon for purposes of NRS 193.165. The inherently dangerous weapon test means that the instrumentality itself, if used in the ordinary manner contemplated by its design and construction, will or is likely to, cause a life-threatening injury or death. *Id. at* 576-77, 798 P.2d at 551. Under Zgombic, it is the district court's duty to determine whether the instrument is an inherently dangerous weapon, except in a few close cases where the court cannot determine as a matter of law whether the weapon is or is not a deadly weapon, the judge will need to submit the entire issue to the jury after instructing it on the previously stated definition of a deadly weapon. *Id. at* 577, 798 P.2d at 552. (quotations omitted).
>
> In Hutchins, this court discussed the classification of knives under the inherently dangerous weapon test, stating: Here the State argues that scissors are analogous to a knife, something which could clearly be classified as a deadly weapon even under the inherently dangerous standard.... In addition to their more commonplace uses, knives are often designed as weapons and have been so used throughout history. Id. 110 Nev. at 111, 867 P.2d at 1141. Although Hutchins allows for the possibility of finding that a knife is a deadly weapon, that case does not stand for the proposition that all knives are considered deadly weapons under the inherently dangerous weapon test. In determining whether a knife is a deadly weapon, the district court must consider the particular type of knife that was used in the crime and determine whether it satisfies the inherently dangerous weapon test.

It is important to note that the cases cited above were prior to the legislative change in 1995.

As the Court is aware, almost anything can be used to kill somebody. For example, if a defendant hit somebody in the face with his fist knocking the victim unconscious and then throws the victim into a swimming pool and the victim dies as a result of drowning. Is the water in the pool a deadly weapon? If a defendant chokes a victim into unconsciousness and then places the victim out in the desert because he believes the victim is dead, thereafter, the victim dies of exposure from the sun. Is the sun a deadly weapon? If in the middle of a domestic

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dispute a wife takes out a frozen turkey and hits the husband over the head, is the frozen turkey a deadly weapon. If a husband throws his wife off a boat in Lake Mead wherein she drowns, the water in Lake Mead a deadly weapon. A defendant who smashes another victims head into the pavement causing death, is the pavement a deadly weapon. If a victim is rendered unconscious by a beating from the defendant's fist, thereafter the defendant believes the victim to be dead and thereafter places the victim in a large industrial freezer to hide the body and the body dies as a result of hypothermia was the freezer a deadly weapon. If a man renders a victim unconscious as a result of a fight believing him to be dead but places him in a trash compactor, is a trash compactor a deadly weapon.

Mr. Castillo would suggest that a tire iron/crow bar is no more a deadly weapon than the water in Lake Mead, the water in a swimming pool, an industrial freezer, pavement, a frozen turkey, a frozen ham, a glass pain that a victim was thrown through.

Compare those examples to the 1998 case of State of Nevada v. Buff, 114 Nev. 1237, 970 P.2d 564, (Nev. 1998).

In Buff, this Court held that the trial Court erred in applying the functional test for determining whether a Swiss army knife was a deadly weapon, for purposes of enhancement sentence. In Buff, appellant was convicted of murder in the first degree with the use of a deadly weapon for the stabbing death of a victim with a Swiss army knife. In Buff, this Court held that the "[w]e conclude that the matter at bar presents the type of close case anticipated in Zgombic, and the district court could not determine as a matter of law that the Swiss army knife used by appellants was a deadly weapon." *Id at* 970 P.2d 564, 568.

Again, it is important to note that this Court determined that the use of Swiss army knife to kill a victim by plunging it into his throat was a close case in terms of whether this could be construed as a deadly weapon.

If this Court determines that taking both hands and plunging a Swiss army knife into ones

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throat is a close issue how can it be determined that the a tire iron/crow bar should be enhanced for the use of a deadly weapon. If a tire iron/crow bar is a deadly weapon, than what object could possibly be used in a murder that would not enhance somebody for the use of a deadly weapon. For example, if a defendant smothers a victim with a pillow. The victim dies of asphyxiation, is the pillow not a deadly weapon. If a controlled substance is forced down someone's throat causing them to overdose, is the controlled substance not a deadly weapon. If a person forced a stocking down someone's throat in an attempt to quit the victim, the victim dies of asphyxiation, is the sock not a deadly weapon.

NRS 193.165(b) defined what a deadly weapon is, "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death". Under the new statute, all of these examples provided above can be applied as a deadly weapon pursuant to the definition given by our legislature. This issue should be explored under the section that this statute is unconstitutionally vague and ambiguous.

If this is the case then every single object used in the commission of a murder must be enhanced for a deadly weapon.

NRS 193.165(5) IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS.

The Instruction provided to the jury states "a deadly weapon is any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

In Sheriff, Clark County v. Luqman, 101 Nev. 149, 697 P.2d 107 (1985) this Court held that:

> [I]t is basic to the principles of the due process clause of the fourteenth amendment that an individual may not be held criminally responsible for conduct which he could not reasonably understand to be proscribed. Sheriff v. Martin, 99 Nev. at 339, 662 P.2d at 636 (quoting United States v. Harris, 347 U.S. 612, 74

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> S.C. 808, 98 LED. 989 (1954)). The law must afford a person of ordinary intelligence the opportunity to know what is prohibited so that he may act accordingly, and it must also provide explicit standards of application in order to avoid arbitrary and discriminatory enforcement. Sheriff v. Martin, above; see also Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), cited by this Nevada Supreme Court in Sheriff v. Martin, 99 Nev. 336, 662 P.2d 634 (1983); State of Nevada v. Glusman, 98 Nev. 412, 651 P.2d 639 (1982), appeal dismissed, 459 U.S. 1192, 103 S.Ct. 1170, 75 L.Ed.2d 423 (1983); Wilmeth v. State, 96 Nev. 403, 610 P.2d 735 (1980); In re Laiolo, 83 Nev. 186, 426 P.2d 726 (1967).

These cases stand for the proposition that if a person of common intelligence must guess at it's meaning than the statute is unconstitutionally vague and ambiguous. In the instant case, it is impossible to tell by the instruction (which is directly from the statute) what constitutes the use of a deadly weapon.

A review of the examples provided above as applied to this statute clearly demonstrate that every single every object used during the commission of a murder must be considered a deadly weapon. For example, the use of the water in swimming pool must be considered a deadly weapon under this statute. For a deadly weapon is any material or substance (H2O or water) which under the circumstances in which its used, attempts to be used or threatened to be used is readily capable of causing substantial bodily harm or death.

In the case of a swimming pool anybody thrown into a swimming pool or kept under the water for five to ten minutes most certainly will have either brain damages or suffer death. Therefore, a clear reading of the statute demonstrates that the water in the pool must be considered a deadly weapon.

Next example, a pillow placed over the victim's head. Under the statute clearly a pillow

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could be considered either a material, substance or instrument which when used to smother a human being is capable of causing substantial body harm or death. Therefore, shoving a pillow over someone's head for ten minutes not letting them breath causing death by asphyxiation most certainly should be applied as a deadly weapon under this statute.

Next, the use of the pavement to bash the victim's head. Pavement clearly is concrete which is a material. The pavement or material under the circumstances in which it is used (to bang a victim's head), is readily capable of causing substantial bodily harm or death. Therefore, the pavement is clearly a deadly weapon under this statute.

Next, industrial freezer. Clearly the freezer can be defined as a device or instrument. In placing a person in a freezer is readily capable of causing substantial bodily harm or death by hypothermia. Therefore, clearly the industrial freezer should be considered a deadly weapon under this statute.

Next, the sock shoved down the victim's throat in order to keep the victim quit. Clearly the sock can be defined as a material. The sock being shoved down the throat and the circumstances of which is being used is readily capable of causing substantial bodily harm or death by way of asphyxiation. Therefore, the sock should be considered a deadly weapon and the defendant's sentence should be enhanced.

Next, the water at Lake Mead. As with the pool the water in Lake Mead must clearly been seen as a deadly weapon, because it is a substance and when you place someone's head under that substance for five to ten minutes it is most certainly is going to cause substantial bodily harm or death. Therefore, the water in Lake Mead must be considered a deadly weapon.

Next, the frozen turkey. A turkey is clearly a material or substance (i.e. Meat) under the circumstances in which it is used bashing someone over the head is readily capable of causing substantial bodily harm or death. Under this statute clearly the frozen turkey should be considered a deadly weapon.

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Next, a neck tie used to strangle the victim to death. A neck tie is a material and under the circumstances in which it used (to choke someone) is readily capable of causing substantial bodily harm or death. A neck tie under this statute is clearly a deadly weapon.

Next, the hypothetical wherein the defendant believes that the victim is dead and places the victim out in the desert. However, the victim dies of exposure of the sun. The sun clearly can be considered made up of a material or substances which under the circumstances in which it used (placing the victim in the scorching Las Vegas sun) is readily capable of causing substantial bodily harm or death. Is the sun a deadly weapon? Pursuant to this statute it most certainly should be applied that way.

Next, the victim is thrown down a long stair case causing the victim to die as a result of a broken neck. The stairs clearly qualify as a material (wood and carpet) which under the circumstances in which it used (thrown the victim down the stairs) is readily capable of causing substantial bodily harm or death. Pursuant to this statute the stairs are a deadly weapon. The State should remember in citing in their criminal information that a deadly weapon can be considered to wit: the sun; to wit: the pavement; to wit: the water within the pool; to wit: the water in Lake Mead; to wit: the frozen turkey; to wit: the frozen ham; to wit: the stairs; to wit: the pillow; to wit: the controlled substance and the list goes on and on of ridiculous examples like this.

The point of these examples is that the law in our State regarding the definition for use of a deadly weapon does not afford a person or ordinary intelligence the opportunity to know what is prohibited so that he or she may act accordingly and it provides a manner that will give the District Attorney's Office arbitrary and discriminatory enforcement of the statute. The statute as written provides the District Attorney's Office with a clear abuse of enforcement. The District Attorney's Office may decide that Mr. Castillo has used a deadly weapon. However, a person accused or convicted of smother a person with a pillow or using a controlled substances to shove

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down their throat may not be applied as a deadly weapon. Yet, under the statute they both could be applied the same way. This leads to the conclusion that the due process clause of the Fourteenth Amendment is being violated based upon a statute that is so vague that men or women of common intelligence must guess at the meaning and differ as to the application.

The statute is unconstitutional because it gives the District Attorney's office an opportunity to apply the law in a discriminatory and arbitrary fashion. Moreover, the statute itself is so vague that people of ordinary intelligence (even in this case) have disputed whether or not this is a deadly weapon.

In Buff, this Court found that a Swiss army knife was a close case. Mr. Castillo would agree with that interpretation. However, if a Swiss army knife is a close case, how can anyone argue that a tire iron/crow bar should be applied as a deadly weapon, anything can be a deadly weapon pursuant to this statute.

IV. MR. CASTILLO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEREIN TRIAL AND APPELLATE COUNSEL FAILED TO OBJECT TO THE BAD CHARACTER EVIDENCE WHICH WAS IMPROPERLY RAISED IN FRONT OF THE JURY.

On August 02, 2002, Mr. Schieck testified that,

> Well, in light of the decision in Evans, clearly the jury was not properly instructed on the use of character evidence and the weighing of aggravating and mitigating circumstances, and the instruction that the Supreme Court set forth in Evans correctly describes how that process should take place. If we didn't object to that we should have. (A.A. Vol. 6, pp. 1325).

During the penalty phase, it was brought out that: 1) Mr. Castillo had been in a Nevada youth training facility in Elko; 2) that Mr. Castillo's first interaction with the juvenile system was in 1981 for an emotionally instability of a child; 3) that as a juvenile Mr. Castillo had been a runaway, accused of attempted murder, arson, petty larceny, threat to life, and destruction of

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county property; 4) Mr. Castillo was in and out of the Elko facility and additionally charged as a juvenile with grand larceny auto, attempt burglary, possession of an unregistered firearm, and escape; 5) Mr. Castillo had attempted to drown his grandmother's dog when he was five years old and had killed birds by smashing their skulls into rocks; 6) Mr. Castillo was accused of attempting to lite the Circus Circus casino on fire in 1983; 7) Mr. Castillo was at age eleven, the youngest person ever committed to the Nevada youth training center; 8) Mr. Castillo admitted the use of marijuana, speed, crack, cocaine, and alcohol as a juvenile; 9) as an adult Mr. Castillo had been disciplined on a assault on a inmate, having tattooing equipment in his cell and jamming a door lock. In sum, Mr. Castillo had a great deal of his character used as evidence against him in an effort to have the jury return a sentence of death.

In Evans v. Nevada, supra, the Supreme Court considered this issue. On appeal, in Evans, this Court explained, " [I]n this case we conclude that Evans trial and appellate counsel in not challenging the prosecutor's improper argument, and we conclude that Evans was prejudiced as a result." Evans, pp. 17. This Court was concerned with the fact that Nevada jurys are not being properly instructed on how the weighing process must occur regarding a capital case. In Evans, post conviction counsel had complained that the jury had been permitted to consider other character evidence against Mr. Evans before they properly found an aggravating circumstance and then weighed that against the mitigating circumstance. Hence, this Court issued an instruction that is to be used in all further capital cases.

In Evans v. State, 117 Nev. Ad. Op. No. 50, this Court issued the following instruction,

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

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evidence for its appropriate purposes.

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

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

In determining individually whether any mitigating circumstances outweigh any aggravating circumstances, you are to consider only evidence relevant to any mitigating and aggravating circumstances. You are not to consider other evidence presented against the defendant.

If you find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists and each of you determines that any mitigating circumstances do not outweigh the aggravating, the defendant is eligible for a death sentence. At this point, you are to consider all three types of evidence, and you still have the discretion to impose a sentence less than death. You must decide on a sentence unanimously.

If you do not decide unanimously that at least one aggravating circumstance has been proven beyond a reasonable doubt or if at least one of you determines that the mitigating circumstances outweigh the aggravating, the defendant is not eligible for a death sentence. Upon determining that the defendant is not eligible for death, you are to consider all three types of evidence in determining a sentence other than death, and you must decide on such a sentence unanimously.

In this case, we conclude that Evans's trial and appellate counsel were deficient in not challenging the prosecutor's improper argument, and we conclude that Evans was prejudiced as a result.

In the instant case, it appears that trial and appellate counsel failed to raise this issue. Mr. Schieck freely admitted at the evidentiary hearing that this should have been objected. In Evans, this error was also used to find that Mr. Evans deserved a new penalty phase. This instruction provided in the Evans decision was obviously was not provided in Mr. Castillo's case. Moreover, it appears that trial and appellate counsel failed to raise this issue.

In the instant case, there was a tremendous amount of character evidence that used by the prosecution against Mr. Castillo. The character evidence listed above has no bearing on whether there is an aggravating circumstance. The evidence listed above is evidence simply listed to demonstrate the poor character of Mr. Castillo. Based upon the fact that there was no objection

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by trial and appellate counsel and the fact that the jury was not properly instructed, compounded by the prosecutor being able to argue this character evidence without a jury being properly instructed demonstrates that Mr. Castillo is entitled to a reversal of his sentence of death based upon a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

V. MR. CASTILLO'S IS ENTITLED TO HAVE A REVERSAL OF HIS SENTENCE OF DEATH AND CONVICTIONS BASED UPON THE FAILURE OF TRIAL COUNSEL TO PROPERLY INVESTIGATE HIS CASE AND MR. CASTILLO IS ENTITLED TO A NEW TRIAL AND PENALTY PHASE BASED UPON THE FAILURE OF TRIAL COUNSEL TO PRESENT A PSYCHOLOGICAL DEFENSE TO THE TRIAL PHASE OF THE CASE.

In the Supreme Court's opinion affirming Mr. Castillo's direct appeal, the Supreme Court noted, "[t]he defense did not put on a case in chief." (A.A. Vol. 6, pp. 1234-1249). In the instant case, as the Supreme Court noted, the defense failed to present any form of defense whatsoever, the defense actually waived their opening argument. More importantly, the following statement was the entire closing argument by the defense counsel:

> Good day, ladies and gentleman. If it please the court, Mr. Bell, Mr. Harmon, and my co-counsel Mr. Schieck, as the Judge informed you, when he was reading the instructions, this is the time known as closing argument. You've heard Mr. Harmon's closing argument. I think it's better to characterize what I'm about to say as some closing comments, as to this phase of the proceedings.
>
> I first want to thank you for your participation in this and the patience that I know you've had to exercise over these past couple of weeks. As Mr. Harmon has correctly state, you've always been on stage here. Now you are taking center stage.
>
> You have not heard much from the defense during this phase, as it has become quite obvious to you, as the events unfolding in here, but that doesn't lessen your burden or your sworn duty that you took an oath to. All the defense asks you to do is to perform your sworn duty. Your burden is no less because we presented very little and had very little participation. Your duty, as we see it, is to review each and every count, each and every element. Make sure that you believe beyond a reasonable doubt that the State has proven beyond a reasonable doubt each and every element within each and every count. Once you have done that,

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follow your convictions accordingly.

Additionally, after you have done that, you've done your duty. You've been fair to all the parties, which is all that any of us can ask of you and for that, the defense both thanks you and applauds you in you efforts. I thank you. (A.A. Vol. 3, pp. 637-638).

This was the entire defense for Mr. Castillo. Yet, as was outlined in the statement of facts (penalty phase), there was a great deal of evidence that Mr. Castillo suffered from extreme emotional disturbance. In fact, it can be characterized that Mr. Castillo is mentally ill. The jury found that the instant murder was committed while the defendant was under the influence of extreme emotional distress and disturbance as one of Mr. Castillo's three mitigating circumstances. However, it should be noted that this same jury would have been unaware of any of the extensive psychological difficulties that Mr. Castillo had suffered throughout his life. Without reiterating all the psychological evidence presented at the penalty phase, (which has been listed in the statement of facts), it is obvious that the defense should have presented this evidence at the trial portion of Mr. Castillo's case.

In a similar case this Court considered that case of Zollie Dumas v. the State of Nevada.

In Dumas v. State, 111 Nev. 1270, 903 P.2d 1816 (1995), this Court overturned the first degree murder conviction of Zollie Dumas.

In Dumas, this Court held, " we reverse on the ground that failure to present psychological or other evidence pertaining to mental status renders Dumas's representation ineffective under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 252, 80 L.Ed.2 674 (1984), and particularly under the case's holding that counsel has a duty to make reasonable investigation. Dumas at 111

This Court noted, "Dumas is mentally deficient being in the second percentile in intelligence, with an I.Q. of 69. He is illiterate and functions at about the third grade level. Dr.

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Jurasky, a psychiatrist employed by the State, reported that Dumas probably suffered organic damage to his intellectual capabilities and was incapable of premeditating an act such as the killing that is subject to this prosecution." At the post conviction hearing, Dr. Jurasky testified that Dumas was acting on impulse and out of emotional desperation rather than with deliberation." Id.

In rendering the holding in Dumas, this Court reasoned that:

> In Riley, we refused to reverse the conviction on this ground because the pre-trial evaluation of Riley was not such that would render counsel's representation ineffective merely because counsel failed to heed the information contained in that report. The Riley opinion distinguished the facts in that case from Deutscher v. Whitley, 964 F.2d 1443, 1446, (9th Cir. 1991), *vacated*, 506 U.S. 935, 113 S.Ct. 367, 121 L.Ed.2d 279 (1992) aff'd sub nom., Deutscher v. Angelone, 16 F.3d 981, 984, (9th Cir. 194), in which counsel failed to investigate and offer evidence concerning the defendant's history of schizophrenia, pathological intoxication and organic brain damage, and Evans v. Lewis, 855 F.2d 631, 636-39 (9th Cir., 1998), in which defense counsel failed to inquire into prior diagnosis of schizophrenia that could have shown an impairment of mental state at the time of crime. See also Riley v. State, 110 Nev. 638, 650, 878 P.2d 272, 280 (1994).

As this Court recognized in Dumas,

> Counsel's failure to investigate and present Dumas' mental condition as a defense virtually assured the jury would find Dumas guilty of first degree murder. With proper investigation, preparation and presentation, defense counsel could very well have presented a cogent defense of mental incapacity or, at least , that Dumas' mental state was inconsistent with premeditated and deliberated first-degree murder. The district court erred when it concluded that defense counsel's failure to pursue the only defense available to Dumas was within the bounds of acceptable advocacy. Counsel's failure to provide effective assistance renders the jury's verdict unreliable. We reverse the district court's order denying appellant's petition for post-conviction relief and remand the matter to the district court for a new trial. Id. at 1271.

Mr. Castillo's defense attorney's should have put forward Mr. Castillo's psychological state of mind at the time of the crime. The defense attorney's put forth no arguments to attempt to mitigate a conviction from first degree murder conviction to a conviction of possibly second

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degree murder based upon the psychological difficulties suffered throughout Mr. Castillo's life. Therefore, based upon the facts of the instant case, combined with a review the State of Nevada v. Dumas, it was reversible error based upon ineffective assistance of counsel for the defense to fail to place this evidence before the jury.

In the instant case, Mr. Castillo's trial counsel failed to present any of the psychological evidence pertaining to Mr. Castillo with the exception of Dr. Etcoff. Dr. Etcoff testified at the penalty phase and summarized the extensive psychological history of Mr. Castillo. The defense made absolutely no effort to present to the jury witnesses who had previously diagnosed Mr. Castillo.

The evidence presented at the penalty phase demonstrates that Mr. Castillo had been diagnosed with sever mental problems from the age of approximately ten (10) years old. The defense most certainly should have investigated the individuals who conducted these psychological tests and diagnosis of Mr. Castillo. Additionally, as has been previously noted in a previous argument this type of evidence should have been presented to the jury in the trial phase.

It is quite obvious that the failure to properly prepare and investigate this case resulted in the defense simply permitting Mr. Castillo to be convicted of murder of the first degree without any form of defense whatsoever. It would have been prudent if not absolutely required pursuant to the Strickland standard to present and investigate any possible psychological defense to a jury during the trial phase. It appears the defense woefully failed in their preparation, investigation, and presentation to the jury of a psychological defense. It is probable that a jury may have convicted Mr. Castillo of murder of the second degree had they been aware of the full scope of Mr. Castillo's mental deficiencies.

In State of Nevada v. Love, 865 P.2d 322, 109 Nev. 1136, (1993), this Court considered

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the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses. In Love, this Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the failure to personally interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. Love, 109 Nev. 1136, 1137.

Additionally, in Warner v. State, 729 P.2d 1359, 102 Nev. 635, 638, (1986), this Court considered a similar issue as that in Love. In Warner, Mr. James Warner provided his defense counsel with a list of three possible witnesses, however, defense counsel did not contact them. Id. at 637. Moreover, in addition to defense counsel's failure to contact potential witnesses provided to him, defense counsel failed to investigate and defense counsel's lack of preparation for trial left Mr. Warner without a defense at trial. Id at 638. Therefore, this Court reversed and remanded Mr. Warner's case for a new trial based upon the following: (1) trial counsel's failure to conduct an adequate investigation; (2) trial counsel's failure to adequately prepare for trial; and (3) trial counsel's failure to interview witnesses.

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

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

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

"An error by trial counsel, even if professionally unreasonable, does not warrant setting aside a judgment of a criminal proceeding if the error had no effect on the judgment. Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. Thus Strickland also requires that the defendant be prejudiced by the unreasonable actions of counsel before his or her conviction will be reversed. The defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id. at* 694, 104 S.Ct. at 2068. Additionally, the Strickland court indicated that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id. at* 696, 104 S.Ct. at 2069.

During the evidentiary hearing, Mr. Schieck testified that he was aware of the Zolie Dumas case. (A.A. Vol. 6, pp. 1324). Mr. Schieck was asked the following questions and gave the following answers:

> Q: Okay, why was Doctor Etcoff not put on the guilt phase to try to argue to the jury that there was a diminished capacity and therefore was perhaps to convict of second degree murder and not first.

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A: I didn't see any diminished capacity defense that the jury would accept. Mr. Castillo was – his intelligence was not similar to Mr. Dumas. I mean, there is a number of distinctions between factually Zolie Dumas's situation, the defense that could have been put on in that case and Mr. Castillo's, the facts of this case and his own character.

Q: So your testimony is that you didn't see that it wasn't necessary to put on a psychological defense because you did not have one.

A: I did not believe we had one.

Q: Did you have anyone analyze Mr. Castillo other than Dr. Etcoff.

A: I don't recall. (A.A. Vol. 6, pp. 1324-1325).

In fact, Mr. Schieck did not dispute that the Supreme Court had stated that no defense had been contended at the time of the guilty phase. (A.A. Vol. 6, pp. 1324). Mr. Schieck agreed that opening argument had been waived and that no real defense at the guilt phase was provided.

Based upon the testimony of Mr. Schieck and the legal analysis provided, Mr. Castillo would respectfully request that this Court reverse his convictions and sentence of death based upon violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

VI. MR. CASTILLO'S CONVICTION IS UNCONSTITUTIONAL BECAUSE OF CUMULATIVE ERROR.

Mr. Castillo's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal and an impartial jury due to the cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, and the systematic deprivation of petitioner's right to the effective assistance of trial and appellate counsel. Const. Amends. V, VI, VIII, & XIV, and Nevada Constitution Art. I and IV.

Each of the claims specified in the post-conviction petition for a writ of habeas corpus, requires that the judgment of conviction be vacated. Mr. Castillo incorporates each and every

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factual allegation and the leal authority contained in the petition as if fully set forth herein.

The cumulative effect of the errors demonstrated in the petition was to deprive the proceedings against Mr. Castillo of fundamental fairness and to result in a constitutionally unreliable sentence. Whether or not any individual error requires that the judgment or sentence be vacated, the totality of these multiple errors and omissions resulted in substantial prejudice to Petitioner.

The State cannot show, beyond a reasonable doubt that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt; in the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Petitioner. Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985).

VII. MR. CASTILLO'S DEATH SENTENCE IS INVALID UNDER THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS HIS RIGHTS UNDER INTERNATIONAL LAW, BECAUSE THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT. U.S. CONSTITUTION ARTICLE VI AND AMENDMENTS VIII AND XIV.

This Court has considered this issue on numerous occasions and had denied this issue on all recent appeals. Mr. Castillo asks for reconsideration of the Constitutionality of the death penalty this issue as well as argument number nine, ten, and eleven. The Eighth Amendment guarantee against cruel and unusual punishment prohibits punishment which is inconsistent with the evolving standards of decency theat mark the progress of a maturing society.

The worldwide trend is toward the abolition of capital punishment and most civilized nations no longer conduct executions. Portugal outlawed capital punishment in 1867; Sweden and Spain abolished the death penalty during the 1970's; and France abolished capital punishment in 1981. In 1990, the United Nations called on member nations to take steps toward

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the abolition of capital punishment. Since this call by the United Nations, Canada, Mexico, Germany, Haiti, and South Africa, pursuant to international law provisions that outlaw "cruel, unusual and degrading punishment" have abolished capital punishment. The death penalty has recently been abolished in Azerbaijan and Lithuania. Many of the "third world" nations have rejected capital punishment on moral grounds. As demonstrated by the world-wide trend toward abolition of the death penalty, state-sanctioned killing is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

The death penalty is unnecessary to achieve any legitimate societal or penal logical interests in Mr. Castillo's case. His mental illness, his neurological deficits, and the circumstances surrounding the case make a death sentence cruel and unusual punishment.

The death penalty constitutes cruel and unusual punishment under any and all circumstances, and constitutes cruel and unusual punishment under the circumstances of this case. The petitioner's death sentence violates international law, which prohibits the arbitrary deprivation of life, and cruel, inhuman or degrading treatment or punishment .I International Covenant on Civil and Political Rights, Articles VI and VII: U.S. Const, Art. VI.

VIII. MR. CASTILLO'S DEATH SENTENCE IS INVALID UNDER THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS UNDER INTERNATIONAL LAW, BECAUSE EXECUTION BY LETHAL INJECTION VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS. U.S. CONSTITUTION ARTICLE VI, AMENDMENTS VIII & XIV.

State law requires that execution be inflicted by an injection of a lethal drug. Nev. Rev. Stat. §. 176.355(1).

The ethical standard of the American Medical Association prohibit physicians from

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participating in an execution other than to certify that a death had occurred. American Medical Association, House of Delegates, Resolution 5 (1992); American Medical Association, Judicial Council, Current Opinion 2.06 (1980). As a result non-physicians staff from the Department of Corrections have assumed the responsibility of locating veins and injecting needles into the arms of the individual being executed.

In recent executions in states employing lethal injections, prolonged and unnecessary pain have been suffered by the condemned individuals because of difficulty in the insertion of needles, unexpected chemical reactions among the lethal drugs or violent reactions to the drugs by the condemned individuals.

The following lethal injections executions, among other, have produced prolonged and unnecessary pain.

a. Stephen Peter Morin – March 13, 1985 (Texas) – Had to probe both arms and legs with needles for 45 minutes before they found the vein.

b. Randy Woolls– August 20, 1986 (Texas)– A drug addict, Woolls had to help the executioner technicians find a good vein for the execution.

c. Raymond Landry – December 13, 1988 (Texas)– Pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the killing, the syringe came out of Landry's vein, spraying the deadly chemical across the room toward the witnesses. The execution team had to reinsert the catheter into the vein. The curtain was drawn for 14 minutes so witnesses could not see the intermission.

d. Stephen McCoy – May 24, 1989 (Texas) Had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses (male) fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who represented McCoy and witnesessed the execution, thought that the fainting would catalyze a chain reaction. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding "The drugs might have been administered in a heavier dose or more rapidly."

e. Rickey Ray Rector– January 24, 1992 (Arkansas)– It took medical staff more than 50 minutes to find a suitable vein in Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal, Rector (who suffered serous brain damage from a lobotomy) tried to help the medical personnel find a vein. The administrator of

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the State's Department of Corrections medical programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein." The administrator said "that may have contributed to his occasional outbursts."

f. Robyn Lee Parks – March 10, 1992 (Oklahoma – Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck, and abdomen, began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were administered. Said Tulsa World Reporter Wayne Greene, "the death looked ugly and scary."

g. Billy Wayne White – April 23, 1992 (Texas) – It took 47 minutes for authorities to find a suitable vein, and White eventually had to help.

h. Justin Lee May – May 7, 1992 (Texas) – May had an unusually violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the item (Huntsville), Mr. May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze. . ." Associated Press reporter Michael Graczyk wrote, "He went into coughing spasms, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back if he had not been belted down. After he stopped breathing his eyes and mouth remained open."

i. John Wayne Gacy - May 19, 1994 (Illinois) – After the execution began, one of the three lethal drugs clogged the tube leading to Gacy's arm, and therefore, stopped flowing. Blinds, covering the window through which witness observe the execution, were then drawn. The clogged tube was replaced with a new one, the blinds were opened, and the execution process resumed. Anesthesiologist blamed the problem on the inexperience of the prison officials who were conduction the execution, saying that proper procedures taught in "IV 101" would have prevented the error.

j. Emmitt Foster– May 3, 1995 (Missouri)– Foster was not pronounced dead until 30 minutes after the executioners began the flow of the death chemicals into his arms. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit witnesses from viewing the scene; they were not reopened until three minutes after the death was pronounced. According to the coroner, who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the gurney; it was so tight that the flow of chemicals into his veins was restricted. It was several minutes after a prison worker finally loosened the strap that death was pronounced. The coroner entered the death chamber twenty minutes after the execution began, noticed the problem and told the officials to loosen the strap so that the execution could proceed.

k. Tommie Smith – July 18, 1996 (Indiana)– Smith was not pronounced dead until an hour and 20 minutes after the execution team began to administer the lethal combination of intravenous drugs. Prison officials said the team could not find a vein in Smith's arm and had to insert an angio-catheter into his hear, a procedure that took 35 minutes. According to authorities, Smith remained conscious during

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the procedure.

