IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
August 12, 2011 2:47 p.m.
Tracie K. Lindeman

GREGORY S. HERMANSKI,
Appellant(s),
vs.

STATE OF NEVADA,
Respondent(s),

Case No: 00C167783
SC No: 58688

RECORD ON APPEAL
VOLUME
5

ATTORNEY FOR APPELLANT
GREGORY S. HERMANSKI # 69140
PROPER PERSON
P.O. BOX 7000
CARSON CITY, NV 89702

ATTORNEY FOR RESPONDENT
DAVID ROGER, ESQ.
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NEVADA 89101

Docket 58688 Document 2011-24627

00C167783 STATE OF NEVADA VS. GREGORY S. HERMANSKI

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ORIGINAL

25

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DANIEL WESTMEYER
Deputy District Attorney
Nevada Bar #010273
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

00C167783
ODM
Order Denying Motion
1515233

THE STATE OF NEVADA,
Plaintiff,
-vs-
GREGORY SCOTT HERMANSKI,
aka Robert James Day, #1679345
Defendant.

Case No. C167783
Dept No. VI

ORDER DENYING DEFENDANT'S PRO PER MOTION FOR LEAVE TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO CORRECT AN ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE AND DEFENDANT' PRO PER MOTION FOR LEAVE TO FILE DEFENDANT'S RESPONSE TO STATE'S OPPOSITION TO DEFENDANT'S PRO PER MOTION TO CORRECT AN ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE

DATE OF HEARING: JUNE 6, 2011
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 6th day of June, 2011, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by DAVID ROGER, District Attorney, through DANIEL WESTMEYER, Deputy District Attorney, and without benefit of argument and good cause appearing therefor,

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IT IS HEREBY ORDERED that the Defendant's Pro Per Motion For Leave To File Supplemental Points And Authorities In Support Of Motion To Correct An Illegal Sentence Or In The Alternative Motion For Modification Of Sentence and Defendant' Pro Per Motion For Leave To File Defendant's Response To State's Opposition To Defendant's Pro Per Motion To Correct An Illegal Sentence Or In The Alternative Motion For Modification Of Sentence , shall be, and it is DENIED.

DATED this 1 day of July, 2011.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

DANIEL WESTMEYER
Deputy District Attorney
Nevada Bar #010273

cc

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NEOJ

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DANIEL WESTMEYER
Deputy District Attorney
Nevada Bar #010273
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI,
aka Robert James Day, #1679345

Defendant.

Case No. C167783

Dept No. VI

NOTICE OF ENTRY OF ORDER

TO: GREGORY SCOTT HERMANSKI, aka, Robert James Day, Defendant in proper person

YOU WILL PLEASE TAKE NOTICE that an Order was entered in the above-entitled action, a copy of which is attached hereto.

DATED this 12th day of July, 2011.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ DANIEL WESTMEYER
DANIEL WESTMEYER
Deputy District Attorney
Nevada Bar #0010273

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CERTIFICATE OF MAILING

I hereby certify that service of the NOTICE OF ENTRY OF ORDER was made the 12th day of July, 2011, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

GREGORY SCOTT HERMANSKI,
aka, Robert James Day
NNCC
PO BOX 7000
CARSON CITY, NV 89702

BY /s/ C. Cintola
Secretary for the District Attorney's Office

ORDR

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DANIEL WESTMEYER
Deputy District Attorney
Nevada Bar #010273
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED
JUL 11 11 12 AM '11
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
GREGORY SCOTT HERMANSKI,
aka Robert James Day, #1679345
Defendant.

Case No. C167783
Dept No. VI

ORDER DENYING DEFENDANT'S PRO PER MOTION FOR LEAVE TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO CORRECT AN ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE AND
DEFENDANT' PRO PER MOTION FOR LEAVE TO FILE DEFENDANT'S RESPONSE TO STATE'S OPPOSITION TO DEFENDANT'S PRO PER MOTION TO CORRECT AN ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE

DATE OF HEARING: JUNE 6, 2011
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 6th day of June, 2011, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by DAVID ROGER, District Attorney, through DANIEL WESTMEYER, Deputy District Attorney, and without benefit of argument and good cause appearing therefor,

IT IS HEREBY ORDERED that the Defendant's Pro Per Motion For Leave To File Supplemental Points And Authorities In Support Of Motion To Correct An Illegal Sentence Or In The Alternative Motion For Modification Of Sentence and Defendant' Pro Per Motion For Leave To File Defendant's Response To State's Opposition To Defendant's Pro Per Motion To Correct An Illegal Sentence Or In The Alternative Motion For Modification Of Sentence , shall be, and it is DENIED.

DATED this 1 day of June, 2011.

ELISSA F. CADISH
DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

DANIEL WESTMEYER
Deputy District Attorney
Nevada Bar #010273

cc

Gregory Scott Hermanski, #69140
N.N.C.C., P.O. Box 7000
Carson City, NV 89702
(defendant, pro se)

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JUL 21 2011
CLERK OF COURT

00C167783
MOT
Motion
1536277

District Court
Clark County, Nevada

The State of Nevada,
plaintiff,

v.

Gregory Scott Hermanski,
defendant.

Case No. C167783
Dept. No. VI
8-1-11
8:30 AM

Notice of Motion/Motion for Reconsideration

Comes Now the defendant, Gregory Scott Hermanski, by and through his proper person, and hereby moves this Honorable Court pursuant to the provisions of NRS 176.555, Eighth Judicial District Court Rules (EJDCR) 2.24, and NRAP, Rule 40, for the court's leave and reconsideration of this court's Order denying defendant's "motion to Correct an Illegal sentence or, in the alternative, motion for modification of sentence" entered July 7, 2011.

This motion is made and based on the entire record

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CLERK OF THE COURT

of these proceedings, the attached Memorandum of Points and Authorities, and any oral argument the court deems necessary at the time of hearing in this matter.

signed this 12 day of July, 2011

Respectfully Submitted,
Gregory S. Hermanski
Gregory Scott Hermanski

Notice of Motion

To: The State of Nevada and the Office of the District Attorney, counsel for plaintiff, please take notice that the defendant, Gregory Scott Hermanski, will bring on for hearing "Motion for Reconsideration" in Department VI of the Eighth Judicial District Court at a time and date to be set by the court.

Further, you are hereby provided notice that your failure to respond and/or to otherwise oppose said motion will be deemed by defendant as to your consenting of the granting of the relief requested by the defendant therein, and that the proceedings of the foregoing motion must proceed pursuant to District Court Rules, (DCR) Rule 13, et. seq., and the Eighth Judicial District Court Rules, (EJDCR) Rule 3.20, to afford defendant with the full panoply protections of due process and equal protection of the law as set forth in the Fifth (5th) and Fourteenth (14th) Amendments to the

United States Constitution and Article 1, § 8 of the Nevada Constitution.

signed this 12 day of July, 2011

Gregory S. Hermanski

Gregory Scott Hermanski

Points and Authorities

Pursuant to the provisions of Rule 40, Nevada Rules of Appellate Procedure, this court has the authority to review and reconsider it's judgment when it can be demonstrated that said judgment was based on the court's having "over-looked or misapprehended any issue of fact or law." See, N.R.A.P. 40 (a).

In the instant case, defendant has presented a claim based on "subject matter jurisdiction" which, under the law, cannot be barred, waived, or forfeited. As such, defendant would respectfully suggest that "law of the case doctrine" does not apply here, and this court has the authority to review and reconsider it's judgment as is more fully set forth herein.

The State has presented argument that defendant's motion to correct an illegal sentence is barred under the law of the case doctrine, and this court has denied the defendant's motion stating "defendant has made the same arguments previously rejected and affirmed on

appeal". See, Order, May 20, 2011.

However, defendant respectfully suggests that the court is mistaken in it's assumption that defendant presented the same arguments in his prior appeal.

In defendant's prior appeal defendant claimed that "the habitual criminal enhancement was illegal because the district court failed to first sentence [defendant] for the underlying offenses". See attached, Order of Affirmance, September 9, 2010.

In the case at bar, defendant claims that the habitual felon enhancement is illegal because the court had no "jurisdiction/subject matter jurisdiction to adjudicate and sentence defendant as an habitual felon". In support of such claim, defendant argues that the state's failure to properly "accuse" defendant, pursuant to the mandatory language of NRS 207.012 (2) acted to deprive the court of such jurisdiction/subject matter jurisdiction.

Moreover, the Nevada Supreme Court made no specific finding as to whether this court had subject matter jurisdiction to adjudicate and sentence defendant as an habitual felon. Indeed, the Supreme Court merely concluded that defendant "failed to demonstrate that the district court was not a competent court of jurisdiction." See attached, Order of Affirmance, September 9, 2010.

In the case of Murray v. State, 803 P.2d 225, (Nev 1990) the Nevada Supreme Court determined that

correction of sentence was not barred by law of the case where the court had previously determined that the defendant's sentence was "within the statutory limits", Murray, 803 P.2d at 226, but because the court determined that issues presented differed from the original case, law of the case doctrine did not apply.

The case at bar is analogous with Murray. In defendant's prior appeal, the Nevada Supreme Court determined that defendant's sentence was "facially legal" but left open the question of jurisdiction.

"In order for law of the case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication". Dictor v. Creative Management Services, 126 Nev. Rep. 4, 223 P.3d 332 (Nev. 2010), see also, Snow-Erlin v. United States, 470 F.3d 804, 807 (9th Cir. 2006). However, "the doctrine does not bar a district court from hearing and adjudicating issues not previously decided", see, id.," and does not apply if the issues presented in a subsequent appeal differ from those presented in a previous appeal." Emeterio v Clint Hurt and Assocs, 114 Nev. 1031, 1034, 967 P.2d 432, 434, (Nev. 1998); Bone v. City of Lafayette, Ind., 919 F.2d 64, 66 (7th Cir 1990)("Subjects an appellate court does not discuss, because the parties did not raise them, do not become law of the case by default").

In the instant case, the Supreme Court did not

"explicitly" nor by "necessary implication" address and decide whether the State's failure to properly accuse defendant of being an habitual felon, in a manner consistent with the mandatory language of NRS 207.012 (2), acted to deprive the district court of subject matter jurisdiction to adjudicate and sentence defendant as an habitual felon pursuant to NRS 207.012.

Moreover, "law of the case doctrine does not apply where subject matter jurisdiction is implicated." Allah v. Juchnewicz, 2003 U.S. Dist. Lexis 4265, 93 Civ. 8813 (LMM)(GWG) (2003). See, e.g., Marcella v. Capital Dist. Physician's' Health Plan, Inc., 293 F. 3d 42, 47 (2nd Cir 2002).

Thus, defendant would proffer that the law of the case doctrine does not apply in the case at bar; not only has defendant demonstrated that the Supreme Court has not addressed and decided the jurisdictional question presented herein on prior appeal, but defendant would further argue that "estoppel may not prevent an objection to subject matter jurisdiction, because such an objection to subject matter jurisdiction may be raised at any time, by any party or the court." Intercontinental Travel Marketing v. F.D.I.C., 45 F3d 1278, 1286 (9th Cir. 1995), citing, Brady Development Corp. v. Resolution Trust Corp, 14 F. 3d 998, 1007 (4th Cir 1994).

