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not represent a fair cross section of the community and systematically discriminates.

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

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

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

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

In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980) , the Supreme Court struck down a Georgia death sentence holding that the aggravating circumstance relied upon

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

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

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

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

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

The factors listed in NRS 200.033, individually and in combination, fail to guide the sentencers discretion and create an impermissible risk of vaguely defined, arbitrarily and

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

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

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

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

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

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

CONCLUSION

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

DATED this 2 dated this May, 2005.

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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 2 day of May, 2005.

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CERTIFICATE OF MAILING

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

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EXHIBIT 139

EXHIBIT 139

MRippo-07016-0335

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RIPPO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No: [illegible]

RESPONDENT'S ANSWERING BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RIPPO,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 44094

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RIPPO,
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Case No. 44094

RESPONDENT'S ANSWERING BRIEF

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

STATEMENT OF THE ISSUES

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

STATEMENT OF THE CASE

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

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

On July 6, 1992, the Honorable Gerard Bongiovanni continued the arraignment to July 20, 1992 on the grounds that Defendant had not yet received a copy of the Grand Jury transcript. (Appellant's Appendix, hereinafter AA, Volume II, page 000379). On July 20, 1992, Defendant again appeared before Judge Bongiovanni and entered pleas of not guilty to all of the charges against him. Defendant waived his right to a speedy trial and upon agreement of both the State and Defendant, trial was scheduled for February 8, 1993. The Court also ordered that discovery would be provided by the District Attorney's Office. (AA, Volume II, pages 000379-000380).

At a motion hearing on January 31, 1994, counsel for Defendant informed the Court that he had subpoenaed both of the Deputy District Attorneys prosecuting this case, John Lukens and Teresa Lowry. Mr. Dunleavy stated that the Deputy District Attorneys had conducted a search pursuant to a search warrant and that in the process of seizing items in the search, the attorneys became witnesses for the defense. Counsel

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF THE FACTS

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

ARGUMENT

I.

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

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

First, this argument is barred by the law of the case doctrine. Where an issue has already been decided on the merits by this Court, the Court's ruling is law of the case, and the issue will not be revisited. *Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001); *see also, McNelton v. State*, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); *Valerio v. State*, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); *Hogan v. Warden*, 109 Nev. 952, 860 P.2d 710

(1993). The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument. *Hall, supra*; *McNelton*, *supra*; *Hogan*, *supra*.

In this case, on direct appeal, Defendant argued that the fact that he was not charged with either burglary or kidnapping prevented these crimes from being offered as aggravating circumstances. With regard to that argument, this Court said:

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

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

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

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

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

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

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

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

McConnell, 606 P.3d at 624.

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

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

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

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

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

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

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

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

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

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

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

Rippo, 113 Nev. at 1264.

Therefore, the torture aggravator would stand.

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

II.

DEFENDANT'S COUNSEL WAS NOT INEFFECTIVE

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

The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. *Evitts v. Lucey*, 469 U.S. 395, 397, 105 S.Ct. 830, 836 837 (1985); *see also*, *Burke v. State*, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In order to demonstrate ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test set forth by *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2065, 2068 (1984); *Williams v. Collins*, 16 F.3d 626, 635 (5th Cir. 1994); *Hollenback v. United States*, 987 F.2d 1272, 1275 (7th Cir. 1993); *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991); *Thomas v. State*, 120 Nev.Adv.Op. 7, 5-6, 83 P.3d 818, 823 (2004). Under this standard, the defendant must establish both that counsel's performance was

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

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

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

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

A. Counsel's Performance was not Deficient

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

1. The trial court's failure to recuse itself and disclose a conflict of interest which allegedly tainted the proceedings.
2. The State's alleged failure to provide exculpatory information to the defense in a timely fashion.
3. Numerous instances of alleged prosecutorial misconduct.
4. Allegations that amendments of the charging document improperly prejudiced Defendant.
5. The allegation that the trial court improperly admitted evidence that a witness was threatened.
6. Allegations that the trial court improperly allowed admission of "bad acts" evidence.
7. Allegations that improper statements by the prosecution during closing argument in the guilt phase warranted reversal of Defendant's conviction.
8. A claim that cumulative error was sufficient to warrant a new trial.
9. Allegations that the use of overlapping and multiple use of the same facts as separate aggravating circumstances was reversible error.
10. Claims that improper statements by the prosecution during opening statement in the penalty phase warranted reversal.
11. Allegations that improper statements by the prosecution during closing argument in the penalty phase entitled Defendant to reversal.

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

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

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

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

B. Defendant Fails to Demonstrate Prejudice

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

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

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

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

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

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

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

III.

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

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

Clearly, this is not a claim that has a reasonable probability of success on appeal. Indeed, waiving the right to speedy trial in a capital murder case is a sound tactical decision on counsel's part as sixty days to prepare for trial would hardly be sufficient. This is especially true considering the substantial evidence the State maintained of Defendant's guilt. While it is true counsel sought several continuances, each instance was for a valid reason and calculated to assure Defendant received a

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

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

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

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

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

IV.

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

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

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

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

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

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

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

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

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

Finally, the Defendant utterly fails to identify what photo he is objecting to. In fact, defense counsel admits he has not seen the actual photo[6] (Id.), nor does he have it in his possession. (AA, Volume II, page 000321). No one was able to definitively testify as to what the photo looked like, whether Defendant was in prison clothes, whether it was a head shot, whether there was a plate number in front of him, whether it had been redacted in any way. Because the Defendant has not produced the photo nor produced any reliable testimony regarding what the photo looked like, there is no cognizable issue before this Court.

V.

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

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

A. No Objection to the Character Evidence Instruction

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

In ground V(a), Defendant asserts that trial counsel was ineffective for failing to object to a jury instruction that he alleges was unconstitutional in that it "did not define and limit the use of character evidence by the jury." In turn, Defendant claims, albeit cursorily, that appellate counsel was ineffective for declining to raise the issue on appeal or "completely assert all available arguments." Similarly, in ground VI, Defendant also asserts that appellate counsel was ineffective for declining to raise what he characterizes as the unconstitutionality of the character evidence instruction. In the latter section, Defendant takes the opportunity to greatly elaborate on his claim, apparently attempting to establish that the error was so egregious, the failure to object should not have precluded appellate counsel from raising the issue on direct appeal. Because both ground V(a) and ground VI effectively raise the identical issue, both are refuted in section VI.

B. Mitigating Factors in the Jury Instructions.

In ground V(b), Defendant argues three distinct claims which he believes rise to the level of ineffective assistance of appellate counsel for "failing to raise on appeal or completely assert all the available arguments." First, Defendant claims that trial counsel should have offered a jury instruction enumerating Defendant's "specific" mitigating circumstances. Second, trial counsel should have objected to the instruction given which listed the statutory mitigating factors. Third, that trial counsel should have submitted a special verdict form listing the mitigating factors found by the jury. As with the preceding section, Defendant merely sets forth a cursory allegation that appellate counsel was ineffective for failing to raise the issue and elaborates upon this argument in ground VII. Again, the arguments set forth in both sections are refuted below in section VII.

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

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

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

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

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

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

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

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

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

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

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

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

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

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[7] Although this court noted and affirmed a similar argument in *Castillo v. State*, 114 Nev. 271, 279-80, 956 P.2d 103, 109 (1998) *corrected by McKenna v. State*, 114 Nev. 1044, 1058 n. 4, 968 P.2d 739, 748 n. 4 (1998), when the prosecutor stated, "The issue is do you, as the trial jury, this afternoon have the resolve and the intestinal fortitude, the sense of commitment to do your legal and moral duty, for whatever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets..." it addressed only the prosecutor's argument on future dangerousness, not the reference to the jury's "duty."

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

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

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

E. No Motion to Strike Two Aggravating Factors

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

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

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

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

> One: The murder was committed by a person under sentence of imprisonment, to wit: Defendant was on parole for a Nevada conviction for the crime of sexual assault in 1982;
>
> Two: The murder was committed by a person who was previously convicted of a felony involving the use of threat or violence to a person of another. Defendant was convicted of sexual assault, a felony, in the state of Nevada in 1982.

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

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

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

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

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

NRS 175.554(3) provides:

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

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

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[9] In *State v. Freese*, 116 Nev. 1097, 13 P.3d 442 (2000), the Nevada Supreme Court held that a failure to conduct a ritualistic oral canvass does not mandate a finding of an invalid plea. Instead, the Court found that an appellate court should not invalidate a plea as long as the totality of the circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea. Id. at 448.

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

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

> Three: The murder was committed while the person was engaged in the commission of and/or an attempt to commit any burglary and the person charged (a) killed the person murdered; or (b) knew that life would be taken or lethal force used, or acted with reckless indifference for human life.
>
> Four: The murder was committed while the person was engaged in the commission of and/or an attempt to commit any kidnapping and the person charged (a) killed the person murdered; or (b) knew that life would be taken or lethal force used; or (c) acted with reckless indifference for human life.
>
> Five: The murder was committed while the person was engaged in the commission of or in an attempt to commit any robbery, and the person charged (a) killed the person murdered; or (b) knew that life would be taken by or lethal force used; or (c) acted with reckless indifference for human life.
>
> Six: The murder involved torture.

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

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

VI.

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

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

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

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

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

During the penalty phase, the jury was instructed as follows:

Instruction No. 6
In the penalty hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense and any other evidence that bears on the defendant's character. Hearsay is admissible in a penalty hearing.