The procedures utilized to conduct the inhumane executions described above are substantially similar to those utilized by the State of Nevada.

The practice is also invalid under the international law, which prohibits cruel, inhuman or degrading treatment or punishment. International Covenant on Civil and Political Rights, Article VII; U.S. Const., Art. VI.

IX. MR. CASTILLO'S CONVICTION AND SENTENCE ARE INVALID PURSUANT TO THE RIGHTS AND PROTECTIONS AFFORD HIM UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, U.S. CONST. ART.VI.

The International Covenant on Civil and Political Rights, (Ex. 127) and international human rights treaty, prohibits the arbitrary deprivation of life and restrict the imposition of the death penalty in countries which have not abolished it to "only the most serious crimes in accordance with the law in force at the time of the commission of the frame and not contrary to the provisions of the present Covenant. . ." ICCPR, Article VI, Sect. 2. The Covenant further prohibits torture and "cruel, inhuman or degrading treatment or punishment," (Article VII); and guarantees every person a fair and public hearing by a competent, independent and impartial tribunal. (Article XIV).

Among the additional protections secured by the Covenant for any person charged with a criminal offense are the guarantees: to be informed promptly and in detail in a language which [the accused] understands of the nature and cause of the charge against him; to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to examine, or have examined, the witnesses against him and to obtain the

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attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and not to be compelled to testify against himself or to confess guilt. 9Article XIV).

All of the specific rights listed above that are guaranteed in the Covenant were violated in the Petitioner's case, and are pleaded elsewhere throughout this petition. Petitioner incorporates each and every factual reference as if fully set forth herein. The rights afforded under Article XIV are guaranteed "in full equality," and thus apply in full force to Mr. Castillo, the indigent petitioner in this capital case.

The violations of Mr. Castillo's rights under international law are prejudicial per se and require that his conviction and sentence be vacated.

X. MR. CASTILLO'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. U.S. CONST. AMENDS. V, VI, VIII AND XIV; NEV. CONST. ART. IN SACS. 3, 6 AND 8; ART IV, SEC. 21.

In support of this claim, Mr. Castillo alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power and an evidentiary hearing:

Mr. Castillo hereby incorporates each and every allegation contained in this petition as if fully set forth herein.

The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. NRS 200.020(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguable exist in every first-degree murder case. *See* NRS 200.033. Nevada permits the imposition of the death

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penalty for all first-degree murders that are "at random and without apparent motive." NRS 200.033(9). Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnapping, to receive money, torture, to prevent lawful arrest, and escape. *See* NRS 200.033. The scope of the Nevada death penalty statute is thus clear: The death penalty is an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all.

The death penalty is accordingly permitted in Nevada for all first-degree murders, and first-degree murder, in turn, are not restricted in Nevada within traditional bounds. As the result of unconstitutional form jury instructions defining reasonable doubt, express malice and premeditation and deliberation, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. Consequently, a death sentence is permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing.

As a result of plea bargaining practices, and imposition of sentences by juries, sentences less than death have been imposed for offenses that are more aggravated than the one for which Mr. Castillo stands convicted; and in situations where the amount of mitigating evidence was less than the mitigation evidence that existed here. The untrammeled power of the sentencer under Nevada law to declines to impose the death penalty, even when no mitigating evidence exists at all, or when the aggravating factors far outweigh the mitigating evidence, means that the imposition of the death penalty is necessarily arbitrary and capricious.

Nevada law fails to provide sentencing bodies with any rational method for separating

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those few cases that warrant the imposition of the ultimate punishment form the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme, and the process is contaminated even further by this Court's decisions permitting the prosecution to present unreliable and prejudicial evidence during sentencing regarding uncharged criminal activities of the accused. Consideration of such evidence necessarily diverts the sentencer's attention from he statutory aggravating circumstances, whose appropriate application is already virtually impossible to discern. The irrationality of the Nevada capital punishment system is illustrated by State of Nevada v. Jonathan Daniels, Eighth Judicial District Court Case No.C126201. Under the undisputed facts of that case, Mr. Daniels entered a convenience store on January 20, 1995, with the intent to rob the store. Mr. Daniels then held the store clerk at gunpoint for several seconds while the clerk begged for his life; Mr. Daniels then shot the clerk in the head at point blank range, killing him. A moment later, Mr. Daniels shot the other clerk. Mr. Daniels and two friends then left the premises calmly after first filling up their car with gas. Despite these egregious facts, and despite Mr. Daniels' lengthy criminal record, he was sentenced to life in prison for these acts.

There is not rational basis on which to conclude that Mr. Daniels deserves to live whereas Mr. Castillo deserves to die. These facts serve to illustrate how the Nevada capital punishment system is inherently arbitrary and capricious. Other Clark County cases demonstrate this same point: In State v. Brumfield, Case No. C145043, the District Attorney accepted a plea for sentence of less than death for a double homicide; and in another double homicide case involving a total of 12 aggravating factors resulted in sentences of less than death for two defendants. State v. Duckworth and Martin, Case No. C108501. Other Nevada cases as aggravated as the one for which Mr. Castillo was sentenced to death have also resulted in lesser sentences. See Ewish v.

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State, 110 Nev. 221, 223-25, 871 P.2d 306 (1994); Callier v. Warden, 111 Nev. 976, 979-82, 901 P.2d 619 (1995); Stringer v. State, 108 Nev. 413, 415-17 836 P.2d 609 (1992).

Because the Nevada capital punishment system provides no rational method for distinguishing between who lives and who dies, such determinations are made on the basis of illegitimate considerations. In Nevada capital punishment is imposed disproportionately on racial minorities: Nevada's death row population is approximately 50% minority even though Nevada's general minority population is less than 20%. All of the people on Nevada's death row are indigent and have had to defend with the meager resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources provided to capital defendants virtually ensures that compelling mitigating evidence will not be presented to, or considered by, the sentencing body. Nevada sentencers are accordingly unable to, and do not, provide the individualized, reliable sentencing determination that the constitution requires.

These systemic problems are not unique to Nevada. The American Bar Association has recently called for a moratorium on capital punishment unless and until each jurisdiction attempting to impose such punishment "implements policies and procedures that are consistent with . . . . longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . . . " as the ABA has observed in a report accompanying its resolution, "administration of the death penalty, from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency" (ABA Report). The ABA concludes that this morass has resulted from the lack of competent counsel in capital cases, the lack of a fair and adequate appellate review process, and the pervasive effects

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of race. Like wise, the states of Illinois and Nebraska have recently enacted or called for a moratorium on imposition of the death penalty.

The United Nations High Commissioner for Human Rights has recently studied the American capital punishment process, and has concluded that "guarantees and safeguards, as well as specific restrictions on Capital Punishment, are not being respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing." The High Commissioner has further concluded that "race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death." The report also described in detail the special problems created by the politicization of the death penalty, the lack of an independent and impartial state judiciary, and the racially biased system of selecting juries. The report concludes:

> The high level of support for the death penalty, even if studies have shown that it is not as deep as is claimed, cannot justify the lack of respect for the restrictions and safeguards surrounding its use. In many countries, mob killings an lynching enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice." Yet they are not acceptable in civilized society.

The Nevada capital punishment system suffers from all of the problems identified in the ABA and United Nations reports - the under funding of defense counsel, the lack of a fair and adequate appellate review process and the pervasive effects of race. The problems with Nevada's process, moreover, are exacerbated by open-ended definitions of both first degree murder and the accompanying aggravating circumstances, which permits the imposition of a death sentence for virtually every intentional killing. This arbitrary, capricious and irrational scheme violates the constitution and is prejudicial *per se.*

CONCLUSION

Therefore, based upon the arguments herein, Mr. Castillo would respectfully request the reversal of his sentence of death and convictions based upon violations of the United States Constitutions Amendments Fourteen, Eight, Five, and Six.

DATED this 25 dated this September, 2003.

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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.

DATED this ____ day of September, 2003.

Respectfully submitted by,

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 23 day of September, 2003, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **APPELLANT'S OPENING BRIEF**, addressed to:

David Roger
District Attorney
200 S. Third Street, 7th Floor
Las Vegas, Nevada 89155

Brian Sandoval
100 North Carson Street
Carson City, Nevada 89701

Simone Miyasato
An employee of Christopher R. Oram, Esq.

EXHIBIT 20

EXHIBIT 20

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM P. CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40982

FILED

FEB 05 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
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 1998, this court affirmed appellant William P. Castillo's conviction of first-degree murder and six other felonies and his sentence of death.[1] The basic facts of the crimes were as follows.[2]

In late November 1995, Castillo helped reroof the house of an 86-year-old woman, Isabelle Berndt. After Castillo found a key to Berndt's house, a coworker dissuaded him from entering, but Castillo indicated he would come back at night. Early in the morning on December 17, 1995, Castillo and an accomplice returned to their apartment with items including a VCR and silverware. Castillo told his girlfriend, who also lived at the apartment, that he had broken into a house, hit the sleeping occupant with a tire iron, stolen some items, and set the house on fire. Early that same morning, firefighters put out a blaze at Berndt's house and found her body inside. An investigator determined that the fire was arson. The coroner determined that Berndt died from an intracranial

[1]Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998), corrected by McKenna v. State, 114 Nev. 1044, 1058 n.4, 968 P.2d 739, 748 n.4 (1998).

[2]See id. at 273-77, 956 P.2d at 105-07.

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04-02287

hemorrhage due to blunt force trauma to her face and head consistent with blows from a crowbar or tire iron. Berndt's daughter later searched the house and found that, among other things, her mother's silverware and VCR were missing. On December 19, 1995, one of Castillo's coworkers contacted the police and told them that Castillo had admitted to entering Berndt's house, hitting her numerous times with a tire iron, smothering her with a pillow, and stealing a VCR, money, and silverware. Police executed a search warrant at Castillo's apartment that night. Castillo and his girlfriend consented to the search, and police recovered the silverware, the VCR, and other incriminating evidence. After his arrest, Castillo waived his Miranda[3] rights and eventually confessed to the crimes.

Castillo received a jury trial. The defense did not present evidence at the guilt phase. The jury returned guilty verdicts on all the counts, including first-degree murder with use of a deadly weapon.

At the penalty hearing, the State presented evidence of Castillo's criminal record. His extensive juvenile record included charges of attempted murder and six counts of arson. He also used marijuana, speed, cocaine, and alcohol. During his adolescence, doctors determined that Castillo understood the difference between right and wrong, had no neurological disorder, but suffered from a personality disorder. At seventeen, Castillo escaped from a youth training facility, was arrested for attempted burglary and certified to adult status, and served fourteen months in prison. In 1993, Castillo was convicted of a robbery in which he had a gun. He was sentenced to three years in prison and committed multiple disciplinary infractions while serving just under two years. At

[3]Miranda v. Arizona, 384 U.S. 436 (1966).

the time of his trial in the instant case, Castillo was charged with battery on his neighbors. The State also introduced victim impact testimony by Berndt's granddaughters and daughter.

A neuropsychologist testified for the defense that Castillo came from a dysfunctional family, had been emotionally, mentally, physically and behaviorally abused, and suffered from "reactive attachment disorder" and "attention deficit hyperactivity disorder." A correctional officer and a juvenile facility counselor each testified to several positive episodes regarding Castillo. Castillo's girlfriend testified that he had few social skills, acted like a "big kid," but was trying to improve. Castillo's mother testified that he had a difficult upbringing due to physical and emotional abuse by his biological father, her own lack of affection for Castillo, and the family's instability. At the hearing's conclusion, Castillo read an unsworn statement expressing regret and remorse for his conduct.

The jurors found four aggravating circumstances: (1) Castillo had been previously convicted of a felony involving the use or threat of violence, and he committed the murder (2) during a burglary, (3) during a robbery, and (4) to avoid a lawful arrest. Three mitigating circumstances were found: Castillo's youth, that he committed the murder under the influence of extreme emotional distress or disturbance, and any other mitigating circumstances. The jurors returned a verdict of death.

In April 1999, Castillo filed a post-conviction petition for a writ of habeas corpus, eventually followed by two supplemental briefs. The district court held an evidentiary hearing and in June 2003 denied the petition. Castillo raises a number of issues on appeal, including ineffective assistance of counsel.

A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both good cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner.[4] Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus.[5] Such claims present a mixed question of law and fact, subject to independent review.[6] To establish ineffective assistance of counsel, a defendant must show that an attorney's representation fell below an objective standard of reasonableness and that the attorney's deficient performance prejudiced the defense.[7] To establish prejudice, the defendant must show that but for the attorney's mistakes, there is a reasonable probability that the result of the proceeding would have been different.[8]

Castillo claims first that his appellate counsel was ineffective in challenging an improper argument by the prosecutor. On direct appeal, counsel contended that the prosecutor committed misconduct in arguing to the jurors that "you will be imposing a judgment of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant."[9] This court considered the

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[4]NRS 34.810.

[5]Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001).

[6]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[7]Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

[8]Id. at 694.

[9]Castillo, 114 Nev. at 279, 956 P.2d at 109.

argument improper but not reversible error.[10] Castillo now complains that his counsel failed to also challenge a different aspect of the prosecutor's argument, regarding the jury's "duty." The prosecutor began the above remark by telling the jury that "[t]he issue is do you . . . have the resolve and the courage, the determination, the intestinal fortitude, the sense of commitment to do your legal and [m]oral duty."[11] In Evans v. State, this court condemned such rhetoric because it is "designed to stir the jury's passion and appeal to partiality."[12]

The district court incorrectly concluded that this issue was subject to the law of the case and deserved no consideration. Castillo's current claim is not simply a refinement of the original direct-appeal issue of prosecutorial misconduct; it is a claim of ineffective assistance of counsel, based, moreover, on a ground not raised on direct appeal. The doctrine of the law the case therefore has no application here.[13] The district court also concluded that because Evans was not decided until 2001, counsel could not be faulted for failing in 1998 to challenge the prosecutor's argument on the ground now raised. This is a relevant but not decisive consideration. It is obviously not necessary in all cases for this court to disapprove specific language before a defense counsel should reasonably object to such language. We conclude that appellate counsel

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[10]Id. at 280-81, 956 P.2d at 109-10.

[11]Trial Transcript (September 24, 1996, Afternoon Session) at 65; cf. Castillo, 114 Nev. at 279, 956 P.2d at 109.

[12]117 Nev. at 633-34, 28 P.3d at 515.

[13]Cf. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

acted unreasonably here in not raising this issue but conclude that no prejudice resulted.

In Evans, considering whether the prosecutor's improper remarks on the jury's "duty" deprived Evans of a fair penalty hearing, we stated that "perhaps they did not, but the prosecutor erred further."[14] Based primarily on that further error (the prosecutor urged the jury to prematurely consider character evidence in reaching a verdict of death), we granted Evans a new penalty hearing.[15] We conclude that the improper argument in this case did not deprive Castillo of a fair penalty hearing. The aggravating circumstances and the other evidence presented against Castillo relevant to his sentence were of such force that the result of his appeal would not have changed even if counsel had challenged the improper argument on both grounds.[16]

Castillo also contends that his trial and appellate counsel were ineffective in failing to challenge the jury instructions in regard to the use of character or "other matter" evidence in the penalty hearing. He cites

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[14]117 Nev. at 634, 28 P.3d at 515.

[15]Id. at 634-37, 28 P.3d at 515-17.

[16]Castillo's attorney, Christopher R. Oram, accuses this court of "reverse discrimination" because on direct appeal we did not grant a new penalty hearing for Castillo, based on this improper argument, as we did for Evans. Castillo apparently is white, and Evans apparently is African-American. This accusation is nonsense. First, the race of the parties before this court has no bearing on our decisions. Second, Castillo did not raise this issue on direct appeal, so this court has not had a proper opportunity to address it before. Third, the primary error that occurred in Evans's case—a prosecutor urging the jury to employ improperly the character evidence—did not occur here. We advise Mr. Oram to refrain from making reckless, unfounded accusations in the future.

Evans again but fails to show that it is apposite. Castillo does not provide this court with the instructions given in his case;[17] he simply asserts that they did not properly inform the jury on how to consider the penalty evidence. However, the error in Evans was not incorrect jury instructions but improper argument by the prosecutor, who wrongly directed jurors to employ "other matter" evidence in determining the existence and weight of aggravating circumstances.[18] This court stated that the jury instructions in that case, though accurate, "did not cure the error introduced by the incorrect argument."[19] Evans set forth for future use jury instructions describing the restricted use of "other matter" evidence, but it did not imply, let alone hold, that lack of such instructions in prior cases constituted error.[20] Castillo has shown neither that his attorneys acted deficiently nor that he was prejudiced.

Castillo claims that his trial counsel was ineffective in failing to properly investigate the case and failing to present a psychological defense in the guilt phase. This claim has no merit. Castillo identifies no evidence which his counsel failed to uncover. He argues that psychological evidence presented by the defense in the penalty phase should have been presented in the guilt phase, making it possible for the jury to find second-

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[17]See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."); see also Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975); NRAP 30(b)(3).

[18]See 117 Nev. at 634-37, 28 P.3d at 515-17.

[19]Id. at 635, 28 P.3d at 516.

[20]Id. at 634-37, 28 P.3d at 515-17.

degree murder. He cites this court's opinion in Dumas v. State, where we concluded that defense counsel was ineffective for failing to investigate and present a defense of mental incapacity or, at least, of a mental state inconsistent with deliberate, premeditated murder.[21] Again, Castillo's authority is not apposite.

Dumas stabbed to death his fiancee; he was mentally deficient and illiterate, had an IQ of 69, and functioned at about a third-grade level.[22] A psychiatrist employed by the State "reported that Dumas probably suffered 'organic damage to [his] intellectual capabilities and was incapable of premeditating'" the killing.[23] The psychiatrist believed rather that "Dumas was acting on impulse and out of emotional desperation."[24] Dumas's counsel failed to investigate or present this evidence. The facts in this case are not comparable. Castillo's counsel did employ a psychologist to investigate Castillo's mental condition. And the record shows that Castillo was average or even above average in intelligence and highly capable of calculation and manipulation; he was delinquent and exhibited a personality disorder but had no neurological damage, mental illness, or learning disability. At the evidentiary hearing, Castillo's trial and appellate counsel, David Schieck, testified that he "didn't see any diminished capacity defense that the jury would accept." He considered the Dumas case different in that Dumas was mentally retarded and

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[21]111 Nev. 1270, 903 P.2d 816 (1995).

[22]Id. at 1271, 903 P.2d at 816-17.

[23]Id.

[24]Id.

committed a crime of passion. Schieck believed that the psychological evidence gathered by his expert was germane only to the penalty phase, and "in fact, a lot of what he would have had to have told the jury about [Castillo's] background probably would have been damaging at the guilt phase of the trial." We conclude that the record shows that defense counsel acted reasonably in investigating Castillo's mental condition and deciding not to offer psychological evidence in the guilt phase.

In his remaining claims, Castillo raises alleged trial or other freestanding errors. He fails to articulate any good cause for failing to raise the claims before, and they are consequently procedurally barred. Although he asserts that his conviction is unconstitutional because of cumulative error, including "the systematic deprivation of petitioner's right to the effective assistance of trial and appellate counsel," this court does not accept

> conclusory, catchall attempts to assert ineffective assistance of counsel. If first-time applicants for post-conviction habeas relief fail to argue specifically that their trial or appellate counsel were ineffective in regard to an issue or to show good cause for failing to raise the issue before, that issue will not be considered, pursuant to NRS 34.810.[25]

The following claims are therefore procedurally barred: the tire iron or crowbar used in the murder was not a deadly weapon; NRS 193.165(5), which defines "deadly weapon," is unconstitutionally vague and ambiguous; the death penalty is cruel and unusual punishment under the Eighth Amendment of the United States Constitution and violates

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[25]Evans, 117 Nev. at 647, 28 P.3d at 523.

international law; execution by lethal injection is cruel and unusual punishment and violates international law; Castillo's conviction and sentence are invalid under the International Covenant on Civil and Political Rights; and Nevada's capital punishment system is unconstitutional because it operates in an arbitrary and capricious manner. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Nancy M. Saitta, District Judge
Christopher R. Oram
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
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Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM P. CASTILLO, Petitioner, vs. E. K. McDANIEL, Warden, and CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada, Respondents.	Case No. C133336 Dept. No. XVIII **EXHIBITS TO PETITION FOR WRIT OF HABEAS CORPUS** (Death Penalty Habeas Corpus Case)

VOLUME 2 OF 15

EXH

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Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM P. CASTILLO, Petitioner, vs. E. K. McDANIEL, Warden, and CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada, Respondents.	Case No. C133336 Dept. No. XVIII **EXHIBITS TO PETITION FOR WRIT OF HABEAS CORPUS** (Death Penalty Habeas Corpus Case)

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Exhibit No.	Description
1.	Judgment of Conviction, State v. Castillo, Clark County, Case No. C133336, November 12, 1996
2.	Indictment, State v. Castillo, Clark County, Case No. C133336, January 19, 1996
3.	Order of Appointment of Counsel, State v. Castillo, Clark County, Case No. C133336, March 14, 1996
4.	Amended Indictment, State v. Castillo, Clark County, Case No. C133336, May 29, 1996
5.	Special Verdict, State v. Castillo, Clark County, Case No. C133336, September 25, 1996

6. Special Verdict, State v. Castillo, Clark County, Case No. C133336, September 25, 1996

7. Verdict, State v. Castillo, Clark County, Case No. C133336, September 25, 1996

8. Guilty Plea Agreement, State v. Michele C. Platou, Clark County, Case No. C133336, September 26, 1996

9. Notice of Appeal, State v. Castillo, Clark County, Case No. C133336, November 4, 1996

10. Appellant's Opening Brief, Castillo v. State, Nevada Supreme Court, Case No. 29512, March 12, 1997

11. Appellant's Reply Brief, Castillo v. State, Nevada Supreme Court, Case No. 29512, May 2, 1997

12. Petition for Rehearing, Castillo v. State, Nevada Supreme Court, Case No. 29512, August 21, 1998

13. Order Denying Rehearing, Castillo v. State, Nevada Supreme Court, Case No. 29512, November 25, 1998

14. Petition for Writ of Habeas Corpus, Castillo v. State, Clark County, Case No. C133336, April 2, 1999

15. Opinion, Castillo v. State, Nevada Supreme Court, Case No. 29512, April 2, 1998

16. Supplemental Brief In Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), Castillo v. State, Clark County, Case No. C133336, October 12, 2001

17. Notice of Appeal, Castillo v. State, Clark County, Case No. C133336, February 19, 2003

18. Findings of Fact, Conclusions of Law and Order, Castillo v. State, Clark County, Case No. C133336, June 11, 2003

19. Appellant's Opening Brief, Castillo v. State, Nevada Supreme Court, Case No. 40982, October 2, 2003

20. Order of Affirmance, Castillo v. State, Nevada Supreme Court, Case No. 40982, February 5, 2004

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21. Notice of Intent to Seek Indictment, LVMPD Event No. 951217-0254, December 26, 1996

22. Notice of Intent to Seek Death Penalty, State v. Castillo, Clark County, Case No. C133336, January 23, 1996

23. Instructions to the Jury, State v. Castillo, Clark County, Case No. C133336, September 4, 1996

24. Verdict, State v. Castillo, Clark County, Case No. C133336, September 4, 1996

25. Instructions to the Jury, State v. Castillo, Clark County, Case No. C133336, September 25, 1996

26. Lewis M. Etcoff, Psychological Evaluation, July 14, 1996

27. Declaration of Herbert Duzant

28. Declaration of Joe Castillo

29. Declaration of Barbara Wickham

30. Declaration of Regina Albert

31. Declaration of Cecilia Boyles

32. Declaration of Ramona Gavan-Kennedy

33. Declaration of Michael Thorpe

34. Declaration of Yolanda Norris

35. Declaration of Lora Brawley

36. Evaluation Report by Rebekah G. Bradley, Ph.D.

37. Curriculum Vitae of Rebekah G. Bradley, Ph.D.

38. Confidential Forensic Report by Jonathan H. Mack, Psy.D.

39. Curriculum Vitae of Jonathan H. Mack, Psy.D.

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40. Declaration of Kelly Lynn Lea

41. Declaration of Dale Eric Murrell

42. Declaration of Lewis M. Etcoff, Ph.D.

43. Declaration of Mary Kate Knowles

44. Declaration of Herbert Duzant

45. David M. Schieck, Esq. Client Billing Worksheet (2/29/96-11/4/96)

46. Affidavit of Vital Statistics, Barbara Margaret Thorpe v. William Patrick Thorpe, Sr., State of Missouri, County of St. Louis, September 14, 1973

47. William P. Thorpe, Sr. Missouri Department of Corrections with Fulton State Hospital records

48. Catholic Services for Children and Youth, Catholic Charities, Archdiocese of St. Louis, records of Max Allen Becker, Yolanda Becker, and Barbara Becker, children of Allegria Dehry-Becker and Robert Becker

49. Divorce proceedings, Barbara Castillo v. Joe Castillo, Clark County, Nevada, Case No. D121396

50. Charles Sarkison, Attorney at Law, records of representation of Barbara M. Wickham, formerly, Barbara Becker-Thorpe-Castillo-Sullivan:

- Custodial proceedings regarding William Patrick Thorpe, Jr. (now William Patrick Castillo), pages 2-25
- Divorce proceedings regarding William Patrick Thorpe, Sr., pages 26-48
- Personal injury lawsuit for accident on 4/10/74, pages 49-69

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51. Missouri Certification of Death, William P. Thorpe, Sr. (Date of Death: July 17, 1984)

52. Missouri Criminal Court records Re: William Patrick Thorpe, Sr.

53. Arturo R. Longoro, M.D. - Medical records of Yolanda Norris, formerly Yolanda Becker

54. Lewis M. Etcoff, Ph.D. records Re: William Patrick Castillo

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55. Order for Adoption, In the Matter of the Adoptive Petition of Joe L. Castillo and Barbara Castillo, Clark County, Nevada, Case No. D40017, January 15, 1982

56. St. Louis Post-Dispatch, news article "Police Keeping Their Eyes Peeled At New Downtown Massage Parlor," September 19, 1976

57. St. Louis Globe-Democrat news article, "His home is a prison cell and his life is a waste," November 7, 1973

58. Children's Hospital of St. Louis medical records on William P. Thorpe, Jr.

59. Oasis Treatment records, 6/9/81-9/11/81

60. Coordinator's Contact Record, 9/14/81-12/15/81

61. Confidential Psychological Evaluation, performed May 24, 1982

62. Las Vegas Mental Health Center, Psychiatric Evaluation, dated July 7, 1982

63. Abandonment proceedings, In the Interest of William P. Thorpe, Jr., Family Court of St. Louis, Case No. 56644

64. State of Nevada, Department of Human Resources, Division of Child and Family Services, Child Abuse reports

65. Nevada Youth Training Center Records

66. Catholic Services for Children and Youth, Catholic Charities, Archdiocese of St. Louis, records of William P. Thorpe, Jr.

67. Independence High School records of William Patrick Castillo

68. Missouri Baptist Hospital, medical records of Barbara M. Thorpe, 8/11/76

69. State of Nevada Children's Behavorial Heath Services records of William Patrick Castillo (formerly William Patrick Thorpe, Jr.)