In Colwell v. State, 118 Nev. 807, 59 P.3d 403 (Nev. 2002) the Nevada Supreme Court determined that "subject

matter jurisdiction is not waivable, and a court's lack of such jurisdiction can be raised for the first time on appeal." 118 Nev. at 812, 59 P.3d at 467, see also, Swan v. Swan, 106 Nev 464, 469, 796 P.2d 221, 224 (Nev. 1990).

Moreover, "the doctrines of waiver and estoppel do not apply to subject matter jurisdiction determinations." Bueford v. Resolution Trust Corp. 991 F.2d 481, 485 (8th Cir 1993), and "subject matter jurisdiction.... can never be forfeited or waived", United States v. Cotton, 535 US. 625, 630, 122 S.Ct. 1781, 152 L.ed. 2d 860 (2002).

Thus, defendant argues that this court erred in concluding that defendant "made the same arguments previously rejected and affirmed on appeal", and that his motion to correct an illegal sentence is not barred by law of the case doctrine, and that defendant cannot, "by his own conduct or otherwise, be estopped from raising the issue of subject matter jurisdiction." Feise v. Resolution Trust Corp. 815 F. Supp. 344, 345 (C.D. Cal. 1993).

Conclusion

Based on the facts, applicable law and argument presented herein, defendant has demonstrated that the court erred in denying defendant's motion to correct an illegal sentence or, in the alternative, motion for modification of sentence. Defendant has demonstrated that said

motion presents the court with a subject matter jurisdictional question which this court has the duty to address and determine.

WHEREFORE, defendant, Gregory Scott Hermanski, respectfully moves this Honorable Court to enter it's Order granting reconsideration and any such further relief as the court may deem defendant is entitled to.

executed this 12 day of July, 2011, Gregory S. Hermanski

Gregory Scott Hermanski
(defendant, pro se)

Certificate of Service

I, Gregory Scott Hermanski, hereby certify, pursuant to N.R.C.P. 5(b), that on this 13 day of July, 2011, I mailed a true and correct copy of the foregoing "Notice of Motion" and "Motion for Reconsideration" by depositing same in prison legal library, first class postage fully pre-paid, addressed as follows:

Office of the District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

and that there is a regular line of communication between the place of mailing and recipient address.

executed this 13 day of July, 2011 Gregory S. Hermanski
Gregory Scott Hermanski

Affirmation

(pursuant to NRS 239B.030)

I, Gregory Scott Hermanski, do hereby affirm that the preceeding "Notice of Motion" and "Motion for Reconsideration" does not contain the social security number of any person.

executed this 13 day of July, 2011 Gregory S. Hermanski

Gregory Scott Hermanski

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55718

FILED

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TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a motion to modify or correct sentence.[1] Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

In his motion filed on February 9, 2010, appellant claimed that the habitual criminal enhancement was illegal because the district court failed to first sentence him for the underlying offenses. Appellant failed to demonstrate that the district court relied on mistaken assumptions regarding his criminal record that worked to his extreme detriment. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Appellant's claim was outside the scope of a motion to correct an illegal sentence as the sentence was facially legal, see NRS 207.012(1)(b), and appellant failed to demonstrate that the district court was not a

[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

competent court of jurisdiction. See Edwards, 112 Nev. at 708, 918 P.2d at 324. We therefore conclude that the district court did not err in denying appellant's motion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.

Douglas, J.

Pickering, J.

cc: Hon. Jennifer Togliatti, District Judge
Gregory Scott Hermanski
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

69140

Gregory Scott Hermanski #69140
N.N.C.C. . P.O. Box 7000
Carson City, NV 89702

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JUL 21 2011
CLERK OF COURT

Gregory Scott Hermanski, #69140
N.N.C.C., P.O. Box 7000
Carson City, NV 89702
(defendant, pro se)

DOC167783
NOTM
Notice of Motion
1536270

District Court
Clark County, Nevada

The State of Nevada,
plaintiff,
v.
Gregory Scott Hermanski,
defendant.

Case No. C167783
Dept. No. VI

Notice of Motion/Motion for leave to file Motion for Reconsideration

Comes Now the defendant, Gregory Scott Hermanski, by and through his proper person, and hereby respectfully moves this Honorable Court, pursuant to Eighth Judicial District Court Rules (EJDCR), Rule 2.24, N.R.A.P. Rule 40, and NRS 176.555 for the court's leave and reconsideration of this court's Order entered July 7, 2011, denying defendant's "Motion to correct an illegal sentence or, in the alternative, motion for modification of sentence, whereupon defendant

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CLERK OF THE COURT

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will demonstrate that this court's decision was based upon the court's having overlooked/misapprehended the facts and the law in this case. See, N.R.A.P., Rule 40(a).

This motion is made and based upon the entire record of these proceedings and any oral argument the court deems necessary at the time of hearing in this matter.

Respectfully Submitted,

executed this 13 day of July, 2011. Gregory S. Hermanski

Notice of Motion

To: The State of Nevada, and the Office of the District Attorney, counsel for the plaintiff: Please Take Notice that the defendant, Gregory Scott Hermanski, will bring on for hearing "Motion for leave to file motion for reconsideration" in Dept. VI of the Eighth Judicial District Court at a time and date to be set by the court.

executed this 13 day of July, 2011 Gregory S. Hermanski

Gregory Scott Hermanski

Certificate of Service

I, Gregory Scott Hermanski hereby certify pursuant to N.R.C.P. 5(b) that on this 13 day of July, 2011, I mailed a true and correct copy of the foregoing "Notice of Motion/Motion for leave to file Motion for Reconsideration" by placing same in a sealed envelope and depositing it, postage fully pre-paid, in the prison legal library, and addressed to:

Office of the District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

and that a regular line of communication exists between the place of mailing and recipient address.

executed this 13 day of July, 2011, Gregory S Hermanski

Gregory Scott Hermanski

-3-

Affirmation

(pursuant to NRS 239B.030)

I, Gregory Scott Hermanski, do hereby affirm that the preceeding "Notice of Motion" and "Motion for leave to file motion for reconsideration" does not contain the social security number of any person.

executed this 13 day of July, 2011 Gregory S Hermanski

Gregory Scott Hermanski

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CLERK OF THE COURT

OPPS

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
THOMAS CARROLL
Chief Deputy District Attorney
Nevada Bar #004232
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- GREGORY SCOTT HERMANSKI, aka Robert James Day, #1679345 Defendant.	CASE NO: C167783 DEPT NO: VI

STATE'S OPPOSITION TO DEFENDANT'S NOTICE OF MOTION/MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

DATE OF HEARING: AUGUST 1, 2011
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through THOMAS CARROLL, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Notice of Motion/Motion for Leave to File Motion for Reconsideration.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include notice of its intent to seek treatment of Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with three hundred eighty-two (382) days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate under which statute Defendant was adjudicated as a habitual criminal, and (3) for the District Court to specify a sentence for each of Defendant's two (2) convictions as the Judgment of Conviction only sets forth one (1) definite term for one (1) offense.

Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering this, the District Court vacated Defendant's sentence and conducted another sentencing

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[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

hearing. In response, the State also filed a notice of intent to seek punishment of Defendant as a habitual criminal pursuant to NRS 207.012 on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

Defendant filed a timely appeal from the Amended Judgment of Conviction, case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in case No. 41405, affirming Defendant's conviction. Remittitur was issued on July 27, 2004.

Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. The Court also ordered a supplemental response from the State regarding Defendant's Ground 3 of his Petition which alleges ineffective assistance of counsel at his re-sentencing under his true birth name. The State filed its Supplemental Response on December 8, 2005. On February 3, 2006, the court denied Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). A Findings of Fact, Conclusions of Law and Order was filed on March 3, 2006. A Notice of Entry of Decision and Order was filed on March 6, 2006.

On March 17, 2006, Defendant filed a Motion for Rehearing. The State filed its Opposition on March 23, 2006. On March 27, 2006, Defendant's motion was denied.

Defendant filed a Notice with the Nevada Supreme Court appealing the District Court's denial of his Post-Conviction Petition for Writ of Habeas Corpus. On July 13, 2006, the Nevada Supreme Court filed an Order of Affirmance and Limited Remand to Correct Judgment of Conviction (case No. 47011). The Supreme Court remanded Defendant's case to the District Court for the sole purpose of amending the Judgment of Conviction to read that Defendant was adjudicated a habitual offender pursuant to NRS 207.012 for both the robbery and burglary counts. Remittitur was issued on August 8, 2006.

Pursuant to the Supreme Court's Order a Second Amended Judgment of Conviction was filed on July 27, 2006.

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Defendant filed a Motion To Stay Proceedings And Motion For Appointment Of Counsel on August 11, 2006. The State filed its Opposition on August 22, 2006. On August 23, 2006, Defendant's motion was denied. Defendant filed a Notice of Appeal on August 28, 2006 from the Second Amended Judgment of Conviction and the District Court's Order denying his Motion to Stay Proceedings And Motion For Appointment of Counsel (case No. 47963). On October 3, 2006, the Nevada Supreme Court filed an order, dismissing Defendant's appeal. Remittitur was issued on October 31, 2006.

On February 9, 2010, Defendant filed a Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence. The Motion was denied by the District Court on February 22, 2010. On March 25, 2010, Defendant filed a Notice of Appeal. On September 9, 2010, the Nevada Supreme Court affirmed the District Court's denial of Defendant's Motion to Correct an Illegal Sentence and found that his sentence was legal. Remittitur was issued on October 5, 2010.

On April 25, 2011, Defendant filed a second Motion to Correct an Illegal Sentence or, in the Alternative Motion for Modification of Sentence to which the State filed a response. The motion was denied by the District Court on May 9, 2011 and the Order of Denial was entered on May 20, 2011. On June 24, 2011, Defendant filed a Notice of Appeal stemming from the denial of this motion.

On June 21, 2011, Defendant filed a Motion for Reconsideration regarding the denial of his motion to correct an illegal sentence. On July 6, 2011, the Court denied the motion as premature as the order from May 20, 2011 has not been entered. The Court filed a Notice of Entry of Order on July 7, 2011.

On July 21, 2011, Defendant filed the instant Notice of Motion/Motion for Leave to file Motion for Reconsideration to which the State responds as follows.

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ARGUMENT

THERE IS NO BASIS IN WHICH TO GRANT DEFENDANT'S MOTION

Defendant has not shown that the Court overlooked or misapprehended any material issue of fact or law when it denied his motion to correct an illegal sentence or to modify sentence; therefore, the Court should deny the instant motions for leave to file a motion to reconsider and his motion for reconsideration. See NRAP 40(a)(1).

Furthermore, , there is no need to "reconsider" this issue it is barred by the doctrine of law of the case. Defendant already raised this issue of his sentence's legality for the first time on February 9, 2010 and its denial was affirmed by the Nevada Supreme Court on September 9, 2010. When an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993); see also Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); Pellegrini, 117 Nev. at 860, 34 P.3d at 519; McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996). 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 subsequently made after reflection upon the previous proceedings." Hogan, 109 Nev. at 952, 860 P.2d at 710 (citing Hall, 91 Nev. 314, 535 P.2d 797); see also McNelton, 115 Nev. 396, 990 P.2d 1263. Here, this challenge to the legality of his sentence has already been decided on the merits by the Nevada Supreme Court on appeal, and thus, is barred by the law of the case doctrine and must be dismissed.

Defendant raised this issue a second time, albeit unsuccessfully, on April 25, 2011. However, the District Court denied the motion. Defendant raised this issue once again on June 21, 2011 and the Court denied the motion. Now, Defendant seeks a motion for reconsideration in order to bring the matter before the Court yet again. Since the issue has been long resolved by the Nevada Supreme Court, per Hall, this motion should be denied.