Instruction No. 7
The State has alleged that aggravating circumstances are present in this case. The defendants have alleged that certain mitigating circumstances are present in this case. It shall be your duty to determine:

A: Whether an aggravating circumstance or circumstances are found to exist; and

B: Whether a mitigating circumstance or circumstances are found to exist; and

C: Based upon these findings whether a defendant should be sentenced to life imprisonment or death. The jury may impose a sentence of death **only if:**

One: The jurors unanimously ... find at least one aggravating circumstance has been established beyond a reasonable doubt; and

Two: The jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

Otherwise, the punishment imposed shall be imprisonment in the state prison with or without the possibility of parole.

A mitigating circumstance itself need not be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any of the other jurors.

The entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances.

Instruction No. 8
The law does not require the jury to impose the death penalty under any circumstances, even when the aggravating circumstances outweigh the mitigating circumstances; nor is the defendant required to establish any mitigating circumstances in order to be sentenced to less than death.

Instruction No. 9
You are instructed that **the following factors are circumstances by which murder of the first degree may be aggravated:**

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

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

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

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

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

Six: The murder involved torture.

Additionally, Instructions Numbers 16 and 17 explained that mitigating circumstances need not rise to the level of a legal justification and also enumerated seven (7) circumstances which could be considered mitigating factors. Number 7 on this list was a "catch all" circumstance allowing the jury to consider *any* mitigating circumstance. Instruction 18 provided that the State has the burden to establish any aggravating factors beyond a reasonable doubt. Instruction 19 then defined reasonable doubt. It was only then that Instruction 20, which Defendant now contests, was given:

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

(24 ROA 81-95).

Thus, the jury was indeed instructed to first consider and weigh only the aggravating and mitigating circumstances prior to determining if death was an appropriate sentence. The jurors were further instructed as to what statutorily

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

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

> For future capital cases, we provide the following instruction to guide the jury's consideration of evidence at the penalty hearing: In deciding on an appropriate sentence for the defendant, you will consider three types of evidence: evidence relevant to the existence of aggravating circumstances, evidence relevant to the existence of mitigating circumstances, and other evidence presented against the defendant. You must consider each type of evidence for its appropriate purposes.
>
> In determining unanimously whether any aggravating circumstance has been proven beyond a reasonable doubt, you are to consider only evidence relevant to that aggravating circumstance. You are not to consider other evidence against the defendant.
>
> In determining individually whether any mitigating circumstance exists, you are to consider only evidence relevant to that mitigating circumstance. You are not to consider other evidence presented against the defendant.
>
> In determining individually whether any mitigating circumstances outweigh any aggravating circumstances, you are to consider only evidence relevant to any mitigating and aggravating circumstances. You are not to consider other evidence presented against the defendant.
>
> If you find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists and each of you determines that any mitigating circumstances do not outweigh the aggravating, the defendant is eligible for a death sentence. At this point, you are to consider all three types of evidence, and you still have the discretion to impose a sentence less than death. You must decide on a sentence unanimously.
>
> If you do not decide unanimously that at least one aggravating circumstance has been proven beyond a reasonable doubt or if at least one of you determines that the mitigating circumstances outweigh the aggravating, the defendant is not eligible for a death sentence. Upon determining that the defendant is not eligible for death, you are to consider all three types of evidence in determining a

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

Id. at 516-17.

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

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

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

VII.

DEFENDANT'S SENTENCE IS VALID BECAUSE THE JURY WAS GIVEN A STATUTORY LIST OF MITIGATING CIRCUMSTANCES AND DESPITE THE FACT THE JURY WAS NOT GIVEN A SPECIAL VERDICT FORM TO LIST MITIGATING FACTORS

Defendant argues three distinct claims which he believes rise to the level of ineffective assistance of appellate counsel for "failing to raise on appeal or completely assert all the available arguments." First, Defendant claims that trial counsel should have offered a jury instruction enumerating Defendant's "specific" mitigating circumstances. Second, trial counsel should have objected to the instruction given which listed the statutory mitigating factors. Third, that trial counsel should have submitted a special verdict form listing the mitigating factors found by the jury. Again, the arguments set forth in section V(b) and section VII are refuted below.

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

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

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

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

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

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

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

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

B. No objection to the instruction given

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

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

> Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:
>
> 1. The defendant has no significant history of prior criminal activity.
> 2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> 3. The victim was a participant in the defendant's criminal conduct or consented to the act.
> 4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.
> 5. The defendant acted under duress or under the domination of another person.
> 6. The youth of the defendant at the time of the crime.
> 7. Any other mitigating circumstance.

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

In *Buchanan v. Angelone*, *supra*, the Court held that the entire context in which the instructions are given must be considered in determining whether reasonable jurors would be led to believe that all evidence of petitioner's background and character could be considered in mitigation. *Id.* at 277-78, 118 S.Ct at 762; *see also*, *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1197-198 (1990).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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have objected and prevented the use of the photograph.

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

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

(See argument V. herein below)

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

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

(See argument V. herein below)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "Other prosecutorial remarks were excessive and unacceptable and should have been challenged at trial and on direct appeal. In rebuttal closing, the prosecutor asked, 'do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of legal commitment to do your legal duty?' Asking the jury if it had the 'intestinal fortitude' to do its 'legal duty' was highly improper. The United States Supreme Court held that a prosecutor erred in trying 'to exhort the jury to do its job'; that kind of pressure . . .has no place in the administration of criminal justice' 'There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from it's actual duty: impartiality'. The prosecutor's words here 'resolve,' 'determination,' 'courage,' 'intestinal fortitude,' 'commitment,' 'duty'– were particularly designed to stir the jury's passion and appeal to partiality"

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

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

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

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

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

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

V. <u>THE INSTRUCTION GIVEN AT THE PENALTY HEARING FAILED TO APPRAISE JURY OF THE PROPER USE OF CHARACTER EVIDENCE AND AS SUCH THE IMPOSITION OF THE DEATH PENALTY WAS ARBITRARY NOT BASED ON VALID WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.</u>

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

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

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

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

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

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

> The State has alleged that aggravating circumstances are present in this case.
> The defendants have alleged that certain mitigating circumstances are present in this case.
>
> It shall be your duty to determine:
>
> (a) Whether an aggravating circumstance or circumstances are found to exist; and
> (b) Whether a mitigating circumstance or circumstances are found to exist; and
> (c) Based upon these findings, whether a defendant should be sentenced to life imprisonment or death.
>
> The jury may impose a sentence of death only if (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.
> Otherwise, the punishment imposed shall be imprisonment in the State Prison for life with or without the possibility of parole.
> A mitigating circumstance itself need not be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any other juror or jurors. The entire jury must agree unanimously, however, as to whether

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

The jury was also told in Instruction 20 that:

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

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

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

> After a conviction of murder, a capital sentencing hearing may be held. The jury hears evidence and argument and is then instructed about statutory aggravating circumstances. The Court explained this instruction as follows:
>
> The purpose of the statutory aggravating circumstance is to limit to a large degree, but not completely, the fact finder's discretion. Unless at least one of the ten statutory aggravating circumstances exist, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the fact finder has a discretion to decline to do so without giving any reason .. . [citation omitted]. In making the decision as to the penalty, the fact finder takes into consideration all circumstances before it from both the guilt—innocence and the sentence phase of the trial. The circumstances relate to both the offense and the defendant.
>
> [citation omitted] . The United States Supreme Court upheld the constitutionality of structuring the sentencing jury's discretion in such a manner. Zant v. Stephens, 462 13.5. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1963)" Brooks, 762 F.2d at 1405.
>
> In Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996) the Court stated:
>
> Under NRS 175.552, the trial court is given broad discretion on questions concerning the admissibility of evidence at a penalty hearing. Guy, 108 Nev. 770, 839 P.2d 578. In Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990), cert. denied,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Murder of the First Degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:
>
> 1. The Defendant has no significant history of prior criminal activity.
> 2. The murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
> 3. The victim was a participant in the Defendant's criminal conduct or consented to the act.
> 4. The Defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.
> 5. The Defendant acted under duress or the domination of another person.
> 6. The youth of the Defendant at the time of the crime.
> 7. Any other mitigating circumstances."

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

VII. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE NEVADA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

XI. RIPPO' S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE NEVADA STATUTORY SCHEME AND CASE LAW WITH RESPECT TO THE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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ROC
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Attorney for Petitioner
MICHAEL DAMON RIPPO

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

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

RECEIPT OF COPY

RECEIPT OF A COPY of the attached **ERRATA TO SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS** is hereby acknowledged this 12 day of March, 2004.

DAVID ROGER, DISTRICT ATTORNEY

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

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
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CONCLUSION

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

DATED this 10 dated this February, 2004.