70. Castillo Family Video Recordings: 12/25/1983, 12/28/83 (William P. Castillo's birthday), 12/24/84, 12/25/84, 12/28/84 (William P. Castillo's birthday) - MANUALLY FILED

71. Acadia Neuro-Behavioral Center, P.A., Richard Douyon, M.D. records of Yolanda Norris (formerly Yolanda Becker)

72. News article, "Police hunt Florissant gang members"

73. William P. Castillo's family tree

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74. Historical View, Life of William Castillo

75. State of Nevada Department of Health and Human Services Health Division letter dated May 11, 2008

76. Las Vegas Metropolitan Police Department Detention Bureau Record of Visitors
12/21/95-8/16/96

77. Ely State Prison Visiting Record 1997-2008

78. Jeffrey Fagan, Deterrence and the Death Penalty: A Critical Review of New Evidence, January 21, 2005, at http://www.deathpenaltyinfo.org

79. Juvenile Division, In the Matter of William P. Castillo aka William P. Thorpe, Clark County, Nevada, Case No. J26174

- Order, July 30, 1982, pg. 1
- Parents Treatment Agreement, July 30, 1982, pgs. 2-3
- Reporter's Transcript of Hearing in Re: Report and Disposition, July 29, 1982, pgs. 4-9
- Transcript of Proceedings, Report and Disposition, December 7, 1982,

pgs. 10-18
- Dispositional Report, January 25, 1983, pgs. 19-21
- Transcript of Proceedings, Report and Disposition, January 25, 1983, pgs. 22-26

80. Family Court of St. Louis County, Missouri, juvenile records, 6/4/85-9/13/85

81. Motion to Exclude Other Bad Acts and Irrelevant Prior Criminal Activity, State v. Castillo, Clark County, Case No. C133336, July 30, 1996

82-100 Omitted

101. Bennett v. State, No. 38934 Respondent's Answering Brief (November 26, 2002)

102. State v. Colwell, No. C123476, Findings, Determinations and Imposition of Sentence (August 10, 1995)

103. Doleman v. State, No. 33424 Order Dismissing Appeal (March 17, 2000)

104. Farmer v. Director, Nevada Dept. of Prisons, No. 18052 Order Dismissing Appeal (March 31, 1988)

105. Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992)

106. Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997)

107. Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part (November 14, 2002)

108. Hankins v. State, No. 20780, Order of Remand (April 24, 1990)

109. Hardison v. State, No. 24195, Order of Remand (May 24, 1994)

110. Hill v. State, No. 18253, Order Dismissing Appeal (June 29, 1987)

111. Jones v. State, No. 24497 Order Dismissing Appeal (August 28, 1996)

112. Jones v. McDaniel, et al., No. 39091, Order of Affirmance (December 19, 2002)

113. Milligan v. State, No. 21504 Order Dismissing Appeal (June 17, 1991)

114. Milligan v. Warden, No. 37845, Order of Affirmance (July 24, 2002)

115. Moran v. State, No. 28188, Order Dismissing Appeal (March 21, 1996)

116. Neuschafer v. Warden, No. 18371, Order Dismissing Appeal (August 19, 1987)

117. Nevius v. Sumner (Nevius I), Nos. 17059, 17060, Order Dismissing Appeal and Denying Petition (February 19, 1986)

118. Nevius v. Warden (Nevius II), Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition for Writ of Habeas Corpus (October 9, 1996)

119. Nevius v. Warden (Nevius III), Nos. 29027, 29028, Order Denying Rehearing (July 17, 1998)

120. Nevius v. McDaniel, D. Nev. No. CV-N-96-785-HDM-(RAM), Response to Nevius' Supplemental Memo at 3 (October 18, 1999)

121. O'Neill v. State, No. 39143, Order of Reversal and Remand (December 18, 2002)

122. Rider v. State, No. 20925, Order (April 30, 1990)

123. Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999)

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124. Rogers v. Warden, No. 22858, Order Dismissing Appeal (May 28, 1993), Amended Order Dismissing Appeal (June 4, 1993)

125. Rogers v. Warden, No. 36137, Order of Affirmance (May 13, 2002)

126. Sechrest v. State, No 29170, Order Dismissing Appeal (November 20, 1997)

127. Smith v. State, No. 20959, Order of Remand (September 14, 1990)

128. Stevens v. State, No. 24138, Order of Remand (July 8, 1994)

129. Wade v. State, No. 37467, Order of Affirmance (October 11, 2001)

130. Williams v. State, No. 20732, Order Dismissing Appeal (July 18, 1990)

131. Williams v. Warden, No. 29084, Order Dismissing Appeal (August 29, 1997)

132. Ybarra v. Director, Nevada State Prison, No. 19705, Order Dismissing Appeal (June 29, 1989)

133. Ybarra v. Warden, No. 43981, Order Affirming in Part, Reversing in Part, and Remanding (November 28, 2005)

134. Ybarra v. Warden, No. 43981, Order Denying Rehearing (February 2, 2006)

135. Rippo v. State; Bejarano v. State, No. 44094, No. 44297, Order Directing Oral Argument (March 16, 2006)

136. State v. Rippo, Case No. C106784, Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), February 10, 2004

137. State v. Rippo, Case No. C106784, Findings of Fact, Conclusions of Law and Order, December 1, 2004

138. Rippo v. State, S. C. Case No. 44094, Appellant's Opening Brief, May 19, 2005

139. Rippo v. State, S. C. Case No. 44094, Respondent's Answering Brief, June 17, 2005

140. Rippo v. State, S. C. Case No. 44094, Appellant's Reply Brief, September 28, 2005

141. Rippo v. State, S. C. Case No. 44094, Appellant's Supplemental Brief As Ordered By This Court, December 12, 2005

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142. Nevada Department of Corrections Confidential Execution Manual, Procedures for Executing the Death Penalty, Nevada State Prison, Revised February 2004

142-A. Nevada Department of Corrections Confidential Execution Manual, Revised October 2007 with transmittal letter dated June 13, 2008

143. Brief of Amici Curiae in Support of Petitioner, United States Supreme Court Case No. 03-6821, David Larry Nelson v. Donal Campbell and Grantt Culliver, October Term, 2003

144. Killer makes final requests, LAS VEGAS SUN, March 18, 2004

145. Leonidas G. Koniaris, Teresa A. Zimmers, David A. Lubarsky, and Jonathan P. Sheldon, Inadequate Anaesthesia in Lethal Injection for Execution, Vol. 365, April 16, 2005, at http://www.thelancet.com

146. Declaration of Mark J. S. Heath, M.D., May 16, 2006, including attachments A-F

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147. Reporter's Transcript of Proceedings, Volume I, Castillo v. State, Clark County, Grand Jury, Case No. C133336, January 11, 1996

148. Reporter's Transcript of Proceedings, Volume II, Castillo v. State, Clark County, Grand Jury, Case No. C133336, January 18, 1996

149. Transcript (Arraignment), Castillo v. State, Clark County, Case No. C133336, January 24, 1996

150. Transcript, Castillo v. State, Clark County, Case No. C133336, March 13, 1996

151. Transcript, Castillo v. State, Clark County, Case No. C133336, April 3, 1996

152. Recorder's Transcript Re: Defendant Castillo's Petition for Writ of Habeas Corpus, Defendant Platou's Petition for Writ of Habeas Corpus, State's Motion to Amend Indictment, Castillo v. State, Clark County, Case No.

C133336, May 1, 1996

153. Reporter's Transcript of Proceedings in Re: Defendant Castillo's Petition for Writ of Habeas Corpus and Defendant Platou's Petition for Writ of Habeas Corpus, Castillo v. State, Clark County, Case No. C133336, May 29, 1996

154. Transcript, Castillo v. State, Clark County, Case No. C133336, July 22, 1996

155. Reporter's Transcript of Proceedings In Re: Motions, Castillo v. State, Clark County, Case No. C133336, August 12, 1996

156. Transcript, Castillo v. State, Clark County, Case No. C133336, August 21, 1996

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157. Trial Transcript, Volume I, Castillo v. State, Clark County, Case No. C133336, August 26, 1996

158. Trial Transcript, Volume II, Castillo v. State, Clark County, Case No. C133336, August 27, 1996 2:10 PM

159. Trial Transcript, Volume II, Castillo v. State, Clark County, Case No. C133336, August 27, 1996 4:40 PM

160. Trial Transcript, Volume III, Morning Session, Castillo v. State, Clark County, Case No. C133336, August 28, 1996

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161. Reporter's Transcript of Trial, Volume III, Afternoon Session, Castillo v. State, Clark County, Case No. C133336, August 28, 1996

162. Trial Transcript, Volume IV - Morning Session, Castillo v. State, Clark County, Case No. C133336, August 29, 1996 9:30 A.M.

163. Reporter's Transcript of Jury Trial, Volume IV - Afternoon Session, Castillo v. State, Clark County, Case No. C133336, August 29, 1996 1:15 P.M.

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164. Trial Transcript, Volume V - Morning Session, Castillo v. State, Clark County, Case No. C133336, September 3, 1996 9:35 A.M.

165. Reporter's Transcript of Trial, Volume V, Afternoon Session, Castillo v. State, Clark County, Case No. C133336, September 3, 1996

166. Trial Transcript, Volume VI, Castillo v. State, Clark County, Case No. C133336, September 4, 1996 11:35 A.M.

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167. Penalty Hearing Transcript, Castillo v. State, Clark County, Case No. C133336, September 19, 1996

168. Reporter's Transcript, Penalty Hearing, Volume I-Afternoon Session, Castillo v. State, Clark County, Case No. C133336, September 19, 1996

169. Reporter's Transcript, Penalty Hearing, Volume II - Morning Session, Castillo v. State, Clark County, Case No. C133336, September 20, 1996

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170. Reporter's Transcript, Penalty Hearing, Volume II - Afternoon Session, Castillo v. State, Clark County, Case No. C133336, September 20, 1996

171. Reporter's Transcript, Penalty Hearing - Volume III - Morning Session, Castillo v. State, Clark County, Case No. C133336, September 24, 1996

172. Reporter's Transcript, Penalty Hearing - Volume III - Afternoon Session, Castillo v. State, Clark County, Case No. C133336, September 24, 1996

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173. Reporter's Transcript, Penalty Hearing - Volume IV, Castillo v. State, Clark County, Case No. C133336, September 25, 1996

174. Reporter's Transcript, Castillo v. State, Clark County, Case No. C133336, November 4, 1996

175. Reporter's Transcript of Motion to Withdraw, Castillo v. State, Clark County, Case No. C133336, December 16, 1996

176. Transcript, Motion for Appointment of Psychiatrist and Co-Counsel, Castillo v. State, Clark County, Case No. C133336, December 6, 1999

177. Reporter's Transcript, State's Motion to Place on Calendar, Castillo v. State, Clark County, Case No. C133336, October 23, 2000

178. Reporter's Transcript, Confirmation of Counsel, Castillo v. State, Clark County, Case No. C133336, October 26, 2000

179. Recorder's Transcript, Defendant's Motion for Extension of Time to File Defendant's Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus, Castillo v. State, Clark County, Case No. C133336, March 12, 2001

180. Recorder's Transcript Re: Argument, Castillo v. State, Clark County, Case No. C133336, March 4, 2002

181. Recorder's Transcript Re: Request of the Court: Argument, Castillo v. State, Clark County, Case No. C133336, April 10, 2002

182. Recorder's Transcript Re: request of the Court: Argument, Castillo v. State, Clark County, Case No. C133336, May 8, 2002

183. Recorder's Transcript Re: Evidentiary Hearing, Castillo v. State, Clark County, Case No. C133336, August 2, 2002

184. Recorder's Transcript Re: Evidentiary Hearing, Castillo v. State, Clark County, Case No. C133336, January 22, 2003

RECEIPT OF COPY

RECEIPT OF A COPY of the above and foregoing EXHIBITS TO PETITION FOR WRIT OF HABEAS CORPUS is hereby acknowledged, this 18th day of September, 2009.

OFFICE OF THE DISTRICT ATTORNEY

BY _____
STEVEN OWENS, Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155

CERTIFICATE OF MAILING

In accordance with Rule 5(b)(2)(B) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on the 18th day of September, 2009, a true and correct copy of the foregoing EXHIBITS TO PETITION FOR WRIT OF HABEAS CORPUS was deposited in the United States mail, first class postage fully prepaid thereon, addressed to:

Catherine Cortez Masto, Nevada Attorney General
Heather D. Procter, Deputy Attorney General
Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701-4717

_____
An employee of the Federal Public Defender

EXHIBIT 21

EXHIBIT 21

NOTICE OF INTENT TO SEEK INDICTMENT

TO: WILLIAM PATRICK CASTILLO AND YOUR LEGAL COUNSEL, STATE PUBLIC DEFENDER, PETE LAPORTA.

YOU ARE HEREBY NOTIFIED THAT ON THURSDAY, JANUARY 11, 1996, AND THURSDAY, JANUARY 18, 1996, THE DISTRICT ATTORNEY INTENDS TO SEEK AN INDICTMENT AGAINST YOU FOR THE CRIMES OF:

CONSPIRACY TO COMMIT BURGLARY AND ROBBERY; BURGLARY; ROBBERY, VICTIM SIXTY-FIVE YEARS OF AGE, OR OLDER; MURDER WITH USE OF A DEADLY WEAPON; CONSPIRACY TO COMMIT BURGLARY AND ARSON; FIRST DEGREE ARSON

OCCURRING ON OR BETWEEN: DECEMBER 26, 1996

AGENCY EVENT NUMBERS: LVMPD 951217-0254

A PERSON WHOSE INDICTMENT THE DISTRICT ATTORNEY INTENDS TO SEEK MAY TESTIFY BEFORE THE GRAND JURY IF HE REQUESTS TO DO SO AND EXECUTES A VALID WAIVER IN WRITING OF HIS CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION. NEV. REV. STAT. 172.241

IF YOU DESIRE TO TESTIFY BEFORE THE GRAND JURY IN THIS MATTER, YOU MUST NOTIFY THE OFFICE OF THE DISTRICT ATTORNEY IMMEDIATELY. THE NOTICE MUST STATE A DESIRE TO TESTIFY AND REQUEST AN OPPORTUNITY TO DO SO. THEREAFTER, YOU MUST KEEP THE DISTRICT ATTORNEY AND YOUR OWN ATTORNEY INFORMED OF YOUR CURRENT LOCATION SO THAT YOU CAN BE CONTACTED TO APPEAR. THE DISTRICT ATTORNEY MAY CONTACT YOU TO TESTIFY THROUGH YOUR ATTORNEY.

IF YOU ARE AWARE OF ANY EVIDENCE WHICH TENDS TO EXPLAIN AWAY THE ABOVE CRIMES, AND IT IS YOUR DESIRE THAT THIS EVIDENCE BE PRESENTED TO THE GRAND JURY, THEN YOU OR YOUR ATTORNEY MUST FURNISH SUCH EVIDENCE TO THE OFFICE OF THE DISTRICT ATTORNEY IMMEDIATELY.

A PERSON WHOSE INDICTMENT THE DISTRICT ATTORNEY INTENDS TO SEEK OR THE GRAND JURY ON ITS OWN MOTION INTENDS TO RETURN, MAY BE ACCOMPANIED BY LEGAL COUNSEL DURING ANY APPEARANCE BEFORE THE GRAND JURY. THE LEGAL COUNSEL WHO ACCOMPANIES A PERSON MAY ADVISE HIS CLIENT, BUT SHALL NOT ADDRESS DIRECTLY THE MEMBERS OF THE GRAND JURY, SPEAK IN SUCH A MANNER AS TO BE HEARD BY MEMBERS OF THE GRAND JURY, OR IN ANY OTHER WAY PARTICIPATE IN THE PROCEEDINGS OF THE GRAND JURY. THE COURT OR THE FOREPERSON OF THE GRAND JURY MAY HAVE THE LEGAL COUNSEL REMOVED IF HE VIOLATES ANY OF THESE PROVISIONS OR IN ANY OTHER WAY DISRUPTS THE PROCEEDINGS OF THE GRAND JURY. NEV. REV. STAT. 172.239

RESPONSES TO TESTIFY OR PRESENT EVIDENCE MUST BE ADDRESSED TO:

DISTRICT ATTORNEY, 200 S. THIRD STREET, 7TH FLOOR- GRAND JURY, LAS VEGAS, NV 89155
THE TELEPHONE NUMBER IS OPERATIVE 8:00 A.M. - 5:00 P.M. (702) 455-5770 / 455-5173

THIS IS THE ONLY NOTICE YOU WILL RECEIVE. IT IS YOUR DUTY TO RESPOND AS SET FORTH ABOVE. ANY RESPONSE INCONSISTENT WITH THE ABOVE DIRECTIONS OR ONE WHICH REQUESTS ADDITIONAL NOTIFICATION OF THE GRAND JURY PROCEEDINGS WILL BE DISREGARDED.

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 8th day of January, 1996, by fax to:

PETE LAPORTA, ESQ.
STATE PUBLIC DEFENDER
FAX: 455-6273

by personal service to:
WILLIAM PATRICK COSTILLO
CS#1153209 CCDC

BY: _____
Clark County District Attorney's Office

95F14456A

EXHIBIT 22

EXHIBIT 22

ORIGINAL

FILED

JAN 23 9 20 AM '96

CLERK

NOTC
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,
#1153209

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

NOTICE OF INTENT

TO SEEK DEATH PENALTY

COMES NOW the State of Nevada, through STEWART L. BELL, Clark County District Attorney, by and through WILLIAM T. KOOT, Chief Deputy District Attorney, pursuant to NRS 175.552 and NRS 200.033 and declares its intention to seek the death penalty at a penalty hearing. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

1. The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another, to-wit:

(a) Attempted Residential Burglary committed on 12-19-90, victim Marilyn Mills. Convicted 6-7-91, Case No. C99212X, Clark County, Nevada.

///

CE31

Castillo, William
Rev'd 10/20/04 8JDC-7
8th JDC recs.

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(b) Robbery committed on 12-14-92, Victim Patricia Rizzo. Convicted 5-28-93, Case No. C111011, Clark County, Nevada.

[See NRS 200.033(2)] The evidence of this aggravating circumstance will consist of documentary proof and/or testimony concerning prior convictions.

2. The murder was committed by WILLIAM CASTILLO 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 and the Defendant:

(a) Killed the person murdered.

(b) Knew or had reason to know that life would be taken or lethal force used.

[See NRS 200.033(4)] The evidence of this aggravating circumstance will consist of testimony and physical evidence arising out of the aggravated nature of the offense itself.

3. The murder was committed by WILLIAM PATRICK CASTILLO 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 Burglary and the Defendant:

(a) Killed the person murdered.

(b) Knew or had reason to know that life would be taken or lethal force used.

[See NRS 200.033(4)] The evidence of this aggravating circumstance will consist of testimony and physical evidence arising out of the aggravated nature of the offense itself.

4. The murder was committed to avoid or prevent a lawful arrest. [NRS 200.033(5)] The evidence of this aggravating circumstance will consist of testimony and physical evidence arising out of the aggravated nature of the offense itself.

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Castillo, William
Rev'd 10/20/04 8JDC-8
8th JDC recs.

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5. The murder was committed by WILLIAM PATRICK CASTILLO, for himself or another, to receive money or any other thing of monetary value. [NRS 200.033(6)] The evidence of this aggravating circumstance will consist of testimony and physical evidence arising out of the aggravated nature of the offense itself.

DATED this 22nd day of January, 1996.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
WILLIAM P. KOOT
Chief Deputy District Attorney
Nevada Bar #000281

RECEIPT OF COPY

RECEIPT OF A COPY of the above and foregoing NOTICE OF INTENT TO SEEK DEATH PENALTY is hereby acknowledged this 23rd day of January, 1996.

STATE PUBLIC DEFENDER
ATTORNEY FOR DEFENDANT

BY _____
309 S. Third Street, 4th Floor
Las Vegas, Nevada 89155

EXHIBIT 23

EXHIBIT 23

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
BY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

Castillo, William
Rcv'd 10/20/04 8JDC-507
8th JDC recs.

1407

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

An Amended Indictment is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Amended Indictment that on or about the 17th day of December, 1998, the Defendant committed the following offenses:

COUNT I - CONSPIRACY TO COMMIT BURGLARY AND/OR ROBBERY

Defendants did then and there meet with each other and between themselves and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit the crimes of Burglary and/or Robbery, and in furtherance of said Conspiracy, Defendants did commit the acts alleged in Counts II and III, which acts are incorporated by this reference as though fully set forth herein.

COUNT II - BURGLARY

Defendants did then and there wilfully, unlawfully, and feloniously enter, with intent to commit a felony, to-wit: Larceny, that certain building occupied by ISABELLE BERNDT, located at 13 N. Yale, Las Vegas, Clark County, Nevada; both Defendants entering the residence and Defendant MICHELLE C. PLATOU aiding or abetting Defendant WILLIAM PATRICK CASTILLO by furnishing transportation to said location and Defendant WILLIAM PATRICK CASTILLO aiding or abetting Defendant MICHELLE C. PLATOU by providing the key to the premises.

COUNT III - ROBBERY, VICTIM SIXTY-FIVE YEARS, OR OLDER

Defendants did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: a video cassette recorder, a set of silverware, "booties", United States currency, and miscellaneous personal property from the person of ISABELLE BERNDT, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of the said ISABELLE BERNDT, a person being sixty-five years of age, or older, the Defendants using force or fear to obtain or retain possession of the property, and/or to prevent or overcome resistance to the taking of the property, and/or to facilitate escape with the property; the Defendants aiding or abetting each other as more specifically set forth in Counts I, II, and IV, incorporated herein by this reference.

COUNT IV - MURDER WITH USE OF A DEADLY WEAPON

Castillo, William
Rcv'd 10/20/04 8JDC-509
8th JDC recs.

Defendants did then and there, without authority of law and with malice aforethought, wilfully

[redacted] did then and there wilfully, unlawfully, and feloniously, without authority of law, and with malice [redacted] strike the head and face with his fists and with a deadly weapon, to-wit: a blunt object and/or a tire iron, the Defendants being responsible under the following theories of criminal liability, to-wit: (1) Principal(s): Defendant WILLIAM PATRICK CASTILLO; (2) Felony Murder: Defendants WILLIAM PATRICK CASTILLO and MICHELLE C. PLATOU during the perpetration or attempted perpetration of the crimes of Burglary and/or Robbery as set forth in Counts II and III, incorporated herein by this reference; (3) as aiders or abettors and as conspirators, WILLIAM PATRICK CASTILLO and MICHELLE C. PLATOU vicariously as participants in a conspiracy to commit the felony offenses of Burglary and/or Robbery, as set forth in Count I, incorporated herein by this reference; the Defendants having conspired with each other to commit said Burglary and/or Robbery and having traveled together to the said ISABELLE BERNDT'S home in the vehicle of MICHELLE C. PLATOU, and Defendant WILLIAM PATRICK CASTILLO having retrieved a blunt object and/or a tire iron from Defendant MICHELLE C. PLATOU'S automobile to use against any persons they might encounter after gaining entry to the residence of ISABELLE BERNDT, the Defendants thereafter committing the crimes of Burglary and/or Robbery, as set forth in Counts II and III, incorporated herein by this reference, the Defendant WILLIAM PATRICK CASTILLO actually inflicting the beating to the said ISABELLE BERNDT resulting in her death.

COUNT V - CONSPIRACY TO COMMIT BURGLARY AND ARSON

Defendants did then and there meet with each other and between themselves and each of them with the other, wilfully, unlawfully and feloniously conspire and agree to commit the crimes of Burglary and Arson, and in furtherance of said Conspiracy, Defendants did commit the acts alleged in Counts VI and VII, which acts are incorporated by this reference as if fully set forth herein.

COUNT VI - BURGLARY

Defendants did then and there wilfully, unlawfully, and feloniously enter, with intent to commit a felony, to-wit: Arson, that certain building occupied by ISABELLE BERNDT, located at 13 N. Yale, Las Vegas, Clark County, Nevada, Defendant WILLIAM PATRICK CASTILLO directly committing said act, Defendant MICHELLE C. PLATOU aiding or abetting its commission by counsel and encouragement and by driving Defendant WILLIAM PATRICK CASTILLO to and from the scene of

the crime.

COUNT VII - FIRST DEGREE ARSON

Defendants did then and there willfully, unlawfully, maliciously, and feloniously set fire to, and cause to be burned, a certain residence, located at 13 N. Yale, Las Vegas, Clark County, Nevada, or all property being then and there the property of ISABELLE BERNDT, by use of open flame and flammable and/or combustible materials, and/or by manner and means unknown, Defendant WILLIAM PATRICK CASTILLO directly committing said act, Defendant MICHELLE C. PLATOU aiding or abetting its commission by counsel and encouragement and by driving Defendant WILLIAM PATRICK CASTILLO to and from the scene of the crime.

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the Defendant is guilty of one or more of the offenses charged.

Each charge and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

Castillo, William
Rcv'd 10/20/04 8JDC-511
8th JDC recs.

INSTRUCTION NO. 4

A conspiracy is an agreement between two or more persons to commit a criminal act. To be guilty of conspiracy, a defendant must intend to commit, or to aid in the commission of, the specific criminal conduct agreed to. The crime is the agreement to do something unlawful; it does not matter whether it was successful or not.

Castillo, William
Rcv'd 10/20/04 8JDC-512
8th JDC recs.

1412

INSTRUCTION NO. 5

It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence.

INSTRUCTION NO. 6

Any person who by day or night, enters any home or building with intent to commit larceny or any felony, is guilty of Burglary.

Castillo, William
Rcv'd 10/20/04 8JDC-514
8th JDC recs.

1414

INSTRUCTION NO. 7

Larceny is the theft of money or property belonging to another person.

Castillo, William
Rcv'd 10/20/04 8JDC-515
8th JDC recs.

1417

INSTRUCTION NO. 6

You are instructed that the offense of burglary is complete if you find that entry was made into a home or building with the intent to commit larceny or any felony therein.

An entry is deemed to be complete when any portion of an intruder's body, however slight, penetrates the space within the building.

Every person who, in the commission of a burglary, commits any other crime, may be prosecuted for each crime separately.

Castillo, William
Rev'd 10/20/04 SJDC-516
8th JDC recs.

INSTRUCTION NO. 9

You are further instructed that in order to constitute the crime of burglary, it is not necessary that you prove that the defendant actually stole any of the articles, goods or money contained in the home at the time of the burglary. The gist of the crime of burglary is the unlawful entering of a building with the intent to steal or do anything therein.

Castillo, William
Rev'd 10/20/04 8JDC-517
8th JDC recs.

INSTRUCTION NO. 20

Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:

(a) Obtain or retain possession of the property;

(b) Prevent or overcome resistance to the taking; or

(c) Facilitate escape.

The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Castillo, William
Rcv'd 10/20/04 SJDC-516
8th JDC recs.

1419

[redacted] 11

The value of property or money taken is not an element of the crime of robbery, and it is not necessary that the State prove the taking of any property or money.

Castillo, William
Rev'd 10/20/04 8JDC-519
8th JDC recs.

1412

INSTRUCTION NO. 12

Any individual identified as a victim who is 65 years of age or older on the date of the alleged crime, satisfies the element of being a victim 65 years of age or older.

Castillo, William
Rev'd 10/20/04 8JDC-520
8th JDC recs.

INSTRUCTION NO. 13

Murder is the unlawful killing of a human being, with malice aforethought, whether express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

Castillo, William
Rev'd 10/20/04 8JDC-521
8th JDC recs.

INSTRUCTION NO. 17

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes rather an unlawful purpose and design in contradistinction to accident and mischance.

Castillo, William
Rev'd 10/20/04 8JDC-522
8th JDC recs.

INSTRUCTION NO. 15

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

Malice may be implied when no provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

Castillo, William
Rcv'd 10/20/04 8JDC-523
8th JDC recs.

INSTRUCTION NO. 16

Murder of the First Degree is murder which is (a) perpetrated by any kind of willful, deliberate and premeditated killing and/or (b) committed during the perpetration of burglary and/or robbery.

Castillo, William
Rcv'd 10/20/04 8JDC-524
8th JDC recs.

INSTRUCTION NO. 17

Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.

Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act 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.

Castillo, William
Rcv'd 10/20/04 8JDC-525
8th JDC recs.

1225

INSTRUCTION NO. 18

The intention to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of its use, and the statements or utterances characterizing the act.

Castillo, William
Rcv'd 10/20/04 8JDC-626
8th JDC recs.

1423

INSTRUCTION NO. 17

There is a kind of murder which carries with it conclusive evidence of premeditation and malice aforethought. This class of murder is murder committed in the perpetration of burglary and/or robbery. Therefore, a killing which is committed in the perpetration of burglary and/or robbery is deemed to be murder in the First Degree, whether the killing was intentional, unintentional or accidental. This is called the Felony-Murder rule.

The Felony-Murder rule is applicable only when a specific intent to commit burglary and/or robbery is proved.

Castillo, William
Rec'd 10/20/04 8JDC-527
8th JDC recs.

1447

INSTRUCTION NO. 29

You are instructed that if you find a defendant guilty of murder of the first degree, you must also determine whether or not a deadly weapon was used in the commission of this crime.

Castillo, William
Rcv'd 10/20/04 8JDC-528
8th JDC recs.

INSTRUCTION NO. 21

A deadly weapon is any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

Castillo, William
Rcv'd 10/20/04 SJDC-529
8th JDC recs.

INSTRUCTION NO. 22

If you find beyond a reasonable doubt that a defendant committed Murder of the First Degree with the Use of a Deadly Weapon, then you are instructed that the verdict of Murder of the First Degree with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Murder, but you do find that a Murder was committed, then you are instructed that the verdict of Murder of the First Degree without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Murder of the First Degree with the Use of a Deadly Weapon and Murder of the First Degree without the Use of a Deadly Weapon.

Castillo, William
Rev'd 10/20/04 SJDC-530
8th JDC recs.

1432

INSTRUCTION NO. 23

The offense of First Degree Murder necessarily includes the lesser offense of Second Degree Murder.

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict of murder of the second degree.

Castillo, William
Rcv'd 10/20/04 8JDC-531
8th JDC recs.

INSTRUCTION NO. 24

Murder of the Second Degree is murder with malice aforethought, but without the additional element of premeditation.

All murder which is not Murder of the First Degree is Murder of the Second Degree.

Castillo, William
Rcv'd 10/20/04 8JDC-532
8th JDC recs.

INSTRUCTION NO. 25

You are instructed that if you find a defendant guilty of murder of the second degree you must also determine whether or not a deadly weapon was used in the commission of this crime.

1437

Castillo, William
Rcv'd 10/20/04 8JDC-533
8th JDC recs.

INSTRUCTION NO. 26

If you find beyond a reasonable doubt that a defendant committed Murder of the Second Degree with the Use of a Deadly Weapon, then you are instructed that the verdict of Murder of the Second Degree with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Murder, but you do find that a Murder was committed, then you are instructed that the verdict of Murder of the Second Degree without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Murder of the Second Degree with the Use of a Deadly Weapon and Murder of the Second Degree without the Use of a Deadly Weapon.

Castillo, William
Rcv'd 10/20/04 8JDC-534
8th JDC recs.

INSTRUCTION NO. 27

Any person who wilfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any dwelling house or other structure, whether occupied or vacant, whether the property of himself or of another, is guilty of arson in the first degree.

Castillo, William
Rcv'd 10/20/04 8JDC-535
8th JDC recs.

INSTRUCTION NO. 28

The word "willfully" means the doing of an act purposely and intentionally, not accidentally. The word "maliciously" means wrongfully, intentionally and without just cause or excuse.

Castillo, William
Rev'd 10/20/04 8JDC-536
8th JDC recs.

INSTRUCTION NO. 21

To constitute the setting fire to or the burning of property as those terms are used in the law just stated to you, it is not necessary that the dwelling, house, or personal property involved be completely destroyed. The burning, which is a necessary element of the crime, is done if fire is so applied or created that it destroys any part of the property, however small. A charring, which involves the destruction of some of the material, is a burning within the meaning of the law.

Castillo, William
Rcv'd 10/20/04 8JDC-537
8th JDC recs.

1437

INSTRUCTION NO. 30

Every person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids and abets in the commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a crime, is a principal, and shall be proceeded against and punished as such.

Castillo, William
Rcv'd 10/20/04 SJDC-538
8th JDC recs.

INSTRUCTION NO. 31

Where several parties join together in a common design to commit any unlawful act, each is criminally responsible for the acts of his confederates committed in furtherance of the common design. In contemplation of law, the act of one is the act of all.

Castillo, William
Rcv'd 10/20/04 8JDC-539
8th JDC recs.

INSTRUCTION NO. 32

You are instructed that presence, companionship, and conduct before, during and after the offense are circumstances from which one's participation in the criminal intent may be inferred.

Castillo, William
Rev'd 10/20/04 8JDC-540
8th JDC recs.

DISTRUCTION NO. 33

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

Castillo, William
Rev'd 10/20/04 8JDC-541
8th JDC recs.

INSTRUCTION NO. 34

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

Castillo, William
Rcv'd 10/20/04 8JDC-642
8th JDC recs.

INSTRUCTION NO. 35

You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

Castillo, William
Rcv'd 10/20/04 8JDC-543
8th JDC recs.

INSTRUCTION NO. 36

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence, direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

Castillo, William
Rev'd 10/20/04 8JDC-544
8th JDC recs.