In light of the fact that the ***Nevada Supreme Court has already reviewed the matter on the merits and the District Court reviewed the issue three previous times***, the State

requests that the Court make a finding that Defendant has engaged in vexatious litigation pursuant to NRS 209.451(1)(d) so that the State can seek a revocation of Defendant's good time credits.

CONCLUSION

For all the foregoing reasons, Defendant's Notice of Motion/Motion for Leave to File Motion for Reconsideration should be denied.

DATED this 22nd day of July, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Thomas Carroll
THOMAS CARROLL
Chief Deputy District Attorney
Nevada Bar #004232

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 22nd day of July, 2011, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY SCOTT HERMANSKI,
aka Robert James Day #69140
NNCC
PO BOX 7000
CARSON CITY, NV 89702

BY: /s/ C. Cintola
C. Cintola
Employee of the District Attorney's Office

CH/TC/cc

Gregory Scott Hermanski, #69140
N.N.C.C., P.O. Box 7000
Carson City, NV 89702
(defendant, pro se)

FILED
JUL 25 2011
CLERK OF COURT

District Court
Clark County, Nevada

00C167783
NOASC
Notice of Appeal (criminal)
1541567

The State of Nevada,
plaintiff,

v.

Gregory Scott Hermanski,
defendant.

Case No. C167783
Dept. No. VI

Notice of Appeal

Notice is hereby given that defendant, Gregory Scott Hermanski, in and through his proper person, appeals to the Supreme Court of Nevada from the Order of the Eighth Judicial District Court denying his "motion for leave to file supplemental Points and Authorities in support of Motion to Correct an illegal sentence or, in the alternative, motion for modification of sentence", and "motion for leave to file defendant's response to state's opposition to defendant's pro per motion

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CLERK OF THE COURT

to correct an illegal sentence or, in the alternative, motion for modification of sentence", entered in this case on July 12, 2011.

Respectfully Submitted,

executed this 18 day of July, 2011 Gregory S. Hermanski

Gregory Scott Hermanski
(defendant, pro se)

Certificate of Service

I, Gregory Scott Hermanski, do hereby certify, pursuant to N.R.C.P. 5(b), that on this 18 day of July, 2011, I served the foregoing "Notice of Appeal" by depositing a true and correct copy of same, in a sealed envelope, first class postage fully pre-paid, in the prison legal library, and addressed to:

Office of the District Attorney
200 Lewis Ave., P.O. Box 552212
Las Vegas, NV 89155-2212

and that there is a regular line of communication between the place of mailing and recipient address.

executed this 18 day of July, 2011, Gregory S. Hermanski

Gregory Scott Hermanski

69140

Gregory Scott Hermanski, #69140
N.N.C.C., P.O. Box 7000
Carson City, NV 89702

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200 Lewis Ave., Third Floor
Las Vegas, NV. 89155-1160

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FILED
JUL 26 2011
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,
Plaintiff(s),
vs.
GREGORY S. HERMANSKI,
Defendant(s),

Case No: 00C167783
Dept No: VI

00C167783
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Case Appeal Statement
1643628

CASE APPEAL STATEMENT

1. Appellant(s): Gregory Scott Hermanski
2. Judge: Elissa Cadish
3. Appellant(s): Gregory Scott Hermanski

Counsel:

Gregory Scott Hermanski #69140
P.O. Box 7000
Carson City, NV 89702

4. Respondent: The State of Nevada

Counsel:

David Roger, District Attorney
200 Lewis Ave.
Las Vegas, NV 89101
(702) 671-2700

5. Respondent's Attorney Licensed in Nevada: Yes
6. Appellant Represented by Appointed Counsel In District Court: Yes

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: June 8, 2000

10. Brief Description of the Nature of the Action: Criminal

Type of Judgment or Order Being Appealed: Misc. Order

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 38028, 41405, 47011, 47963, 55718, 58688

12. Child Custody or Visitation: N/A

Dated This 26 day of July 2011.

Steven D. Grierson, Clerk of the Court

By: _____

Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

Gregory Scott Hermanski, #69140
N.N.C.C., P.O. Box 7000
Carson City, NV. 89702

FILED
AUG 09 2011
CLERK OF COURT

District Court
Clark County, Nevada

00C167783
ROPP
Reply to Opposition
1661554

The State of Nevada,
plaintiff,
-vs-
Gregory Scott Hermanski,
defendant.

Case No. C167783
Dept. No. VI

"Defendant's Reply to State's Opposition"

Comes Now the defendant, Gregory Scott Hermanski, in proper person, and pursuant to District Court Rules, Rule 13 (4), hereby submits defendant's reply to the "State's "Opposition" to defendant's notice of motion/motion for leave to file motion for reconsideration".

This reply is made and based upon the entire record of these proceedings, the attached Memorandum of Points and authorities, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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Points and Authorities

"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, 535 P.2d 797 (1975), see also, Walker v. State, 85 Nev. 337, 343, 445 P.2d 34, 38 (1969), (emphasis added).

Defendant respectfully suggests that, despite the state's argument to the contrary, defendant has demonstrated in his motion for reconsideration that this Honorable Court overlooked/misapprehended that the facts and issues determined by the Supreme Court in defendant's prior appeal were not "substantially the same" as that presented in the instant case. See, "Motion for Reconsideration", page #4, lines 2-25.

As such, defendant asserts that the law of the case doctrine does not apply in the instant case, and this Honorable Court has the authority pursuant to N.R.A.P., Rule 40(a)(i) to reconsider it's judgment.

Conclusion

Wherefor, defendant, Gregory Scott Hermanski, respectfully requests that this Honorable Court grant defendant's motion for reconsideration and any further relief the court deems appropriate.

Respectfully Submitted,

executed this 28 day of July, 2011.

Gregory S. Hermanski

Gregory Scott Hermanski
(defendant, pro se)

Certificate of Service

I, Gregory Scott Hermanski, hereby certify, pursuant to N.R.C.P. 5(b) that on this 28th day of July, 2011, I mailed a true and correct copy of the foregoing "Defendant's Reply to State's Opposition" by depositing same in prison legal library, first class postage fully pre-paid, and addressed as follows:

David Roger, District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

and that a regular line of communication exists between the place of mailing and recipient address.

executed this 28 day of July, 2011, Gregory S. Hermanski
Gregory Scott Hermanski

Affirmation

I, Gregory Scott Hermanski, do hereby affirm, pursuant to NRS 239B.030 that the preceeding "Defendant's Reply to State's Opposition" does not contain the social security number of any person.

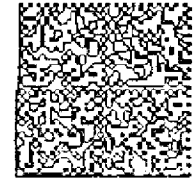
executed this 28 day of July, 2011. Gregory S Hermanski

Gregory Scott Hermanski

69140

Gregory Scott Hermanski #69140
N.N.C.C. - P.O. Box 7000
Carson City, NV 89702

FIRST CLASS



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Clerk of Court
200 Lewis Ave., Third Floor
Las Vegas, NV 89155-1160

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CLERK OF THE COURT

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ORDR

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
AMY FERREIRA
Deputy District Attorney
Nevada Bar #010347
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI, aka, Robert James Day, #1679345

Defendant.

Case No. C167783
Dept No. VI

ORDER DENYING DEFENDANT'S PRO PER MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

DATE OF HEARING: AUGUST 1, 2011
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 1st day of August, 2011, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by DAVID ROGER, District Attorney, through AMY FERREIRA, Deputy District Attorney, and good cause appearing therefor,

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CLERK OF THE COURT

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The Court stated based on the Notice of Appeal having been filed in this matter, the Court does not have jurisdiction to entertain this motion. Additionally, if the Court considered the pleadings on the merits, Court will make findings, including that there were no facts or law presented in the relief being requested, and deny the motion

DATED this 8 day of August, 2011.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

AMY FERREIRA
Deputy District Attorney
Nevada Bar #010347

rj

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CLERK OF THE COURT

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DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
AMY FERREIRA
Deputy District Attorney
Nevada Bar #010347
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI,
aka Robert James Day, #1679345

Defendant.

Case No. C167783

Dept No. VI

NOTICE OF ENTRY OF ORDER

TO: GREGORY SCOTT HERMANSKI, aka, Robert James Day, Defendant in proper person

YOU WILL PLEASE TAKE NOTICE that an Order was entered in the above-entitled action, a copy of which is attached hereto.

DATED this 12th day of August, 2011.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ AMY FERREIRA
AMY FERREIRA
Deputy District Attorney
Nevada Bar #010347

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CERTIFICATE OF MAILING

I hereby certify that service of the NOTICE OF ENTRY OF ORDER was made the 12th day of August, 2011, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

GREGORY SCOTT HERMANSKI,
aka, Robert James Day #69140
NORTHERN NEVADA CORRECTIONAL CENTER
PO BOX 7000
CARSON CITY, NV 89702

BY /s/ C. Cintola
Secretary for the District Attorney's Office

cc

ORDR

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
AMY FERREIRA
Deputy District Attorney
Nevada Bar #010347
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED

2011 AUG 11 A 10:23

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI, aka,
Robert James Day, #1679345

Defendant.

Case No. C167783
Dept No. VI

ORDER DENYING DEFENDANT'S PRO PER MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

DATE OF HEARING: AUGUST 1, 2011
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 1st day of August, 2011, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by DAVID ROGER, District Attorney, through AMY FERREIRA, Deputy District Attorney, and good cause appearing therefor,

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///

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///

P:\WPDOCS\ORDR\FORDR\006\00697810.doc

The Court stated based on the Notice of Appeal having been filed in this matter, the Court does not have jurisdiction to entertain this motion. Additionally, if the Court considered the pleadings on the merits, Court will make findings, including that there were no facts of law presented in the relief being requested, and deny the motion

DATED this 8 day of August, 2011.

ELISSA F. CADISH

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

AMY FERREIRA
Deputy District Attorney
Nevada Bar #010347

rj

*Name: HERMANSKI,GREGORY SUBJECT REPORT PAGE 5
*FID #: 257269 Generated by Transaction - Interactive Query
* Date: 11/27/2002 Time: 10:20:56 EST

Case Number: 9904-0624-2044-C

Case Status: DET LODGED
Originating District: 004 FL/S MIAMI
Lead Deputy: BRITT,THOMAS J

Charge Information:

Agency: USMS
Charge: 5011, PAROLE VIOLATION -
Warrant Date: 06/21/1999
Date Received: 06/24/1999
OCDE: No

Original Charge Information:

Charge: 1211, ROBBERY - BANKING-TYPE INST
Offense Date: 10/02/1983
Agency: FBI - DOJ FEDERAL BUREAU OF INVESTIGATION
Contact/Phone:

Suspense Information:

Seq. # 1
Renewal Date: 08/17/2002
Days Suspended: 150
Date Suspended: 03/20/2002
Reason Suspended: LODGED DETAINER
Original Agency Notified: Y
Detained in District: 048
Prison: HIGH DESERT PRISON, NEVADA
Number: 69140
Release Date: 08/17/2002
Remarks: IN CUSTODY UNDER THE NAME ROBERT DAY

MARKED FOR IDENTIFICATION
CASE # C167783
PROPOSED EXHIBIT # A
Defendant's

UNITED STATES GOVERNMENT
M E M O R A N D U M

DATE: March 20, 2002

RELPY TO ATTN OF: Kathleen Dozier
USMS, S/FL INVESTIGATIVE SERVICES DIVISION

SUBJECT: **HERMANSKI,GREG # 00766-192**

TO: **USMS, D/Nevada**
ATTN: WARRANTS SECTION--

Please take the following action with regards to the enclosed warrant:

1. _____ Warrant enclosed for execution. **Subject arrested on** . Please enclose a copy of photo and a copy of the executed warrant.