Respectfully submitted:

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EXHIBIT 137

EXHIBIT 137

FILED
DEC 18 5G AM '04
CLERK

ORDR
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Clark County District Attorney
Nevada Bar #002781
STEVEN S. OWENS
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: C106784
DEPT NO: XIV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

THIS CAUSE having come on for hearing before the Honorable Donald M. Mosley, District Judge, on the 10th day of September, 2004, the Petitioner being present, represented by CHRISTOPHER R. ORAM, ESQ., the Respondent being represented by DAVID ROGER, District Attorney, by and through STEVEN S. OWENS, 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

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

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

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

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

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MR\ppo-07016-1689

ORDER

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

DATED this 18TH day of November, 2004.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

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EXHIBIT 138

EXHIBIT 138

MRippo-07016-0396

IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

MICHAEL RIPPO, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 44094

FILED

MAY 19 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

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

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

MICHAEL RIPPO, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 44094

APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
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(b) **Failure to Offer Any Jury Instruction with Rippo's Specific Mitigating Circumstances and Failed to Object to an Instruction That Only Listed the Statutory Mitigators and Failed to Submit a Special Verdict Form Listing Mitigatating Circumstances Found by the Jury.**

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

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X. RIPPO'S CONVICTION AND SENTENCE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, AND RELIABLE SENTENCE DUE TO THE FAILURE OF This Court TO CONDUCT FAIR AND ADEQUATE APPELLATE REVIEW. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE T, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

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

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STATEMENT OF THE CASE

MICHAEL DAMON RIPPO (hereinafter referred to as RIPPO) stands convicted of a number of felonies, including two counts of First Degree Murder (A.A. Vol. II, pp. 415). He was sentenced to death by lethal injection by the trial jury (A.A. Vol. II, pp. 415). RIPPO was represented by Steve Wolfson and Phil Dunleavy at trial.

RIPPO was indicted by the Clark County Grand Jury on June 5, 1992, on charges of Murder, Robbery, Possession of Stolen Vehicle, Possession of Credit Cards Without the Cardholder's Consent and Unauthorized Signing of Credit Card Transaction Document (A.A. Vol. II, pp. 378). RIPPO was arraigned on July 20, 1992, before the Honorable Gerard Bongiovanni and waived his right to a trial within sixty days (A.A. Vol. II, pp. 379). Oral requests for discovery and reciprocal discovery were granted by the Court (A.A. Vol. II, pp. 379). RIPPO'S formal Motion for Discovery was granted by the Court on November 4, 1992 (A.A. Vol. II, pp. 381).

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

The trial date was continued several times, the first being at the request of defense counsel on February 5, 1993, due to a scheduling conflict and the case was reset for trial for September 13, 1993 (A.A. Vol. II, pp. 382-383). On September 10, 1993, the date set for the hearing of a number of pretrial motions the defense moved to continue the trial date based on having just received from prosecutor John Lukens, on September 7th, notice of the State's

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

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

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

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

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

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

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

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On August 8, 2002, Mr. David Schieck filed a Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (A.A. Vol. I, pp. 001-104). On March 12, 2004, the undersigned was permitted to file a second Supplement Petition in Support of the Writ of Habeas Corpus (A.A. Vol. I, pp. 168-216).

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

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

STATEMENT OF FACTS

[1]On February 20, 1992, the apartment manager of the Katie Arms Apartment Complex

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

During the search, on e of the officers found drugs and placed Starr under arrest. Lukens testified that he told Starr:

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

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

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The jury found Rippo guilty of two counts of first-degree murder, and one count each of robbery and unauthorized use of a credit card. After the penalty hearing, the jury sentenced Rippo to death, finding six aggravating factors:(1) the murders were committed by a person under sentence of imprisonment; (2) the murders were committed by a person who was previously convicted of a felony involving the use or threat of violence to another person; (3) the murders were committed while the person was engaged in the commission of or an attempt to commit robbery; (4) the murders involved torture; (5) the murders were committed while the person was engaged in the commission of or an attempted to commit burglary; and (60 the murders were committed while the person was engaged in the commission of or an attempt to commit kidnapping.

ARGUMENT

I. RIPPO'S SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE THE JURY WAS ALLOWED TO USE OVERLAPPING AGGRAVATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE I, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

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

RIPPO herein asserts that overlapping and multiple use of the same facts as separate aggravating circumstances resulted in the arbitrary and capricious imposition of the death penalty. Trial counsel failed to file any pretrial motion challenging the aggravating

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circumstances as being overlapping, failed to object at the penalty hearing to the use of the aggravators, and failed to offer any jury instruction on the matter.

The original notice of intent to seek the death penalty filed by the State on June 30, 1992 alleged the presence of four aggravating circumstances, i.e., under sentence of imprisonment, previously convicted of a felony involving violence, committed during the commission a robbery, and torture or mutilation of the victim. The State filed an Amended Notice of Intent to Seek the death penalty on March 23, 1994 wherein the State added the aggravators of: committed during the commission of a burglary; and during the commission of a kidnapping. The Amended Notice was filed after the original two prosecutors were removed from the case. The jury at the conclusion of the penalty hearing found the presence of all six (6) aggravating circumstances (A.A. Vol. II, pp. 414-415).

In essence the State was allowed to double count the same conduct in accumulating three of the aggravating circumstances. The robbery, burglary and kidnapping aggravating circumstances are all based upon the same set of operative facts and unfairly accumulated to compel the jury toward the death penalty. Additionally the aggravators for under sentence of imprisonment and prior conviction of a violent felony both arose from the same 1982 sexual assault conviction. The use of the same set of operative facts to multiple aggravating circumstances in a State that uses a weighing process, such as Nevada does, violates principles of Double Jeopardy and deprived RIPPO of Due Process of Law. United States Constitution, Amendments V1 VII, XIV; Nevada Constitution, Article I, Section 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The use in the penalty phase of both of these special circumstances allegation thus artificially inflates the particular circumstances of the crime and strays from the high court's mandate that the state 'tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty' (Godfrey v. Georgia, (1980) 446 U.S. 420 at P.28, 100 S.Ct 1759 at p. 1764, 64 L.Ed.2d 398. The United States Supreme Court requires that the capital - sentencing procedure must be one that 'guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.' (Jurek v. Texas (1976) 428 U.S. 262 at pp. 273-74, 96 S.Ct. 2950 at pp 2956-2957) , 49 L.Ed.2d 929) . That requirement is not met in a system where the jury considers the same act or an indivisible course of conduct to be more than one special circumstance. Harris, 679 P.2d at 449.

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

It can be anticipated that the State will argue that any error that occurred as a result of the inappropriate stacking of the aggravating circumstances was harmless error in this case because of the existence of other valid aggravating circumstances. The Nevada statutory scheme has two components that would seem to foreclose the existence of harmless error at a penalty hearing. First the jury is required to proceed through a weighing process of aggravation versus mitigation and second, the jury has the discretion, even in the absence of mitigation to return with a life sentence irregardless of the number of aggravating

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

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

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

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

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

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

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

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

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

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

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

"The question of whether a defendant has received ineffective assistance of counsel at

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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 2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id. at* 688, 104 S.Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id. at* 694, 104 S.Ct. at 2068.

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

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

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372 U.S. 353 (1963).

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

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

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

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

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

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

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

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

Prosecutor Harmon described RIPPO to the jury as looking like a "choir boy". In order to prejudice RIPPO in the eyes of the jury, the State showed the jury a picture of RIPPO as he

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

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

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

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

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

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

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

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

(See argument VI. herein below)

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

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

(See argument VI. herein below)

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

©). Failure to Argue the Existence of Specific Mitigating Circumstances During Closing Argument at the Penalty Hearing or the Weighing Process Necessary Before the Death Penalty Is Even an Option for the Jury.

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

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

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

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

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

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

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

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

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

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

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

> Other prosecutorial remarks were excessive and unacceptable and should have been challenged at trial and on direct appeal. In rebuttal closing, the prosecutor asked, 'do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of legal commitment to do your legal duty?' Asking the jury if it had the 'intestinal fortitude' to do its 'legal duty' was highly improper. The United States Supreme Court held that a prosecutor erred in trying 'to exhort the jury to do its job'; that kind of pressure . . .has no place

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

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

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

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

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

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

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

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VI. **THE INSTRUCTION GIVEN AT THE PENALTY HEARING FAILED TO APPRAISE JURY OF THE PROPER USE OF CHARACTER EVIDENCE AND AS SUCH THE IMPOSITION OF THE DEATH PENALTY WAS ARBITRARY NOT BASED ON VALID WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.**

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

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

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

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

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

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

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

The jury may impose a sentence of death only if (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.
Otherwise, the punishment imposed shall be imprisonment in the State Prison for life with or without the possibility of parole.
A mitigating circumstance itself need not be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any other juror or jurors. The entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances."

The jury was also told in Instruction 20 that:

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

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

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

After a conviction of murder, a capital sentencing hearing may be held. The jury hears evidence and argument and is then instructed about statutory aggravating circumstances. The Court explained this instruction as follows:

The purpose of the statutory aggravating circumstance is to limit to a large degree, but not completely, the fact finder's discretion. Unless at least one of the ten statutory aggravating circumstances exist, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the fact finder has a

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

[citation omitted] . The United States Supreme Court upheld the constitutionality of structuring the sentencing jury's discretion in such a manner. Zant v. Stephens, 462 13.5. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1963)" Brooks, 762 F.2d at 1405.

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

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

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

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

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

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

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

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

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

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

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

In Lockett v. Ohio, 438 US 586, 98 S.Ct 2954, 57 L.Ed. 2d 973 (1978) the Court held that in order to meet constitutional muster a penalty hearing scheme must allow consideration as a mitigating circumstance any aspect of the defendant's character or record or any of the

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

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

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

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

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

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

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

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

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

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

This Court has held that due process requirements apply to a penalty hearing. In Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991) the Court held that due process requires

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

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

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

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

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

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

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

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

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the objection of RIPPO. At the conclusion of the testimony RIPPO moved for a mistrial which was denied by the District Court. RIPPO also raised the issue on direct appeal on the basis that the testimony was cumulative and excessive. This Court denied the claim. The ruling in this case and others establishes that this Court puts no meaningful boundaries on victim impact testimony resulting in the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments.