INSTRUCTION NO. 37

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

1345

Castillo, William
Rcv'd 10/20/04 8JDC-545
8th JDC recs.

INSTRUCTION NO. 38

You are instructed that the law does not compel a defendant in a criminal case to take the stand and testify, and no presumption may be raised and no inference of any kind may be drawn, from the failure of a defendant to testify.

Castillo, William
Rcv'd 10/20/04 SJDC-546
8th JDC recs.

INSTRUCTION NO. 37

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

Castillo, William
Rev'd 10/20/04 8JDC-547
8th JDC recs.

INSTRUCTION NO. 10

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

Castillo, William
Rev'd 10/20/04 8JDC-648
8th JDC recs.

INSTRUCTION NO. 41

In arriving at a verdict in this case as to whether the defendant is guilty or not guilty, the subject of penalty or punishment is not to be discussed or considered by you and should in no way influence your verdict.

If the Jury's verdict is Murder of the First Degree, you will, at a later hearing, consider the subject of penalty or punishment.

Castillo, William
Rcv'd 10/20/04 SJDC-549
8th JDC recs.

INSTRUCTION NO. 22

When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesman here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

14

Castillo, William
Rcv'd 10/20/04 8JDC-650
8th JDC recs.

INSTRUCTION NO. 43

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given you in the presence of, and after notice to, the district attorney and the Defendant and his counsel.

Readbacks of testimony are time-consuming and are not encouraged unless you deem it a necessity. Should you require a readback, you must carefully describe the testimony to be read back so that the court reporter can arrange his notes. Remember, the court is not at liberty to supplement the evidence.

Castillo, William
Rcv'd 10/20/04 8JDC-551
8th JDC recs.

INSTRUCTION NO. 44

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberations by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN: _____
DISTRICT JUDGE

Castillo, William
Rev'd 10/20/04 8JDC-552
8th JDC recs.

EXHIBIT 24

EXHIBIT 24

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT I - CONSPIRACY TO COMMIT BURGLARY AND/OR ROBBERY.

DATED this 4th day of September, 1996.

JOHN R. RUHLMANN
FOREPERSON

CE31

Castillo, William
Rcv'd 10/20/04 SJDC-563
8th JDC recs.

1453

VER

FILED IN OPEN COURT
SEP 0 4 1996 10 42 am
LORETTA BOWMAN, CLERK
BY [signature] Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT II - BURGLARY.

DATED this 4th day of September, 1996.

JOHN R RUHLMANN

FOREPERSON

CE31

Castillo, William
Rev'd 10/20/04 8JDC-554
8th JDC recs.

1455

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT III - ROBBERY, VICTIM SIXTY-FIVE YEARS, OR OLDER.

DATED this 4th day of September, 1996.

JOHN R RUHLMANN

FOREPERSON

Lite.

1457

X

VER

FILED IN OPEN COURT
SEP 0 4 1996 19 6:42 pm
LORETTA BOWMAN, CLERK
BY [signature] Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT IV - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON.

DATED this 4th day of September, 1996.

JOHN R. RUHLMANN

FOREPERSON

1459

VER

FILED IN OPEN COURT
SEP 04 1996 19 6:12 pm
LORETTA BOWMAN, CLERK
BY [signature] Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT V - CONSPIRACY TO COMMIT BURGLARY AND ARSON.

DATED this 4th day of September, 1996.

JOHN R. RUHLMANN
FOREPERSON

CE31

Castillo, William
Rcv'd 10/20/04 8JDC-557
8th JDC recs.

1661

WCastillo - 027-8JDC0557

VER

FILED IN OPEN COURT
SEP 04 1996 19 6 12 am
LORETTA BOWMAN, CLERK
BY _____ Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO,

Defendant(s).

Case No. C133336
Dept. No. VII
Docket P

VERDICT

We, the jury in the above entitled case, find the defendant WILLIAM PATRICK CASTILLO, Guilty of COUNT VI - BURGLARY.

DATED this 4th day of September, 1996.

JOHN R. RUHLMANN

FOREPERSON

GE31

Castillo, William
Rev'd 10/20/04 8JDC-658
8th JDC recs.

1463

In the Supreme Court of the State of Nevada

WILLIAM P. CASTILLO, Petitioner, vs. E.K. McDANIEL, Warden, Ely State Prison, CATHERINE CORTEZ MASTO, Attorney General for Nevada, Respondents.	No. 56176

APPELLANT'S APPENDIX

Appeal from Order Denying Petition for Writ of Habeas Corpus (Post-Conviction)

Eighth Judicial District Court, Clark County

VOLUME 3 of 21

FRANNY A. FORSMAN
Federal Public Defender
GARY A. TAYLOR
Assistant Federal Public Defender
Nevada Bar No. 11031C
411 East Bonneville Ave, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 30th day of April, 1997, by depositing a copy in the U.S. Mail, postage prepaid, addressed to: District Attorneys Office, 200 S. Third St., Las Vegas, NV 89155; and Attorney Generals Office, 555 E. Washington, No. 3900, Las Vegas, NV 89101.

Kathleen Fitzgerald

KATHLEEN FITZGERALD, an employee of David M. Schieck

EXHIBIT 12

EXHIBIT 12

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

WILLIAM PATRICK CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Case No. 29512

FILED

AUG 21 1998

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

PETITION FOR REHEARING

COMES NOW, Appellant WILLIAM CASTILLO, by and through his attorney DAVID M. SCHIECK, ESQ. and pursuant to NRAP Rule 40 petitions this Court for rehearing of the direct appeal decided on April 2, 1998 in Castillo v. State, 114 Nev.Ad.Op. 33 (1998).

This Petition is made and based on the arguments and authorities herein contained and the records and briefs on file with this Court.

ARGUMENT

I.

THE IMPROPER ARGUMENT THAT WAS FOUND TO BE HARMLESS ERROR WAS SUBJECTED TO THE WRONG STANDARD AND SHOULD HAVE RESULTED IN A NEW PENALTY HEARING

NRAP 40 provides in relevant portion as follows:

> "(a) *Time for filing; content; answer; action by court if granted.* A petition for rehearing may be filed within eighteen (18) days after entry of written judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law of fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to

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present....

. . .

(c) *Scope of application; when rehearing considered.*

(1) Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing.

(2) The court may consider rehearings in the following circumstances:

(i) When it appears that the court has overlooked or misapprehended a material matter in the record or otherwise, or

(ii) In such other circumstances as will promote substantial justice."

This Court in its Opinion entered in the case at bar found that portions of the prosecutor's future dangerousness argument were improper and thereafter stated that:

"The test for evaluating whether an inappropriate comment by the prosecutor merits reversal of the defendant's conviction is whether the inappropriate comments `so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Bennets v. State, 111 Nev. 1099, 1105, 901 P.2d 676, 680 (1995). We conclude that although a portion of the prosecutor's argument was improper, the improper portion did not unfairly prejudice Castillo in light of the overwhelming evidence of his guilt"

Castillo, 114 Nev. Ad. Op. at 12-13.

The strength or weakness of the State's case with respect to CASTILLO'S guilt was not at issue during the penalty hearing. The subject of guilt had already been determined beyond a reasonable doubt and the jury is not entitled to consider lingering or residual doubt as a mitigating circumstance. See Homick v. State, 108 Nev. 127, 141, 825 P.2d

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600, 609 (1992) and Evans v. State, 112 Nev. Ad. Op. 145 (1996). Application of the sufficiency of the evidence to convict standard to a penalty hearing error was therefore clearly improper.

When error occurs during a penalty hearing the more appropriate standard to be applied is the one utilized when an aggravating circumstance is stricken by the appellate court. In Domingues v. State, 112 Nev. Ad. Op. 89 (1996) the Court was faced with an invalid aggravating circumstance and stated as follows:

> "However, we have carefully reviewed the evidence in this case and conclude that it supports the jury's finding of each of the remaining three aggravating circumstances. The jury determined that there were no mitigating circumstances sufficient to outweigh the aggravating circumstances. **After a careful review, we conclude beyond a reasonable doubt that the jury would have reached the same result had the invalid aggravator been omitted.**" (emphasis added)

The same or a similar standard must be applied when this Court finds that error occurred during the closing argument of a penalty hearing. In other words the Court should "after careful review" decide whether, beyond a reasonable doubt, the jury would have reached the same result had the improper argument not been made.

In the instant case the jury found four aggravating circumstances and three mitigating circumstances (10 ROA 2101-2106). The jury may have found more mitigating circumstances had the Court properly instructed the jury on CASTILLO'S proposed mitigating circumstances. The non-statutory mitigating circumstance that CASTILLO had argued before the

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jury, but which the jury could not check in the special verdict form, were:

1. The defendant has admitted his guilt of the offense charged;

2. The defendant has demonstrated remorse for the commission of the offense;

3. The defendant cooperated with the police after he was identified as a suspect;

4. The defendant had not preplanned the commission of the murder; and

5. The defendant had a difficult childhood. (9 ROA 1989)

(The failure to properly instruct the jury was raised on appeal and denied, however the failure to properly instruct now prejudices CASTILLO in his argument on the propriety of the death penalty where error has occurred during the penalty hearing.)

The finding of three statutory mitigating circumstances shows that this case was not an open and shut case where the death penalty is the only appropriate verdict. It is respectfully urged that the improper argument by the prosecutor was so prejudicial that it cannot be said, beyond a reasonable doubt, that the jury verdict was not a result thereof. This Court recognized the harmful nature of the argument in it's opinion:

> "This language improperly suggests that the jury must decide whether to execute the defendant or bear responsibility for the death of an innocent future victim. Presenting the jury's decision as a choice between killing a guilty person or an innocent person will likely result in a juror's decision to impose

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the death penalty more often than if the jury's decision had been portrayed in it proper light"

Castillo, at page 12.

CONCLUSION

It is respectfully urged that the Court should review the penalty hearing error under the standard set forth above and based thereon vacate the sentence imposed and remand the case for a new penalty hearing.

DATED: April 17, 1998

RESPECTFULLY SUBMITTED:

DAVID M. SCHIECK, ESQ.
NEVADA BAR NO. 0824
302 E. CARSON, NO. 600
LAS VEGAS, NV 89101
702-382-1844
ATTORNEY FOR APPELLANT

CERTIFICATE OF MAILING

I, KATHLEEN FITZGERALD, do hereby certify that on April 17, 1998, a copy of the foregoing Petition for Rehearing was deposited in the United States Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to the following:

District Attorney's Office
200 S. Third St.
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson
Carson City, NV 89701

KATHLEEN FITZGERALD
An employee of
DAVID M. SCHIECK, ESQ.

EXHIBIT 13

EXHIBIT 13

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM PATRICK CASTILLO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 29512

FILED

NOV 25 1998

JANETTE M. BLOOM
CLERK OF SUPREME COURT

DEPUTY CLERK

ORDER DENYING REHEARING

This is a petition for rehearing in an appeal from a judgment of conviction of one count of first-degree murder with use of a deadly weapon and a sentence of death.

This court affirmed appellant William Patrick Castillo's conviction and sentence in an opinion filed April 2, 1998. Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998). We concluded that an improper remark by the prosecutor during the penalty phase did not warrant reversal.

> The test for evaluating whether an inappropriate comment by the prosecutor merits reversal of the defendant's conviction is whether the inappropriate comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Bennett v. State, 111 Nev. 1099, 1105, 901 P.2d 676, 680 (1995). We conclude that although a portion of the prosecutor's argument was improper, the improper portion did not unfairly prejudice Castillo in light of the overwhelming evidence of his guilt.

Id. at ___, 956 P.2d at 109-10.

Castillo points out that this court misstated the proper standard of review when we stated that we relied on the evidence supporting Castillo's conviction to evaluate the fairness of the penalty proceedings and affirm Castillo's sentence. This court was required to determine whether the prosecutor's improper remarks were unfairly prejudicial and violated due process in light of the strength of the evidence which supported imposing the death penalty on Castillo. See Guy v. State, 108 Nev. 770, 786, 839 P.2d 578, 588 (1992).

This court may grant rehearing if "it appears that the court has overlooked or misapprehended a material matter in the

record or otherwise" or in "such other circumstances as will promote substantial justice." NRAP 40(c)(2).

We conclude that our misstatement was not material and does not warrant rehearing. Given the strong evidence of the aggravated nature of the murder in this case, evidence which we considered in rendering our original decision, the prosecutor's improper remarks did not unfairly prejudice Castillo. The jurors validly found four aggravating circumstances. They found that the mitigating evidence did not outweigh the aggravating. They were familiar with the circumstances of the murder, which was callous, brutal, and completely unprovoked. They were also familiar with the victim, who was an elderly woman living alone. Given these facts which strongly support the jurors' verdict, we conclude beyond a reasonable doubt that the prosecutor's remarks did not unfairly prejudice Castillo.

This court did not misapprehend a material matter requiring rehearing, and rehearing would not promote substantial justice. We therefore deny the petition.

It is so ORDERED.[1]

Springer, C.J.

Shearing, J.

Rose, J.

Young, J.

cc: Hon. Mark W. Gibbons, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
David M. Schieck
Loretta Bowman, Clerk

[1]The Honorable A. William Maupin, Justice, voluntarily recused himself from the decision of this matter.

EXHIBIT 14

EXHIBIT 14

0014
WILLIAM CASTILLO, #51918
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301
PETITIONER IN PROPER PERSON

Shirley B Rangeline

Apr 2 11 38 AM '99

FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

WILLIAM CASTILLO, Petitioner, vs. WARDEN OF ELY STATE PRISON, and THE STATE OF NEVADA, Respondent.	CASE NO. C 133336 DEPT. NO. VII

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
AND MOTION FOR APPOINTMENT OF COUNSEL

DATE OF HEARING: 4-20-99
TIME OF HEARING: 8:30

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON, WHITE PINE COUNTY

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, LAS VEGAS, NEVADA

3. Date of judgement of conviction: 11-12-96

4. Case number: C 133336

5. (a) Length of sentence: DEATH

(b) If sentence is death, state any date upon which

MC

execution is scheduled: STAYED PENDING APPEAL

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes _____ No XX

If "yes", list crime, case number and sentence being served at this time: _____

7. Nature of offense involved in conviction being challenged: FIRST DEGREE MURDER

8. What was your plea? (Check one)

(a) Not guilty XX

(b) Guilty _____

(c) Guilty but mentally ill _____

(d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: _____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury XX

(b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No XX

12. Did you appeal from the judgement of conviction?

Yes XX No ____

13. If you did appeal, answer the following:

(a) Name of court: NEVADA SUPREME COURT

(b) Case number or citation: 29512

(c) Result: CONVICTION AFFIRMED

(d) Date of result: 4-2-98

(A COPY OF THE DECISION IS ATTACHED)

14. If you did not appeal, explain briefly why you did not: _____

15. Other than a direct appeal from the judgement of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgement in any court, state or federal? Yes _X_ No ___

16. If your answer to No. 15 was "yes," give the following information:

(a)(1) Name of court: UNITED STATES SUPREME COURT

(2) Nature of proceeding: WRIT OF CERTIORARI

(3) Grounds raised:

(a) WAS PETITIONER DENIED DUE PROCESS BY THE IMPROPER ARGUMENT AT THE PENALTY HEARING WHEREIN THE PROSECUTOR ASKED THE JURY TO VOTE AGAINST PETITIONER AND IN FAVOR OF FUTURE INNOCENT VICTIMS?

(b) DID THE REFUSAL OF THE COURT TO INSTRUCT THE JURY ON PETITIONER'S THEORY OF DEFENSE WITH RESPECT TO MITIGATING CIRCUMSTANCES VIOLATE DUE PROCESS AND THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT?

(c) WHETHER PETITIONER'S EIGHT AMENDMENT RIGHTS WERE VIOLATED WHEN THE COURT GAVE AN ANTI-SYMPATHY INSTRUCTION TO THE JURY?

(4) Did you receive an evidentiary hearing on your petition, application or motion? NO

(5) Result: DENIED

(6) Date of result: 3-22-99

(7) If known, citations of any written opinion or date of

orders entered pursuant to such result: _____

(b) as to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? _____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion? N/A

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) ___

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other

post-conviction proceeding? If so, identify: NO

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL. THESE MATTERS ARE NOT PROPERLY RAISED ON DIRECT APPEAL.

19. Are you filing this petition more than 1 year following the filing of the judgement of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) NO

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgement under attack? Yes ____ No XX

If yes, state what court and the case number: _____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: TRIAL ATTORNEY: PETER LaPORTA and DAVID SCHIECK; and

ATTORNEY FOR DIRECT APPEAL: DAVID SCHIECK

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgement under attack?

Yes _____ No XX

If yes, specify where and when it is to be served, if you know: _____

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: DENIED RIGHTS UNDER SIXTH AND FOURTEENTH AMENDMENTS AS I DID NOT RECEIVE DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

Supporting FACTS (Tell your story briefly without citing cases or law.): I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED COUNSEL APPOINTED TO HELP ME COMPLETE THIS PETITION AND FILE A SUPPLEMENTAL PETITION

(b) Ground two: DENIED RIGHTS UNDER SIXTH AND FOURTEENTH AMENDMENTS AS I DID NOT RECEIVE DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

Supporting FACTS (Tell your story briefly without citing cases or law.): I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED COUNSEL APPOINTED TO HELP ME COMPLETE THIS PETITION AND FILE A SUPPLEMENTAL PETITION

WHEREFORE, Petitioner prays that the court grant Petitioner relief to which he may be entitled in this proceeding; and pursuant to NRS 34.820 appoint counsel to

assist Petitioner in these proceedings.

EXECUTED at Ely State Prison on 3-30-99

/s/ William P. Castillo
WILLIAM CASTILLO

VERIFICATION

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

/s/ William P. Castillo
WILLIAM CASTILLO

EXHIBIT 15

EXHIBIT 15

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM PATRICK CASTILLO,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

No. 29512

FILED

APR 02 1998

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a judgment of conviction entered pursuant to a jury verdict of guilty of one count of murder with use of a deadly weapon, and from a sentence of death. Eighth Judicial District Court, Clark County; A. William Maupin, Judge.

Affirmed.

David M. Schieck, Las Vegas, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart Bell, District Attorney, Clark County, and James Tufteland, and Ronald C. Bloxham, Chief Deputy District Attorneys, Clark County, for Respondent.

O P I N I O N

PER CURIAM:

In late November 1995, appellant William Patrick Castillo held a job as a roofer in Las Vegas. Harry Kumma, a former co-worker, contacted Castillo and two other roofing employees, Kirk Rasmussen and Jeff Donovan, about completing a side job. The side job involved re-roofing the residence of the victim, Isabelle Berndt.

Kumma, Rasmussen, Donovan, and Castillo worked on Berndt's roof on November 25, 1995. While performing ground cleanup at Berndt's residence, Castillo indicated to Donovan that he found a key to Berndt's home and wanted to enter. Donovan told Castillo that he should not and directed Castillo

to return the key to the place where he found it. In response, Castillo stated "I'll just come back later at nighttime."

At some time during the roofing job, Castillo asked Kumma to lend him $500 so that Castillo could pay his lawyer for services rendered in connection with an unrelated criminal battery charge. Kumma did not lend Castillo the money.

Prior to these events, Castillo began residing with his girlfriend, Tammy Jo Bryant, and a friend, Michelle Platou. At about 6:00 p.m. on December 16, 1995, Castillo left the apartment with Platou in Platou's car. The two returned to the apartment at approximately 3:00 a.m. on the morning of December 17, 1995, with a VCR, a box containing silverware, and a bag containing knit booties. A few minutes later, Castillo and Platou again departed. They returned about twenty minutes later.

At about 9:00 or 10:00 a.m. on December 17, 1995, Castillo and Platou allegedly informed Bryant that they had committed a robbery and stolen several items. According to Bryant, Castillo and Platou further informed her that while in the house, Platou inadvertently bumped into a wall and made some noise. Castillo and Platou allegedly told Bryant that Castillo then hit a sleeping person with a tire iron Castillo brought into the house. The two then departed the scene. According to Bryant, they further stated that, out of fear that they left incriminating fingerprints on the wall of the house, they returned to the residence at 3:00 a.m. to burn down the house.

In the early morning hours of December 17, 1995, neighbors notified the police that Berndt's residence was ablaze. Firefighters found Berndt's body inside the house. An arson investigator determined that two independent fires, set by "human hands," using some type of accelerant, caused the blaze. Investigators found a charred bottle of lighter fluid at the

scene and several spots in the living room where an accelerant was present. Laboratory tests confirmed these findings.

According to the coroner's autopsy report, Berndt suffered "multiple crushing-type injuries with lacerations of the head, crushing injuries of the jaws," and several broken teeth. Berndt also had deep lacerations on the back of the head and injuries to the face and ears. According to the coroner, all injuries were contemporaneous. The coroner testified that Berndt died as a result of an intracranial hemorrhage due to blunt force trauma to the face and head. The coroner further testified that these injuries were consistent with blows from a crowbar or tire iron.

A Las Vegas Metropolitan Police Department crime analyst investigated Berndt's residence and observed fire, smoke and water damage in the living room, kitchen and master bedroom. He noted that dresser drawers had been opened, two jewelry boxes had been opened, and the house had been "ransacked." The crime analyst also observed blood marks on the wall next to Berndt's body, which was found lying on a bed.

On December 17, 1995, Berndt's only child, Jean Marie Hosking, arrived at Berndt's residence. She searched the house and determined that her mother's silverware was missing. This silverware featured a distinctive floral pattern, had an engraved "B" on each piece, and was stored in a wooden box on the shelf in Berndt's bedroom. Also missing were a VCR, Christmas booties Berndt was knitting for her grandchildren, and eight $50 U.S. savings bonds.

On December 19, 1995, Rasmussen, one of Castillo's coworkers, contacted the police. According to Rasmussen, during the carpool to work on December 18, 1995, Castillo said, "This weekend I murdered an 86-year-old lady in her sleep." Castillo also allegedly stated that he entered Berndt's house with the

intent to steal Berndt's valuables, hit Berndt numerous times with a tire iron, and heard her "gurgling" in her own blood, before he put a pillow over her head to smother her. Castillo also allegedly told Rasmussen that he had stolen a VCR, money, and silverware and that he intended to sell these items to raise money to pay his attorney.

The following morning, Castillo allegedly told Rasmussen that the crime had been reported on the news. On December 19, Rasmussen drove by Berndt's residence, saw that it had been burned, and contacted the police to report what he had learned.

On the evening of December 19, 1995, Charles McDonald, another roofer, visited Castillo's apartment. Castillo offered to sell a set of silverware to McDonald for $500. McDonald testified that the silverware was in a wooden box. When McDonald later viewed Berndt's silverware, he noted that it appeared to be the same silverware that Castillo tried to sell to him.

Based upon the information provided by Rasmussen, police obtained and executed a search warrant on the apartment shared by Castillo, Bryant, and Platou at 10:00 p.m. on December 19, 1995. Castillo and Bryant were present when the police arrived and permitted them to enter; both Castillo and Bryant gave their consent to a search of their apartment. Police recovered the silverware, the VCR, the booties, and a bottle of lighter fluid from the apartment. The officers also located a notebook with the notation "$50, VCR, $75, camera, silverware."

After execution of the search warrant, the officers arrested Castillo. At the detective bureau, Castillo waived his Miranda rights and made statements during two separate, consecutive interviews. During the first interview, Castillo indicated that he had received the VCR and other property from

a friend. Shortly after the first interview ended, the detectives returned and informed Castillo of the evidence that had been obtained against him from Bryant and Rasmussen. Castillo then confessed to the killing, robbery, and arson.

Subsequently, Castillo pleaded not guilty on all counts, and a jury trial commenced August 26 and concluded on September 4, 1996. The prosecution presented all the evidence cited above in its case in chief. The defense did not put on a case in chief. The jury returned guilty verdicts on all counts: conspiracy to commit burglary, burglary, robbery of a victim sixty-five years or older, first degree murder with use of a deadly weapon, conspiracy to commit burglary and arson, and first-degree arson.

Castillo's penalty hearing took place from September 19 to September 24, 1996. Bruce Kennedy of the Nevada Youth Parole Board testified about Castillo's extensive juvenile history and record. Kennedy became acquainted with Castillo in 1984 while Kennedy was a parole counselor at the Nevada Youth Training Center in Elko. Kennedy's testimony revealed: (1) Castillo began running away from home regularly when he was nine years old, (2) by 1984, Castillo had already been charged with attempted murder, petty larceny, and six counts of arson (including an incident in which he tried to burn down the Circus Circus Hotel in Las Vegas), and (3) much of Castillo's criminal misbehavior remained uncharged. Kennedy also testified that, by the age of fifteen, Castillo had already used marijuana, speed, cocaine, and alcohol.

Due to his extensive misbehavior, Castillo participated in numerous Nevada state juvenile programs, lived with family members in different areas of the country for short periods of time and ultimately returned to Nevada. During his adolescence, doctors determined that Castillo understood the

difference between right and wrong, did not suffer from a neurological disorder, but suffered from a personality disorder.

Other State witnesses testified that in 1990, at age seventeen, Castillo escaped from a Nevada youth training facility; Castillo was arrested for attempted burglary and later certified to adult status on charges arising from this incident. Castillo served fourteen months in prison, expiring his term. In April 1993, Castillo was convicted of robbery arising from an incident which occurred in December 1992. Castillo had a gun during that robbery. Castillo was sentenced to three years, served just under two years, committed multiple disciplinary infractions while in prison, and was released in May 1995.

In June 1995, Castillo participated in the armed robbery of a cashier, but was not formally charged. In December 1995, Castillo was charged with battery upon one of his neighbors. These charges were pending at the time of the instant trial.

After this extensive testimony about Castillo's prior criminal behavior, the State introduced victim impact evidence through testimony by Berndt's granddaughters and Berndt's daughter, Hosking. These individuals testified about their personal interaction with Berndt, the quality of Berndt's life, and the effect of Berndt's death on their lives.

The first defense witness, a neuropsychologist, testified that Castillo: had been emotionally, mentally, physically and behaviorally abused; suffered from "reactive attachment disorder" and "attention deficit hyperactivity disorder;" and came from a dysfunctional family. One correctional officer and one juvenile facility counselor testified as to several positive episodes regarding Castillo.

Thereafter, Castillo's girlfriend, Bryant, testified that Castillo had few social skills, acted like a "big kid," but

was trying to improve. Castillo's mother testified that Castillo had a difficult upbringing due to the physical and emotional abuse he received from his biological father, her own lack of affection for Castillo, and the family's instability. At the hearing's conclusion, Castillo read an unsworn statement to the jury expressing his feelings including regret and remorse concerning his conduct.

The jury returned a verdict of death, finding four aggravating circumstances and three mitigating circumstances. The jury found that the aggravating circumstances were that the murder was committed: (1) by a person previously convicted of a felony involving the use or threat of violence, specifically, a robbery committed on December 14, 1992; (2) while Castillo was committing burglary; (3) while Castillo was committing robbery; and (4) to avoid or prevent a lawful arrest. The jury found the following mitigating circumstances: (1) the youth of the defendant at the time of the crime; (2) the murder was committed while the defendant was under the influence of extreme emotional distress or disturbance; and (3) any other mitigating circumstances.

Castillo alleges that the district court committed seven reversible errors, three during the guilt phase of his trial.

First, Castillo contends that the district court improperly allowed repeated testimonial references to the booties Berndt knitted for her grandchildren. He contends that this testimony was irrelevant and prejudicial; Castillo further contends that the references amounted to an improper emotional appeal to consider the victim's family and constituted improper victim impact evidence. Castillo also contends that the admission of the testimony relating to the booties violated his rights to due process and a fair trial.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Although generally admissible, relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice, if it confuses the issues, or if it amounts to the needless presentation of cumulative evidence. NRS 48.025; NRS 48.035. District courts are vested with considerable discretion in determining the relevance and admissibility of evidence. Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996), cert. denied, ___ U.S. ___, 117 S. Ct. 1267 (1997).

Hosking and Rasmussen each briefly discussed the booties in their testimony. Testimony about the booties served to connect the booties found at Castillo's apartment with the crime scene. We conclude that this testimony was generally relevant, sufficiently brief so as not to have prejudiced Castillo, and not unnecessarily cumulative. Thus, we conclude that its admission did not deprive Castillo of his rights to due process or a fair trial.

Second, Castillo contends that admission of a family photograph and autopsy photographs depicting Berndt amounted to impermissible victim impact evidence. Castillo contends that the prejudicial effect of these photographs substantially outweighed their probative value.

The admissibility of photographs is within the sound discretion of the district court. Greene v. State, 113 Nev. 157, 167, 931 P.2d 54, 60 (1997). It is within the district court's discretion to exclude photographs when their prejudicial effect substantially outweighs their probative value. Id.

We conclude that the family photograph was relevant on the issue of Berndt's identity and accurately depicted her six months prior to the killing; this photograph also provided a comparison with her appearance in the autopsy photographs. Accordingly, we conclude that the probative value of the family photograph outweighed its prejudicial effect thus the district court did not abuse its discretion by admitting it.

With respect to the autopsy photographs, this court recently reiterated its position that even gruesome photographs are admissible if they aid in ascertaining the truth, and that "'despite gruesomeness, photographic evidence has been held admissible when . . . utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction.'" Browne v. State, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997) (Quoting Theriault v. State, 92 Nev. 185, 193, 547 P.2d 668, 674 (1976).

Here, the autopsy photographs reveal the extent and severity of Berndt's injuries. In light of the considerable discretion afforded the trial court in deciding whether to admit photographic evidence and this court's pronouncements in Browne, we conclude that the district court did not abuse its discretion in admitting the autopsy photographs.

Third, Castillo contends that the State improperly elicited testimony from Kumma indicating the subject of another case in which Castillo was involved. The district court judge made a pretrial ruling barring admission of evidence of "why the fees [to his attorney] were incurred" but allowing evidence of the fact of Castillo's debt to his attorney on the issue of motive. Despite this pretrial ruling, the district court permitted Kumma to testify that Castillo was involved in "another case." Castillo contends that in light of its pretrial ruling, the district court abused its discretion by allowing

this testimony and erred in refusing to declare a mistrial on the basis of this admission.

Our review of the challenged testimony reveals that the testimony the prosecutor elicited from Kumma did not disclose the nature of the other case in which Castillo was involved, namely, whether it was criminal or civil; thus, the prosecutor did not violate the district court's pretrial ruling on the matter. We conclude that even if Kumma's testimony was improper, the inadvertent reference to Castillo's prior criminal conduct did not warrant a mistrial. Therefore, we conclude that the district court did not err in refusing to declare a mistrial on this basis.

Castillo contends that the district court committed four additional, reversible errors during his penalty hearing.

Castillo contends that the prosecutor's improper argument concerning future victims mandates a new penalty hearing pursuant to Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) ("Howard II"). Castillo further contends that the prosecutor's argument "went far beyond that Castillo might be a future danger."