2. X Warrant enclosed to be filed as a Detainer. **SUBJ IS IN CUSTODY HIGH DESERT PRISON-UNDER THE NAME OF DAY, Robert.**

3. _____**Warrant return unexecuted.**

4. _____**Additional information remarks:**

If you have any question feel free to contact me at 305-536-4628 and/or fax- 305-536-4636.

Respectfully,

Kathleen Dozier
Investigative Research Specialist
Enclosure: ( )

Memorandum

RECEIVED
U.S. MARSHALS SERVICE
2002 NOV 27 PM 1:35

#857269

WARRANT APPLICATION & WARRANT
Re: Hermanski, Gregory
Reg. No. 00766-192

Date Warrant Issued:

June 21, 1999

To:

U.S. Marshal
Southern District of Florida
301 North Miami Avenue
205 Federal Courthouse Square
Miami, FL 33128-7785

From:

Helen A. Herman
Case Analyst
U.S. Parole Commission

Enclosed are copies of Warrant Application and Warrant in duplicate, issued by the United States Parole Commission for the above-named parolee. Notify the Commission of all developments concerning the disposition of this warrant.

Please assume custody as soon as possible or when located. NOTE: If the parolee is already in the custody of federal or state authorities, do not execute this warrant. Place a detainer and notify the Commission for further instructions. *Do not execute the warrant if the parolee is released on bond.* Also, if a criminal arrest warrant has been issued for this parolee, execution of such criminal warrant shall take precedence and the Parole Commission is to be notified before its warrant may be executed.

PROBATION OFFICER: Please keep the Commission advised of all further developments in this case.

cc: W. Alan McGhee
U.S. Probation Officer
Southern District of Florida
15327 N.W. 60 Avenue
Suite 200
Miami Lakes, FL 33014

PROCEDURE: After execution of the warrant give one copy of Warrant Application to the prisoner; furnish one copy to the U.S.Probation Officer as soon as practical after taking custody; and advise the Regional Office of the Parole Commission which issued the Warrant that subject is in custody. Give the place of confinement, and the date Warrant was executed. When prisoner is returned to the designated institution, leave Warrant Application and one Warrant with Warden. Make your return on the other Warrant to the Regional Commissioner of the region where it was issued.

NOTE: If there has been a conviction of an offense committed while under supervision, no preliminary interview by a Probation Officer will be conducted unless the Commission orders otherwise.

WARRANT

U.S. Department of Justice
United States Parole Commission

To Any Federal Officer Authorized To Serve Criminal Process Within The United States:

WHEREAS, Hermanski, Gregory, Reg. No. 00766-192 was sentenced by the United States District Court to serve a sentence of 10 Yrs, 1 Mo, 8 Days (orig); 954 Days (M.R. Viol.) for the crime of Bank Robbery; Use of Firearm in the Commission of a Robbery and was on February 5, 1999 released in accordance with Sec. 4163, Title 18, U.S.C. (Mandatory Release) from Coleman FCI with 369 days remaining to be served;

AND, WHEREAS, reliable information has been presented to the undersigned Member of this Commission that said released prisoner named in this warrant has violated one or more conditions of his release;

NOW, THEREFORE, this is to command you by authority of Sec. 4213, Title 18, U.S.C., to execute this warrant by taking the above-named, wherever found in the United States, and hold him in your custody either until he is released by order of the Parole Commission, or until you are authorized to transport him for further custody.

WITNESS my hand and the seal on June 21, 1999.

U.S. Parole Commissioner

UNITED STATES PAROLE COMMISSION

Case Of	Hermanski, Gregory	Date	June 21, 1999
Reg. No	00766-192	M.R. Termination Date	2/9/2000
FBI No	888420C	Violation Date	6/1/99
Birth Date	11/26/53	Released	2/5/99
Race	White		
Sentence Length	10 Yrs, 1 Mo, 8 Days (orig); 864 Days (M.R. viol)		
Original Offence	Bank Robbery; Use of Firearm in the Commission of a Robbery		

You shall, unless you have been convicted of a new offense, be given a preliminary interview by an official designated by a Regional Commissioner to determine if there is probable cause to believe that you have violated the conditions of your release, and if so, whether to release you or hold you for a revocation hearing.

At your preliminary interview and any subsequent revocation hearing you may present documentary evidence and voluntary witnesses on your behalf, and, if you deny the charge(s) against you, you may request the presence of those who have given information upon which the charges are based. Such witnesses will be made available for questioning unless good cause is found for their non-appearance.

You may be represented by an attorney or other representative of your choice, or, if you are unable to pay for counsel, an attorney will be provided by the U.S. District Court if you fill out and promptly return a Form CJA-22 to a U.S. Probation Officer.

If, after a revocation hearing, you are found to have violated the conditions of your release the Commission may: (1) restore you to supervision, and, if appropriate, (a) reprimand you; (b) modify your conditions of supervision; or (c) refer you to a residential community treatment center for the remainder of your sentence; or (2) revoke your parole or mandatory release, in which case the Commission will also decide when to consider you for further release.

If you have been convicted of a new offense (committed while on parole) which is punishable by a term of imprisonment, you will not receive sentence credit for the time you spent on parole. **Exception: for cases heard in the 9th Circuit beginning on October 22, 1990, the Commission will exercise discretion, in accordance with 28 C.F.R. 2.52 (Appendix), prior to ordering the forfeiture of sentence credit for the time spent on parole.** If the Commission finds that you absconded or otherwise refused to submit to parole supervision, the Commission may order that you not receive credit toward service of your sentence for that amount of time. (If your original sentence was imposed for violation of the District of Columbia Criminal Code, you will not receive credit for time spent on parole regardless of whether or not you have been convicted of a crime.)

A special parole term violator whose parole is revoked shall receive no credit for time spent on parole.

CHARGES:

Charge No. 1 - **Failure to Report Change in Residence.** On or about 6/14/99, USPO McGhee learned that subject had moved from his last reported residence on or about 6/1/99. Subject has failed to advise his USPO of his current address and his whereabouts are unknown. This charge is based on information contained in the letter dated 6/15/99 from USPO McGhee.
I ADMIT [ ] or DENY [ ] this charge.

Charge No. 2 - **Failure to Submit to Drug Testing.** On or about the following dates, subject failed to submit a urine specimen as instructed and as required by Condition No. 14 of his/her release: 2/26, 3/27, 4/28, 4/30, 5/24, and 6/9/99. This charge is based on information contained in the letter dated 6/15/99 from USPO McGhee.
I ADMIT [ ] or DENY [ ] this charge.

Preliminary Interview Is Required

Warrant Recommended By:

Warrant Issued.....June 21, 1999

Helen A. Herman, Case Analyst
U.S. Parole Commission,

Probation Office Requesting Warrant..Southern District of Florida (Miami - Lakes)

( ) Commission ( ) Inmate ( ) Institution ( ) USPO ( ) Interviewing Officer ( ) Chron

Gregory Hermanski Reg. No. 00766-192
Warrant Application
Page 1 of 1

** TOTAL PAGE.06 **

Kat

Here is the info on Gregory Hermanski

Name: Robert Day
Dob: 02/06/1954
Inmate# 69140
Location: High Desert Prison
Charge: Robbery with a deadly weapon
Burglary with a deadly weapon

Send detainer to :

Offender Management Attn: Marcie Peterson
PO Box 7011
Carson City , Nevada
89706

Fax 775-687-6715

** TOTAL PAGE.06 **

United States Department of Justice
United States Marshals Service

DETAINER

BASED ON FEDERAL PAROLE VIOLATION WARRANT

UNITED STATES MARSHAL
DISTRICT OF NEVADA
300 S. Las Vegas Blvd., #4240, Las Vegas, NV 89101
(702) 388-6355 Ext. 6704 or Ext. 6443 or 6963 (WARRANT SUPERVISOR - 388-6443)

Please type or print neatly:

TO: NEVADA STATE PRISON
(currently @ High Desert)

FAX: 775-687-6715
(775-887-3284 Warrants)

DATE: March 26, 2002
SUBJECT: HERMANSKI, GREG
AKA: (Booked as) DAY, Robert
ID#: 69140
USMS #: 00766-182
DOW#: June 21, 1999
Southern District of Florida

Please accept this Detainer against the above-named subject who is currently in your custody. The United States Parole Commission has issued a Federal parole violation warrant against the subject. Prior to the subject's release from your custody, please notify this office at once so that we may assume custody if necessary. If the subject is transferred from your custody to another detention facility, we request that you forward our Detainer to said facility at the time of transfer and advise this office as soon as possible. The notice and speedy trial requirements of the Interstate Agreement on Detainers Act do NOT apply to this Detainer, which is based on a Federal parole violation warrant. In accordance with U.S. Parole Commission regulations, please read or show the following to the subject:

"YOU ARE HEREBY ADVISED THAT A DETAINER HAS BEEN FILED AGAINST YOU ON THE BASIS OF A WARRANT ISSUED BY THE U.S. PAROLE COMMISSION. IF YOU ARE SERVING A NEW SENTENCE OF CONFINEMENT FOR A CRIME COMMITTED WHILE ON PAROLE, YOU MAY SUBMIT TO THE U.S. PAROLE COMMISSION ANY INFORMATION YOU WOUL LIKE CONSIDERED BY THE PAROLE COMMISSION IN DISPOSING OF THE WARRANT. UPON RECEIPT OF SUCH INFORMATION, YOUR CASE WILL BE REVIEWED ON THE RECORD BY THE PAROLE COMMISSION."

After reading or showing the above language to the subject, please execute the following:

The foregoing was read to or by the subject and a copy of the Detainer and the charges upon which it is based was delivered to him on _____ (Date)

Signed: _____ Title: _____

Please acknowledge receipt of this Detainer. In addition, please provide one copy of the Detainer to the subject and return one copy of the Detainer to this office in the enclosed self-addressed envelope.