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

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

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

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

. . .To the extent that our criticism of the Kazalyn instruction in Byford means

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that the instruction was in effect to some degree erroneous, the error was not plain.

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

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

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

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

X. RIPPO'S CONVICTION AND SENTENCE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, AND RELIABLE SENTENCE DUE TO THE FAILURE OF This Court TO CONDUCT FAIR AND ADEQUATE APPELLATE REVIEW. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE T, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.

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

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

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

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

XI. <u>RIPPO'S CONVICTION AND SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, IMPARTIAL JURY FROM CROSS-SECTION OF THE COMMUNITY, AND RELIABLE DETERMINATION DUE TO THE TRIAL, CONVICTION AND SENTENCE BEING IMPOSED BY A JURY FROM WHICH AFRICAN AMERICANS AND OTHER MINORITIES WERE SYSTEMATICALLY EXCLUDED AND UNDER REPRESENTED. UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14; NEVADA CONSTITUTION ARTICLE T, SECTIONS 3, 6 AND 8; ARTICLE IV, SECTION 21.</u>

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Las Vegas, Nevada 89101

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

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

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

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

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 10 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

this case do not amount to a "mock execution" nor do they constitute "psychological torture" and is no basis for this court to disregard or ignore that finding. Claim 5 must also fail.

Based upon the foregoing, and the reasons stated in Respondents' previously filed Answe Reply to Traverse, Nevius is not entitled to further review of his instant claims and he is not entitl relief on any of the claims, either.

RESPECTFULLY SUBMITTED this 18th day of October, 1999.

FRANKIE SUE DEL PAPA
Attorney General

By: Dorothy Nash Holmes
Dorothy Nash Holmes
Deputy Attorney General
Criminal Justice Division

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State Nevada, and on this 18th day of October, 1999, I served a copy of the foregoing RESPONSE T NEVIUS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPOF OF AMENDED SECOND SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS, by mailir a copy thereof to:

MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, #700
Las Vegas, Nevada 89101

Traci R Dory

EXHIBIT 121

EXHIBIT 121

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER SOUND O'NEILL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39143

FILED

DEC 18 2002

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

ORDER OF REVERSAL AND REMAND

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

On May 5, 1995, the district court convicted appellant, pursuant to a jury verdict, of robbery with the use of a deadly weapon. The district court adjudicated appellant a habitual criminal and sentenced him to a term of life with the possibility of parole. This court dismissed appellant's untimely appeal from his judgment of conviction for lack of jurisdiction.[1]

On March 12, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On March 26, 1996, the district court summarily denied appellant's petition, incorrectly stating that the district court did not have jurisdiction over appellant's petition because his direct appeal was still pending in this court. Appellant then filed a "notice of error" regarding the order

[1]See O'Neill v. State, Docket No. 27987 (Order Dismissing Appeal, February 23, 1996).

SUPREME COURT
OF
NEVADA

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02-21673

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dismissing appellant's petition in the district court. The district court reconsidered appellant's petition and on April 19, 1996 entered its findings of facts and conclusions of law denying the petition. This court subsequently dismissed appellant's appeal because we concluded that he filed an untimely notice of appeal.[2]

On December 19, 2001, appellant filed his second proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied appellant's petition as successive. This appeal followed.

Appellant filed his petition more than six years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.[3] Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.[4] Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.[5]

To establish good cause to excuse a procedural default, a petitioner must demonstrate that some impediment external to the defense prevented him from complying with the state procedural default

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[2]See O'Neill v. State, Docket No. 31754 (Order Dismissing Appeal, February 24, 1998).

[3]See NRS 34.726; see also Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998).

[4]See NRS 34.810(1)(b), (2).

[5]See NRS 34.726; NRS 34.810(1)(b), (3).

rules.[6] In an attempt to excuse the procedural defaults, appellant contends that the district court incorrectly dismissed his first petition in which he claimed, among other things, that he was denied the effective assistance of counsel because his trial counsel refused to file a notice of appeal on his behalf. He also claims that this court incorrectly dismissed as untimely his appeal from the district court's dismissal of his first petition. We agree that appellant can successfully demonstrate good cause and prejudice to excuse the procedural defaults.[7]

In appellant's first timely petition, he claimed, among other claims, that his counsel was ineffective for refusing to file a direct appeal on appellant's behalf. The district court failed to conduct an evidentiary hearing and denied appellant's petition. This court has held that an appellant is entitled to an evidentiary hearing if he raises claims, which if true, would entitle him to relief and if his claims are not belied by the

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[6]See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

[7]We note that appellant also attempts to demonstrate good cause by claiming that he was denied the appointment of post-conviction counsel, he is uneducated in the law, and he was in lock-down which prevented him access to the law library. These claims do not establish good cause to excuse the procedural bars. See NRS 34.750 (the district court may appoint post-conviction counsel for indigent petitioners.); cf. NRS 34.820(1)(a) (if petitioner has been sentenced to death and it is his first post-conviction petition, the district court shall appoint counsel to represent petitioner); see also Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988); Lozada, 110 Nev. 349, 871 P.2d 944.

record.[8] Here, appellant's claim that his counsel refused to file a direct appeal on his behalf does not appear to be belied by the record and, if true, would entitle him to relief.[9] Thus, the district court erred in failing to conduct an evidentiary hearing on appellant's appeal deprivation claim.

Approximately two years later, appellant appealed the district court's dismissal of his petition. This court subsequently denied appellant's appeal as untimely. Appellant, however, was never served by the clerk of the district court with notice of entry of order.[10] This court has held that "under NRS 34.575(1) and NRS 34.830, the time to file a notice of appeal from an order denying a post-conviction habeas petition does not commence to run until notice of entry of an order denying the petition has been separately served by the district court on both the petitioner and the petitioner's counsel."[11] Here, the district court clerk properly served notice of entry of the district court's April 19, 1996 order on appellant's counsel,

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[8]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[9]See Lozada, 110 Nev. 349, 871 P.2d 944; Davis v. State, 115 Nev 17, 974 P.2d 658 (1999) (if the client expresses a desire to appeal, counsel is obligated to file a notice of appeal on the client's behalf); Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999) (counsel is obligated to advise appellant of the right to a direct appeal and to perfect a direct appeal on appellant's behalf if a direct appeal claim exists that has a reasonable likelihood of success).

[10]See NRS 34.830(2), (3).

[11]See Klein v. Warden, 118 Nev. ___, ___, 43 P.3d 1029, 1032 (2002) (citing Lemmond v. State, 114 Nev. 219, 954 P.2d 1179 (1998)).

but did not separately serve appellant. Because appellant was never served with notice of entry of order, the thirty-day appeal period provided by NRS 34.575(1) never commenced to run.[12] Therefore, appellant's notice of appeal from the April 19, 1996 dismissal of his first petition was timely filed, and this court incorrectly denied it as untimely.

We conclude that the district court's failure to recognize that appellant had presented a timely, cognizable claim based on the ineffective assistance of counsel in his first petition and this court's erroneous denial of appellant's appeal from the dismissal of his first petition constitute impediments external to the defense, and thus good cause to excuse the filing of his present successive and untimely petition where he again raised the claim that his counsel was ineffective for refusing to file a direct appeal on his behalf.[13] Moreover, prejudice is presumed for such a deprivation of counsel.[14]

We remand this case to the district court to conduct an evidentiary hearing to determine whether appellant's trial counsel deprived him of the right to file a direct appeal.[15] If the district court determines that appellant was deprived of a direct appeal without his

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[12]See id.

[13]See Lozada, 110 Nev. at 357-58, 871 P.2d at 949.

[14]See id. at 356, 871 P.2d at 948.

[15]See Davis, 115 Nev. 17, 974 P.2d 658; Thomas, 115 Nev. 148, 979 P.2d 222. The district court may exercise its discretion and appoint appellant counsel for the evidentiary hearing. See NRS 34.750.

consent, the district court shall appoint counsel to represent appellant and shall permit appellant to file a petition for a writ of habeas corpus raising issues appropriate for direct appeal.[16] If the district court denies appellant relief, he may then file an appeal from that denial in this court.[17] Accordingly, we

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

Shearing, J.

Leavitt, J.

Becker, J.

cc: Hon. Steven P. Elliott, District Judge
Attorney General/Carson City
Washoe County District Attorney
Nathalie Huynh
Washoe District Court Clerk

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[16]See Lozada, 110 Nev. at 359, 871 P.2d at 950.

[17]In light of this court's determination that an evidentiary hearing is necessary, we decline to reach the merits of any of the claims that appellant raises in his petition.

EXHIBIT 122

EXHIBIT 122

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWRENCE EUGENE RIDER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 20925

FILED

APR 30 1990

Clerk of Supreme Court

By

CHIEF DEPUTY CLERK

O R D E R

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

On November 5, 1984, appellant was convicted, pursuant to a guilty plea, of one count of sexual assault and sentenced to serve a life term with the possibility of parole in the Nevada State Prison. Appellant did not file a direct appeal challenging his conviction. In 1986, however, appellant filed in the district court a post-conviction petition for a writ of habeas corpus. The district court denied that petition, and this court affirmed the decision of the district court. See Rider v. Director, Order Dismissing Appeal, Docket No. 18138, filed June 25, 1987. In 1989, appellant filed in the district court a second post-conviction petition for a writ of habeas corpus. The district court denied that petition, and this court again affirmed the decision of the district court. See Rider v. Warden, Order Dismissing Appeal, Docket No. 19360, filed December 6, 1989. On December 14, 1989, appellant filed in the district court the instant post-conviction petition for a writ of habeas corpus. The state opposed the petition and on January 23, 1990, the district court denied the petition. This appeal followed.