This improper prosecutorial argument to which Castillo objected at trial, was as follows:

> The issue is do you, as the trial jury, this afternoon have the resolve and the intestinal fortitude, the sense of commitment to do your legal and moral duty, for whatever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets, I say it based upon the testimony of Dr. Etcoff and Corrections Officer Berg about the threat he is to other inmates, and I say it based upon the analysis of his inherent future dangerousness, whatever your decision is today, and it's sobering, whatever the decision is, you will be imposing a judgment of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant.

This court has held that a prosecutor may argue the future dangerousness of a defendant during a penalty hearing even "where there is no evidence of violence independent of the murder in question." Jones v. State, 113 Nev. 454, 469, 937 P.2d 55, 64 (1997) (citing Redman v. State, 108 Nev. 227, 235, 828 P.2d 395, 400 (1992)). Here, the prosecutor presented to the jury copious evidence of Castillo's dangerous propensities. Specifically, Dr. Etcoff, a psychologist for the defense, testified on cross-examination that Castillo told him: (1) he had a "God-like" complex when he had a gun, (2) he had committed many crimes, and (3) he was not afraid of punishment. Dr. Etcoff also testified that due to Castillo's attitude, Castillo was likely to be more rebellious in prison, act aggressively and anti-socially, and injure people without remorse. Dr. Etcoff further testified that in the past, Castillo had been violent in prison, even in the high security wing, and that Castillo would continue to pose a security threat.

Corrections Officer Mark Berg testified that while serving a sentence in the Northern Nevada Corrections Center in 1992 and 1993, Castillo assaulted other inmates on at least two separate occasions, and breached other prison security regulations. We conclude that in addition to the violent nature of the crime in this case, we conclude that there exists copious evidence to support the future dangerousness theory presented by the prosecution.

We also conclude, however, that portions of the prosecutor's future dangerousness argument were improper. We take this opportunity to sharpen the line that separates proper from improper future dangerousness argument.

In Jones v. State, this court admonished the prosecutor for suggesting that the defendant, Jones, might have intended to use weapons, found in his cell before trial, to

inflict bodily harm upon members of the jury. 113 Nev. 454, 469, 937 P.2d 55, 64-65 (1997). Our admonition in the Jones case clarified our position that personalizing the identity of a defendant's potential future victim is improper. Absent abundant evidence of guilt, such conduct might merit a new penalty hearing. We affirmed this position in McGuire v. State, 100 Nev. 153, 158, 677 P.2d 1060, 1064 (1984) where we declared improper a prosecutor's attempt to personalize the identity of a future victim, by suggesting that individual jurors place themselves in the position of the victim or a member of the victim's family.

In Howard v. State we held that it is also "improper to ask the jury to vote in favor of future victims and against the defendant." 106 Nev. 713, 719, 800 P.2d 175, 178 (1990). In the instant case, the prosecutor presented to the jurors just such a choice when he said, "you will be imposing a judgment of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant." This language improperly suggests that the jury must decide whether to execute the defendant or bear responsibility for the death of an innocent future victim. Presenting the jury's decision as a choice between killing a guilty person or an innocent person will likely result in a juror's decision to impose the death penalty more often than if the jury's decision had been portrayed in its proper light.

The test for evaluating whether an inappropriate comment by the prosecutor merits reversal of the defendant's conviction is whether the inappropriate comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Bennett v. State, 111 Nev. 1099, 1105, 901 P.2d 676, 680 (1995). We conclude that although a portion of the prosecutor's argument was improper, the improper portion

did not unfairly prejudice Castillo in light of the overwhelming evidence of his guilt.

Castillo contends that testimony from Berndt's daughter and two granddaughters was unduly repetitive and constituted improper and cumulative victim impact evidence. Castillo contends that the district court's failure to limit "the nature and scope of this testimony to avoid the arbitrary and capricious entry of the death penalty" violated the Due Process Clause and the Nevada Constitution.

The three victim impact witnesses were each related to Berndt. They testified about the quality of Berndt's life and the impact of her death upon themselves and other family members. They also spoke about periods of time they spent with Berndt. This court has previously concluded that similar testimony did not violate the defendant's constitutional rights. See Wesley v. State, 112 Nev. 502, 519-20, 916 P.2d 793, 804 (concluding that repetitive testimony of victim's three friends, two of whom testified that the victim was a father figure in their lives, did not violate the defendant's constitutional rights). The policy underlying admission of victim impact evidence in penalty hearings strongly favors affirming the decision and penalty in the instant case. Furthermore, Castillo's position is untenable because it contradicts relevant case law and requires reinterpretation of the Nevada Constitution. Accordingly, we conclude that the district court did not abuse its discretion in permitting all three witnesses to testify.

Castillo contends that "the anti-sympathy" jury instruction violated his Eighth Amendment rights because "it undermined the jury's constitutionally mandated consideration of mitigating evidence."

The district court instructed the jury as follows: "A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law." This court approved this instruction in Wesley, 112 Nev. at 519, 916 P.2d at 803-04, stating that it is proper when offered in conjunction with an instruction regarding the consideration of mitigating factors. The record here reveals that Castillo's counsel argued mitigation during his penalty phase closing argument, that the district court properly instructed the jury regarding mitigation, and that the jury in fact found three mitigating factors. Accordingly, we conclude that this argument lacks merit.

Castillo contends that the district court erred in refusing to instruct the jury regarding five nonstatutory mitigating circumstances.

At the penalty phase, the district court approved the defense's request to give jury instructions as to three statutory mitigating circumstances: the youth of the defendant, that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, and "any other mitigating circumstances." The district court denied the defendant's request to instruct the jury separately on five nonstatutory mitigating circumstances, namely, that the defendant: (1) has admitted his guilt of the offense charged, (2) has demonstrated remorse for the commission of the offense, (3) cooperated with police after he was identified as a suspect, (4) had not planned to commit the murder; and (5) had a difficult childhood.

This court reviews a district court's refusal to give a proposed nonstatutory mitigating jury instruction for an abuse of discretion, or judicial error. Howard v. State, 102 Nev.

572, 578, 729 P.2d 1341, 1345 (1986) ("Howard I"). Castillo cites Lockett v. Ohio, 438 U.S. 586 (1978) in support of his argument. There, a four-justice plurality of the United States Supreme Court concluded that a death penalty statute entirely precluding the sentencer from considering as a mitigating factor any aspect of the defendant's character or record violates the Eighth and Fourteenth Amendments. Id. at 606-08. In Boyde v. California, 494 U.S. 370, 380-86 (1990), however, the Court determined that a mitigating circumstances instruction similar to the Nevada "catchall" provision satisfied constitutional standards.

Here, the district court instructed the jury to consider three mitigating circumstances, including the "catchall" provision. The jury returned a verdict of death after finding four aggravating circumstances and three mitigators. Clearly, the jury considered the mitigating circumstances. Thus, we conclude that the district court properly refused to give Castillo's proposed instructions on the grounds that they would have amounted to inappropriate comment on the evidence by the court and that Castillo was free to argue these outside factors under the "catchall" mitigation instruction.

Finally, we conclude that the death sentence imposed upon Castillo was not the product of passion, prejudice, or any arbitrary factor, nor was it excessive in light of the gravity of the crime and the defendant. See NRS 177.055(2). Thus, we

affirm the jury verdict and sentencing in all respects.[1]

Springer, C. J.

Shearing, J.

Rose, J.

Young, J.

[1]The Honorable A. William Maupin, Justice, did not participate in the decision of this appeal.

EXHIBIT 16

EXHIBIT 16

ORIGINAL

SUPP
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WILLIAM CASTILLO

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA Plaintiff, vs. WILLIAM CASTILLO, Defendant.	CASE NO. C133336 DEPT. NO. XVIII DOCKET NO.

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

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

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

DATED this 11 day of October, 2001.

Respectfully submitted by:

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STATEMENT OF THE CASE

On January 19, 1996, William Castillo (hereinafter referred to as CASTILLO) was indicted by the Clark County Grand Jury on the charges of Conspiracy to Commit burglary and/or Robbery, Burglary, Robbery of Victim over the age of sixty-five years, Murder with Use of a Deadly Weapon, Conspiracy to Commit Burglary and Arson, and First Degree Arson (1 ROA 1-5). CASTILLO entered a plea of not guilty and waived his right to a trial within sixty days (Minutes, pp. 1). The State filed a Notice of Intent to seek the death penalty alleging as aggravating circumstances that (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to another; (2) the murder was committed while engaged, alone or with others in the commission of or an attempt to commit or flight after committing any robbery; (3) the murder was committed while engaged in the commission of or an attempt to commit or flight after committing a burglary; (4) the murder was committed to avoid or prevent a lawful arrest; and (5) the murder was committed to receive money or other thing of monetary value (1ROA 218-220).

Jury selection commenced on August 26, 1996, and concluded with a death qualified jury being seated on August 28, 1996 (Minutes pp.10-11).

After three days of testimony the matter was submitted to the jury and a verdict returned on September 4, 1996, of guilty on all counts contained in the Amended Indictment (Minutes pp. 14-15). The penalty hearing took place from September 19, 1996, through September 24, 1996 (Minutes pp. 15-17). A verdict of death was returned on September 25, 1996, with the jury entering special verdicts finding the existence of four aggravating circumstances and three

mitigating circumstances and that the aggravating circumstances outweighed the mitigating circumstances (10 ROA 2101-2106).

STATEMENT OF THE FACTS

A. TRIAL PHASE

Isabelle Berndt moved into 13 North Yale, Las Vegas, Nevada in 1959 and she continued to reside in the home until mid December, 1995 (5 ROA 985). As of that time she was eighty six (86) years of age, haveing been born on August 3, 1909 (5 ROA 986-987). She was a neat housekeeper and would have no reason to leave a book of matches on the floor of her house or to have Ronsonol lighter fluid in her house (5 ROA 986-987). During the latter part of November, 1995, Berndt had a roofing job done on her house and she went to spend the Thanksgiving holiday in California.

Harry Kumma had been a roofer for about twenty-five (25) years and at one time was employed at Dean Roofing Company (5 ROA 1028-9). He would occasionally work side jobs for a small independent contractor (5 ROA 1030). On the Thanksgiving weekend of 1995 he did a side job on a house on Yale Street (5 ROA 1031). Kumma got three other individuals that worked for Dean Roofing to help him with the job; Kirk Rasmussen, Jeff Donovan and William CASTILLO (5 ROA 1033). Work started at approximately 6 a.m. on the 25th of November with the first phase being, the tearing off the old roof (5 ROA 1036). The tear off was completed by about 12:30 at which time CASTILLO and Donovan were assigned to do the cleanup on the ground (5 ROA 1037).

At one time, CASTILLO had asked to borrow $500.00 to pay his lawyer, however,

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Kumma did not lend him the money because he was in no financial position to do so (5 ROA 1038). Whenever CASTILLO worked with Kumma at Dean Roofing he was a good worker and that is why he had asked him to help on the side job (5 ROA 1040).

Jeff Donovan had been employed at Dean Roofing for about two and a half years (5 ROA 1041). As of the time of the Yale Street side job he had known CASTILLO for about four or five months (5 ROA 1043). While he was assisting in the clean up on the ground, Donovan came around the corner of the house and CASTILLO was holding up a key (5 ROA 1046). CASTILLO stated that he wanted to go into the house with the key, however, Donovan told him no and to put the key back (5 ROA 1047). CASTILLO then stated that he would just come back later at nighttime. (5 ROA 1048).

Twenty-three (23) year old Duane Wright was driving along I- 95 approaching the Decatur off ramp on December 17, 1995, when he observed smoke coming out of a house, and he decided along with his friend and passenger, Joe Giles, to check it out (6 ROA 1066). When they pulled over in front of the house, he observed a guy kicking at the front door trying to get in (6 ROA 1066). He observed a car in the driveway and a neighbor came out and was screaming that there was an old lady in the house (6 ROA 1068). After unsuccessfully attempting to get the front door open, the window to the left of the door was broken out and they started squirting the fire with the garden house (6 ROA 1070). Wright was able to crawl into the house about thirty (30) feet, but was unable to make it into the back bedroom because of the smoke and fire (6 ROA 1071). An attempt was also made to enter the rear door of the house but the fire prevented any entry (6 ROA 1072). Also helping to try to put out the fire was neighbor John Russo and his son

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(6 ROA 1237).

Arson investigator Ben Hoge was called to the scene at about 3:26 A.M. (6 ROA 1087). Hoge entered the house and determined that the heaviest smoke patterns were coming out of the living room front (6 ROA 1093). He also went into the back bedroom and noticed a fire origin against the north bedroom window (6 ROA 1094). There was no accidental causes for fire in the bedroom or in the living room (6 ROA 1095 and 1104). It was his opinion that each of the fires were independently set by human hands with some type of accelerant (6 ROA 1107). The accelerant had been applied in an up and down motion rather that having been poured (6 ROA 1109). A Ronsonal lighter fluid bottle was found in the kitchen area of the house (6 ROA 1112). There was no fire damage to the bed and no fire damage to the body (6 ROA 1125-1126).

Cliff Mitchell is the canine handler for the Clark County Fire Department and works with the yellow Labrador Josie (6 ROA 1132). Josie located several spots in the living room where an accelerant was present (6 ROA 1140). The findings made by Josie were verified by the crime lab (6 ROA 1146).

Berndt's family was notified of her death and the fire and a search of the house was made to determine items that may have been missing. One of the items was a set of silverware that had little flowers around the handles and a B engraved on each piece (5 ROA 997). The silverware was usually kept in a wooden box on a shelf in her bedroom (5 ROA 998-999). Also missing from the house was a VCR that had been kept on the console in the living room and Christmas booties being knitted by Berndt and eight (8) United States saving bonds in the amount of fifty (50) dollars each (5 ROA 1000; 1015-1016).

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The lug wrench or tire iron was still in the trunk of Berndt's vehicle and she would have no reason to keep such an item in her house. (5 ROA 1025-1026).

Dr. Roger Buckland performed the autopsy on Isabelle Berndt (6 ROA 1158). Berndt had multiple crushing-type injuries with lacerations to the head, crushing injuries of the jaw, the jaws were fractured and the teeth were broken (6 ROA 1162). All injuries were contemporaneous, i.e., withing the same general time frame (6 ROA 1167). The injuries extended to the ears over the forehead, over the fact, the chin, and one deep laceration on the back of her head (6 ROA 1163). Cause of death was intracranial hemorrhage due to blunt force trauma to the face and head (6 ROA 1164). The blunt force trauma was consistent with that which would result from being hit with a crow bar or a tire iron (6 ROA 1165). There was no burning or charring of the body and there was no smoke or burning noted in the lungs or air passages (6 ROA 1166).

Senior Crime Scene Analyst Gary Reed assisted in processing the Yale Street residence (6 ROA 1169). When he entered th house he observed fire, smoke, and water damage in the front room, kitchen, and master bedroom (6 ROA 1171). The northwest bedroom did not have much fire damage, however, the dresser drawers were pulled open, the bed was messed up, the closet doors were open and there was some sign of displacement in the room (6 ROA 1172). There were signs of ransacking and a jewelry box had been left in an open condition (6 ROA 1173). Items appeared to be missing from several places (6 ROA 1174). A pillow was located on the bed partially covering the face of the victim, and was matched to a pillow that was located in the other bedroom of the residence (6 ROA 1159).

Berndt's family was notified of her death and a search of the house was made to determine

that the items that may have been missing. One of the items was a set of silverware that had little flowers around the handles and a B engraved on each piece (5 ROA 997). The silverware was usually kept in a wooden box on a shelf in her bedroom (5 ROA 998-999). Also missing from the house was a VCR that had been kept on the console in the living room and Christmas booties being knitted by Berndt and eight (8) United States savings bonds in the amount of fifty (50) dollars each (5 ROA 1000; 1015-1016).

The lug wrench or tire iron was still in the trunk of Berndt's vehicle and she would have no reason to keep such an item in her house. (5 ROA 1025-1026).

Tammy Jo Bryant met CASTILLO in August, 1995, and they developed a relation ship as boyfriend and girlfriend and moved in together (6 ROA 1198). A short time later Michelle Platou also moved in (6 ROA 1199). Platou had a white Mazda automobile while neither Bryant nor CASTILLO had a car (6 ROA 1201). At about 6 P.M. or shortly thereafter on December16, 1995, CASTILLO and Platou left the residence together in Platou's vehicle (6 ROA 1203). They returned to the apartment at about 3:00 o'clock the following morning (6 ROA 1203).

When CASTILLO and Platou returned to the apartment they had with them a VCR, a box containing silverware and a bag containing booties (6 ROA 1204-1205). After a short time, CASTILLO and Platou left again and returned after about twenty minutes (6 ROA 1206). At about nine or ten o'clock on the morning of December 17, 1995, CASTILLO and Platou told Bryant that they had robbed a house and that there had been two people in the house and that Platou hit a wall or made a noise and that they panicked and were scared and then CASTILLO hit the person and they both freaked out and left (6 ROA 1208). CASTILLO indicated that he had

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hit the person with a tire iron from Platou's vehicle (6 ROA 1208-9). He thought the person was a man because the snoring was very loud (6 ROA 1223). The tire iron was then thrown into a dumpster (6 ROA 1209). They told Bryant that they had gone back the second time because they believed that Platou had left finger prints and that they going to burn the house to destroy any fingerprints (6 ROA 1210). CASTILLO was nervous and upset as he was describing the incident to Bryant (6 ROA 1222). After he told her he continued to feel bad and guilty (6 ROA 1224).

On December 19, 1995, the police came to Bryant's apartment with a search warrant and also asked for permission to search which she granted (6 ROA 1211). The police recovered the silverware, VCR and booties from the apartment (6 ROA 1211). The police also found a bottle of Rosonol lighter fluid in the apartment, which is the kind that CASTILLO used to fuel his cigarette lighter (6 ROA 1214). A notebook taken from the apartment during the search had notation on one of the pages $50.00, VCR, camera, and silverware in the handwriting of CASTILLO (6 ROA 1216).

When the police came to search the residence CASTILLO was cooperative with them and did not try to hide anything, and actually pointed things out during the search (6 ROA 1221).

Kirk Rasmussen contacted police officer Thomas Lau on December 19, 1995, and gave him some information about the Berndt homicide (6 ROA 1241). Lau then contacted the assigned homicide detectives (6 ROA 1243). It was based on the information from Rasmussen that the police obtained the search warrant that was served on the Bryant apartment (6 ROA 1244). Lau assisted in the execution of the warrant (6 ROA 1246).

CASTILLO had worked for Rasmussen for a period of about five months (6 ROA 1256).

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CASTILLO lived in close proximity to Rasmussen and Rasmussen would regularly provide transportation to and from work at Dean Roofing (6 ROA 1257). Rasmussen was aware that CASTILLO found a key in a hideaway box at the Berndt house (6 ROA 1261). CASTILLO actually showed him the key (6 ROA 1262). Rasmussen told him to put it back and CASTILLO did so, stating that he shouldn't think that way (6 ROA 1263).

On Monday, December 18, 1995, during the ride to work, CASTILLO was kind of quite and had a weird look on his face (6 ROA 1267). After some small talk, CASTILLO told Rasmussen that he had murdered and eighty six (86) year old lady in her sleep (6 ROA 1267). CASTILLO then proceeded to give him the details (6 ROA 1268-1270). CASTILLO told him that he did not know it was a women when it occurred (6 ROA 1271). The person was gurgling in it's own blood and he took a pillow and put it over the person's face an smothered the person out (6 ROA 1272). The intention was to sell the property stolen to obtain money (6 ROA 1273). Rasmussen was in disbelief and shock and did not press CASTILLO for details (6 ROA 1275).

The next morning on the way to work, CASTILLO asked Rasmussen if he had watched the news, and then proceeded to tell him what the news reports had said (6 ROA 1280). On the way home on Tuesday, Rasmussen drove past the Yale Street residence and after observing that it had been burned, went to the police and talked to Officer Lau (6 ROA 1282).

After work on December 19, 1995, Charles McDonald went over to the apartment of CASTILLO (7 ROA 1311). He was at the apartment for about an hour or so and during that period of time CASTILLO asked him if he wanted to buy some silverware (7 ROA 1312). CASTILLO showed him a set of silverware in a box and told him it was work $1,500.00 but was

willing to discount the price to $500.00 (7 ROA 1314). When McDonald indicated that he could not afford the silverware, CASTILLO offered to put him on a payment plan (7 ROA 1314).

Detective Donald Tremel was one of the primary investigating officers assigned to the homicide of Isabelle Berndt (7 ROA 1320). He was involved in the service of the search warrant on the apartment of CASTILLO (7 ROA 1321). CASTILLO immediately let the police into the apartment when they knocked on the door (7 ROA 1346). Both CASTILLO and Bryant consented to the search of the apartment and were cooperative and did not impede the investigation in any way (7 ROA 1326; 1347). Both a VCR and a silverware box were found in the apartment (7 ROA 1326). Tremel also recovered the single booty from the Russo house and then went back to the Bryant apartment and recovered the plastic bag containing other booties in it (7 ROA 1334-1335).

Detective Dwayne Morgan arrested CASTILLO after the conclusion of the apartment search and took him to the police department (7 ROA 1376). After CASTILLO received his Miranda rights he gave two separate taped statements to Morgan (7 ROA 1379). During the first interview CASTILLO indicated that he had received the property from a friend who he wouldn't identify by name (7 ROA 1380). A short period of time after the first interview, he was interviewed again and told that information had been gathered from Bryant and Rasmussen (7 ROA 1382). CASTILLO then became sullen and after a pause told Morgan that it was he that had committed the killing, robbery, and arson (7 ROA 1384-85).

B. PENALTY HEARING

Testimony at the penalty hearing concentrated a great deal on CASTILLO'S extensive

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juvenile history. CASTILLO offers a condensed version of most of said testimony due to its lengthy nature.

Bruce Kennedy of the Nevada Youth Parole Bureau first became acquainted with CASTILLO in 1984 when he was assigned to his case load while he was a parole counselor and he supervised CASTILLO while he was on parole between stints at the Nevada Youth Training Center in Elko (8 ROA 1598; 1601). Juvenile records showed that CASTILLO received psychiatric testing on a number of occasions and the results did not show any psychosis or mental health issues (8 ROA 1606). CASTILLO was considered to be normal, but delinquent (8 ROA 1606).

CASTILLO'S first interaction with the juvenile system was in 1981 when he was brought in for emotional instability of a child (8 ROA 1610). The juvenile history then continued for a number of years including incidents of runaway, emotional instability of a child, attempt murder, arson, petty larceny, threat to life, and destruction of county property (8 ROA 1610-1630). Starting in 1985 there were a number of other juvenile contacts that involved violation of his parole status, resulting in CASTILLO being recommitted to the Nevada Youth Training Center in Elko (8 ROA 1619). CASTILLO was then in and out of the Elko facility and charged with a number of charges, including grand larceny auto, no driver's license, petty larceny, attempted burglary, possession of an unregistered handgun and escape from Elko (8 ROA 1620). For the attempted burglary charge he was certified as an adult and that was where his juvenile record ended (8 ROA 1620).

Certain dispositional reports from the various juvenile proceedings were admitted into

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evidence detailing some of the events that had transpired (8 ROA 1622-1626). Included within the reports were descriptions of CASTILLO drowning his grandmother's dog when he was five years old and killing several birds by smashing their skulls with rocks (8 ROA 1626). In one incident CASTILLO was caught with another child attempting to light the Circus Circus casino on fire in January, 1983 (8 ROA 1630). At age ten (10) years CASTILLO was assessed by Dr. Kirby Reed, a neurologist, who indicated in his findings, inter alia, that:

> "Under assessment this ten year old male who demonstrates normal growth and early development presently neurological examination reveals neither hard nor soft findings. I do not feel that there is a neurological basis for the patient's ongoing personality disorder. I feel that he does need to be in at least 24 hour residential placement for the safety of not only himself but for the general public"(8 ROA 1632).

CASTILLO, at age eleven, was one of the youngest persons ever committed to the Nevada Youth Training Center (8 ROA 1640). Over the years perhaps only one or two younger persons were ever committed to the Elko facility (8 ROA 1660). Elko is usually reserved for the worst of the juvenile offenders (8 ROA 1664).

The State of Nevada Youth Resources Panel saw the diagnosis for CASTILLO very poor, and looked into placement in out of state programs, but due to the expense and poor prognosis the State was unwilling to provide any specialized care for CASTILLO (8 ROA 1644). By the time he had reached age thirteen CASTILLO had been through every program available in Nevada, including parole, formal probation, mental health counseling, Children's Behavioral Services, foster home placement, Spring Mountain Youth Camp and the Third Cottage Program (8 ROA 1646). CASTILLO was treated based on the diagnosis of conduct disorder and

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treatment plans that were tried included counseling, vocational assignments and education (8 ROA 1671).

As of age fifteen CASTILLO had been committed to, paroled and revoked at the Nevada Youth Treatment Center three times (8 ROA 1647). He admitted to the use of marijuana, speed, crack, cocaine, and alcohol by that age (8 ROA 1648). Ultimately he totaled five separate commitments to Elko (8 ROA 1673). Each time he was able to achieve the requirements set by the facility and go before a parole panel consisting of a classification counselor, school teacher, dormitory staff and cottage staff and again a recommendation to the superintendent that he be released to the community and his family (8 ROA 1674). At age seventeen, due to continued criminal activity and new criminal activity and new charges of attempted burglary and escape from NYTC CASTILLO was certified as an adult by the juvenile court (8 ROA 1652-1654).

CASTILLO was the beneficiary of virtually all of the options that juvenile court services had to offer and had received a high school education and graduated from high school while at NYTC (8 ROA 1681). He was determined to be moderately successful at NYTC but when returned home he would revert to the old behaviors that got him into trouble in the first place (8 ROA 1681). Juvenile authorities were aware that CASTILLO had an abusive upbringing and that he may have been abused (8 ROA 1677).

An attempt had been made to place CASTILLO with his maternal grandmother in St. Louis (8 ROA 1674). This placement also failed and the report from the Missouri Department of Social Services reflected that CASTILLO was a seriously disturbed child who was beyond the scope of their services and that he came from a dysfunctional family (8 ROA 1674).

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Charmaine Smith was the Parole and Probation Officer assigned to prepare CASTILLO'S pre- sentence report on the attempt burglary case (8 ROA 1694). CASTILLO plead guilty on March 19, 1991, and on April 16, 1991, was sentenced to two (2) years in prison (8 ROA 1697;1705). The case involved a situation where CASTILLO and another youth attempted to kick in the front door of a house and were chased away by the female occupant wielding a mace canister (8 ROA 1706).

CASTILLO was also convicted on a robbery arising out of a December 14, 1992, incident wherein, he had grabbed a purse from a pedestrian as his co-defendant drove the vehicle along the sidewalk (8 ROA 1712). CASTILLO was convicted after a jury trial on April 15, 1993, (8 ROA 1714). He was sentenced to three years in prison on May 20, 1993 (8 ROA 1717). CASTILLO expired the sentence in just under two years and was released from prison on May 8, 1995, (8 ROA 1720).

Senior correctional officer for the Nevada Department of Prisons, Mark Berg testified that he had contact with CASTILLO at the Northern Nevada Correctional Center (8 ROA 1753). While in prison CASTILLO had been disciplined for being involved in an assault on another inmate, having tattooing equipment in his cell and jamming a door lock (8 ROA 1758-1760). CASTILLO was also disciplined for hitting another inmate with a lock, and yelling threats at the inmate after he informed the correctional officers of the incident (8 ROA 1762).

Michael Blanford of the National Park Service testified that he was dispatched on June 30, 1995, to the Callville Bay dock cashier on the report of an armed robbery (8 ROA 1781). When he arrived on the scene the dock cashier, Jeannie O'Brien indicated that she had been robbed of

over a thousand dollars by a man with a chrome plated handgun (8 ROA 1782). Attempts were made to catch the described individual, and CASTILLO was stopped but released because he did not match the description (8 ROA 1784). Four days later O'Brien was re-interviewed and she admitted that she had lied and that CASTILLO had come up with a plan whereby she would report a robbery and give the wrong description to the police (8 ROA 1786). CASTILLO had told her that if she did not cooperate with the robbery she had better watch her back and that she would be shot and killed (8 ROA 1788). CASTILLO had not been charged with any involvement in the incident (8 ROA 1789).

On October 3, 1995, Jill Russell was living in a apartment complex on North Rainbow Boulevard and called the police because of a disturbance and when CASTILLO was arrested by the police he threatened to get her as he was taken away (8 ROA 1798-99). The next day CASTILLO forced his way into her apartment and the door hit her on the side of her face (8 ROA 1800). CASTILLO was charged with two counts of battery and the matter was still pending on December 17, 1995 (8 ROA 1802).

The granddaughter of Berndt, Lisa Keimach testified concerning the death of her grandmother and the impact on her life (9 ROA 1811). She would see her grandmother several times per year and on holidays (9 ROA 1812). Keimach also testified at some length concerning the quality of her grandmother's life and what she would do during the course of her days (9 ROA 1813-1816).

Ronda, another granddaughter and the sister of Lisa was also called by the State (9 ROA 1822). She was a school teacher just like her grandmother and related a number of stories

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concerning becoming a school teacher and the value of her grandmother to her as a teacher (9 ROA 1822-1825). She also talked about the effect of the death of her grandmother on her life (9 ROA 1825-1840).

Finally, the State recalled the daughter of Berndt, Jean Marie Hosking (9 ROA 1840). She told the jury about her early childhood and living with her mother and about how she had moved out west and then her mother had followed (9 ROA 1841-1843). She also talked about the early years of Berndt's career as a school teacher (9 ROA 1844). Hosking concluded her testimony with a description of the impact on her life of the loss of a mother (9 ROA 1851-1853).

CASTILLO called Dr. Lewis Etcoff to testify concerning his findings and opinions based on his examinations of CASTILLO (9 ROA 1859). Etcoff, was Board certified in neuropsychology and had testified as an expert in the Eight Judicial District about two dozen times (9 ROA 1861). Etcoff had reviewed the available information concerning CASTILLO and had conducted a two and one half hour interview with him (9 ROA 1862-1864).

During the first five years of life CASTILLO moved about twenty times thorough various states (9 ROA 1864). There was an enormous amount of family dysfunction in the parents, and his father left his mother after placing a knife to her throat and threatening to kill her (9 ROA 1865). His mother was very young and suffered a sever depressive disorder for which she was eventually hospitalized and had to undergo electroconvulsive therapy (9 ROA 1865). CASTILLO was seriously disturbed emotionally, mentally, and behaviorally sufficient that he suffered a reactive attachment disorder which is a very serious psychiatric disorder (9 ROA 1866). By the age of five he was unable to formal normal human bonds and was doing some very significant

violent misbehavior (9 ROA 1866).