RECEIPT
Date: 3-21-02
Signed: Marcy Peterson
By: MARCY PETERSON
Title: WARRANTS COORDINATOR
FAX: PLEASE FAX BACK TO USMS LAS VEGAS, NEVADA 702-388-6937 AS ACKNOWLEDGMENT OF RECEIPT

Very truly yours,

Jose G. Trapcoso
United States Marshal

Sandi Allen

By: Sandi Allen, Invest. Res. Spec.
Please Advise When Ready for P/U
702-388-6744 or 388-6963

PRIOR EDITIONS ARE OBSOLETE AND NOT TO BE USED

Form USM-16a
OCT 1/99

C 167783

Page 995

CERTIFICATE OF LIVE BIRTH

KANSAS STATE BOARD OF HEALTH
Division of Vital Statistics

BIRTH NUMBER

DO NOT WRITE IN THIS SPACE: 54 005385

MAR 10 1954 Registrar's No. 522

1. PLACE OF BIRTH
a. County: Leavenworth 522
b. City (If outside corporate limits, write RURAL and give township) or Town: Leavenworth
c. Full Name of (If NOT in hospital or institution, give street address or location) Hospital or Institution: CUSHING MEMORIAL HOSPITAL 2

2. USUAL RESIDENCE OF MOTHER (Where does mother live?)
a. State: Kansas b. County: Leavenworth
c. City (If outside corporate limits, write RURAL and give township) or Town: Leavenworth 522
d. Street Address (If rural, give location): 1123 Grand

3. CHILD'S NAME (Type or print): a. (First) Robert b. (Middle) James c. (Last) Day

4. SEX: Male

5a. THIS BIRTH: Single [X] Twin [ ] Triplet [ ]

5b. IF TWIN OR TRIPLET (this child born): 1st [ ] 2nd [ ] 3rd [ ]

6. DATE OF BIRTH (Month) (Day) (Year): February 6, 1954

FATHER OF CHILD

7. FULL NAME: a. (First) Robert b. (Middle) Lee c. (Last) Day

8. COLOR OR RACE: White

9. AGE (at time of this birth): 18 YEARS

10. BIRTHPLACE (State or foreign country): Kansas

11a. USUAL OCCUPATION: Mechanic-Fite Motor Company

11b. KIND OF BUSINESS OR INDUSTRY:

MOTHER OF CHILD

12. FULL MAIDEN NAME: a. (First) Gloria b. (Middle) Kay c. (Last) Jones

13. COLOR OR RACE: White

14. AGE (At time of this birth): 18 YEARS

15. BIRTHPLACE (State or foreign country): Kansas

16. CHILDREN PREVIOUSLY BORN TO MOTHER (Do NOT include this child)
a. How many OTHER children are now living? 1
b. How many OTHER children were born alive but are now dead? 0
c. How many children were stillborn (born dead after 20 weeks pregnancy)? 0

17. PARENT: I hereby certify that the information above is correct to the best of my knowledge and belief. Signature: Mrs Robert Day Date:

I hereby certify that this child was born alive on the date stated above.

18a. SIGNATURE: [signature]
18b. ATTENDANT AT BIRTH: M. D. [X] Midwife [ ] Other (specify)
18c. ADDRESS: Leavenworth, Kans.
18d. DATE SIGNED: 2/14/54

19. CHILD'S REGISTERED LOCAL REG. NO.: FEB 17 1954

20. REGISTRAR'S SIGNATURE: [signature]

21. DATE ON WHICH GIVEN NAME ADDED BY (Registrar):

MARKED FOR IDENTIFICATION
CASE # C 167783
PROPOSE EXHIBIT # B
Plaintiff's

FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20537

PRIVACY ACT OF 1974 (P.L. 93-579) REQUIRES THAT FEDERAL, STATE, OR LOCAL AGENCIES INFORM INDIVIDUALS WHOSE SOCIAL SECURITY NUMBER IS REQUESTED WHETHER SUCH DISCLOSURE IS MANDATORY OR VOLUNTARY, BASIS OF AUTHORITY FOR SUCH SOLICITATION, AND USES WHICH WILL BE MADE OF IT.

JUVENILE FINGERPRINT SUBMISSION YES [ ] TREAT AS ADULT YES [XX]	DATE OF ARREST MM DD YY: 9 9 1997	ORI CONTRIBUTOR: FL060027C FED CORR COMPEX-MED ADDRESS: COLEMAN, FL REPLY DESIRED? YES [ ]
SEND COPY TO: (ENTER ORI)	DATE OF OFFENSE MM DD YY	PLACE OF BIRTH (STATE OR COUNTRY): KANSAS — COUNTRY OF CITIZENSHIP: USA
MISCELLANEOUS NUMBERS	SCARS, MARKS, TATTOOS, AND AMPUTATIONS: RJ S ROWDER "EAGLE" CD KANSAS MINOR SCARS	
	RESIDENCE/COMPLETE ADDRESS: 1221 A 124 COURT — CITY: MIAMI — STATE: FL	
OFFICIAL TAKING FINGERPRINTS (NAME OR NUMBER): S Jackson	LOCAL IDENTIFICATION/REFERENCE: 19440-044	PHOTO AVAILABLE? YES [XX] PALM PRINTS TAKEN? YES [ ]

EMPLOYER: IF U.S. GOVERNMENT, INDICATE SPECIFIC AGENCY. IF MILITARY, LIST BRANCH OF SERVICE AND SERIAL NO.	OCCUPATION
CHARGE/CITATION 1. ESCAPE RETURN/ORIG BANK ROBBERY? LATEST PV-TECHNICAL VIOLATION w/ABSCOUNDING 18:4205(g)	DISPOSITION 1. CAG 10 YRS 16 MONTHS
2.	2.
3.	3.
ADDITIONAL	ADDITIONAL
ADDITIONAL INFORMATION/BASIS FOR CAUTION	STATE BUREAU STAMP

FD-249 (Rev. 12-1-84) — U.S. GPO: 1995—405-015/20012

MARKED FOR IDENTIFICATION
Defendant's Proposed Exhibit
C167783 5/9/01 A

U.S Department of Justice
United States Parole Commission
5550 Friendship Boulevard
Chevy Chase, Maryland 20815-7201

Notice of Action

FEB 0 7 1996

Name: DAY, Robert James

Register Number: 19440-044 **Institution:** FCI Butner

In the case of the above-named parole action was ordered:

Rescind Presumptive Parole date of (November 19, 1995). Continue to a Presumptive Parole (August 22, 1996) with the Special Drug and Alcohol Aftercare Conditions. You shall participate as instructed by your U.S. Probation Officer in a program approved by the Parole Commission for the treatment of narcotic addiction or drug and/or alcohol dependency, which may include testing and examination to determine if you have reverted to the use of drugs or alcohol. You shall also abstain from the use of alcohol and/or all other intoxicants during and after the course of treatment. This requires the additional service of 8 months.

FINDINGS OF FACT:
The Commission finds that you have committed the following violations:

CHARGE NO. 1: **Escape.**
Basis: Your admission to the examiner and CDC findings of 7/24/95.

REASONS:

You escaped from non-secure custody which requires 8-16 months to be added to your original presumptive parole date (November 19, 1995). Plus time in escape status (33 days).

MARKED FOR IDENTIFICATION
Defendant's Proposed Exhibit
0167783 5/9/01 B

Appeals Procedure:
The above decision is appealable to the National Appeals Board under 28 C.F.R. 2.26:

November 20, 1995 Eastern Region Commissioner: John R. Simpson Docket Clerk: dlw

ENTERED 2-7-96

U.S Department of Justice
United States Parole Commission
5550 Friendship Boulevard
Chevy Chase, Maryland 20815-7201

Notice of Action

RECEIVED
INMATE SYSTEMS
FCI - FPC
OCT 25 1995
BUTNER, NC 27509

Name: Day, Robert James

Register Number: 19440-044 Institution: CCM-NC / FCI Butner

In the case of the above-named parole action was ordered:

Pursuant to 28 CFR .34, reopen and retard presumptive reparole date of November 19, 1995, and schedule for a rescission hearing on the next available docket, October, 1995.

REASONS:

On 7/26/95, you were found guilty by the DEO of Escape.

MARKED FOR IDENTIFICATION
Defendant's Proposed Exhibit C
5/9/01
C1677783

Appeals Procedure:
THE ABOVE DECISION IS NOT APPEALABLE.

10-25-95

October 25, 1995 Eastern Region Commissioner: John R. Simpson Docket Clerk: sds

OCT-25-1995 14:50 COMM CORR-BOP RALEIGH, NC 919 856 4777 P.01/01

27-MAR-80

DAY, ROBERT JAMES 15FEB80101738

1 VIOLATION OF MO CONTROLLED SUBSTANCE LAW - POSSESSION

COURT ROOM - DIVISION II (29-MAR-80)

JUDGMENT

THE DEFENDANT'S PUNISHMENT FIXED AT 6 MONTHS CONFINEMENT IN BOONE COUNTY JAIL .

(1)

P.19

MARKED FOR IDENTIFICATION
State's Proposed Exhibit 1
C167783 5/9/01

STATE OF MISSOURI } SS
COUNTY OF BOONE }

I, CHERYL WHITMARSH, Clerk of the Circuit Court of Boone County, Missouri, hereby certify the above and foregoing is a full, true and correct copy of

Court Document

as fully as the same remains of record in my said office. IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said office this 23rd day of March 2001

CHERYL WHITMARSH, CLERK
Circuit Clerk of Boone County, Mo

By Carol L. Rumble
Deputy Clerk

CIRCUIT COURT

57292

Case No. 57292

DSP 7-15-75

Number of Case	NAME OF PARTIES	ATTORNEYS	KIND OF ACTION	DATE OF FILING Month	Day	Year
57292	STATE OF MISSOURI	Earl P. Saits	Count I Transfer of Controlled Substance	JAN	2	1975
	vs.		Count II Sale of Controlled Substance			
	ROBERT JAMES DAY	David V. Bean	Cash Bond $1000.00			

Date of Orders	ORDERS OF COURT
JAN 2 1975	Transcript of Judgment from Boone County Magistrate Court Division I, received and filed and on the same day Assistant Prosecuting Attorney files Information.
Jan 6, 75	D.A. cons. Def't. cons. prior to be served. F/NAEW) Files) not guilty entd. Cause set to Trial Docket for setting this Div. II.
Jan 6, 75	Set for Feb 20, 1975 9:00 AM Div. II
JAN 21 1975	Richard C. Thomas files Motion for Continuance on behalf of defendant.
Jan 28-75	Motion for cont sustained. Reset to trial setting docket Mar 3, 1975 Div II Gene
Jan 28	Set for Feb 20, 1975, 1:30 Div. II
May 30-75	St appr by asst PA. Dft appears & by counsel. PG withdrawn as to CT II. PG entrd as to CT I. Ct finds that dft has knowingly, intelligently & voluntarily entrd PG w/understdg & nature & elements & possible punishment & that he has had effective assistance of counsel. Imposition of sent suspended pending pre-sent investigation

Page 1001

STATE OF MISSOURI

cause No. 5792

ROBERT JAMES DAY

Date of Orders	ORDERS OF COURT
	4 mpt. Dft regstd o/b July 10, 1975. Dispstn set for July 14, 1975. Jogmtt to remove to St & Orlf. Nolpros entrd by St as to C.T. I. said C.T. dsmsd & Dft discha thrfr. Gone.
July 1, 1975	Board of Probation and Parole files Pre-Sentence Investigation Report.
July 14-75	St apply by asst PA. Dft app in pers & by couns. Pre-sent invstgtn & rept rcvd. Probat pd @ 5 yr in Dft & Corr. Allocutn, plea & sent. Sent prelage contd to July 15, 1975, Div I, @ 9:00 a.m. Gone.
July 15-75	St apply asst PA. Dft app in pers & by couns. Cause for the consid. sent impos ordrd execd. Sheriff with Dep to assist in del & dft to Dept of Corr. Rptr to prepare & file w/in 30 da Transcript of proceedings held May 20, 1975, July 14, 1975, & This date. Gone.
July 22, 1975	Charles S. Russell, Official Court Reporter, Division I, files Transcript of Proceedings had on May 20, 1975, July 14, 1975 and July 15, 1975.
AUG 22 1975	Charles S. Russell, Official Court Reporter Time Assigned at (as in case of $1.50