Our preliminary review of the record on appeal reveals that the district court may have erred when it denied

appellant's petition. Specifically, we note that the state's opposition to appellant's petition correctly noted that NRS 34.725 requires a prisoner to prosecute a petition for post-conviction relief pursuant to NRS 177.315 prior to filing a post-conviction petition for a writ of habeas corpus. The state noted that appellant never prosecuted a petition for post-conviction relief, and thus requested that appellant's petition be dismissed. See Passanisi v. Director, 105 Nev. ___, 769 P.2d 72 (1989).

Because the district court did not enter findings of fact and conclusions of law supporting its decision, it appears that appellant's petition was denied pursuant to NRS 34.725. We note, however, that appellant was convicted in 1984, and that NRS 34.725 was not enacted until 1987. A petition for post-conviction relief must be filed within one year after the entry of a judgment of conviction. See NRS 177.315(3). Therefore, it is apparent that the procedural default created by NRS 34.725 did not come into existence until well after the expiration of the time within which appellant could overcome that default. Under these circumstances, dismissal under NRS 34.725 may have been unwarranted.

We also note that appellant's latest petition contained grounds for relief challenging the constitutionality of NRS 200.375, which requires a board to certify that persons convicted of sexual assault do not present a menace to society before such persons may be released on parole. These claims for relief did not arise until after the expiration of the time within which appellant would have been required to file a petition for post-conviction relief. See NRS 177.315(3). Further, it would have been inappropriate for appellant to raise these claims in a post-conviction proceeding brought pursuant to NRS Chapter 177. See NRS 177.315(1) (post-

conviction available to challenge only the constitutionality of a judgment of conviction or sentence).

Because it appears that the district court may have erred by not considering the merits of appellant's petition, respondent shall have twenty (20) days from the date of this order within which to show cause why this appeal should not be remanded to the district court for a proper consideration of appellant's petition.

It is so ORDERED.

Young, C. J.

cc: Hon. Brian McKay, Attorney General
Hon. Rex Bell, District Attorney
Lawrence Eugene Rider

EXHIBIT 123

EXHIBIT 123

IN THE SUPREME COURT OF THE STATE OF NEVADA

BILLY RAY RILEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 33750

FILED

NOV 19 1999

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court order dismissing a second post-conviction petition for a writ of habeas corpus in a death penalty case. We conclude that all the claims appellant Billy Ray Riley raised in the instant petition are procedurally barred because he failed to prove cause and prejudice or demonstrate a fundamental miscarriage of justice to overcome Nevada's procedural default rules.

On October 1, 1989, the victim was killed by a single gunshot wound to the chest. Riley was convicted of one count each of robbery with the use of a deadly weapon and first degree murder with the use of a deadly weapon and was sentenced to death. This court affirmed Riley's conviction and death sentence on direct appeal. Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991).

Riley subsequently filed his first post-conviction petition, which the district court denied on June 29, 1992. This court affirmed the district court's order. Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994), cert. denied, 514 U.S. 1052 (1995).

On August 26, 1998, Riley filed in proper person a post-conviction petition for a writ of habeas corpus. On

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November 16, 1998, through counsel, Riley refiled the petition. On January 29, 1999, the district court dismissed the petition as procedurally defaulted. This appeal follows.

First, Riley contends that the district court erred by dismissing his petition without conducting an evidentiary hearing. This contention is without merit because Riley must first overcome procedural default before he is entitled to have the court reach the merits of the substantive claims in his petition. Cf. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Second, Riley contends that he sufficiently proved cause and prejudice to overcome the procedural default in NRS 34.810 for each of the claims he raised in the instant petition. Some of these claims had previously been raised in either his direct appeal or in his first post-conviction petition. His remaining claims have never been raised.

Riley argues that the reason he failed to raise certain claims in previous proceedings was ineffective assistance of his first post-conviction counsel. Riley cites Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997), for the proposition that he was entitled to counsel for his first post-conviction proceedings. Therefore, he argues that he is entitled to the concomitant right to effective assistance of that counsel. See id. Riley's argument has no merit.

In his appellate opening brief, Riley informs this court that his first post-conviction counsel was appointed to represent him on April 20, 1993. In 1991, the Nevada Legislature amended NRS 34.820(1) to mandate appointment of counsel for a first post-conviction proceeding in a death penalty case, effective for petitions filed on or after January

1, 1993. 1991 Nev. Stat. ch. 44, §§ 20, 32, at 87, 92. Thus, according to Crump, a petitioner has a right to effective assistance of that appointed counsel, and ineffective assistance could constitute good cause for failure to raise claims in that proceeding. Crump, 113 Nev. at 303-04, 934 P.2d at 253.

However, the record in this case reveals that April 20, 1993 was the date counsel was appointed for the appeal from the first post-conviction proceeding. The post-conviction petition was filed in proper person on July 22, 1991, and a supplemental petition was filed through counsel on September 23, 1991.[1] During that time, NRS 34.820 did not provide for appointment of counsel, and NRS 177.345(1) provided the district court with the discretion, not a mandate, to appoint counsel. Accordingly, Riley clearly did not have the right to effective assistance of his first post-conviction counsel. See McKague v. Warden, 112 Nev. 159, 163-64, 912 P.2d 255, 257-58 (1996). Accordingly, Riley has failed to satisfy his burden of proving cause to overcome the procedural default in NRS 34.810(3) for successive petitions.

Additionally, Riley fails to allege cause for raising the same claims he previously raised in his direct appeal and first post-conviction proceeding. Accordingly, those claims are procedurally barred by the doctrine of law of the case, see Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975), as well as by NRS 34.810.

---

[1]We note that in the instant petition presented below, Riley correctly indicated that first post-conviction counsel was appointed on or before September 23, 1991. We are unclear as to why Riley's current counsel on appeal misinformed this court as to the date prior counsel was appointed, a date that is crucial to the disposition of this appeal.

Riley next argues that in dismissing his current petition, the district court erroneously failed to review the merits of his case under the "fundamental miscarriage of justice" exception to procedural default. See NRS 34.800(1)(b); Schlup v. Delo, 513 U.S. 298, 314-15 (1995). The district court incorrectly concluded that Nevada does not recognize such an exception, citing Sanchez v. Warden, 89 Nev. 273, 275, 510 P.2d 1362, 1363 (1973). Nevertheless, we conclude that Riley failed to demonstrate a fundamental miscarriage of justice and has therefore failed to overcome procedural default. Accordingly, we

ORDER this appeal dismissed.

Young, J.

Agosti, J.

Leavitt, J.

cc: Hon. Ronald D. Parraguirre, District Judge
Attorney General
Clark County District Attorney
David J. Pancoast
Clark County Clerk

EXH

FILED
SEP 18 2009
CLERK OF COURT

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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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EXH
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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 124

EXHIBIT 124

JUN 14 1993

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK JAMES ROGERS,

Appellant,

vs.

WARDEN, NEVADA DEPARTMENT OF PRISONS,

Respondent.

No. 22858

RECEIVED
MAY 28 1993
Attorney General's Office

FILED
MAY 28 1993

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

ORDER DISMISSING APPEAL

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

Appellant was convicted of three counts of first degree murder and one count each of attempted murder and grand larceny. He was sentenced to receive the death penalty. On direct appeal, this court affirmed appellant's conviction and sentence. Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985), cert. denied, 476 U.S. 1130 (1986).

Subsequently, appellant filed in the district court a petition for post-conviction relief. The district court appointed counsel to represent appellant and appointed a physician to determine appellant's competency. After conducting an evidentiary hearing, the district court dismissed the subsequent appeal. Rogers v. State, Docket No. 17719 (Order Dismissing Appeal, June 29, 1987).

Appellant then filed a petition for a writ of habeas corpus in federal district court. The federal court stayed the proceeding. Rogers v. Whitley, 717 F. Supp. 706 (D. Nev. 1989).

On October 17, 1990, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent appellant. Without granting an evidentiary hearing, the

district court denied appellant's petition on December 24, 1991. This appeal followed.

Appellant raised two claims in his petition: (1) that the M'Naughtan test for criminal insanity should not have been used at his trial, and (2) appellant was deprived of due process at trial because he had been required to affirmatively prove his insanity defense.

Both of these claims were raised and rejected by this court in appellant's direct appeal. Rogers, 101 Nev. at 464, 705 P.2d at 669. This court's prior decision is the law of this case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Thus, the district court did not err in denying the petition. Our resolution of this issue makes it unnecessary to consider the merits of appellant's remaining arguments.

Appellant's contentions lacking merit, we

ORDER this appeal dismissed.

Rose, C.J.

Steffen, J.

Young, J.

Springer, J.

Shearing, J.

cc: Hon. Michael R. Griffin, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Claassen & Olson
Mary Sue Johnson, Clerk

JUN 14 1993

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK JAMES ROGERS,

Appellant,

vs.