Reactive attachment disorder is a type of disorder that can only rarely be overcome with treatment (9 ROA 1868). Such children can work in society and marry, but the chances of them being successfully employed or successful in normal social situation is very much reduced (9 ROA 1869).There were many components of CASTILLO'S history that validated the diagnosis (9 ROA 1870). To compound the problem at age nine or ten CASTILLO was diagnosed with Attention Deficit Hyperactivity Disorder (9 ROA 1871). ADHD is a neurological disturbance wherein, there is essentially a lack of one of the neurotransmitters in the brain, dopamine, reaching the frontal lobes (9 ROA 1872). The only way to successfully treat someone with the combination fo the two disorders found by Dr. Etcoff is a long term residential treatment center with a small number of other children until they are eighteen (9 ROA 1874). Such treatment is not available and was not available during the time that CASTILLO was involved with the juvenile system (9 ROA 1875).

The final factor found by Etcoff that contributed to the problems of CASTILLO was that his stepfather was physically and mentally abusive (9 ROA 1876). The instances of abuse, included locking him in his room and making him urinate in a pan, forced to each hot chilies until he vomited, and hitting him with a inch thick leather strap (9 ROA 1877). CASTILLO was so afraid of his stepfather that he would run away all of the time (9 ROA 1877).

As a result of all the factor, CASTILLO also developed a childhood onset conduct disorder (9 ROA 1879). This is an oppositional behavior that goes beyond having a chip on your shoulder and is a very serious pre-sociopathic behavior that has t be dealt with at some point or it

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worsens (9 ROA 1880). Most people who suffer the type of childhood as did CASTILLO either turn out to be criminals or very mentally ill or is some other ways so dysfunctional that their lives are wasted in comparison to the way their lives might have turned out (9 ROA 1881).

Jerry Harring had worked at the Nevada Youth Training Center since November, 1974, (9 ROA 1914). At the time of his testimony he was a classification counselor (9 ROA 1914). He first met CASTILLO in 1982 when he was just twelve years old (9 ROA 1915). CASTILLO had written a letter to Harring to be read to the other kids that went through the program, telling them of all the mistakes that he had made and that they should listen to what the counselors told them (9 ROA 1916). The letter was to be read to the kids when they were being orientated through the Reception and Classification procedure (9 ROA 1918). The letter has had a very positive impact on the teaching of the classes (9 ROA 1920). CASTILLO was a very troubled child and the resources of the Elko facility were and are limited. (9 ROA 1920).

Sonny Carlman, a correctional officer with the Clark County Detention Center, was familiar with CASTILLO from inside of the jail (9 ROA 1941). CASTILLO was a worker in the unit and had not given Carlman any problems during the two and one half months that he had been supervising him (9 ROA 1949).

Tammy Bryant, testified concerning her relationship with CASTILLO (9 ROA 1947). When she first met him he had no social skills and wouldn't really go anywhere (9 ROA 1949). He was working everyday and then just basically coming home (9 ROA 1949). CASTILLO talked about wanting to change his life, and she was the first person to ever really show him any attention and affection (9 ROA 1950). CASTILLO did not even know how to cook such simple

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items as chilly hot dogs, and he was happy when she showed him how (9 ROA 1951).

The last witness called by CASTILLO at the penalty hearing was his mother Barbra Sullivan (9 ROA 1958). CASTILLO was born in St. Louis on December 28, 1972 (9 ROA 1959). She was only eighteen when he was born and at the time was floating back and forth between her mother's house and her in-laws (9 ROA 1960). She got thrown out of both houses after CASTILLO was born and then left him with the in-laws and went to Lake Tahoe (9 ROA 1962). She made a living for the first four years on Billy's life by working different waitress jobs (9 ROA 1964). CASTILLO'S father was in the military and they were stationed oversea when she became pregnant and after she was thrown down a flight of stairs by the father she was returned to the States and the father was sent to the brig (9 ROA 1966). The father, William Thorpe was a very violent individual that had numerous run-ins with the law for robbery and beating people (9 ROA 1967). He even spent time in prison (9 ROA 1968). All of Thorpe's brother's were also involved in criminal activities and were violent individuals (9 ROA 1969). Thorpe's father had shot him with a shotgun on one occasion (9 ROA 1970). Thorpe tried to kill Sullivan on three occasions and the last time he put a gun in her mouth and flipped out and ended up in an institution (9 ROA 1978).

After Sullivan was thrown out of the residences available to her and CASTILLO, she turned to prostitution to support herself (9 ROA 1970). After six months in Lake Tahoe she had gotten a job, married and a home and she returned to St. Louis and picked up CASTILLO and brought him to Nevada (9 ROA 1973). She had to fight for custody in Missouri because CASTILLO'S grandmother's filed to get custody of him (9 ROA 1974).

With respect to the early years of CASTILLO'S life, Sullivan admitted that she didn't love him like she should have and like she did her later born children (9 ROA 1977). This was because she hated his father so much, she saw to his needs but didn't give him any love, she just didn't have it in her during that period of her life (9 ROA 1980-81).

CASTILLO had his first contact with the authorities when he was five years of age and Sullivan just was not equipped to deal with it (9 ROA 1980-81).

CASTILLO gave an unsworn statement to the jury explaining some of his feelings, regrets, and expressing remorse for his conduct.

ARGUMENT

I. MR. CASTILLO IS ENTITLED TO HAVE HIS SENTENCE OF DEATH AND CONVICTIONS REVERSED BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.

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

1. counsel's performance fell below an objective standard of reasonableness,
2. counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of the trial would probably have been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must

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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.

II. MR. CASTILLO WAS DENIED DUE PROCESS BY THE IMPROPER ARGUMENT AT THE PENALTY HEARING WHEREIN THE PROSECUTOR ASKED THE JURY TO VOTE AGAINST MR. CASTILLO AND IN FAVOR OF FUTURE INNOCENT VICTIMS PURSUANT TO THE JURY'S DUTY.

During the penalty hearing the prosecutor was permitted by the trial court to engage in an argument that has been disapproved for many years. The objectionable argument during the penalty hearing was as follows:

> The issue is to you, as the trial jury, this afternoon have the resolve and the courage, the determination, the intestinal fortitude, the sense of commitment to do you legal and moral duty, for what ever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets, I say it based upon the testimony of Dr. Etcoff and correctional officer Berg about the threat he is to other inmates, and I say it based upon the analysis of his inherent future dangerousness, whatever the decision is, you will be imposing a judgement of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant.
> Mr. Schieck: I am going to object your honor to this argument of future victims.

Mr. Schieck objected to this argument. On direct appeal appellate counsel raised this exact issue. On April 2, 1998, the Nevada Supreme Court specifically rejected this argument. (See attached exhibits). However, this Supreme Court only addressed the argument of appellate counsel regarding the future dangerousness contention made by the prosecutor. The Supreme Court held that,

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> "In Howard v. State, we held that it is also improper to ask the jury to vote in favor of future victims and against the defendant. 106 Nev. 713, 719, 800 P.2d 175, 178 (1990) (Supreme Court Decision pp. 12). In the instant case the prosecutor presented to the jurors just a choice when he said "You will be imposing a judgment of death and it is just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for the future victim of this defendant" This language improperly suggests that the jury must decide whether to execute the defendant or bear responsibility for the death of an innocent future victim. Presenting the jury's decision as a choice between killing a guilty person or an innocent person will likely result in jurors decision to impose the death penalty more often then if the jury's decision had been portrayed in it's proper light.

The Nevada Supreme Court then rejected Mr. Castillo's argument based upon the prosecutor's statement of future dangerousness. The Nevada Supreme Court found the prosecutor's statements were improper however, they did not rise to the level of reversible error. It is important to note, that the prosecutor that made this argument against Mr. Castillo was Chief Deputy District Attorney Mel Harmon. It is also important to note, that appellate counsel only argued that the prosecutor's comments should be reversed based upon future dangerousness. Appellate counsel failed to make any argument regarding the prosecutor's reference to the jury's legal and moral duty. It is Mr. Castillo's contention that appellate counsel was ineffective for failing to raise the argument that Mr. Mel Harmon's statements resulted in reversible error based upon advising the jury that they had legal and moral duty to execute.

As was previously state, the Nevada Supreme Court issued an opinion affirming Mr. Castillo's sentence of death in 1998.

On July 24, 2001, the Nevada Supreme Court decided the case of Vernell Ray Evans v. State of Nevada, 117 Nev. Ad.Op. 50, (a copy of which is attached as Exhibit B). In Evans, the defendant had been sentenced to die as a result of being convicted of four counts of first degree murder.

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The facts surrounding Mr. Evan's case are horrendous. Apparently, Mr. Evans entered an apartment seeking revenge against a lady who had assisted the authorities on a drug investigation. Id. As a result, Mr. Evans and a cohort proceeded to shoot and kill four human beings. The intended target was in fact tortured in her bathtub. A four year old child was present in the apartment and hiding in the closet. She testified that it was the defendant who had committed the murders. Id. pp.3.

The Supreme Court reversed Mr. Evans sentence of death based in part upon the improper argument of the prosecutor during closing arguments. The following is an excerpt of the prosecutor's improper argument during Mr. Evans' penalty phase, it is important to note, that the prosecutor who made the argument was again Chief Deputy District Attorney Mel Harmon. It is also important to compare the improper arguments made by Mr. Harmon in Mr. Evans' case to the arguments made in Mr. Castillo's. The arguments in question are almost identical. Moreover, the Court will find that the arguments in Mr. Castillo's are slightly more egregious than the arguments made against Mr. Evans by the same prosecutor. In Evans, during rebuttal closing the prosecutor stated,

> "Do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of commitment to do you legal duty?" pp. 14-15. The Nevada Supreme Court explained, " Asking the jury if it had the intestinal fortitude to do it's legal duty was highly improper the United States Supreme Court held that a prosecutor erred in trying to exhort the jury to it's job; that kind of pressure. . . has no place in the administration of criminal justice. There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir the passion and can only distract a jury from it's actual duty; impartiality. The prosecutor's words here "resolve", "determination", "courage", "intestinal fortitude", "commitment", "duty", were particularly designed to stir the jury's passion and appeal to partiality. Id.

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The Nevada Supreme Court then held,

> " Although this Court noted a similar argument in Castillo v. State, 114 Nev. 271, 279, 280, 959 P.2d 103, 109,(corrected by McKenna v. State, 114 Nev. 1044, 1058, 968 P.2d 739, 748 (1998), it addressed only the prosecutor's argument on future dangerousness, not the reference to the jury's duty". Id

The Nevada Supreme Court specifically stated in Evans, that, Appellate counsel for Castillo only argued future dangerousness regarding his comment and did not raise the issue of the jury's duty. It appears that the Nevada Supreme Court had indicated that the remarks made by Mr. Harmon in Evans, were improper and resulted in a reversal of a death sentence based upon his argument regarding the jury's duty portion of Mr. Harmon's argument. The Nevada Supreme Court's specifically states, " that we considered a similar type argument by Mr. Castillo however, he only argued future dangerousness and not the jury's duty." Therefore, it seems obvious that Mr. Castillo's appellate counsel was ineffective for failing to raise the correct issue regarding Mr. Harmon's statements.

It is important to compare Mr. Harmon's statements in both Evans and Castillo to demonstrate the identical nature of his arguments. In Castillo, Mr. Harmon states, "The issue is to you, as the trial jury, this afternoon have the resolve, and the courage, the determination, the intestinal fortitude, the sense of commitment to do your legal and moral duty, for what ever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets. . ." In Evans, Mr. Harmon stated "Do you as a jury have the resolve the determination, the intestinal fortitude, the sense of commitment to do your legal duty?"

The Nevada Supreme Court specifically held in Evans that it was improper for the prosecutor to use such word to as resolve, determination, courage, intestinal fortitude,

commitment, and duty. In Mr. Castillo's case the prosecutor used the word resolve, courage, determination, intestinal fortitude, and went one step further by saying the commitment legal and moral duty.

In Evans, Mr. Harmon simply stated, "Do you have the commitment to do your legal duty." In Castillo, Mr. Harmon went one step further and asked the jury regarding their commitment to their legal and moral duty. Subsequently, the Evans case demonstrates that Mr. Harmon's argument's in Castillo were more egregious than the Evans case based upon his question regarding the jurors legal and moral duty. However, it appears that the arguments by Mr. Harmon in both cases are identical. The arguments appear to come from the same script. However, the Nevada Supreme Court has determined that Mr. Evans should receive a new penalty phase for the horrendous and brutal murder of four innocent people whereas, Mr. Castillo was not entitled to a new penalty phase based upon the same identical argument.

The Nevada Supreme Court specifically, addressed the comparison of Evans to Castillo and determined that unfortunately, appellate counsel only raised the argument regarding Mr. Harmon's statement of future dangerousness. Therefore, Mr. Castillo now contents that appellate counsel was ineffective pursuant to the Strickland standard. Had appellate counsel raised the argument that the prosecutor had violated his constitutional rights based upon his arguments to the jury regarding their legal and moral duty that the outcome of the case would have resulted in a new penalty phase.

Surely, the State of Nevada can not argue that somehow Mr. Castillo who is convicted of the murder of one individual is somehow presents a more egregious case then Mr. Evans who

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brutally murdered and tortured at least one of the four victims. The evidence in Mr. Evans' case appears to be overwhelming. Hence, an argument that the evidence in Mr. Castillo's case is overwhelming is of no bearing.

Additionally, it should be noted that Mr. Castillo is a white man. Mr. Evan is a African American man. It is not our contention, yet, that there is any equal protection violation of the Fourteenth Amendment to the United States Constitution. However, the similarities in the case are apparent. Mr. Harmon was a prosecutor in both cases. Mr. Evans, a African American man, was convicted of the heinous murder of four innocent individual. Mr. Castillo, a white man has been convicted of murdering one individual. The same prosecutor has made an identical argument in both Mr. Evans and Mr. Castillo's penalty phase. Mr. Evans' has had his sentence of death reversed. Mr. Castillo has not.

In the event that the outcome of this case is affirmed it would be Mr. Castillo's contention that the State of Nevada has clearly treated him differently that Mr. Evans. The State can content that there is overwhelming evidence against Mr. Castillo. It is obvious that there was overwhelming evidence over Mr. Evans. A young child was able to identify Mr. Evans as the person she saw in the apartment committing those brutal acts. The question then becomes why has the Court determined that Mr. Evans is entitled to a new hearing based in part upon the arguments of Mr. Harmon, yet, determined that Mr. Castillo is not entitled to a new penalty phase with the identical argument made by the same prosecutor. The Fourteenth Amendment of the Untied States Constitution section one states,

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state in wherein they reside.

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No state shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the law." emphasis added.

Again, Mr Castillo reserves the right to argue an equal protection violation in the event that there is no reasonable grounds to affirm his sentence of death as compared to Mr. Evans. A review of Mr. Evans case compared to Mr. Castillo' s case demonstrates that Mr. Castillo is absolutely entitled to a reversal of his death sentence based upon the improper comments of the prosecutor. In the event he is not entitled to a new penalty phase Mr. Castillo specifically raises the argument that the State of Nevada has violated the equal protection clause and protected the rights of Mr. Evans, a African American, over the rights of Mr. Castillo, a white man. The State of Nevada has denied Mr. Castillo equal protection of the laws based upon his race. Based upon the foregoing argument Mr. Castillo demands that this Court reverse his sentence of death and permit him a new penalty phase based upon the violations Mr. Castillo's rights under the United States Constitution, Amendments Fourteen, Eight, Five, and Six.

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III. MR. CASTILLO'S SENTENCE OF DEATH FOR THE USE OF A DEADLY WEAPON IN COMBINATION WITH HIS FIRST DEGREE MURDER CONVICTION MUST BE OVERTURNED BASED UPON A CROWBAR NOT BEING A DEADLY WEAPON.

On September 4, 1996, the jury returned guilty verdicts as to all counts. Specifically, Mr. Castillo was found guilty of first degree murder with the use of a deadly weapon. As was outlined in the statement of facts, the State alleged that Mr. Castillo attacked the victim with a tire iron which Mr. Castillo allegedly brought into the house. The coroner testified that the victim died as

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a result of a intracranial hemorrhage due to blunt force trauma to the face and head. The coroner further testified that these injuries were consistent with blows from a crow bar or tire iron. A crow bar or tire iron does not amount to a deadly weapon.

It is important to note that the Nevada Legislature appears to have attempted to overrule Zgombic v. State, 106 Nev. 571, 578, 598 P.2d 548 (1990), when the Nevada Legislature enacted what NRS 193.165(b) which states:

> Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

This Court has addressed this issue on a number of occasions. In Milton v. State, 908 P.2d 684 (1995), this Court considered whether there was a use of a deadly weapon when a knife was used to kill the victim. This Court indicated that District Court must determine, as a matter of law, whether the instrument is an inherently dangerous weapon. Specifically, this Court held:

> "[f]inally, Gregory contends that there is no basis in the record to support his enhanced sentences for use of a deadly weapon in the commission of the crimes. We are forced to agree. In Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990), this court overruled the functional test and applied the inherently dangerous weapon test for determining whether an instrumentality is a deadly weapon for purposes of NRS 193.165. The inherently dangerous weapon test means that the instrumentality itself, if used in the ordinary manner contemplated by its design and construction, will or is likely to, cause a life-threatening injury or death. *Id. at* 576-77, 798 P.2d at 551. Under Zgombic, it is the district court's duty to determine whether the instrument is an inherently dangerous weapon, except in a few close cases where the court cannot determine as a matter of law whether the weapon is or is not a deadly weapon, the judge will need to submit the entire issue to the jury after instructing it on the previously stated definition of a deadly weapon. *Id. at* 577, 798 P.2d at 552. (quotations omitted).

> In Hutchins, this court discussed the classification of knives under the inherently dangerous weapon test, stating: Here the State argues that scissors are analogous to a knife, something which could clearly be classified as a deadly weapon even under the inherently dangerous standard.... In addition to their more commonplace uses, knives are often designed as weapons and have been so used throughout history. Id. 110 Nev. at 111, 867 P.2d at 1141. Although Hutchins allows for the possibility of finding that a knife is a deadly weapon, that case does not stand for the proposition that all knives are considered deadly weapons under the inherently dangerous weapon test. In determining whether a knife is a deadly weapon, the district court must consider the particular type of knife that was used in the crime and determine whether it satisfies the inherently dangerous weapon test.

It is important to note that the cases cited above were prior to the legislative change in 1995.

As the Court is aware, almost anything can be used to kill somebody. For example, if a defendant hit somebody in the face with his fist knocking the victim unconscious and then throws the victim into a swimming pool and the victim dies as a result of drowning. Is the water in the pool a deadly weapon? If a defendant chokes a victim into unconsciousness and then places the victim out in the desert because he believes the victim is dead, thereafter, the victim dies of exposure from the sun. Is the sun a deadly weapon? If in the middle of a domestic dispute a wife takes out a frozen turkey and hits the husband over the head, is the frozen turkey a deadly weapon. If a husband throws his wife off a boat in Lake Mead wherein she drowns, the water in Lake Mead a deadly weapon. A defendant who smashes another victims head into the pavement causing death, is the pavement a deadly weapon. If a victim is rendered unconscious by a beating from the defendant's fist, thereafter the defendant believes the victim to be dead and thereafter places the victim in a large industrial freezer to hide the body and the body dies as a result of

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hypothermia was the freezer a deadly weapon. If a man renders a victim unconscious as a result of a fight believing him to be dead but places him in a trash compactor, is a trash compactor a deadly weapon.

Mr. Castillo would suggest that a tire iron/crow bar is no more a deadly weapon than the water in Lake Mead, the water in a swimming pool, an industrial freezer, pavement, a frozen turkey, a frozen ham, a glass pain that a victim was thrown through.

Compare those examples to the 1998 case of State of Nevada v. Buff, 114 Nev. 1237, 970 P.2d 564, (Nev. 1998).

In Buff, this Court held that the trial Court erred in applying the functional test for determining whether a Swiss army knife was a deadly weapon, for purposes of enhancement sentence. In Buff, appellant was convicted of murder in the first degree with the use of a deadly weapon for the stabbing death of a victim with a Swiss army knife. In Buff, this Court held that the "[w]e conclude that the matter at bar presents the type of close case anticipated in Zgombic, and the district court could not determine as a matter of law that the Swiss army knife used by appellants was a deadly weapon." *Id at* 970 P.2d 564, 568.

Again, it is important to note that this Court determined that the use of Swiss army knife to kill a victim by plunging it into his throat was a close case in terms of whether this could be construed as a deadly weapon.

If this Court determines that taking both hands and plunging a Swiss army knife into ones throat is a close issue how can it be determined that the a tire iron/crow bar should be enhanced for the use of a deadly weapon. If a tire iron/crow bar is a deadly weapon, than what object could possibly be used in a murder that would not enhance somebody for the use of a deadly weapon. For example, if a defendant smothers a victim with a pillow. The victim dies of asphyxiation, is

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the pillow not a deadly weapon. If a controlled substance is forced down someone's throat causing them to overdose, is the controlled substance not a deadly weapon. If a person forced a stocking down someone's throat in an attempt to quit the victim, the victim dies of asphyxiation, is the sock not a deadly weapon.

NRS 193.165(b) defined what a deadly weapon is, "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death". Under the new statute, all of these examples provided above can be applied as a deadly weapon pursuant to the definition given by our legislature. This issue should be explored under the section that this statute is unconstitutionally vague and ambiguous.

The undersigned can find no new Nevada cases establishing the exact terms to what must be considered a deadly weapon. If this is the case then every single object used in the commission of a murder must be enhanced for a deadly weapon.

NRS 193.165(5) IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS.

The Instruction provided to the jury states "a deadly weapon is any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

In Sheriff, Clark County v. Luqman, 101 Nev. 149, 697 P.2d 107 (1985) this Court held that:

> [i]t is basic to the principles of the due process clause of the fourteenth amendment that an individual may not be held criminally responsible for conduct which he could not reasonably understand to be proscribed. Sheriff v. Martin, 99 Nev. at 339, 662 P.2d at 636 (quoting United States v. Harris, 347 U.S. 612, 74 S.C. 808, 98 LED. 989 (1954)). The law must afford a person of ordinary

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> intelligence the opportunity to know what is prohibited so that he may act accordingly, and it must also provide explicit standards of application in order to avoid arbitrary and discriminatory enforcement. Sheriff v. Martin, above; see also Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), cited by this Nevada Supreme Court in Sheriff v. Martin, 99 Nev. 336, 662 P.2d 634 (1983); State of Nevada v. Glusman, 98 Nev. 412, 651 P.2d 639 (1982), appeal dismissed, 459 U.S. 1192, 103 S.Ct. 1170, 75 L.Ed.2d 423 (1983); Wilmeth v. State, 96 Nev. 403, 610 P.2d 735 (1980); In re Laiolo, 83 Nev. 186, 426 P.2d 726 (1967).

These cases stand for the proposition that if a person of common intelligence must guess at it's meaning than the statute is unconstitutionally vague and ambiguous. In the instant case, it is impossible to tell by the instruction (which is directly from the statute) what constitutes the use of a deadly weapon.

A review of the examples provided above as applied to this statute clearly demonstrate that every single every object used during the commission of a murder must be considered a deadly weapon. For example, the use of the water in swimming pool must be considered a deadly weapon under this statute. For a deadly weapon is any material or substance (H2O or water) which under the circumstances in which its used, attempts to be used or threatened to be used is readily capable of causing substantial bodily harm or death.

In the case of a swimming pool anybody thrown into a swimming pool or kept under the water for five to ten minutes most certainly will have either brain damages or suffer death. Therefore, a clear reading of the statute demonstrates that the water in the pool must be considered a deadly weapon.

Next example, a pillow placed over the victim's head. Under the statute clearly a pillow

could be considered either a material, substance or instrument which when used to smother a human being is capable of causing substantial body harm or death. Therefore, shoving a pillow over someone's head for ten minutes not letting them breath causing death by asphyxiation most certainly should be applied as a deadly weapon under this statute.

Next, the use of the pavement to bash the victim's head. Pavement clearly is concrete which is a material. The pavement or material under the circumstances in which it is used (to bang a victim's head), is readily capable of causing substantial bodily harm or death. Therefore, the pavement is clearly a deadly weapon under this statute.

Next, industrial freezer. Clearly the freezer can be defined as a device or instrument. In placing a person in a freezer is readily capable of causing substantial bodily harm or death by hypothermia. Therefore, clearly the industrial freezer should be considered a deadly weapon under this statute.

Next, the sock shoved down the victim's throat in order to keep the victim quit. Clearly the sock can be defined as a material. The sock being shoved down the throat and the circumstances of which is being used is readily capable of causing substantial bodily harm or death by way of asphyxiation. Therefore, the sock should be considered a deadly weapon and the defendant's sentence should be enhanced.

Next, the water at Lake Mead. As with the pool the water in Lake Mead must clearly been seen as a deadly weapon, because it is a substance and when you place someone's head under that substance for five to ten minutes it is most certainly is going to cause substantial bodily harm or death. Therefore, the water in Lake Mead must be considered a deadly weapon.

Next, the frozen turkey. A turkey is clearly a material or substance (i.e. Meat) under the circumstances in which it is used bashing someone over the head is readily capable of causing

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substantial bodily harm or death. Under this statute clearly the frozen turkey should be considered a deadly weapon.

Next, a neck tie used to strangle the victim to death. A neck tie is a material and under the circumstances in which it used (to choke someone) is readily capable of causing substantial bodily harm or death. A neck tie under this statute is clearly a deadly weapon.

Next, the hypothetical wherein the defendant believes that the victim is dead and places the victim out in the desert. However, the victim dies of exposure of the sun. The sun clearly can be considered made up of a material or substances which under the circumstances in which it used (placing the victim in the scorching Las Vegas sun) is readily capable of causing substantial bodily harm or death. Is the sun a deadly weapon? Pursuant to this statute it most certainly should be applied that way.

Next, the victim is thrown down a long stair case causing the victim to die as a result of a broken neck. The stairs clearly qualify as a material (wood and carpet) which under the circumstances in which it used (thrown the victim down the stairs) is readily capable of causing substantial bodily harm or death. Pursuant to this statute the stairs are a deadly weapon. The State should remember in citing in their criminal information that a deadly weapon can be considered to wit: the sun; to wit: the pavement; to wit: the water within the pool; to wit: the water in Lake Mead; to wit: the frozen turkey; to wit: the frozen ham; to wit: the stairs; to wit: the pillow; to wit: the controlled substance and the list goes on and on of ridiculous examples like this.

The point of these examples is that the law in our State regarding the definition for use of a deadly weapon does not afford a person or ordinary intelligence the opportunity to know what is prohibited so that he or she may act accordingly and it provides a manner that will give the

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District Attorney's Office arbitrary and discriminatory enforcement of the statute. The statute as written provides the District Attorney's Office with a clear abuse of enforcement. The District Attorney's Office may decide that Mr. Castillo has used a deadly weapon. However, a person accused or convicted of smother a person with a pillow or using a controlled substances to shove down their throat may not be applied as a deadly weapon. Yet, under the statute they both could be applied the same way. This leads to the conclusion that the due process clause of the Fourteenth Amendment is being violated based upon a statute that is so vague that men or women of common intelligence must guess at the meaning and differ as to the application.

The statute is unconstitutional because it gives the District Attorney's office an opportunity to apply the law in a discriminatory and arbitrary fashion. Moreover, the statute itself is so vague that people of ordinary intelligence (even in this case) have disputed whether or not this is a deadly weapon.

In Buff, this Court found that a Swiss army knife was a close case. Mr. Castillo would agree with that interpretation. However, if a Swiss army knife is a close case, how can anyone argue that a tire iron/crow bar should be applied as a deadly weapon, anything can be a deadly weapon pursuant to this statute.

IV. MR. CASTILLO'S IS ENTITLED TO HAVE A REVERSAL OF HIS SENTENCE OF DEATH AND CONVICTIONS BASED UPON THE FAILURE OF TRIAL COUNSEL TO PROPERLY INVESTIGATE HIS CASE.

In the instant case, Mr. Castillo's trial counsel failed to present any of the psychological evidence pertaining to Mr. Castillo with the exception of Dr. Etcoff. Dr. Etcoff testified at the penalty phase and summarized the extensive psychological history of Mr. Castillo. The defense

made absolutely no effort to present to the jury witnesses who had previously diagnosed Mr. Castillo.

The evidence presented at the penalty phase demonstrates that Mr. Castillo had been diagnosed with sever mental problems from the age of approximately ten (10) years old. The defense most certainly should have investigated the individuals who conducted these psychological tests and diagnosis of Mr. Castillo. Additionally, as has been previously noted in a previous argument this type of evidence should have been presented to the jury in the trial phase.

It is quite obvious that the failure to properly prepare and investigate this case resulted in the defense simply permitting Mr. Castillo to be convicted of murder of the first degree without any form of defense whatsoever. It would have been prudent if not absolutely required pursuant to the Strickland standard to present and investigate any possible psychological defense to a jury during the trial phase. It appears the defense woefully failed in their preparation, investigation, and presentation to the jury of a psychological defense. It is probable that a jury may have convicted Mr. Castillo of murder of the second degree had they been aware of the full scope of Mr. Castillo's mental deficiencies.

In State of Nevada v. Love, 865 P.2d 322, 109 Nev. 1136, (1993), this Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses. In Love, this Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the failure to personally interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. Love, 109 Nev. 1136, 1137.

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Additionally, in Warner v. State, 729 P.2d 1359, 102 Nev. 635, 638, (1986), this Court considered a similar issue as that in Love. In Warner, Mr. James Warner provided his defense counsel with a list of three possible witnesses, however, defense counsel did not contact them. Id. at 637. Moreover, in addition to defense counsel's failure to contact potential witnesses provided to him, defense counsel failed to investigate and defense counsel's lack of preparation for trial left Mr. Warner without a defense at trial. Id at 638. Therefore, this Court reversed and remanded Mr. Warner's case for a new trial based upon the following: (1) trial counsel's failure to conduct an adequate investigation; (2) trial counsel's failure to adequately prepare for trial; and (3) trial counsel's failure to interview witnesses.

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

Under Strickland, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id. at* 691, 104 S.Ct. at

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2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id. at* 688, 104 S.Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id. at* 694, 104 S.Ct. at 2068.

"An error by trial counsel, even if professionally unreasonable, does not warrant setting aside a judgment of a criminal proceeding if the error had no effect on the judgment. Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. Thus Strickland also requires that the defendant be prejudiced by the unreasonable actions of counsel before his or her conviction will be reversed. The defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id. at* 694, 104 S.Ct. at 2068. Additionally, the Strickland court indicated that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id. at* 696, 104 S.Ct. at 2069.