AFFIDAVIT

State of Missouri
County of Boone

COUNT I TRANSFER OF CONTROLLED SUBSTANCE
COUNT II SALE OF CONTROLLED SUBSTANCE

STATE OF MISSOURI
vs.
JIM DAY

Before
TEMPLE H. MORGETT, Magistrate
of Boone County, Missouri

Now on this 2nd day of May, 19 74, personally appeared before me Temple H. Morgett, Magistrate, within and for the county aforesaid Michael L. Midyett, Assistant Prosecuting Attorney who being duly sworn, upon his official oath states that Jim Day

COUNT I on or about the 30th day of January 19 74 at the said County of Boone and State of Missouri did wilfully, unlawfully and feloniously transfer a certain controlled substance, to-wit: Amphetamines, as defined by Schedule III, to-wit: Section 195.017 6 (a), to an individual; and

COUNT II On or about the 2nd day of February, 1974, at the said County of Boone and State of Missouri, did wilfully, unlawfully and feloniously sell a certain controlled substance, to-wit: Amphetamines, as defined by Schedule III, to-wit: Section 195.017 6 (a) to an individual for and in consideration of lawful currency of the United States of America; contrary to the form of the statutes in such cases made and provided; and all

subscribed and sworn to before me this 2d day of May, 1974

Michael L. Midyett
Prosecuting Attorney

Temple H. Morgett
Magistrate

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

STATE OF MISSOURI)
VS)
ROBERT JAMES DAY)

COUNT I TRANSFER OF CONTROLLED SUBSTANCE
COUNT II SALE OF CONTROLLED SUBSTANCE

CASE NO. 57292

INFORMATION

Comes now Earl F. Seitz, Assistant Prosecuting Attorney within and for the County of Boone and State of Missouri and upon his official oath informs the Court that Robert James Day:

COUNT I On or about the 30th day of January, 1974, at the said County of Boone and State of Missouri did wilfully, unlawfully and feloniously transfer a certain controlled substance, to-wit: Amphetamine, a Schedule II controlled substance as defined by RSMO 195.017 (1969) and revised by the Missouri Division of Health on September 28, 1974, to an individual, and

COUNT II On or about the 2nd day of February, 1974, at the said County of Boone and State of Missouri did wilfully, unlawfully and feloniously sell a certain controlled substance, to-wit: Amphetamines, a Schedule II controlled substance as defined by RSMo 195.017 (1969) and revised by the Missouri Division of Health on September 28, 1974, to an individual for and in consideration of lawful currency of the United States of America, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State.

Earl F. Seitz
Assistant Prosecuting Attorney

Earl F. Seitz, Assistant Prosecuting Attorney of Boone County, Missouri, makes oath and says that the facts stated in the above and foregoing are true and correct according to his best information and belief.

Earl F. Seitz
Assistant Prosecuting Attorney

Subscribed and sworn to before me this 2nd day of January, 1975.

Mary Boothe
Clerk of the Circuit Court

WITNESSES:

E. L. Porter
Afton Ware

FILED
BOONE COUNTY
JAN 2 1975
MARY BOOTHE
CLERK, CIRCUIT COURT
COLUMBIA, MO.

CERTIFIED COPY OF SENTENCE AND JUDGMENT OF COURT

STATE OF MISSOURI,
County of Boone. } In the Circuit Court June Term, 1975.

Be it Remembered, That on this the 14th day of July, 1975, at the regular June Term of the Boone County Circuit Court begun and held at the Courthouse in the City of Columbia, in the County and State aforesaid, before the HONORABLE JOHN M. CAVE Judge of the Thirteenth Judicial Circuit of the State of Missouri and Judge of this Court, the following among other proceedings were had, to-wit:

THE STATE OF MISSOURI, Plaintiff,
No. 57292 v. } CRIMINAL ACTION
ROBERT JAMES DAY, Defendant } SENTENCE AND JUDGMENT
} INF: Sale Of Controlled Substance

Now on this 14th day of July, 1975 comes the Assistant Prosecuting Attorney on behalf of the State of Missouri and comes also the defendant, in person and in the presence of his attorney, David V. Bear III. Whereupon, the defendant is informed by the Court that on May 20, 1975, he entered a plea of guilty to Count II of the Information charging Sale of Controlled Substance. Upon inquiry, the Court found that said plea of guilty was knowingly, intelligently, and voluntarily entered with understanding of the nature of charge and range of punishment. The Court further found that the defendant had effective assistance of counsel.

Imposition of sentence was suspended pending pre-sentence investigation and report. Final disposition was by the Court set for July 14, 1975.

And now the pre-sentence investigation and report is by the Court considered. Whereupon, punishment is fixed at five (5) years in the Department of Corrections. And now being asked if he, the said defendant, has any legal cause to show why Judgment should not be pronounced against him, according to law, fails to show such cause.

IT IS THEREFORE SENTENCED, ORDERED AND ADJUDGED by the Court that the defendant, Robert James Day, having heretofore entered plea of guilty to Count II of Information charging Sale Of Controlled Substance, be confined in an institution to be designated by the Department of Corrections of the State of Missouri for a period of five (5) years; there to be kept, confined, and treated in the manner directed by law until the Judgment and sentence of the Court herein be complied with or unless otherwise discharged by due course of law.

It is further ordered by the Court that further proceedings be continued to July 15, 1975, Division I at 9:00 a.m.

STATE OF MISSOURI } ss.
County of Boone }

I, Janet Davis, Clerk of the Circuit Court of Boone County, Missouri, hereby certify that the above is a true copy of the original Judgment and Sentence of the Court in the cause therein named, as the same appears of record in my office.

I further certify that on July 15, 1975, sentence heretofore imposed was by the Court ordered executed. Sheriff was authorized one deputy to assist in delivery of the defendant to the Department of Corrections.

WITNESS my hand as Clerk, and the seal of said Court, done at office in Columbia, this 16th day of July, 1975.

JANET DAVIS, CLERK

STATE OF MISSOURI } SS
COUNTY OF BOONE }

I, CHERYL WHITMARSH, Clerk of the Circuit Court of Boone County, Missouri, hereby certify the above and foregoing is a full, true and correct copy of

Court Documents

as fully as the same remains of record in my said office. IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said office this 23rd day of March 2001

CHERYL WHITMARSH, CLERK
Circuit Clerk of Boone County, Mo

By Carol L Runkle
Deputy Clerk

Last Name
DAY

First Name
ROBERT

Middle Name
JAMES

REG #:
19440-044

Date of Photo
SEP 9, 1997

COM

W M FEB 6, 1954 HT 6 00 WT 172 HR/BN EY/BL

BP-S396.058 CERTIFICATE OF RECORD CDFRM
MAY 94
U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

I , R. Burns, hereby certify and attest that I am the INMATE SYSTEMS MANAGER and as such that I am the official custodian of the records of this Institution whose official name and address is:

Federal Correctional Complex
P.O. Box 1029
Coleman, FL, 33521-0849

and that the following and attached records are true and correct copies of records of said Institution pertaining to:

NAME: **DAY, Robert James** REG. NO.: **19440-044**

and consisting of: (1) Photograph, (2) Judgment and Commitment, (3) Other: Background History as reported in PSI.

IN WITNESS WHEREOF, I have hereunto set my hand at Federal Correctional Institution, Coleman, Florida, this 11TH day of January A.D.2001.

R. Burns
Custodian of Records

(2)

Inmate Systems Manager
Title

STATE OF Florida }
}
} ss.
COUNTY OF Sumter }

Subscribed and sworn to before me this 23rd day of February 2001.

Signature of Officer Authorized To Administer Oaths (18 U.S.C. 4004)

MARKED FOR IDENTIFICATION
State's Proposed Exhibit 2
CR 67783 5/9/01

Record Copy - Requester; Copy - Central File
(This form may be replicated via WP)

Replaces BP-396(58) of OCT 88

U.S. DEPARTMENT OF JUSTICE **WARRANT APPLICATION**
UNITED STATES PAROLE COMMISSION

Case Of	Day, Robert James	Date	April 4, 1997
Reg. No	19440-044	Parole Termination Date	07-10-99
FBI No	652643N8	Violation Date	11-18-96
Birth Date	02-06-54	Released	August 22, 1996
Race	White		
Sentence Length	10 years(orig.), 1,784 days(parole violator term)		
Original Offense	Bank Robbery		

You shall, unless you have been convicted of a new offense, be given a preliminary interview by an official designated by a Regional Commissioner to determine if there is probable cause to believe that you have violated the conditions of your release, and if so, whether to release you or hold you for a revocation hearing.

At your preliminary interview and any subsequent revocation hearing you may present documentary evidence and voluntary witnesses on your behalf, and, if you deny the charge(s) against you, you may request the presence of those who have given information upon which the charges are based. Such witnesses will be made available for questioning unless good cause is found for their non-appearance.

You may be represented by an attorney or other representative of your choice, or, if you are unable to pay for counsel, an attorney will be provided by the U.S. District Court if you fill out and promptly return a Form CJA-22 to a U.S. Probation Officer.

If, after a revocation hearing, you are found to have violated the conditions of your release the Commission may: (1) restore you to supervision, and, if appropriate, (a) reprimand you; (b) modify your conditions of supervision; or (c) refer you to a residential community treatment center for the remainder of your sentence; or (2) revoke your parole or mandatory release, in which case the Commission will also decide when to consider you for further release.

If you have been convicted of a new offense (committed while on parole) which is punishable by a term of imprisonment, you will not receive sentence credit for the time you spent on parole. **Exception: for cases heard in the 9th Circuit beginning on October 22, 1990, the Commission will exercise discretion, in accordance with 28 C.F.R. 2.52 (Appendix), prior to ordering the forfeiture of sentence credit for the time spent on parole.** If the Commission finds that you absconded or otherwise refused to submit to parole supervision, the Commission may order that you not receive credit toward service of your sentence for that amount of time. (If your original sentence was imposed for violation of the District of Columbia Criminal Code, you will not receive credit for time spent on parole regardless of whether or not you have been convicted of a crime.)

A special parole term violator whose parole is revoked shall receive no credit for time spent on parole.

CHARGES:

Charge No. 1 Law Violations: (a) Careless and Imprudent Driving; (b) Driving While Intoxicated; (c) Failure to Appear - On or about 11-18-96, subject was issued a citation for the offense(s) cited in (a) above after he was involved in a accident wherein he struck a truck that was stopped at an intersection to make a left turn. He was later charged with Driving While Intoxicated in reference to this incident and was scheduled to appear in Boone County Circuit Court on 02-28-97. Subject failed to appear in court as scheduled. This charge is based on information contained in the letters dated 12-18-96 and 03-27-97 from USPO Landrum.
(a)I ADMIT [ ] or DENY [ ] this charge.
(b)I ADMIT [ ] or DENY [ ] this charge.
(c)I ADMIT [ ] or DENY [ ] this charge.

Charge No. 2 - Violation of Special Condition (DRUG/ALCOHOL). On or about the following date(s), subject failed to keep regularly scheduled appointments with Family Counseling Center for submission of urine specimens/counseling: 02-02-97, 02-21-97 and 03-07-97 This charge is based on information contained in the letter dated 03-27-97 from USPO Landrum.
I ADMIT [ ] or DENY [ ] this charge.

Charge No. 3 - Failure to Report Change in Residence. On or about 03-14-97, USPO Landrum learned that subject had moved from his last reported residence with his mother, Kay Day, on or about 03-10-97. Subject has failed to advise his USPO of his current address and his whereabouts are unknown. This charge is based on information contained in the letter dated 03-27-97 from USPO Landrum.
I ADMIT [ ] or DENY [ ] this charge.