WARDEN, NEVADA DEPARTMENT OF PRISONS,

Respondent.

No. 22858

RECEIVED

JUN - 4 1993

Attorney General's Office

FILED

JUN 04 1993

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

AMENDED ORDER DISMISSING APPEAL[1]

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

Appellant was convicted of three counts of first degree murder and one count each of attempted murder and grand larceny. He was sentenced to receive the death penalty. On direct appeal, this court affirmed appellant's conviction and sentence. Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985), cert. denied, 476 U.S. 1130 (1986).

Subsequently, appellant filed in the district court a petition for post-conviction relief. The district court appointed counsel to represent appellant and appointed a physician to determine appellant's competency. After conducting an evidentiary hearing, the district court denied the petition. This court dismissed the subsequent appeal. Rogers v. State, Docket No. 17719 (Order Dismissing Appeal, June 29, 1987).

Appellant then filed a petition for a writ of habeas corpus in federal district court. The federal court stayed the proceeding. Rogers v. Whitley, 717 F. Supp. 706 (D. Nev. 1989).

On October 17, 1990, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent appellant. Without granting an evidentiary hearing, the

[1]This order is issued in place of our order dismissing appeal entered on May 28, 1993.

district court denied appellant's petition on December 24, 1991. This appeal followed.

Appellant raised two claims in his petition: (1) that the M'Naughten test for criminal insanity should not have been used at his trial, and (2) appellant was deprived of due process at trial because he had been required to affirmatively prove his insanity defense.

Both of these claims were raised and rejected by this court in appellant's direct appeal. Rogers, 101 Nev. at 464, 705 P.2d at 669. This court's prior decision is the law of this case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Thus, the district court did not err in denying the petition. Our resolution of this issue makes it unnecessary to consider the merits of appellant's remaining arguments.

Appellant's contentions lacking merit, we

ORDER this appeal dismissed.

Rose, C.J.

Steffen, J.

Young, J.

Springer, J.

Shearing, J.

cc: Hon. Michael R. Griffin, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Claassen & Olson
Mary Sue Johnson, Clerk

EXHIBIT 125

EXHIBIT 125

COPY

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK ROGERS A/K/A MARK JOSEPH HEYDUK A/K/A TEEPEE FOX,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL AND DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ROBERT BAYER,
Respondents.

No. 36137

FILED
MAY 13 2002
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

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

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

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

SUPREME COURT
OF
NEVADA

(O) 1947A

AA002286

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

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

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

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[3]See NRS 34.726(1).

[4]NRS 34.810(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury." We conclude that the trial court makes a pronouncement of guilt once it accepts a defendant's guilty plea as valid. This is the point in the proceedings which is equivalent to a jury's rendering of a guilty verdict. Thus, under NRS 200.033(2) a valid conviction existed for Rogers's 1977 offense. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young J.

Agosti J.

Leavitt J.

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

EXHIBIT 126

EXHIBIT 126

IN THE SUPREME[illegible]RT OF THE STATE OF NEVADA

RICKY DAVID SECHREST,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 29170

FILED

NOV 20 1997

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

ORDER DISMISSING APPEAL

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

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

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

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

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

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

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

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

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

[2]These claims include: (1) whether the prosecutor committed misconduct by commenting on a jury instruction regarding the Pardons Board, see Sechrest v. State, 101 Nev. 360, 368, 705 P.2d 626, 632 (1985); (2) whether it was an abuse of discretion to deny Sechrest's request for additional counsel, see id. at 367-68, 705 P.2d at 631-32; (3) whether Sechrest's confession was properly admitted, see id. at 363-67, 705 P.2d at 629-31; (4) whether the testimony of Dr. Lynn Gerow, Sechrest's psychiatrist, violated Sechrest's Fifth Amendment right not to incriminate himself, see Sechrest v. State, 108 Nev. 158, 160-61, 826 P.2d 561, 565-66 (1992); and (5) whether trial counsel provided ineffective assistance for failure to investigate and interview Dr. Gerow, see id. at 161-63, 826 P.2d at 566-67.

dismissed the repetitive claims.

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

Good cause has been defined by this court as "any impediment external to the defense" which prevents the petitioner from bringing the claim earlier. Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989). Additionally, "prejudice" requires the petitioner to show "'not merely that the errors of trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

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

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

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

After a thorough review of the record, we conclude that Sechrest was not prejudiced by this error. Therefore, he is not entitled to any relief. Accordingly, we conclude that the district court did not err in dismissing the instant petition based on procedural default.[1] We

ORDER this appeal dismissed.

Shearing, C.J.

Springer, J.

Rose, J.

Young, J.

Haupin, J.

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

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[1]Sechrest further contends that this court applies procedural default rules inconsistently. We conclude that this argument has no merit. See Valerio v. State, 112 Nev. 383, 389-90, 915 P.2d 874, 878 (1996). Additionally, in his reply brief, Sechrest raised for the first time the issue of ineffective assistance of counsel during his first post-conviction petition proceedings. We conclude that this issue is inappropriately raised, and therefore, we need not consider it. See NRAP 28(c) (issues in the reply brief shall be limited to responding to new matters brought in the opposing brief); Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52-53, 623 P.2d 981, 983-84 (1981) (this court need not consider issues not raised below). Accordingly, we deny as moot both the state's motion to strike Sechrest's reply brief and Sechrest's motion to file an untimely opposition to the state's motion.

EXHIBIT 127

EXHIBIT 127

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY FRANK SMITH,

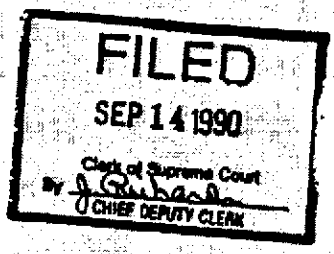
Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 20959



ORDER OF REMAND

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

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

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

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

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

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

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

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

It is so ORDERED.

Young, C.J.

Steffen, J.

Springer, J.

Mowbray, J.

Rose, J.

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

EXHIBIT 128

EXHIBIT 128

IN THE SUPREME COURT OF THE STATE OF N

DEWAYNE DEREK STEVENS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 24138

FILED
JUL 08 1994

ORDER OF REVERSE

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

On April 24, 1986, Dewayne Derek Stevens was convicted, pursuant to a jury verdict, of one count each of first-degree murder, robbery with the use of a deadly weapon, possession of a stolen credit card and grand larceny auto. Stevens was sentenced by the jury to death by lethal injection on the first-degree murder charge. He also was sentenced by the district court to fifteen years for the robbery conviction, a consecutive fifteen years for use of a deadly weapon, a consecutive six years on the possession of a stolen credit card conviction, and a consecutive ten years for the grand larceny auto conviction.

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

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

Stevens v. State, Docket No. 17590 (Order Dismissing Appeal, October 21, 1988).

On May 10, 1989, Stevens filed a proper person petition for post-conviction relief (the "first petition") in the district court pursuant to NRS 177.315 - NRS 177.385.[1] Included among Stevens' claims for post-conviction relief was an allegation of ineffective assistance of appellate counsel. Accordingly, Stevens requested the appointment of counsel other than his appellate counsel to assist him in the prosecution of his post-conviction claims. The district court failed to address Stevens' request for appointed counsel (despite NRS 177.345's dictate to assess the need to appoint counsel within ten days after the filing of a petition for post-conviction relief). In addition, the State filed no response in opposition to Stevens' first petition (in contravention of NRS 177.355 which required the State to respond within fifty days after the filing of the petition).

Stevens' first petition then lay dormant for almost six months (a violation of NRS 177.360(6) which required the district court to "make all reasonable efforts to expedite" petitions for post-conviction relief). At that point, out of frustration with the inactivity on his first petition, Stevens moved to withdraw his petition so that he could pursue federal habeas corpus relief. The district court allowed Stevens to withdraw his first petition. In doing so, the district court did not canvass Stevens regarding his request for the appointment of new counsel.

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

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[1]These sections were repealed effective January 1, 1993.

a second proper petition for post-conviction relief (the "second petition"). The district judge denied Stevens' second petition on the ground that Stevens had not shown "good cause" for failing to file the petition within one year after the dismissal of his direct appeal as required by NRS 177.315(3).[2] This appeal followed.

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

Stevens was entitled to counsel in this case. Although Stevens' did not have the automatic right to counsel, see NRS 177.345,[3] it would have been an abuse of discretion for

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[2]NRS 177.315(3) provided:

> Unless there is good cause shown for delay, a proceeding under NRS 177.315 to 177.385, inclusive, must be filed within 1 year after the entry of judgment of conviction or, if an appeal has been taken from such judgment, within 1 year after the final decision upon or pursuant to the appeal.

[3]NRS 177.345(1) provided:

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

(continued...)

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

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

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[3](...continued)

(a) The issues presented by the petition are difficult;

(b) The petitioner is unable to comprehend the proceedings; or

(c) Counsel is necessary in order to proceed with discovery.

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

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

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

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

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[4]For the reasons described above, this case is also distinguishable from our holding in Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).