V. THE DISTRICT COURT ERRED IN FAILING TO HOLD A REQUESTED EVIDENTIARY HEARING TO PERMIT MR. CASTILLO TO ESTABLISH FACTS OUTSIDE OF THE RECORD.

In Hatley v. Nevada, 100 Nev. 214, 678 P.2d 1160 (1984), this Court held that:

> We conclude that it was an error for the District Court to deny the petition without first holding and evidentiary hearing. It is well settled that when a petition for Post-Conviction Relief contains allegations of fact outside the record which, if true, would entitle the petitioner to relief, an evidentiary hearing thereon is required

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(quotations and citations omitted) Id.

See also Bolden v State 99 Nev. 181, 659 P.2d 886 (1983).

Clearly, the court should hold an evidentiary hearing to permit Mr. Castillo to call his trial and appellate counsel.

In fact, an evidentiary hearing would establish the actual reason that trial and appellate counsel failed to raise the issues raised herein. It is incumbent upon the court to hold the evidentiary hearing as opposed to attempting to divine the reason that trial and appellate counsel failed to raise these issues.

In sum, Mr. Castillo requests an evidentiary hearing to establish facts not in evidence in support his post-conviction writ of habeas corpus. These issues should be permitted to be explored at an evidentiary hearing. As in Hatley, this Court concluded that it is error for the District Court to deny an evidentiary hearing to a petition for post-conviction writ of habeas corpus, wherein allegations of facts outside the record, if true, would entitled petitioner relief. Mr. Castillo has clearly established that there existed facts outside the record, if true, would entitle him to a new trial. For the foregoing reason, Mr. Castillo would respectfully request that this Court grant him an evidentiary hearing.

VI. MR. CASTILLO IS ENTITLED TO A NEW TRIAL AND PENALTY PHASE BASED UPON THE FAILURE OF TRIAL COUNSEL TO PRESENT A PSYCHOLOGICAL DEFENSE TO THE TRIAL PHASE OF THE CASE.

In the Supreme Court's opinion affirming Mr. Castillo's direct appeal, the Supreme Court noted, "[t]he defense did not put on a case in chief." (See attached opinion pp.4). In the instant

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case, as the Supreme Court noted, the defense failed to present any form of defense whatsoever, the defense actually waived their opening argument. More importantly, the following statement was the entire closing argument by the defense counsel:

> "Good day, ladies and gentleman. If it please the court, Mr. Bell, Mr. Harmon, and my co-counsel Mr. Schieck, as the Judge informed you, when he was reading the instructions, this is the time known as closing argument. You've heard Mr. Harmon's closing argument. I think it's better to characterize what I'm about to say as some closing comments, as to this phase of the proceedings.
>
> I first want to thank you for your participation in this and the patience that I know you've had to exercise over these past couple of weeks. As Mr. Harmon has correctly state, you've always been on stage here. Now you are taking center stage.
>
> You have not heard much from the defense during this phase, as it has become quite obvious to you, as the events unfolding in here, but that doesn't lessen your burden or your sworn duty that you took an oath to. All the defense asks you to do is to perform your sworn duty. Your burden is no less because we presented very little and had very little participation. Your duty, as we see it, is to review each and every count, each and every element. Make sure that you believe beyond a reasonable doubt that the State has proven beyond a reasonable doubt each and every element within each and every count. Once you have done that, follow your convictions accordingly.
>
> Additionally, after you have done that, you've done your duty. You've been fair to all the parties, which is all that any of us can ask of you and for that, the defense both thanks you and applauds you in you efforts. I thank you. (7 ROA pp. 1533-1534).

This was the entire defense for Mr. Castillo. Yet, as was outlined in the statement of facts (penalty phase), there was a great deal of evidence that Mr. Castillo suffered from extreme emotional disturbance. In fact, it can be characterized that Mr. Castillo is mentally ill. The jury found that the instant murder was committed while the defendant was under the influence of extreme emotional distress and disturbance as one of Mr .Castillo's three mitigating circumstances. However, it should be noted that this same jury would have been unaware of any of the extensive psychological difficulties that Mr. Castillo had suffered throughout his life.

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Without reiterating all the psychological evidence presented at the penalty phase, (which has been listed in the statement of facts), it is obvious that the defense should have presented this evidence at the trial portion of Mr. Castillo's case.

In a similar case the Nevada Supreme Court considered that case of Zollie Dumas v. the State of Nevada.

In Dumas v. State, 111 Nev. 1270, 903 P.2d 1816 (1995), this Court overturned the first degree murder conviction of Zollie Dumas.

In Dumas, this Court held, " we reverse on the ground that failure to present psychological or other evidence pertaining to mental status renders Dumas's representation ineffective under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 252, 80 L.Ed.2 674 (1984), and particularly under the case's holding that counsel has a duty to make reasonable investigation. Dumas at 111

This Court noted, "Dumas is mentally deficient being in the second percentile in intelligence, with an I.Q. of 69. He is illiterate and functions at about the third grade level. Dr. Jurasky, a psychiatrist employed by the State, reported that Dumas probably suffered organic damage to his intellectual capabilities and was incapable of premeditating an act such as the killing that is subject to this prosecution." At the post conviction hearing, Dr. Jurasky testified that Dumas was acting on impulse and out of emotional desperation rather than with deliberation." Id.

In rendering the holding in Dumas, this Court reasoned that:

> "In Riley, we refused to reverse the conviction on this ground because the pre-trial evaluation of Riley was not such that would render counsel's representation ineffective merely because counsel failed to heed the information contained in that report. The Riley opinion distinguished the facts in that case from Deutscher v.

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> Whitley, 964 F.2d 1443, 1446, (9th Cir. 1991), *vacated*, 506 U.S. 935, 113 S.Ct. 367, 121 L.Ed.2d 279 (1992) aff'd sub nom., Deutscher v. Angelone, 16 F.3d 981, 984, (9th Cir. 194), in which counsel failed to investigate and offer evidence concerning the defendant's history of schizophrenia, pathological intoxication and organic brain damage, and Evans v. Lewis, 855 F.2d 631, 636-39 (9th Cir., 1998), in which defense counsel failed to inquire into prior diagnosis of schizophrenia that could have shown an impairment of mental state at the time of crime. See also Riley v. State, 110 Nev. 638, 650, 878 P.2d 272, 280 (1994)."

As this Court recognized in Dumas,

> " counsel's failure to investigate and present Dumas' mental condition as a defense virtually assured the jury would find Dumas guilty of first degree murder. With proper investigation, preparation and presentation, defense counsel could very well have presented a cogent defense of mental incapacity or, at least , that Dumas' mental state was inconsistent with premeditated and deliberated first-degree murder. The district court erred when it concluded that defense counsel's failure to pursue the only defense available to Dumas was within the bounds of acceptable advocacy. Counsel's failure to provide effective assistance renders the jury's verdict unreliable. We reverse the district court's order denying appellant's petition for post-conviction relief and remand the matter to the district court for a new trial." id. at 1271.

Mr. Castillo's defense attorney's should have put forward Mr. Castillo's psychological state of mind at the time of the crime. The defense attorney's put forth no arguments to attempt to mitigate a conviction from first degree murder conviction to a conviction of possibly second degree murder based upon the psychological difficulties suffered throughout Mr. Castillo's life. Therefore, based upon the facts of the instant case, combined with a review the State of Nevada v. Dumas, it was reversible error based upon ineffective assistance of counsel for the defense to fail to place this evidence before the jury.

VII. MR. CASTILLO'S CONVICTION IS UNCONSTITUTIONAL BECAUSE OF CUMULATIVE ERROR.

Mr. Castillo's conviction is invalid under the federal and state constitutional guarantees of

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due process, equal protection, the effective assistance of counsel, a fair tribunal and an impartial jury due to the cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, and the systematic deprivation of petitioner's right to the effective assistance of trial and appellate counsel. Const. Amends. V, VI, VIII, & XIV, and Nevada Constitution Art. I and IV.

Each of the claims specified in the post-conviction petition for a writ of habeas corpus, requires that the judgment of conviction be vacated. Mr. Castillo incorporates each and every factual allegation and the leal authority contained in the petition as if fully set forth herein.

The cumulative effect of the errors demonstrated in the petition was to deprive the proceedings against Mr. Castillo of fundamental fairness and to result in a constitutionally unreliable sentence. Whether or not any individual error requires that the judgment or sentence be vacated, the totality of these multiple errors and omissions resulted in substantial prejudice to Petitioner.

The State cannot show, beyond a reasonable doubt that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt; in the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Petitioner. Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985).

VIII. MR. CASTILLO'S DEATH SENTENCE IS INVALID UNDER THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS HIS RIGHTS UNDER INTERNATIONAL LAW, BECAUSE THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT. U.S. CONSTITUTION ARTICLE VI AND AMENDMENTS VIII AND XIV.

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The Eighth Amendment guarantee against cruel and unusual punishment prohibits punishment which is inconsistent with the evolving standards of decency theat mark the progress of a maturing society.

The worldwide trend is toward the abolition of capital punishment and most civilized nations no longer conduct executions. Portugal outlawed capital punishment in 1867; Sweden and Spain abolished the death penalty during the 1970's; and France abolished capital punishment in 1981. In 1990, the United Nations called on member nations to take steps toward the abolition of capital punishment. Since this call by the United Nations, Canada, Mexico, Germany, Haiti, and South Africa, pursuant to international law provisions that outlaw "cruel, unusual and degrading punishment" have abolished capital punishment. The death penalty has recently been abolished in Azerbaijan and Lithuania. Many of the "third world" nations have rejected capital punishment on moral grounds. As demonstrated by the world-wide trend toward abolition of the death penalty, state-sanctioned killing is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

The death penalty is unnecessary to achieve any legitimate societal or penal logical interests in Mr. Castillo's case. His mental illness, his neurological deficits, and the circumstances surrounding the case make a death sentence cruel and unusual punishment.

The death penalty constitutes cruel and unusual punishment under any and all circumstances, and constitutes cruel and unusual punishment under the circumstances of this case. The petitioner's death sentence violates international law, which prohibits the arbitrary deprivation of life, and cruel, inhuman or degrading treatment or punishment .l International

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Covenant on Civil and Political Rights, Articles VI and VII: U.S. Const, Art. VI.

IX. MR. CASTILLO'S DEATH SENTENCE IS INVALID UNDER THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS UNDER INTERNATIONAL LAW, BECAUSE EXECUTION BY LETHAL INJECTION VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS. U.S. CONSTITUTION ARTICLE VI, AMENDMENTS VIII & XIV.

State law requires that execution be inflicted by an injection of a lethal drug. Nev. Rev. Stat. §. 176.355(1).

The ethical standard of the American Medical Association prohibit physicians from participating in an execution other than to certify that a death had occurred. American Medical Association, House of Delegates, Resolution 5 (1992); American Medical Association, Judicial Council, Current Opinion 2.06 (1980). As a result non-physicians staff from the Department of Corrections have assumed the responsibility of locating veins and injecting needles into the arms of the individual being executed.

In recent executions in states employing lethal injections, prolonged and unnecessary pain have been suffered by the condemned individuals because of difficulty in the insertion of needles, unexpected chemical reactions among the lethal drugs or violent reactions to the drugs by the condemned individuals.

The following lethal injections executions, among other, have produced prolonged and unnecessary pain.

a. Stephen Peter Morin – March 13, 1985 (Texas) – Had to probe both arms and legs with needles for 45 minutes before they found the vein.
b. Randy Woolls– August 20, 1986 (Texas)– A drug addict, Woolls had to help the

executioner technicians find a good vein for the execution.

c. Raymond Landry – December 13, 1988 (Texas)– Pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the killing, the syringe came out of Landry's vein, spraying the deadly chemical across the room toward the witnesses. The execution team had to reinsert the catheter into the vein. The curtain was drawn for 14 minutes so witnesses could not see the intermission.

d. Stephen McCoy – May 24, 1989 (Texas) Had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses (male) fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who represented McCoy and witnesessed the execution, thought that the fainting would catalyze a chain reaction. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding "The drugs might have been administered in a heavier dose or more rapidly."

e. Rickey Ray Rector– January 24, 1992 (Arkansas)– It took medical staff more than 50 minutes to find a suitable vein in Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal, Rector (who suffered serous brain damage from a lobotomy) tried to help the medical personnel find a vein. The administrator of the State's Department of Corrections medical programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein." The administrator said "that may have contributed to his occasional outbursts."

f. Robyn Lee Parks – March 10, 1992 (Oklahoma – Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck, and abdomen, began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were administered. Said Tulsa World Reporter Wayne Greene, "the death looked ugly and scary."

g. Billy Wayne White – April 23, 1992 (Texas) – It took 47 minutes for authorities to find a suitable vein, and White eventually had to help.

h. Justin Lee May – May 7, 1992 (Texas) – May had an unusually violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the item (Huntsville), Mr. May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze. . ." Associated Press reporter Michael Graczyk wrote, "He went into coughing spasms, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back if he had not been belted down. After he stopped breathing his eyes and mouth remained open."

i. John Wayne Gacy - May 19, 1994 (Illinois) – After the execution began, one of the three lethal drugs clogged the tube leading to Gacy's arm, and therefore, stopped flowing. Blinds, covering the window through which witness observe the

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execution, were then drawn. The clogged tube was replaced with a new one, the blinds were opened, and the execution process resumed. Anesthesiologist blamed the problem on the inexperience of the prison officials who were conduction the execution, saying that proper procedures taught in "IV 101" would have prevented the error.

j. Emmitt Foster– May 3, 1995 (Missouri)– Foster was not pronounced dead until 30 minutes after the executioners began the flow of the death chemicals into his arms. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit witnesses from viewing the scene; they were not reopened until three minutes after the death was pronounced. According to the coroner, who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the gurney; it was so tight that the flow of chemicals into his veins was restricted. It was several minutes after a prison worker finally loosened the strap that death was pronounced. The coroner entered the death chamber twenty minutes after the execution began, noticed the problem and told the officials to loosen the strap so that the execution could proceed.

k. Tommie Smith – July 18, 1996 (Indiana)– Smith was not pronounced dead until an hour and 20 minutes after the execution team began to administer the lethal combination of intravenous drugs. Prison officials said the team could not find a vein in Smith's arm and had to insert an angio-catheter into his hear, a procedure that took 35 minutes. According to authorities, Smith remained conscious during the procedure.

The procedures utilized to conduct the inhumane executions described above are substantially similar to those utilized by the State of Nevada.

Because of the inability of the State of Nevada to carry out Mr. Castillo's execution must be vacated. The practice is also invalid under the international law, which prohibits cruel, inhuman or degrading treatment or punishment. International Covenant on Civil and Political Rights, Article VII; U.S. Const., Art. VI.

X. MR. CASTILLO'S CONVICTION AND SENTENCE ARE INVALID PURSUANT TO THE RIGHTS AND PROTECTIONS AFFORD HIM UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, U.S. CONST. ART.VI.

The International Covenant on Civil and Political Rights, (Ex. 127) and international

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human rights treaty, prohibits the arbitrary deprivation of life and restrict the imposition of the death penalty in countries which have not abolished it to "only the most serious crimes in accordance with the law in force at the time of the commission of the frame and not contrary to the provisions of the present Covenant. . ." ICCPR, Article VI, Sect. 2. The Covenant further prohibits torture and "cruel, inhuman or degrading treatment or punishment," (Article VII); and guarantees every person a fair and public hearing by a competent, independent and impartial tribunal. (Article XIV).

Among the additional protections secured by the Covenant for any person charged with a criminal offense are the guarantees: to be informed promptly and in detail in a language which [the accused] understands of the nature and cause of the charge against him; to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and not to be compelled to testify against himself or to confess guilt. 9Article XIV).

All of the specific rights listed above that are guaranteed in the Covenant were violated in the Petitioner's case, and are pleaded elsewhere throughout this petition. Petitioner incorporates each and every factual reference as if fully set forth herein. The rights afforded under Article XIV are guaranteed "in full equality," and thus apply in full force to Mr. Castillo, the indigent petitioner in this capital case.

The violations of Mr. Castillo's rights under international law are prejudicial per se and

require that his conviction and sentence be vacated.

XI. MR. CASTILLO'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. U.S. CONST. AMENDS. V, VI, VIII AND XIV; NEV. CONST. ART. In SACS. 3, 6 AND 8; ART IV, SEC. 21.

In support of this claim, Mr. Castillo alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power and an evidentiary hearing:

Mr. Castillo hereby incorporates each and every allegation contained in this petition as if fully set forth herein.

The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. NRS 200.020(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguable exist in every first-degree murder case. *See* NRS 200.033. Nevada permits the imposition of the death penalty for all first-degree murders that are "at random and without apparent motive." NRS 200.033(9). Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnapping, to receive money, torture, to prevent lawful arrest, and escape. *See* NRS 200.033. The scope of the Nevada death penalty statute is thus clear: The death penalty is an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all.

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The death penalty is accordingly permitted in Nevada for all first-degree murders, and first-degree murder, in turn, are not restricted in Nevada within traditional bounds. As the result of unconstitutional form jury instructions defining reasonable doubt, express malice and premeditation and deliberation, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. Consequently, a death sentence is permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing.

As a result of plea bargaining practices, and imposition of sentences by juries, sentences less than death have been imposed for offenses that are more aggravated than the one for which Mr. Castillo stands convicted; and in situations where the amount of mitigating evidence was less than the mitigation evidence that existed here. The untrammeled power of the sentencer under Nevada law to declines to impose the death penalty, even when no mitigating evidence exists at all, or when the aggravating factors far outweigh the mitigating evidence, means that the imposition of the death penalty is necessarily arbitrary and capricious.

Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment form the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme, and the process is contaminated even further by Nevada Supreme Court decisions permitting the prosecution to present unreliable and prejudicial evidence during sentencing regarding uncharged criminal activities of the accused. Consideration of such evidence

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necessarily diverts the sentencer's attention from he statutory aggravating circumstances, whose appropriate application is already virtually impossible to discern. The irrationality of the Nevada capital punishment system is illustrated by State of Nevada v. Jonathan Daniels, Eighth Judicial District Court Case No.C126201. Under the undisputed facts of that case, Mr. Daniels entered a convenience store on January 20, 1995, with the intent to rob the store. Mr. Daniels then held the store clerk at gunpoint for several seconds while the clerk begged for his life; Mr. Daniels then shot the clerk in the head at point blank range, killing him. A moment later, Mr. Daniels shot the other clerk. Mr. Daniels and two friends then left the premises calmly after first filling up their car with gas. Despite these egregious facts, and despite Mr. Daniels' lengthy criminal record, he was sentenced to life in prison for these acts.

There is not rational basis on which to conclude that Mr. Daniels deserves to live whereas Mr. Castillo deserves to die. These facts serve to illustrate how the Nevada capital punishment system is inherently arbitrary and capricious. Other Clark County cases demonstrate this same point: In State v. Brumfield, Case No. C145043, the District Attorney accepted a plea for sentence of less than death for a double homicide; and in another double homicide case involving a total of 12 aggravating factors resulted in sentences of less than death for two defendants. State v. Duckworth and Martin, Case No. C108501. Other Nevada cases as aggravated as the one for which Mr. Castillo was sentenced to death have also resulted in lesser sentences. See Ewish v. State, 110 Nev. 221, 223-25, 871 P.2d 306 (1994); Callier v. Warden, 111 Nev. 976, 979-82, 901 P.2d 619 (1995); Stringer v. State, 108 Nev. 413, 415-17 836 P.2d 609 (1992).

Because the Nevada capital punishment system provides no rational method for

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distinguishing between who lives and who dies, such determinations are made on the basis of illegitimate considerations. In Nevada capital punishment is imposed disproportionately on racial minorities: Nevada's death row population is approximately 50% minority even though Nevada's general minority population is less than 20%. All of the people on Nevada's death row are indigent and have had to defend with the meager resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources provided to capital defendants virtually ensures that compelling mitigating evidence will not be presented to, or considered by, the sentencing body. Nevada sentencers are accordingly unable to, and do not, provide the individualized, reliable sentencing determination that the constitution requires.

These systemic problems are not unique to Nevada. The American Bar Association has recently called for a moratorium on capital punishment unless and until each jurisdiction attempting to impose such punishment "implements policies and procedures that are consistent with . . . . longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . . . " as the ABA has observed in a report accompanying its resolution, "administration of the death penalty, from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency" (ABA Report). The ABA concludes that this morass has resulted from the lack of competent counsel in capital cases, the lack of a fair and adequate appellate review process, and the pervasive effects of race. Like wise, the states of Illinois and Nebraska have recently enacted or called for a

moratorium on imposition of the death penalty.

The United Nations High Commissioner for Human Rights has recently studied the American capital punishment process, and has concluded that "guarantees and safeguards, as well as specific restrictions on Capital Punishment, are not being respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing." The High Commissioner has further concluded that "race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death." The report also described in detail the special problems created by the politicization of the death penalty, the lack of an independent and impartial state judiciary, and the racially biased system of selecting juries. The report concludes:

> The high level of support for the death penalty, even if studies have shown that it is not as deep as is claimed, cannot justify the lack of respect for the restrictions and safeguards surrounding its use. In many countries, mob killings an lynching enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice." Yet they are not acceptable in civilized society.

The Nevada capital punishment system suffers from all of the problems identified in the ABA and United Nations reports - the under funding of defense counsel, the lack of a fair and adequate appellate review process and the pervasive effects of race. The problems with Nevada's process, moreover, are exacerbated by open-ended definitions of both first degree murder and the accompanying aggravating circumstances, which permits the imposition of a death sentence for virtually every intentional killing. This arbitrary, capricious and irrational scheme violates the constitution and is prejudicial *per se*.

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CONCLUSION

Therefore, based upon the arguments herein, Mr. Castillo would respectfully request the reversal of his sentence of death and convictions based upon violations of the United States Constitutions Amendments Fourteen, Eight, Five, and Six.

DATED this 4 dated this October, 2001.

Respectfully submitted:

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EXHIBIT 17

EXHIBIT 17

NOTC
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FILED
FEB 19 4 04 PM '03
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. WILLIAM CASTILLO, Defendant.	CASE NO. C133336 DEPT. NO. XVIII DOCKET NO.

NOTICE OF APPEAL

NOTICE is hereby given that Defendant, WILLIAM CASTILLO, hereby appeals to the Supreme Court of the State of Nevada from his Denial of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) which was denied by the District Court on January 22, 2003

DATED this 18 day of February, 2003.

By _____
CHRISTOPHER R. ORAM
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Attorney for Defendant
WILLIAM CASTILLO

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R ORAM and that on the 19 day of February, 2003, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **NOTICE OF APPEAL**, addressed to:

Supreme Court Clerk
Supreme Court Building
201 S. Carson Street
Carson City, NV 89170

David Roger
District Attorney
200 South Third Street, 7th floor
Las Vegas, Nevada 89155

Hon. Frankie Sue Del Papa
Attorney General
555 E. Washington Ave., 3rd Floor
Las Vegas, NV 89101

Leola A. Chapin
An employee of Christopher R. Oram, Esq.

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EXHIBIT 18

EXHIBIT 18

ORDR
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CLARK PETERSON
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FILED IN OPEN COURT
JUN 11 2003
20
SHIRLEY B. PARRAGUIRRE, CLERK
BY AMBER FARLEY
DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
WILLIAM CASTILLO,
#1153209
Defendant.

CASE NO: C133336
DEPT NO: XVIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: January 22, 2003
TIME OF HEARING: 9:00 A.M.

THIS CAUSE having come on for hearing before the Honorable Nancy M. Saitta, District Judge, on the 22nd day of January, 2003, the Petitioner not being present, Represented by CHRISTOPHER ORAM, the Respondent being represented by DAVID ROGER, District Attorney, by and through CLARK PETERSON, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On January 19, 1996, the Defendant William Patrick Castillo (hereinafter "Defendant") was charged by Indictment with Conspiracy To Commit Burglary and / or Robbery (Felony - NRS 199.480, 205.060, 200.380); two counts of Burglary (Felony - NRS

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205.060); Robbery, Victim Sixty-Five Years of Age, or Older (Felony - NRS 200.380, 193.167); Murder With Use of A Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165); Conspiracy To Commit Burglary and Arson (Felony - NRS 199.480, 205.060, 205.010); and First Degree Arson (Felony - NRS 205.010). On January 23, 1996, the State filed a Notice of Intent To Seek the Death Penalty setting forth five aggravating circumstances.

2. Trial commenced on August 26, 1996. At trial, Defendant was represented by Mr. David Schieck. The facts of the crime itself are reported in Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998). On September 4, 1996, the jury returned a verdict of guilty on all counts. A penalty hearing commenced on September 19, 1996. On September 25, 1996, the jury returned a sentence of death, finding four aggravating circumstances and three mitigating circumstances. The jury found that the aggravating circumstances were that the murder was committed (1) by a person previously convicted of a felony involving the use or threat of violence, specifically, a robbery committed on December 14, 1992; (2) while Castillo was committing burglary; (3) while Castillo was committing robbery; and (4) to avoid or prevent a lawful arrest. The jury found the following mitigating circumstances: (1) the youth of the defendant at the time of the crime; (2) the murder was committed while the defendant was under the influence of extreme emotional distress or disturbance; and (3) any other mitigating circumstances. On November 4, 1996, Defendant was formally sentenced.

3. On February 28, 1997, the Defendant filed a direct appeal. On April 2, 1998, the Nevada Supreme Court affirmed Defendant's conviction. Castillo v. State, supra. Defendant was represented by Mr. David Schieck on appeal. After an unsuccessful petition for rehearing and petition to the United States Supreme Court for a writ of certiorari, remittitur for Defendant's direct appeal was issued on April 28, 1999 by the Nevada Supreme Court.

4. On April 2, 1999, Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction). Counsel was appointed, and a Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) was filed on October 12, 2001. The State filed its Opposition to Defendant's Supplemental Petition on December 12, 2001. On

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May 8, 2002, this Court granted a limited evidentiary hearing for the sole purpose of investigating the claims of ineffective assistance of counsel.

5. On August 2, 2002, this Court held an evidentiary hearing regarding Defendant's attorney's efforts at trial, penalty phase and on direct appeal. Mr. Schieck testified at the evidentiary hearing. Following the hearing, this Court ordered supplemental briefing. On September 27, 2002, Defendant filed his Second Supplemental Brief in Support of the Petition. On November 26, 2003, the State filed its Response to the Second Supplemental Brief.

6. On January 22, 2003, this Court heard brief additional argument and denied Defendant's Petition in its entirety.

7. Trial counsel was not ineffective.

8. Appellate counsel was not ineffective.

9. The record does not support a claim of psychological deficiency or mental illness.

10. The balance of Defendant's claims are procedurally barred or without merit.

CONCLUSIONS OF LAW

1. Claims of ineffective assistance of counsel are evaluated under the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under Strickland, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense. Id. at 687, 104 S.Ct. 2052. To establish prejudice based on trial counsel's deficient performance, a petitioner must show that but for counsel's errors there is a reasonable probability that the verdict would have been different. Id. at 694, 104 S.Ct. 2052. To establish prejudice based on appellate counsel's deficient performance, a petitioner must show that the omitted issues would have had a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

2. Defendant has failed to establish that either trial counsel or appellate counsel either fell below an objective standard of reasonableness or that their performance prejudiced the defense. All issues in Defendant's petition regarding ineffective assistance of counsel,

therefore, must fail.

3. Defendant's specific claim that trial counsel was ineffective in not objecting to a portion of the prosecutor's argument and his appellate counsel was ineffective in not raising the particular issue on appeal must fail for several reasons.

4. The propriety of the specific comment in fact was objected to by trial counsel and was raised on direct appeal as being an improper argument of future dangerousness. The Nevada Supreme Court decided that, though the argument was improper, Defendant was not prejudiced in light of the overwhelming evidence against him. Castillo, supra, at 279-80. Defendant now claims that trial counsel and appellate counsel should have objected to the same comment and appealed based on a new ground—that the comment was an improper "moral duty" argument, citing the newly-decided case of Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001). Since the Nevada Supreme Court has already considered the propriety of this exact argument on direct appeal, albeit on a different ground, the Nevada Supreme Court's decision is considered law of the case. Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). A defendant may not "merely suppl[y] a more focused review of the issues stemming from the illumination of hindsight," as Defendant has done here. Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993).

5. Additionally, Evans was decided in 2001, years after Defendant's trial and direct appeal which occurred in 1996 and 1998 respectively. Requiring trial and appellate counsel to predict a decision three years in the future runs afoul of the limitation that every effort must be made to eliminate the "distorting effects of hindsight" and to "evaluate the conduct under the circumstances and from counsel's perspective at the time" of the alleged ineffectiveness. Evans, supra; Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). As such, it cannot be said that Defendant's trial or appellate counsel fell below an objective standard of reasonableness in failing to object or raise this issue on the cumulative "moral duty" ground.

6. Also, in Evans, the penalty was reversed as a result of numerous instances of misconduct in the penalty phase argument, not simply due to the "moral duty" argument. In

fact, the Nevada Supreme Court in Evans noted that the "moral duty" argument, "considered alone perhaps they did not [prejudice the defendant], but the prosecutor erred further." Evans, supra, 28 P.3d at 515. Thus, because it cannot be said that had trial counsel or appellate counsel here raised the additional ground that the penalty here would have necessarily been overturned, Defendant has failed to demonstrate that the actions of his trial or appellate counsel caused him prejudice.

7. Defendant's specific claim that counsel was ineffective for not raising or appealing the jury instruction regarding the use of character evidence in penalty hearings as clarified in the Evans case must also fail for the reasons set forth above, in that the Evans decision was decided years after the trial and appeal in this case. This Court is additionally persuaded that counsel should not have been required to predict the clarification in the Evans case as the case itself specifically limits the applicability of the decision to future capital cases only. Evans, supra, 28 P.3d at 516.

8. Defendant's specific claim that counsel was ineffective in not investigating and presenting a psychological defense must fail.

9. First, the trial record itself does not support such a defense. Defense counsel did investigate the Defendant's psychological history and had a psychological evaluation performed by Dr. Lewis Etcoff. In past psychological evaluations, the Defendant was characterized as extremely intelligent and manipulative. The record shows that Defendant was not under any type of mental incapacity when he committed the crimes for which he was charged. Several psychological evaluations of the Defendant had been conducted over the years to determine the cause of his behavior. Defendant was never found to have any mental illness. The Defendant has never been treatment for any mental disorder except for a two-year period when he was a youth in which he was experimentally given Ritalin to see if it would be of any benefit. The results of that experimental period were inconclusive. In all of Defendant's psychological evaluations, the Defendant was determined to be of above average intelligence with no mental deficiencies. Defendant's problems were determined to be a result of immaturity and poor judgment. Dr. Lewis Etcoff testified for the defense at the

penalty hearing. During his testimony, Dr. Etcoff concluded that the Defendant did not suffer from any mental illness. In fact, Dr. Etcoff's psychological evaluation of the Defendant would have been harmful to any kind of defense counsel may have proffered. Dr. Etcoff concluded that the Defendant is intelligent, rebellious and hostile. There is nothing in the record to indicate that a psychological defense would have been successful, and Defendant has failed to proffer any evidence outside the record to support his claim.