Preliminary Interview Is Required

Warrant Recommended By:

Stephen J. Husk

Warrant Issued.....April 4, 1997

Stephen J. Husk, Case Analyst
U.S. Parole Commission,

Probation Office Requesting Warrant..Western District of Missouri (Jefferson City)
( ) Commission ( ) Inmate ( ) Institution ( ) USPO ( ) Interviewing Officer ( ) Chron

WARRANT

U.S. Department of Justice
United States Parole Commission

To Any Federal Officer Authorized To Serve Criminal Process Within The United States:

WHEREAS, Day, Robert James, Reg. No. 19440-044 was sentenced by the United States District Court to serve a sentence of 10 years(orig.), 1,784 days(parole violator term) for the crime of Bank Robbery and was on August 22, 1996 released on parole from Butner FCI with 1,052 days remaining to be served;

AND, WHEREAS, reliable information has been presented to the undersigned Member of this Commission that said released prisoner named in this warrant has violated one or more conditions of his release;

NOW, THEREFORE, this is to command you by authority of Sec. 4213, Title 18, U.S.C., to execute this warrant by taking the above-named, wherever found in the United States, and hold him in your custody either until he is released by order of the Parole Commission, or until you are authorized to transport him for further custody.

WITNESS my hand and the seal on April 4, 1997.

John R. Simpson
U.S. Parole Commissioner

DEFENDANT TURNED OVERTO
AIRLIFT. PTT 00115
ON 08-14-97
BY DUSM Dan R. Yunker
I certify that I received this court order/writ on 08-07-97 and partially executed same ORDER by delivering the body of the within named defendant from airlift PTT0124 to COC at TAMPA, FL
BY: J. Hall AFO
PAT WILKERSON USM WDOK

I certify that I received this court order/writ on 3-14-97 and partially executed same ORDER by delivering the body of the within named defendant from airlift PTT 0011 to FTL at OKC
BY: PAT WILKERSON USM WDOK

released to supervision or to Special Parole Term

(Name) [redacted] (Number) [redacted] (Institution)

UNITED STATES MARSHAL'S RETURN TO UNITED STATES PAROLE COMMISSION

NOTE: Do not execute this warrant if subject is being held in custody on other Federal, State, or Local charges, unless otherwise ordered by the Commission. (See accompanying instructions on Form H-24.)

_____ District of MN ss:

Received this writ the 27th day of MAY, 19 97, and executed same by arresting the within-named Robert James DAY

this 27th day of MAY, 19 97, at 4:30 pm and committing him to ANOKA County Jail, ANOKA MN

Charles ZACHARIAS
(U.S. Marshal)

By Timothy SMITH
(Deputy Marshal)

Further executed same by committing him to COM

at 5:30 PM on 9-9-97, 19____, the institution designated by the Attorney General, with the copy of the Warrant and warrant application.

J Bell, Lt. SOC
(U.S. Marshal)

By _____
(Deputy Marshal)

NOTE.—The original of this warrant is to be returned to U.S. Parole Comissioner of the parole region where it was issued.

I have received a copy of the warrant application dated April 4, 1997

Signature [signature]

Date 5/28/97

(If subject refuses to sign, Marshal should so indicate.)

MAY-29-97 (THU) 16:51 W/NO 1254 TEL:816 426 6005 P.005

WARRANT

Corrected by usm

RECEIVED

U.S. Department of Justice
United States Parole Commission

To Any Federal Officer Authorized To Serve Criminal Process Within The United States:

WHEREAS, Day, Robert James, Reg. No. 19440-044 was sentenced by the United States District Court for the Western District of Missouri to serve a sentence of 10 years (Orig); 2099 days (PV) for the crime of Bank Robbery and was on October 18 1993 released on re-parole from FCI Bastrop with 1784 days remaining to be served;

AND, WHEREAS, reliable information has been presented to the undersigned Member of this Commission that said released prisoner named in this warrant has violated one or more conditions of his release;

NOW, THEREFORE, this is to command you by authority of Sec. 4213, Title 18, U.S.C., to execute this warrant by taking the above-named, wherever found in the United States, and hold him in your custody either until he is released by order of the Parole Commission, or until you are authorized to transport him for further custody.

WITNESS my hand and the seal on January 21, 1994.

Jasper R. Clay Jr.
U.S. Parole Commissioner
Eastern Region

WARRANT for return of Prisoner released to supervision or to Special Parole Term

(Name) (Number) (Institution)

UNITED STATES MARSHAL'S RETURN TO UNITED STATES PAROLE COMMISSION

NOTE: Do not execute this warrant if subject is being held in custody on other Federal, State, or Local charges, unless otherwise ordered by the Commission. (See accompanying instructions on Form H-24.)

EASTERN District of NORTH CAROLINA ss:

Received this writ the 20th day of JANUARY, 19 94, and executed same by arresting the within-named Robert James Day this 18 ~~20~~ 20th day of July, 19 94, at Harnett Corr. Ctr. and committing him to the Robeson County Jail.

William I. Berryhill, Jr.
(U.S. Marshal)

By W.D. Sneed
(Deputy Marshal)

Further executed same by committing him to FCI Butner at Butner, NC on September 14, 1994, the institution designated by the Attorney General, with the copy of the Warrant and warrant application.

In accordance with T18 USC 4163, the inmate herein named was released on 8-22-1996 via PAROLE with 1052 days remaining to be served. A term of N/A years of probation/SFT/supervision is to follow.

W.I. Berryhill Jr.
(U.S. Marshal)

By W.D. Sneed
(Deputy Marshal)

D. Colston 10-13-96
[Sh Staff] Date Certified

NOTE: The original of this warrant is to be returned to U.S. Parole Commissioner of the parole region where it was issued.

I have received a copy of the warrant application dated 11-21-94

Signature Robert J Day

Date 11-22-94

(If subject refuses to sign, Marshal shall so indicate.)

U.S. DEPARTMENT OF [redacted]TICE
UNITED STATES PAROLE COM[redacted]SION

WARRAN[redacted]PPLICATION

Case Of.....	Day, Robert James	FBI No.....	652643N8
Reg. No.....	19440-044	Birth Date.....	2/6/54
Issuing Region.....	Eastern Region	Race.....	White
Date.....	January 21, 1994	Re-Parole-Termination Date.....	9/6/98
District From.....	Western District of Missouri	Violation Date.....	12/23/93
District To.....	Eastern District of North Carolina	Released.....	October 18, 1993
Transferred To.....		Sentence Length.....	10 years (Orig); 2099 days (PV)
Original Offense.....	Bank Robbery		

You shall, unless you have been convicted of a new offense, be given a preliminary interview by an official designated by a Regional Commissioner to determine if there is probable cause to believe that you have violated the conditions of your release, and if so, whether to release you or hold you for a revocation hearing.

At your preliminary interview and any subsequent revocation hearing you may present documentary evidence and voluntary witnesses on your behalf, and, if you deny the charge(s) against you, you may request the presence of those who have given information upon which the charges are based. Such witnesses will be made for questioning unless good cause is found for their non-appearance.

You may be represented by an attorney or other representative of your choice, or, if you are unable to pay for counsel, an attorney will ailable be provided by the U.S. District Court if you fill out and promptly return a Form CJA-22 to a U.S. Probation Officer.

If, after a revocation hearing, you are found to have violated the conditions of your release the Commission may: (1) restore you to supervision, and, if appropriate, (a) reprimand you; (b) modify your conditions of supervision; or (c) refer you to a residential community treatment center for the remainder of your sentence; or (2) revoke your parole or mandatory release, in which case the Commission will also decide when to consider you for further release.

If you have been convicted of a new offense (committed while on parole) which is punishable by a term of imprisonment, you will not receive sentence credit for the time you spent on parole. **Exception: for cases heard in the 9th Circuit beginning on October 22, 1990, the Commission will exercise discretion, in accordance with 28 C.F.R. 2.52 (Appendix), prior to ordering the forfeiture of sentence credit for the time spent on parole.** If the Commission finds that you absconded or otherwise refused to submit to parole supervision, the Commission may order that you not receive credit toward service of your sentence for that amount of time. (If your original sentence was imposed for violation of the District of Columbia Criminal Code, you will not receive credit for time spent on parole regardless of whether or not you have been convicted of a crime.)

A special parole term violator whose parole is revoked shall receive no credit for time spent on parole.

CHARGES:

Charge No. 1 - Violation of Special Condition (DAPS). On or about the following dates 12/23/93, 12/28, 12/30, 1/4/94, 1/5, 1/6, 1/11, 1/13, 1/15/94, subject failed to keep regularly scheduled appointments with Wake County Treatment Center for submission of urine specimens/counseling. This charge is based on information contained in the letter dated 1/18/94 from USPO Massey along with Wake County Treatment Reports.
I ADMIT [ ] or DENY [ ] this charge.

Charge No. 2 - Failure to Report Change in Residence. On or about 1/4/94, subject left his last known residence at 920 Reedy Creek Road, Cary, North Carolina. Subject has failed to advise his USPO of his current address and his whereabouts are unknown. This charge is based on information contained in the letter dated 1/18/94 from USPO Massey.
I ADMIT [ ] or DENY [ ] this charge.

Charge No. 3 - Failure to Report to USPO as Directed. On or about the following dates, subject failed to report to his U.S. Probation Officer as directed: 1/6/94 and 1/14/94. This charge is based on information contained in the letter dated 1/18/94 from USPO Massey.
I ADMIT [ ] or DENY [ ] this charge.

Charge No. 4 - Failure to Report Change in Employment. On or about 12/31/93, subject terminated his employment at John Hazel Paint Company, Cary, North Carolina. Subject failed to advise his USPO of his change in employment. This charge is based on information contained in the letter dated 1/18/94 from USPO Massey.
I ADMIT [ ] or DENY [ ] this charge.

Charge No. 5 - Felonious Financial Transaction Card Theft; Misdemeanor Financial Transaction Card Theft. On or about 1/20/94, subject was arrested by Raleigh, North Carolina, Police for the above-cited offense(s) which occurred on or about 1/20/94. In this offense, the subject stole a credit card and used it to purchase $85.99 worth of goods. This charge is based on information contained in the letter dated 1/21/94 from USPO Massey.
I ADMIT [ ] or DENY [ ] this charge.

United States of America vs.

United States District Court for

DEFENDANT

DOCKET NO.

REG # 19440-044

JUDGMENT AND PROBATION/COMMITMENT ORDER AO-245 (9/82)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: August DAY: 3 YEAR: 1984

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☐ WITH COUNSEL Irvin L. Johnson, Assistant Federal Public Defender
(Name of Counsel)

FILED
AUG 3 1984
R. F. CONNOR, CLK.
U. S. DISTRICT COURT
WEST DISTRICT
OF MISSOURI

PLEA

plea entered on June 29, 1984

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☐ NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged ☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of on or about April 13, 1984, in the Western District of Missouri, by force and violence and by intimidation did take from the person and presence of persons about $3,240.00 in money, belonging to and in the care, custody, control, management and possession of the Empire Bank, Springfield, Missouri, the deposits of which were then insured by the Federal Deposit Insurance Corporation; all in violation of Title 18, United States Code, Section 2113(a), as charged in an indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years pursuant to Title 18, United States Code, Section 4205(a).