[5]Stevens' appellate counsel failed to raise this issue on direct appeal. Stevens argues that the "cause and prejudice" standard of NRS 177.375(2) is satisfied by virtue of the ineffective assistance of appellate counsel under which he labored. It is well-established that ineffective assistance of counsel which rises to the level of a constitutional violation establishes the "cause and prejudice" sufficient to overcome a waiver. See, e.g., Murray v. Carrier, 477 U.S. 478, 488-89 (1986); Encsminger v. Iowa, 386 U.S. 748, 751 (1967); Grimage v. Warden, 94 Nev. 520, 521 (1978); Stewart v. Warden, 92 Nev. 588, 589 (1976). In this instance, we agree that Stevens' appellate counsel was ineffective in failing to raise the issue of the knowingness and intelligence of Stevens' waiver of his Sixth Amendment right to counsel. Accordingly, Stevens has established the requisite cause and prejudice to overcome the apparent waiver of this issue.

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

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

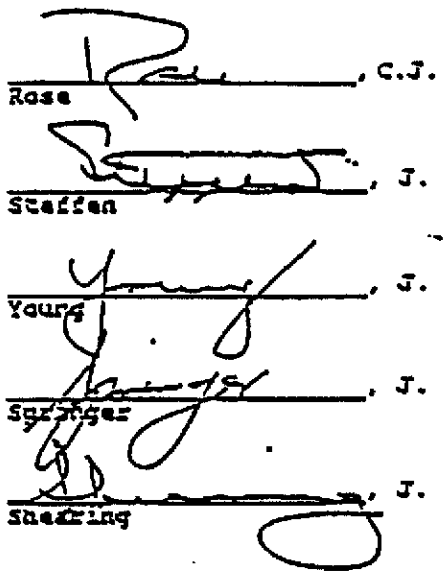
(quoting Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948) (plurality) (emphasis added)); accord Reynolds v. Warden, 86 Nev. 941, 944, 478 P.2d 574, 576 (1970) ("In each case the 'intelligent waiver' must be tested in light of the particular circumstances surrounding the case, including the background, experience, and conduct of the accused."); Andersen v. State, 98 Nev. 539, 654 P.2d 1024 (1982); Cohen v. State, 97 Nev. 166, 625 P.2d 1170 (1981); Sundrant v. Fogliani, 82 Nev. 166, 415 P.2d 293 (1966).

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

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

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

It is so ORDERED.



Rose, C.J.

Steffen, J.

Young, J.

Springer, J.

Shearing, J.

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

EXHIBIT 129

EXHIBIT 129

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY FRANK WADE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37467

FILED

OCT 11 2001

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

ORDER OF AFFIRMANCE

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

On August 23, 1996, appellant was convicted of one count of conspiracy to sell a controlled substance and one count of trafficking in a controlled substance. The district court sentenced appellant to life in prison with the possibility of parole after ten years. Appellant filed a direct appeal, and this court affirmed appellant's judgment of conviction.[1] Thereafter, appellant filed a petition for rehearing, which was also denied.[2] The remittitur issued on October 27, 1999.

On October 4, 2000, appellant filed a post-conviction petition for a writ of habeas corpus, arguing that his counsel was ineffective. The district court ordered the State to file a response. In its response, the State argued that appellant's petition should be dismissed, in part, because it was not verified as required by NRS 34.730.

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

[1]Wade v. State, 114 Nev. 914, 966 P.2d 160 (1998).

[2]Wade v. State, 115 Nev. 290, 986 P.2d 438 (1999) (denying rehearing and modifying prior opinion).

01-17147

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

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

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

Third, appellant argues that the district court erred in striking his first amended petition. We disagree. The district court did not err in striking the first amended petition because appellant was prohibited, by statute, from filing an amended petition. Indeed, NRS 34.750 authorizes a supplemental petition only where the district court has determined that counsel shall be appointed to represent a petitioner acting in proper person, or where a supplemental petition is ordered by

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[3]See NRS 34.730(1) ("A petition must be verified by petitioner or his counsel."); see also Sheriff v. Scalio, 96 Nev. 776, 616 P.2d 402 (1980); Sheriff v. Chumphol, 95 Nev. 818, 603 P.2d 690 (1979); Sheriff v. Arvey, 93 Nev. 72, 560 P.2d 153 (1977).

[4]NRS 34.730(1).

[5]See Beets v. State, 110 Nev. 339, 871 P.2d 357 (1994); Mazzan v. State, 109 Nev. 1067, 863 P.2d 1035 (1993).

[6]See NRS 34.730.

the court.[7] Here, the district court neither appointed counsel to represent appellant acting in proper person nor authorized an amended petition. Accordingly, the district court did not err in striking appellant's first amended petition because appellant had no statutory right to amend.

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

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

Trial counsel may not represent appellant in a post-conviction proceeding where appellant claims ineffective assistance of counsel because the ethical code of conduct prohibits an attorney from representing a client in a matter where he is likely to be a witness.[8] Although a petitioner may waive this existing actual conflict, in so doing, a petitioner would be limiting his potential claims because his trial counsel may not present a claim of his own ineffectiveness. Accordingly, prior to allowing trial counsel to represent a particular petitioner in a post-conviction proceeding, the district court should, on the record, explain the nature of the conflict, the disabilities this would place on potential claims,

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

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

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

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

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

ORDER the judgment of the district court AFFIRMED.

Young J.

Agosti J.

Leavitt J.

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

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

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

EXHIBIT 130

EXHIBIT 130

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARY WALLACE WILLIAMS,

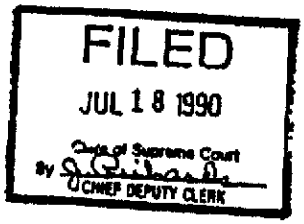
Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 20732



ORDER DISMISSING APPEAL

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

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

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

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

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

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

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

Appellant's contentions lacking merit, we

ORDER this appeal dismissed.

Young, C.J.

Steffen, J.

Springer, J.

Mowbray, J.

Rose, J.

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

EXHIBIT 131

EXHIBIT 131

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARY WALLACE WILLIAMS,

Appellant,

vs.

WARDEN, ELY STATE PRISON, SHERMAN HATCHER,

Respondent.

No. 29084

FILED

AUG 29 1997

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

ORDER DISMISSING APPEAL

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

The facts of this case are set out in Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987). In August 1982, appellant Cary Wallace Williams ("Williams") confessed to murdering Katherine Carlson and her unborn child and to burglarizing the Carlson home. Williams was charged with murder, manslaughter and burglary, and he pled guilty to all three charges. Following a penalty hearing, a three-judge panel sentenced Williams to death and to two consecutive ten-year terms. Williams appealed his conviction and sentences and petitioned the district court for post-conviction relief, which was denied. This court consolidated Williams' direct appeal and appeal from the denial of post-conviction relief. On May 29, 1987, this court affirmed Williams' conviction and sentences. Id.

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

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

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

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

"The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975); accord Mazzan v. Warden, 112 Nev. 838, 842-43, 921 P.2d 920, 922 (1996). In Hall, this court stated, "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." 91 Nev. at 316, 535 P.2d at 799.

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

of guilty. Id. at 230, 717 P.2d at 510-11.

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

Williams argues that the present petition contains new and different grounds for relief. We conclude that Williams has not met his burden of proving that "good cause exists for his failure to raise any grounds in an earlier petition and that he will suffer actual prejudice if the grounds are not considered." Crump v. Warden, 113 Nev. ___, ___, 934 P.2d 247, 252 (1997) (quoting Phelps v. Director, Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988)); see NRS 34.810(2).

Finally, absent good cause, a court may hear the merits of successive claims if failure to do so would result in a miscarriage of justice. Sawyer v. Whitley, 505 U.S. 333, 339 (1991). This exception for "actual innocence" has a narrow scope. Id. at 340. A showing of "actual innocence" must focus on the elements that make the petitioner eligible for death, and cannot include additional mitigating evidence that was not introduced because of claimed constitutional errors. Id. at 347; see Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993), cert. denied, ___ U.S. ___, 117 S.Ct. 334 (1996). Thus, Williams' claims that trial counsel failed to present mitigating evidence are not relevant.

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

torture and was similar to a gang slaying.

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

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

ORDER this appeal dismissed.

Shearing, C.J.

Springer, J.

Rose, J.

Young, J.

Maupin, J.

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

EXHIBIT 132

EXHIBIT 132

IN THE [illegible]ME COURT OF THE STATE OF NE[illegible]

ROBERT YBARRA,

Appellant,

vs.

DIRECTOR, NEVADA STATE PRISON,

Respondent.

No. 19705

FILED

JUN 29 1989

CLERK OF SUPREME COURT
By
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

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

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

This court affirmed appellant's conviction and sentence. See Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). Appellant subsequently filed in the Seventh Judicial District Court a petition for post-conviction relief pursuant to NRS 177.315. On July 9, 1986, however, the district court denied appellant's petition. Again, this court affirmed the judgment of the district court. See Ybarra v. State, 103 Nev. 8, 731 P.2d 353 (1987).

On March 16, 1987, appellant filed in the federal district court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On September 9, 1987, the federal district judge entered a minute order which noted that the first count in appellant's habeas petition alleged that the M'Naghten test for sanity should not have been used in appellant's trial. The federal judge observed that appellant had raised this same issue in his direct appeal, and also noted that Nevada's choice of the M'Naghten test for sanity did not

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

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

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

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

appellant's constitutional rights. We [illegible] initially, we note that appellant has failed to cite any authority to this court which demonstrates that the use of the M'Naghten test at his penalty hearing was improper in any way. We need not consider arguments that are not supported by relevant legal authority. See Cunningham v. State, 94 Nev. 128, 575 P.2d 936 (1978). Moreover, appellant has wholly failed to demonstrate that the use of the M'Naghten test during the penalty phase of his trial deprived him of an individualized assessment of his mental state in that proceeding. Thus, the M'Naghten test was used properly in appellant's penalty hearing.