10. Second, the testimony at the evidentiary hearing demonstrates that a psychological defense would not have succeeded. At the evidentiary, Defendant's counsel referenced the Zolie Dumas case, Dumas v. State, 111 Nev. 1270, 903 P.2d 816 (1995), and specifically questioned Mr. Schieck as to why he did not pursue a diminished capacity defense in attempt to get a conviction of second degree murder and not first degree murder. Mr. Schieck testified that he did not see any diminished capacity defense that the jury would accept because Defendant's intelligence was not similar to Mr. Dumas' and also that there were a number of factual distinctions between the two cases. For example, Dumas was found to be in the second percentile of intelligence and functioned at about third-grade level, Dumas at 1270, whereas Defendant in the instant case was determined to be of above average intelligence. "[S]trategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). The Nevada Supreme Court has held that it is presumed counsel fully discharged his duties, and said presumption can only be overcome by strong and convincing proof to the contrary. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978).

11. Thus, it cannot be said that either trial or appellate counsel fell below an objective standard of reasonableness or that their conduct caused Defendant any prejudice.

12. Defendant's other issues relating to the constitutionality of the death penalty, that the death penalty is cruel and unusual punishment, that it is excessive and that it is arbitrary and capriciously applied also must fail.

13. First, these issues are more appropriately raised on direct appeal. When a defendant fails to raise a claim on direct appeal and then attempts to revive the claim in a petition for

writ of habeas corpus that claim is deemed waived unless the defendant can show good cause. NRS 34.810; Kimmell v. Warden, 101 Nev. 6, 692 P.2d 1282 (1985). Defendant has not shown good cause. Thus, these issues are procedurally barred.

14. Second, because the Nevada Supreme Court has consistently upheld the constitutionality of the Nevada Death Penalty scheme, it cannot be said that either trial counsel or appellate counsel were ineffective for failing to raise these arguments. See, e.g., Colwell v. State, 112 Nev. 807, 814-15, 919 P.2d 403, 408 (1996); see also Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909 (1976).

15. Similarly, Defendant's claim regarding the unconstitutional vagueness of the deadly weapon enhancement is an issue more appropriately raised on direct appeal and the failure to raise the issue constitutes a waiver of the issue. NRS 34.810; Kimmell, supra. Defendant has not shown good cause for the failure to raise the issue, nor has he shown that his counsel were ineffective in failing to raise the issue either at trial or on appeal.

16. Defendant's claim regarding cumulative error must also fail. As detailed above, Defendant has not demonstrated error. As Justice Gunderson stated in his dissenting opinion in LaPena v. State, 92 Nev. 1, 14, 544 P.2d 1187, 1195 (1976), "nothing plus nothing is nothing."

17. Any additional issues raised in Defendant's petition are either procedurally barred or meritless.

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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 _____ day of June, 2003.

DISTRICT JUDGE

CLARK PETERSON
DISTRICT ATTORNEY
Nevada Bar #6088

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

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EXHIBIT 19

EXHIBIT 19

IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

WILLIAM CASTILLO, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 40982

FILED

OCT 02 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY _____
CHIEF DEPUTY CLERK

APPEAL FROM JUDGMENT OF CONVICTION
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE A. WILLIAM MAUPIN, PRESIDING

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

WILLIAM CASTILLO, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 40982

APPEAL FROM JUDGMENT OF CONVICTION
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE A. WILLIAM MAUPIN, PRESIDING

APPELLANT'S OPENING BRIEF

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ISSUES PRESENTED FOR REVIEW

I. MR. CASTILLO IS ENTITLED TO HAVE HIS SENTENCE OF DEATH AND CONVICTIONS REVERSED BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.

II. MR. CASTILLO WAS DENIED DUE PROCESS BY THE IMPROPER ARGUMENT AT THE PENALTY HEARING WHEREIN THE PROSECUTOR ASKED THE JURY TO VOTE AGAINST MR. CASTILLO AND IN FAVOR OF FUTURE INNOCENT VICTIMS PURSUANT TO THE JURY'S DUTY.

III. MR. CASTILLO'S SENTENCE OF DEATH FOR THE USE OF A DEADLY WEAPON IN COMBINATION WITH HIS FIRST DEGREE MURDER CONVICTION MUST BE OVERTURNED BASED UPON A CROWBAR NOT BEING A DEADLY WEAPON.

IV. MR. CASTILLO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEREIN TRIAL AND APPELLATE COUNSEL FAILED TO OBJECT TO THE BAD CHARACTER EVIDENCE WHICH WAS IMPROPERLY RAISED IN FRONT OF THE JURY.

V. MR. CASTILLO'S IS ENTITLED TO HAVE A REVERSAL OF HIS SENTENCE OF DEATH AND CONVICTIONS BASED UPON THE FAILURE OF TRIAL COUNSEL TO PROPERLY INVESTIGATE HIS CASE AND MR. CASTILLO IS ENTITLED TO A NEW TRIAL AND PENALTY PHASE BASED UPON THE FAILURE OF TRIAL COUNSEL TO PRESENT A PSYCHOLOGICAL DEFENSE TO THE TRIAL PHASE OF THE CASE.

VI. MR. CASTILLO'S CONVICTION IS UNCONSTITUTIONAL BECAUSE OF CUMULATIVE ERROR.

VII. MR. CASTILLO'S DEATH SENTENCE IS INVALID UNDER THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS HIS RIGHTS UNDER INTERNATIONAL LAW, BECAUSE THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT. U.S. CONSTITUTION ARTICLE VI AND AMENDMENTS VIII AND XIV.

VIII. MR. CASTILLO'S DEATH SENTENCE IS INVALID UNDER THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS UNDER INTERNATIONAL LAW, BECAUSE EXECUTION BY LETHAL INJECTION VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND

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UNUSUAL PUNISHMENTS. U.S. CONSTITUTION ARTICLE VI, AMENDMENTS VIII & XIV.

IX. MR. CASTILLO'S CONVICTION AND SENTENCE ARE INVALID PURSUANT TO THE RIGHTS AND PROTECTIONS AFFORD HIM UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS. U.S. CONST. ART.VI.

X. MR. CASTILLO'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. U.S. CONST. AMENDS. V, VI, VIII AND XIV; NEV. CONST. ART. IN SACS. 3, 6 AND 8; ART IV, SEC. 21.

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STATEMENT OF THE CASE

On January 19, 1996, William Castillo (hereinafter referred to as CASTILLO) was indicted by the Clark County Grand Jury on the charges of Conspiracy to Commit burglary and/or Robbery, Burglary, Robbery of Victim Over the Age of Sixty-Five Years, Murder with Use of a Deadly Weapon, Conspiracy to Commit Burglary and Arson, and First Degree Arson (A.A. Vol. 1, pp. 1-5). CASTILLO entered a plea of not guilty and waived his right to a trial within sixty days (A.A. Vol. 6, pp. 1159). The State filed a Notice of Intent to seek the death penalty alleging as aggravating circumstances that (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to another; (2) the murder was committed while engaged, alone or with others in the commission of or an attempt to commit or flight after committing any robbery; (3) the murder was committed while engaged in the commission of or an attempt to commit or flight after committing a burglary; (4) the murder was committed to avoid or prevent a lawful arrest; and (5) the murder was committed to receive money or other thing of monetary value (A.A. Vol. 1, pp. 6-8).

Jury selection commenced on August 26, 1996, and concluded with a death qualified jury being seated on August 28, 1996 (A.A. Vol. 6, pp. 1168-1169).

After three days of testimony the matter was submitted to the jury and a verdict returned on September 4, 1996, of guilty on all counts contained in the Amended Indictment (A.A. Vol. 6, pp. 1172). The penalty hearing took place from September 19, 1996, through September 24, 1996 (A.A. Vol. 6, pp. 1173-1175). A verdict of death was returned on September 25, 1996, with the jury entering special verdicts finding the existence of four aggravating circumstances and three mitigating circumstances and that the aggravating circumstances outweighed the mitigating circumstances (A.A. Vol. 6, pp. 1142-1143).

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On February 28, 1997, Mr. Castillo filed an appeal raising seven issues. On April 2, 1998, this Court issued and order affirming Mr. Castillo's convictions. On January 22, 1999, Mr. Castillo filed a Petition for Writ of Cert with the United States Supreme Court. On March 22, 1999, the United States Supreme Court denied Mr. Castillo's Petition.

On April 2 ,1999, Mr. Castillo filed a Petition for Writ of Habeas Corpus and a Motion to Appoint Counsel. The undersigned was appointed to assist Mr. Castillo and file a supplemental brief in support of the Petition for Writ of Habeas Corpus. On October 12, 2001, the undersigned filed the Supplemental Brief (A.A. Vol. 6, pp. 1179-1278). On August 2, 2002, the district court held an evidentiary hearing wherein trial counsel and appellate counsel, Mr. David Schieck testified (A.A. Vol. 6, pp. 1338). At the conclusion of the evidentiary hearing, the court ordered further briefing (A.A. Vol. 6, pp. 1334). Thereafter, Mr. Castillo filed a Second Supplemental Brief in Support of his Petition for Writ of Habeas Corpus on September 27, 2002 (A.A. Vol. 6, pp. 1339-1364). After argument, the district court denied Mr. Castillo's Petition for Writ of Habeas Corpus (A.A. Vol. 6, pp. 1387). This appeal follows.

STATEMENT OF THE FACTS

A. TRIAL PHASE

Isabelle Berndt moved into 13 North Yale, Las Vegas, Nevada in 1959 and she continued to reside in the home until mid December, 1995 (A.A. Vol. 1, pp. 158). As of that time she was eighty six (86) years of age, haveing been born on August 3, 1909 (A.A. Vol. 1, pp. 159-160). She was a neat housekeeper and would have no reason to leave a book of matches on the floor of her house or to have Ronsonol lighter fluid in her house (A.A. Vol. 1, pp. 159-160). During the latter part of November, 1995, Berndt had a roofing job done on her house and she went to spend

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the Thanksgiving holiday in California.

Harry Kumma had been a roofer for about twenty-five (25) years and at one time was employed at Dean Roofing Company (A.A. Vol. 1, pp. 201-202). He would occasionally work side jobs for a small independent contractor (A.A. Vol. 1, pp. 203). On the Thanksgiving weekend of 1995 he did a side job on a house on Yale Street (A.A. Vol. 1, pp. 204). Kumma got three other individuals that worked for Dean Roofing to help him with the job; Kirk Rasmussen, Jeff Donovan and William CASTILLO (A.A. Vol. 1, pp. 206). Work started at approximately 6 a.m. on the 25th of November with the first phase being, the tearing off the old roof (A.A. Vol. 1, pp. 209). The tear off was completed by about 12:30 at which time CASTILLO and Donovan were assigned to do the cleanup on the ground (A.A. Vol. 1, pp. 210).

At one time, CASTILLO had asked to borrow $500.00 to pay his lawyer, however, Kumma did not lend him the money because he was in no financial position to do so (A.A. Vol. 1, pp. 211). Whenever CASTILLO worked with Kumma at Dean Roofing he was a good worker and that is why he had asked him to help on the side job (A.A. Vol. 1, pp. 213).

Jeff Donovan had been employed at Dean Roofing for about two and a half years (A.A. Vol. 1, pp. 214). As of the time of the Yale Street side job he had known CASTILLO for about four or five months (A.A. Vol. 1, pp. 216). While he was assisting in the clean up on the ground, Donovan came around the corner of the house and CASTILLO was holding up a key (A.A. Vol. 1, pp. 219). CASTILLO stated that he wanted to go into the house with the key, however, Donovan told him no and to put the key back (A.A. Vol. 1, pp. 220). CASTILLO then stated that he would just come back later at nighttime. (A.A. Vol. 1, pp. 221).

Twenty-three (23) year old Duane Wright was driving along I- 95 approaching the Decatur off ramp on December 17, 1995, when he observed smoke coming out of a house, and

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he decided along with his friend and passenger, Joe Giles, to check it out (A.A. Vol. 2, pp. 239). When they pulled over in front of the house, he observed a guy kicking at the front door trying to get in (A.A. Vol. 2, pp. 239). He observed a car in the driveway and a neighbor came out and was screaming that there was an old lady in the house (A.A. Vol. 2, pp. 241). After unsuccessfully attempting to get the front door open, the window to the left of the door was broken out and they started squirting the fire with the garden house (A.A. Vol. 2, pp. 243). Wright was able to crawl into the house about thirty (30) feet, but was unable to make it into the back bedroom because of the smoke and fire (A.A. Vol. 2, pp. 244). An attempt was also made to enter the rear door of the house but the fire prevented any entry (A.A. Vol. 2, pp. 245). Also helping to try to put out the fire was neighbor John Russo and his son (A.A. Vol. 2, pp. 410).

Arson investigator Ben Hoge was called to the scene at about 3:26 A.M. (A.A. Vol. 2, pp. 260). Hoge entered the house and determined that the heaviest smoke patterns were coming out of the living room front (A.A. Vol. 2, pp. 266). He also went into the back bedroom and noticed a fire origin against the north bedroom window (A.A. Vol. 2, pp. 267). There was no accidental causes for fire in the bedroom or in the living room (A.A. Vol. 2, pp. 267, 277). It was his opinion that each of the fires were independently set by human hands with some type of accelerant (A.A. Vol. 2, pp. 280). The accelerant had been applied in an up and down motion rather that having been poured (A.A. Vol. 2, pp. 282). A Ronsonal lighter fluid bottle was found in the kitchen area of the house (A.A. Vol. 2, pp. 285). There was no fire damage to the bed and no fire damage to the body (A.A. Vol. 2, pp. 298-299).

Cliff Mitchell is the canine handler for the Clark County Fire Department and works with the yellow Labrador Josie (A.A. Vol. 2, pp. 305). Josie located several spots in the living room where an accelerant was present (A.A. Vol. 2, pp. 313). The findings made by Josie were

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verified by the crime lab (A.A. Vol. 2, pp. 319).

Berndt's family was notified of her death and the fire and a search of the house was made to determine items that may have been missing. One of the items was a set of silverware that had little flowers around the handles and a B engraved on each piece (A.A. Vol. 1, pp. 170). The silverware was usually kept in a wooden box on a shelf in her bedroom (A.A. Vol. 1, pp. 171-172). Also missing from the house was a VCR that had been kept on the console in the living room and Christmas booties being knitted by Berndt and eight (8) United States saving bonds in the amount of fifty (50) dollars each (A.A. Vol. 1, pp. 173; 188-189).

The lug wrench or tire iron was still in the trunk of Berndt's vehicle and she would have no reason to keep such an item in her house. (A.A. Vol. 1, pp. 198).

Dr. Roger Buckland performed the autopsy on Isabelle Berndt (A.A. Vol. 2, pp. 331). Berndt had multiple crushing-type injuries with lacerations to the head, crushing injuries of the jaw, the jaws were fractured and the teeth were broken (A.A. Vol. 2, pp. 335). All injuries were contemporaneous, i.e., withing the same general time frame (A.A. Vol. 2, pp. 340). The injuries extended to the ears over the forehead, over the face, the chin, and one deep laceration on the back of her head (A.A. Vol. 2, pp. 337). Cause of death was intracranial hemorrhage due to blunt force trauma to the face and head (A.A. Vol. 2, pp. 337). The blunt force trauma was consistent with that which would result from being hit with a crow bar or a tire iron (A.A. Vol. 2, pp. 338). There was no burning or charring of the body and there was no smoke or burning noted in the lungs or air passages (A.A. Vol. 2, pp. 339).

Senior Crime Scene Analyst Gary Reed assisted in processing the Yale Street residence (A.A. Vol. 2, pp. 342). When he entered the house he observed fire, smoke, and water damage in the front room, kitchen, and master bedroom (A.A. Vol. 2, pp. 344). The northwest bedroom did

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not have much fire damage, however, the dresser drawers were pulled open, the bed was messed up, the closet doors were open and there was some sign of displacement in the room (A.A. Vol. 2, pp. 345). There were signs of ransacking and a jewelry box had been left in an open condition (A.A. Vol. 2, pp. 346). Items appeared to be missing from several places (A.A. Vol. 2, pp. 347). A pillow was located on the bed partially covering the face of the victim, and was matched to a pillow that was located in the other bedroom of the residence (A.A. Vol. 2, pp. 332).

Berndt's family was notified of her death and a search of the house was made to determine that the items that may have been missing. One of the items was a set of silverware that had little flowers around the handles and a B engraved on each piece (A.A. Vol. 1, pp. 170). The silverware was usually kept in a wooden box on a shelf in her bedroom (A.A. Vol. 1, pp. 171-172). Also missing from the house was a VCR that had been kept on the console in the living room and Christmas booties being knitted by Berndt and eight (8) United States savings bonds in the amount of fifty (50) dollars each (A.A. Vol. 1, pp. 173; 188-189).

Tammy Jo Bryant met CASTILLO in August, 1995, and they developed a relationship as boyfriend and girlfriend and moved in together (A.A. Vol. 2, pp. 371). A short time later Michelle Platou also moved in (A.A. Vol. 2, pp. 372). Platou had a white Mazda automobile while neither Bryant nor CASTILLO had a car (A.A. Vol. 2, pp. 374). At about 6 P.M. or shortly thereafter on December 16, 1995, CASTILLO and Platou left the residence together in Platou's vehicle (A.A. Vol. 2, pp. 376). They returned to the apartment at about 3:00 o'clock the following morning (A.A. Vol. 2, pp. 376).

When CASTILLO and Platou returned to the apartment they had with them a VCR, a box containing silverware and a bag containing booties (A.A. Vol. 2, pp. 377-378). After a short time, CASTILLO and Platou left again and returned after about twenty minutes (A.A. Vol. 2, pp.

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379). At about nine or ten o'clock on the morning of December 17, 1995, CASTILLO and Platou told Bryant that they had robbed a house and that there had been two people in the house and that Platou hit a wall or made a noise and that they panicked and were scared and then CASTILLO hit the person and they both freaked out and left (A.A. Vol. 2, pp. 381). CASTILLO indicated that he had hit the person with a tire iron from Platou's vehicle (A.A. Vol. 2, pp. 381-382). He thought the person was a man because the snoring was very loud (A.A. Vol. 2, pp. 396). The tire iron was then thrown into a dumpster (A.A. Vol. 2, pp. 382). They told Bryant that they had gone back the second time because they believed that Platou had left finger prints and that they going to burn the house to destroy any fingerprints (6 ROA 1210). CASTILLO was nervous and upset as he was describing the incident to Bryant (A.A. Vol. 2, pp. 395). After he told her he continued to feel bad and guilty (A.A. Vol. 2, pp. 397).

On December 19, 1995, the police came to Bryant's apartment with a search warrant and also asked for permission to search which she granted (A.A. Vol. 2, pp. 384). The police recovered the silverware, VCR and booties from the apartment (A.A. Vol. 2, pp. 384). The police also found a bottle of Rosonol lighter fluid in the apartment, which is the kind that CASTILLO used to fuel his cigarette lighter (A.A. Vol. 2, pp. 387). A notebook taken from the apartment during the search had notation on one of the pages $50.00, VCR, camera, and silverware in the handwriting of CASTILLO (A.A. Vol. 2, pp. 389).

When the police came to search the residence CASTILLO was cooperative with them and did not try to hide anything, and actually pointed things out during the search (A.A. Vol. 2, pp. 394).

Kirk Rasmussen contacted police officer Thomas Lau on December 19, 1995, and gave him some information about the Berndt homicide (A.A. Vol. 2, pp. 414). Lau then contacted the

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assigned homicide detectives (A.A. Vol. 2, pp. 416). It was based on the information from Rasmussen that the police obtained the search warrant that was served on the Bryant apartment (A.A. Vol. 2, pp. 417). Lau assisted in the execution of the warrant (A.A. Vol. 2, pp. 419).

CASTILLO had worked for Rasmussen for a period of about five months (A.A. Vol. 2, pp. 429). CASTILLO lived in close proximity to Rasmussen and Rasmussen would regularly provide transportation to and from work at Dean Roofing (A.A. Vol. 2, pp. 430). Rasmussen was aware that CASTILLO found a key in a hideaway box at the Berndt house (A.A. Vol. 2, pp. 434). CASTILLO actually showed him the key (A.A. Vol. 2, pp. 435). Rasmussen told him to put it back and CASTILLO did so, stating that he shouldn't think that way (A.A. Vol. 2, pp. 436).

On Monday, December 18, 1995, during the ride to work, CASTILLO was kind of quite and had a weird look on his face (A.A. Vol. 2, pp. 440). After some small talk, CASTILLO told Rasmussen that he had murdered and eighty six (86) year old lady in her sleep (A.A. Vol. 2, pp. 440). CASTILLO then proceeded to give him the details (A.A. Vol. 2, pp. 441-442). CASTILLO told him that he did not know it was a women when it occurred (A.A. Vol. 2, pp. 444). The person was gurgling in it's own blood and he took a pillow and put it over the person's face an smothered the person out (A.A. Vol. 2, pp. 445). The intention was to sell the property stolen to obtain money (A.A. Vol. 2, pp. 446). Rasmussen was in disbelief and shock and did not press CASTILLO for details (A.A. Vol. 2, pp. 448).

The next morning on the way to work, CASTILLO asked Rasmussen if he had watched the news, and then proceeded to tell him what the news reports had said (A.A. Vol. 2, pp. 453). On the way home on Tuesday, Rasmussen drove past the Yale Street residence and after observing that it had been burned, went to the police and talked to Officer Lau (A.A. Vol. 2, pp.

455).

After work on December 19, 1995, Charles McDonald went over to the apartment of CASTILLO (A.A. Vol. 3, pp. 484). He was at the apartment for about an hour or so and during that period of time CASTILLO asked him if he wanted to buy some silverware (A.A. Vol. 3, pp. 485). CASTILLO showed him a set of silverware in a box and told him it was work $1,500.00 but was willing to discount the price to $500.00 (A.A. Vol. 3, pp. 487). When McDonald indicated that he could not afford the silverware, CASTILLO offered to put him on a payment plan (A.A. Vol. 3, pp. 487). Detective Donald Tremel was one of the primary investigating officers assigned to the homicide of Isabelle Berndt (A.A. Vol. 3, pp. 493). He was involved in the service of the search warrant on the apartment of CASTILLO (A.A. Vol. 3, pp. 494). CASTILLO immediately let the police into the apartment when they knocked on the door (A.A. Vol. 3, pp. 519). Both CASTILLO and Bryant consented to the search of the apartment and were cooperative and did not impede the investigation in any way (A.A. Vol. 3, pp. 499; 520). Both a VCR and a silverware box were found in the apartment (A.A. Vol. 3, pp. 499). Tremel also recovered the single booty from the Russo house and then went back to the Bryant apartment and recovered the plastic bag containing other booties in it (A.A. Vol. 3, pp. 807-508).

Detective Dwayne Morgan arrested CASTILLO after the conclusion of the apartment search and took him to the police department (A.A. Vol. 3, pp. 549). After CASTILLO received his Miranda rights he gave two separate taped statements to Morgan (A.A. Vol. 3, pp. 552). During the first interview CASTILLO indicated that he had received the property from a friend who he wouldn't identify by name (A.A. Vol. 3, pp. 553). A short period of time after the first interview, he was interviewed again and told that information had been gathered from Bryant and Rasmussen (A.A. Vol. 3, pp. 555). CASTILLO then became sullen and after a pause told

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Morgan that it was he that had committed the killing, robbery, and arson (A.A. Vol. 3, pp. 557-558).

B. PENALTY HEARING

Testimony at the penalty hearing concentrated a great deal on CASTILLO'S extensive juvenile history. CASTILLO offers a condensed version of most of said testimony due to its lengthy nature.

Bruce Kennedy of the Nevada Youth Parole Bureau first became acquainted with CASTILLO in 1984 when he was assigned to his case load while he was a parole counselor and he supervised CASTILLO while he was on parole between stints at the Nevada Youth Training Center in Elko (A.A. Vol. 3, pp. 678, 681). Juvenile records showed that CASTILLO received psychiatric testing on a number of occasions and the results did not show any psychosis or mental health issues (A.A. Vol. 3, pp. 686). CASTILLO was considered to be normal, but delinquent (A.A. Vol. 3, pp. 686).

CASTILLO'S first interaction with the juvenile system was in 1981 when he was brought in for emotional instability of a child (A.A. Vol. 3, pp. 690). The juvenile history then continued for a number of years including incidents of runaway, emotional instability of a child, attempt murder, arson, petty larceny, threat to life, and destruction of county property (A.A. Vol. 3, 4, pp. 690-709). Starting in 1985 there were a number of other juvenile contacts that involved violation of his parole status, resulting in CASTILLO being recommitted to the Nevada Youth Training Center in Elko (A.A. Vol. 4, pp. 698). CASTILLO was then in and out of the Elko facility and charged with a number of charges, including grand larceny auto, no driver's license, petty larceny, attempted burglary, possession of an unregistered handgun and escape from Elko (A.A. Vol. 4, pp. 699). For the attempted burglary charge he was certified as an adult and that was

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where his juvenile record ended (A.A. Vol. 4, pp. 699).

Certain dispositional reports from the various juvenile proceedings were admitted into evidence detailing some of the events that had transpired (A.A. Vol. 4, pp. 701-705). Included within the reports were descriptions of CASTILLO drowning his grandmother's dog when he was five years old and killing several birds by smashing their skulls with rocks (A.A. Vol. 4, pp. 705). In one incident CASTILLO was caught with another child attempting to light the Circus Circus casino on fire in January, 1983 (A.A. Vol. 4, pp. 709). At age ten (10) years CASTILLO was assessed by Dr. Kirby Reed, a neurologist, who indicated in his findings, inter alia, that:

> Under assessment this ten year old male who demonstrates normal growth and early development presently neurological examination reveals neither hard nor soft findings. I do not feel that there is a neurological basis for the patient's ongoing personality disorder. I feel that he does need to be in at least 24 hour residential placement for the safety of not only himself but for the general public (A.A. Vol. 4, pp. 711).

CASTILLO, at age eleven, was one of the youngest persons ever committed to the Nevada Youth Training Center (A.A. Vol. 4, pp. 719). Over the years perhaps only one or two younger persons were ever committed to the Elko facility (A.A. Vol. 4, pp. 739). Elko is usually reserved for the worst of the juvenile offenders (A.A. Vol. 4, pp. 743).

The State of Nevada Youth Resources Panel saw the diagnosis for CASTILLO very poor, and looked into placement in out of state programs, but due to the expense and poor prognosis the State was unwilling to provide any specialized care for CASTILLO (A.A. Vol. 4, pp. 723). By the time he had reached age thirteen CASTILLO had been through every program available in Nevada, including parole, formal probation, mental health counseling, Children's Behavioral Services, foster home placement, Spring Mountain Youth Camp and the Third Cottage Program (A.A. Vol. 4, pp. 725). CASTILLO was treated based on the diagnosis of conduct disorder and treatment plans that were tried included counseling, vocational assignments and education (A.A.

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Vol. 4, pp. 750).

As of age fifteen CASTILLO had been committed to, paroled and revoked at the Nevada Youth Treatment Center three times (A.A. Vol. 4, pp. 726). He admitted to the use of marijuana, speed, crack, cocaine, and alcohol by that age (A.A. Vol. 4, pp. 727. Ultimately he totaled five separate commitments to Elko (A.A. Vol. 4, pp. 752). Each time he was able to achieve the requirements set by the facility and go before a parole panel consisting of a classification counselor, school teacher, dormitory staff and cottage staff and again a recommendation to the superintendent that he be released to the community and his family (A.A. Vol. 4, pp. 753). At age seventeen, due to continued criminal activity and new criminal activity and new charges of attempted burglary and escape from NYTC CASTILLO was certified as an adult by the juvenile court (A.A. Vol. 4, pp. 731-733).

CASTILLO was the beneficiary of virtually all of the options that juvenile court services had to offer and had received a high school education and graduated from high school while at NYTC (A.A. Vol. 4, pp. 760). He was determined to be moderately successful at NYTC but when returned home he would revert to the old behaviors that got him into trouble in the first place (A.A. Vol. 4, pp. 760). Juvenile authorities were aware that CASTILLO had an abusive upbringing and that he may have been abused (A.A. Vol. 4, pp. 756).

An attempt had been made to place CASTILLO with his maternal grandmother in St. Louis (A.A. Vol. 4, pp. 699). This placement also failed and the report from the Missouri Department of Social Services reflected that CASTILLO was a seriously disturbed child who was beyond the scope of their services and that he came from a dysfunctional family (A.A. Vol. 4, pp. 753).

Charmaine Smith was the Parole and Probation Officer assigned to prepare CASTILLO'S

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pre- sentence report on the attempt burglary case (A.A. Vol. 4, pp. 772). CASTILLO plead guilty on March 19, 1991, and on April 16, 1991, was sentenced to two (2) years in prison (A.A. Vol. 4, pp. 775; 783). The case involved a situation where CASTILLO and another youth attempted to kick in the front door of a house and were chased away by the female occupant wielding a mace canister (A.A. Vol. 4, pp. 784).

CASTILLO was also convicted on a robbery arising out of a December 14, 1992, incident wherein, he had grabbed a purse from a pedestrian as his co-defendant drove the vehicle along the sidewalk (A.A. Vol. 4, pp. 790). CASTILLO was convicted after a jury trial on April 15, 1993, (A.A. Vol. 4, pp. 792). He was sentenced to three years in prison on May 20, 1993 (A.A. Vol. 4, pp. 795). CASTILLO expired the sentence in just under two years and was released from prison on May 8, 1995, (A.A. Vol. 4, pp. 798).

Senior correctional officer for the Nevada Department of Prisons, Mark Berg testified that he had contact with CASTILLO at the Northern Nevada Correctional Center (A.A. Vol. 4, pp. 831). While in prison CASTILLO had been disciplined for being involved in an assault on another inmate, having tattooing equipment in his cell and jamming a door lock (A.A. Vol. 4, pp. 836-838). CASTILLO was also disciplined for hitting another inmate with a lock, and yelling threats at the inmate after he informed the correctional officers of the incident (A.A. Vol. 4, pp. 840).

Michael Blanford of the National Park Service testified that he was dispatched on June 30, 1995, to the Callville Bay dock cashier on the report of an armed robbery (A.A. Vol. 4, pp. 857). When he arrived on the scene the dock cashier, Jeannie O'Brien indicated that she had been robbed of over a thousand dollars by a man with a chrome plated handgun (A.A. Vol. 4, pp. 860). Attempts were made to catch the described individual, and CASTILLO was stopped but released