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

ORDER this appeal dismissed.

Young, C.J.

Steffen, J.

Springer, J.

Mowbray, J.

Rose, J.

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

EXHIBIT 133

EXHIBIT 133

IN THE SUPREME 3 OF NEVADA

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

No. 43981

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

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

On July 23, 1981, the district court convicted appellant Robert Ybarra, Jr., pursuant to a jury verdict, of first-degree murder, first-degree kidnapping with substantial bodily harm, battery with the intent to commit sexual assault with substantial bodily harm, and sexual assault with substantial bodily harm. Ybarra was sentenced to death for first-degree murder. The district court also sentenced him to three consecutive terms of life in prison without the possibility of parole on the remaining counts. This court dismissed Ybarra's direct appeal.[1] The remittitur issued on March 4, 1985.

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

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

an evidentiary hearing on July 11, 1986. This court dismissed Ybarra's appeal on January 21, 1987.[2] On March 10, 1988, Ybarra filed a post-conviction petition for habeas relief, which the district court dismissed on December 30, 1988. This court dismissed Ybarra's appeal on June 29, 1989.[3] On April 26, 1993, Ybarra filed a second post-conviction habeas petition. The district court granted the State's motion to dismiss the petition on June 29, 1998. This court dismissed Ybarra's appeal on July 6, 1999.[4]

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

Ybarra filed his petition approximately 18 years after this court issued the remittitur from his direct appeal. Thus, Ybarra's petition was untimely filed.[5] Moreover, his petition was successive because he had previously filed three post-conviction petitions in the district court.[6] Ybarra's petition was procedurally barred absent a demonstration of good

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

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

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

[5]See NRS 34.726(1).

[6]See NRS 34.810(1)(b), (2).

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

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

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

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

[8]See NRS 34.800(2).

[9]121 Nev. ___, ___, 112 P.3d 1070, 1076-82 (2005); see Pellegrini v. State, 117 Nev. 860, 879-80, 34 P.3d 519, 532 (2001).

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

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

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[10]See NRS 200.030(4)(a).

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

[12]120 Nev. ___, 102 P.3d 606 (2004).

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

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

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

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[13]Id. at ___, 102 P.3d. at 624.

[14]See Ybarra, 100 Nev. at 177, 679 P.2d at 803. Specifically, Ybarra contended that the California probation order was inadmissible because it did not reflect on its face that counsel had represented him.

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

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

Ybarra raises, among others, the following claims in his appeal: jury misconduct requires reversal of his conviction and sentence; the conviction and sentence are invalid because a juror refused to consider all sentencing options provided by law; the district court erred in refusing to excuse a juror for cause; the jury was not impartial; the district court erred in failing to conduct a competency hearing; Ybarra was improperly sentenced to consecutive terms for sexual assault and battery with the intent to commit sexual assault; the prosecutor committed a pattern of misconduct, rendering Ybarra's trial fundamentally unfair; the district court improperly instructed the jury on the defense of insanity; the statutorily mandated reasonable doubt instruction improperly minimized the State's burden of proof; his death sentence is invalid because of the reduced standard of reliability for admission of evidence at the penalty phase; his death sentence constitutes cruel and unusual punishment; execution by lethal injection constitutes cruel and unusual punishment; and the cumulative effect of the errors alleged mandate reversal of his conviction and sentence. However, these claims could have been raised on direct appeal.[16] Nothing in Ybarra's submissions demonstrates good cause

[16]See NRS 34.810(1)(b)(2) (providing that the court shall dismiss a post-conviction petition for a writ of habeas corpus when the petitioner's

continued on next page . . .

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

Ybarra also argues that his death sentence must be reversed because the jury was not instructed that to impose death it had to find beyond a reasonable doubt that the aggravating circumstances were not outweighed by the mitigating circumstances. This claim also could have been raised on direct appeal. Although Ybarra cites recent decisions by the Supreme Court[17] and this court[18] to support this claim, the claim could also have been raised at the time of his trial.[19] Moreover, Ybarra failed to include in his appendix the instructions provided to the jury during the penalty phase. Thus, he failed to include critical documentation supporting his claim despite his submission of several thousand pages of documentation in his appendix. Therefore, Ybarra has not demonstrated good cause for failing to raise the claim earlier, nor does he show that he suffered actual prejudice.

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

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

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

[19]See NRS 200.030(4); Witter v. State, 112 Nev. 908, 923, 921 P.2d 886, 896 (1996); 1977 Nev. Stat., ch. 585, § 1, at 1542, and § 13, at 1546. Further, even if Ring, 536 U.S. 584, created the basis for this claim, Ring does not apply retroactively. See Colwell v. State, 118 Nev. 807, 821-22, 59 P.3d 463, 472-73 (2002).

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

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

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

[21]See id. at 13-14, 731 P.2d at 357.

[22]See id. at 14, 731 P.2d at 357.

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

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

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

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

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

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[25]See NRS 34.810(1)(b)(2).

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

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

Ybarra also claims that he is incompetent to be executed. We conclude that the record before us belies this claim. He also asserts that he cannot be executed because he is mentally retarded. It appears that this issue has never been decided. The Supreme Court has held that the Eighth Amendment prohibits the execution of mentally retarded criminals.[27] And NRS 175.554(5) provides that a person sentenced to death may move to set his sentence aside on the grounds that he is mentally retarded if the matter has not been previously determined. The statute further provides that upon such a motion, the district court shall

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[26]See Ybarra, 100 Nev. at 176, 679 P.2d at 802-03.

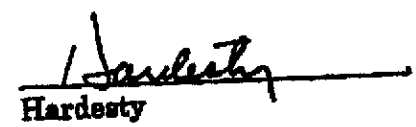
[27]Atkins v. Virginia, 536 U.S. 304 (2002).

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

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

J.
Maupin

J.
Gibbons



J.
Hardesty

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

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

EXHIBIT 134

EXHIBIT 134

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 43981

FILED

FEB 0 2 2006

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

ORDER DENYING REHEARING

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

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

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

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

[2]See NRAP 40(c)(2).

[3]See NRAP 40(c)(1).

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

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

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

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

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[4]273 U.S. 510 (1927).

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

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

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

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

[6]NRAP 30(b)(3).

[7]119 Nev. 173, 69 P.3d 676 (2003).

[8]Id. at 179, 69 P.3d at 680-81.

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

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

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

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[9] NRAP 30(b) provides:

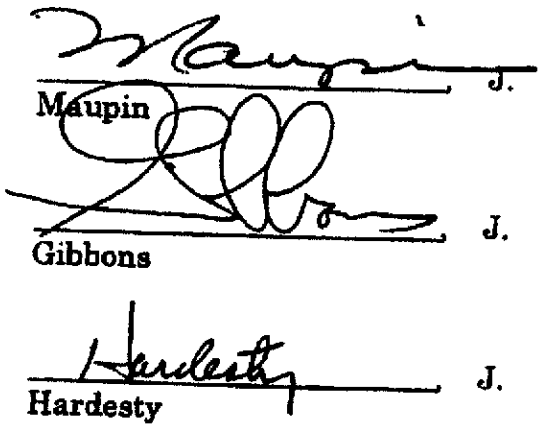
> Except as otherwise required by this Rule, all matters not essential to the decision of issues presented by the appeal shall be omitted. Brevity is required; the court may impose costs upon parties or attorneys who unnecessarily enlarge the appendix.

[10] 121 Nev. ___, 112 P.3d 1070 (2005).

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

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

It is so ORDERED.



Maupin J.

Gibbons J.

Hardesty J.

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

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[11]Id. at ___, 112 P.3d at 1077.

EXHIBIT 135

EXHIBIT 135

mPDA|KM|DA|12-13

IN THE SUPREME COURT OF THE STATE

MICHAEL RIPPO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44094

JOHN BEJARANO A/K/A JUAN MUNOZ A/K/A JOHN BEJARNO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44297

ORDER DIRECTING ORAL ARGUMENT

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

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

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

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

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[2]See NRS 200.033(4).

[3]See NRS 200.033(6).

[4]114 Nev. 299, 304, 956 P.2d 88, 91 (1998).

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

> The jury may impose a sentence of death only if
>
> (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.
>
> Otherwise, the punishment imposed shall be imprisonment in the state prison with or without the possibility of parole.
>
> A mitigating circumstance itself need not be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any other jurors. The entire jury must agree unanimously, however, as to

continued on next page . . .

It is so ORDERED.

_____, C.J.

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

. . . *continued*

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

EXHIBIT 136

EXHIBIT 136

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SUPP
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Attorney for Petitioner
MICHAEL DAMON RIPPO

FILED

FEB 10 4 08 PM '04

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

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

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

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

///

000168

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

DATED this 10 day of February, 2004.

Respectfully submitted by:

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Attorney for Petitioner
MICHAEL DAMON RIPPO

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I. STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

II. STATEMENT OF THE FACTS

A. TRIAL TESTIMONY

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. PENALTY HEARING TESTIMONY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ARGUMENT

I. RIPPO'S CONVICTION AND SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS, EFFECTIVE ASSISTANCE OF COUNSEL AND RELIABLE SENTENCE BECAUSE RIPPO WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL. UNITED STATES CONSTITUTION