The defendant is ordered to make restitution in the amount of $86.00.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON

THIS DATE

By

( ) CLERK

(X) DEPUTY

SIGNED BY

☐ U.S. District Judge

☐ U.S. Magistrate

ROSCOE C. CLARK

Date August 3, 1984

GENERAL CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall, during the period of probation, conduct himself as a law-abiding, industrious citizen and observe all conditions of probation prescribed by the court. **TO THE DEFENDANT** — You shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any change in your place of residence;
(6) follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Maximum probation period (per indictment or information) which may be imposed on defendant eligible for sentencing under the Youth Corrections Act, 18 U.S.C. § 5005 et seq., is one year for conviction of a misdemeanor or six months for conviction of a petty offense.

I hereby certify and return that I have executed (in part) the within commit by delivering the said Robert James Day from Greene County Jail, Medical Center for Federal Prisoners Springfield, Mo. on this 13th day of August, 1984. FFT, FCI Ashland, KY

RETURN M. Thayer W/Mo (Deputy's signature and district)

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

ON 9/4/84 I COMPLETED A PARTIAL TRANSFER OF THE NAMED WITHIN BY ASSUMING CUSTODY AT FCI Ashland AND TRANSPORTATING HIM TO FCI Ashland FOR FURTHER REMOVAL.

_____ United States Marshal.

_____ Deputy Marshal.

BOP BUS LT

ON 8/15/84 I COMPLETED A PARTIAL TRANSFER OF THE NAMED WITHIN BY ASSUMING CUSTODY AT USP Lvn FOR AND TRANSPORTATING HIM TO FCI Ashland FOR FURTHER REMOVAL.

BOP BUS LT

PRESENTENCE REPORT

CONFIDENTIAL

NAME (Last, First, Middle)

Day, Robert James

a/k/a: Day, Kenneth J.
Day, James Robert

DATE: 07/24/84

ADDRESS: Greene County Jail
929 North Robberson
Springfield, Missouri
65802

LEGAL ADDRESS: 1221-A, 124 Court
Miami, Florida 33101
(last address)

"F.B.I. EXEMPT"

DOCKET NO.: 84-03138-01-CR-S-1

RACE: Caucasian

CITIZENSHIP: United States

AGE	DATE OF BIRTH	PLACE OF BIRTH	SEX
30	02/06/54	Leavenworth, Kansas	Male

EDUCATION: GED (high school equivalency)

MARITAL STATUS: Divorced

DEPENDENTS: 2 (Sons)

SOC. SEC. NO.: 498-62-9076

FBI NO.: 652 643 N8

OTHER IDENTIFYING NO.: USMS Prisoner No. 19440-044

OFFENSE

Bank Robbery, 18 U.S.C. 2113(a)
(1-Count Indictment)

PENALTY

20 Years and/or $5,000, plus $86 restitution

CUSTODIAL STATUS: In federal custody in lieu of $100,000 surety bond.

DATE OF ARREST: 04/18/84

PLEA
05/18/84 - Not guilty
06/29/84 - Guilty

VERDICT: Not applicable

DETAINERS OR CHARGES PENDING

See Page -ii-

OTHER DEFENDANTS

None

CONFIDENTIAL
PROPERTY OF U.S. COURTS
SUBMITTED FOR OFFICIAL USE OF
U.S. PAROLE COMMISSION AND
FEDERAL BUREAU OF PRISONS. TO BE
RETURNED AFTER SUCH USE, OR UPON REQUEST.
DISCLOSURE AUTHORIZED ONLY TO
COMPLY WITH 18 U.S.C. 4208(b)(2).

ASSISTANT U.S. ATTORNEY	DEFENSE COUNSEL	
David C. Jones, Esq.	Gregory K. Johnson, Esq. Assistant Federal Public Defender (Appointed)	1949 East Sunshine Suite 3-104 Springfield, Missouri 65804 (417) 881-4090

DISPOSITION

SENTENCING JUDGE

DATE

"F.B.I. EXEMPT"

Detainers or Charges Pending

03/21/63 - A Missouri state parole violator's warrant was issued and that warrant remains outstanding.

"F.B.I. EXEMPT"

11/14/63 - In Raleigh, North Carolina, a warrant is yet pending for Day charging him with obtaining property by false pretense.

-11-

"F.B.I. EXEMPT"

OFFENSE:

Day's first contact with federal authorities occurred on April 18, 1984, when he disembarked from an Ozark Air Lines plane at Lambert Field in St. Louis, Missouri. Subject was taken into custody for questioning regarding the robbery of the Empire Bank located at 2501 North Kansas Street in Springfield, Missouri.

"F.O.I. EXEMPT"

Day appeared before United States Magistrate David D. Noce in St. Louis on April 19, 1984, pursuant to a Complaint filed in the Western District of Missouri on that date charging Day with the robbery of the Empire Bank. A $100,000 surety bond was set, and the defendant was remanded to custody in lieu of bond.

On April 24, 1984, a one-count Indictment was returned in the Western District of Missouri charging a violation of Title 18, United States Code, Section 2113(a). On April 27, 1984, Day appeared before Magistrate Noce in St. Louis for a removal hearing. He was ordered removed to the Western District of Missouri, and the $100,000 bond was continued.

Day made his initial appearance in the Western District of Missouri at Springfield on May 11, 1984, before United States Magistrate James C. England at which time the $100,000 surety bond was continued. On May 18, 1984, Day entered a plea of not guilty to the Indictment before Magistrate England. On June 29, 1984, Day entered a plea of guilty to the Indictment before Chief United States District Court Judge Russell G. Clark, and a presentence report was ordered.

Pretrial Services Information. In that Day has remained in continuous federal custody in lieu of $100,000 surety bond since his arrest, he has not been supervised by Pretrial Services.

Prosecution Version. Information obtained from the files of the United States Attorney and an interview with the investigative Federal Bureau of Investigation (FBI) agent revealed the following circumstances:

On April 13, 1984, at approximately 2:15 p.m., a lone white male, approximately 26 years of age with brown hair, entered the Empire Bank at 2501 North Kansas, Springfield, Missouri. Upon entering the bank, this individual displayed a note indicating "you have 30 seconds, $10,000 in a deposit bag, move, no alarm -- I don't get caught -- no-one gets hurt. Understand? I'll be beside you!" That note was displayed to three bank tellers. After reviewing this note, these three tellers handed $3,240 in Empire Bank funds to the robber. During the course of the robbery, numerous photographs were taken by the bank's surveillance cameras.

At approximately 4:00 p.m. on that same day, FBI agents received information that an individual matching the description of the robber had taken a taxi from a location approximately 100 yards from the Empire Bank to the Springfield airport at approximately 2:30 p.m. As a result, Empire Bank's surveillance photographs were shown to an airport police officer who positively identified the individual depicted in the photograph, as an individual who identified himself as Kenneth J. Day who boarded an Ozark flight to St. Louis, Missouri, at approximately 4:30 p.m.

At approximately 5:10 p.m., an individual who identified himself as Kenneth J. Day was arrested by St. Louis, Missouri, Police Security Officers as he departed the Ozark Air Lines flight from Springfield, Missouri. At the time of the arrest, Day was searched, and $3,154 was recovered. At the time of his arrest, Day was wearing a pair of shoes and sunglasses which matched those worn during the course of the robbery.

Day subsequently consented to a search of his luggage, and a brown and white plaid shirt matching the one worn in the robbery was seized.

Fingerprint identification received by the FBI later revealed that Kenneth J. Day was, in actuality, James Robert Day, a parole violator from the state of Missouri. FBI agents in St. Louis, Missouri, subsequently identified James Robert Day as the same individual depicted in the Empire Bank surveillance photographs taken during the aforementioned robbery.

Information received from Ozark Air Lines in Springfield, Missouri, revealed that on April 18, 1984, the individual posing as Kenneth J. Day purchased an airline ticket to St. Louis, Missouri, with eight $10 bills. As a result, all but $6 of the funds stolen from the Empire Bank have been accounted for.

On May 15, 1984, a spread of various photographs, one of which was the defendant, was shown to two Empire Bank employees who positively identified the defendant as being the individual who robbed that bank.

Victim Impact Statement. Senior Vice President Bill Hawkensmith at Empire Bank advised the total amount of money returned to their bank was the $3,154 which was in Day's possession when he arrived in St. Louis, and thus, the bank loss was $86.

Defendant's Version. The defendant advised that on April 12, 1984, he came to Missouri from Florida, stopping first in Greenville, North Carolina, to see a girlfriend. Day stated he lived with this girlfriend previously for about two years. Day said that when he stopped in North Carolina he and his girlfriend broke up,

and thus, he left North Carolina and returned to Bolivar, Missouri, to see his father. Day stated he left North Carolina as he knew he could not work there. He stated his state parole had been transferred to North Carolina, and he had earlier left North Carolina without telling his probation officer, and thus, he knew he would be in trouble. Day stated he had gone to work in Florida because he had a cousin who was working there as a pilot. After arriving in Missouri and talking with his father, Day contemplated what action he might take in that he had violated the conditions of his state parole. Day stated he knew that he could not go back to North Carolina. He stated he did not have any money and, at that time, was using cocaine, and due to breaking up with his girlfriend, he did not care much and felt sorry for himself.

F. B. I.

Day admitted he robbed the Empire Bank to get money so that he could buy more cocaine. Day stated he went to St. Louis after the bank robbery as he knew an individual there who would sell him some cocaine. Day stated he planned to leave St. Louis to travel to an undetermined destination. He said he did not think much beyond St. Louis but planned to leave Missouri because he felt police officers would be more likely to look for him in Missouri since a parole violator's warrant had been issued, and his father lived in Missouri. Day stated he knew the decisions which he made were not wise, and if he had the same set of circumstances again, he would turn himself in to a state probation officer. Day stated one of the reasons that caused him and his girlfriend to break up was that his girlfriend wanted him to turn himself in, because she would not marry him until his legal obligations were completed.

PRIOR RECORD:

According to checks with federal, state, and local law-enforcement agencies, defendant has the following prior criminal record:

Adult

Date	Offense	Place	Disposition
10/27/74 (Age 20)	Sale of controlled substance	Boone County, Missouri	Pled guilty, 5 years Missouri Department of Corrections, 07/14/75

The defendant advised he was represented by Attorney Dave Bear. Day was convicted of selling amphetamine tablets. According to the defendant, he sold 230 "white crosses" (amphetamines) to an undercover agent for $120. In the state of Missouri, there is an additional five-year parole added to all convictions for sale of a controlled substance. Day was received at the Missouri State

Penitentiary on July 16, 1975, and assigned Register Number 27961. He was paroled on August 16, 1976. On March 21, 1983, while serving the 5-year special parole term, Day was declared an absconder from supervision, and a parole violator's warrant was issued which is yet in effect. When originally paroled, Day was paroled to the Camdenton, Missouri, area; later transferred to Union, Missouri; and eventually that supervision was transferred to North Carolina where he absconded from supervision.

02/14/80 (Age 26)	Possession of marijuana, under 35 grams	Columbia, Missouri	Pled guilty, 6 months in jail, 03/24/80

"F.O.I. EXEMPT"

The defendant advised he was represented by an attorney in this misdemeanor conviction. Day had in his possession a marijuana cigarette which had contents of less than 35 grams of marijuana. When arrested, he was originally investigated for possession of a controlled substance in that he had six blue and white capsules in his possession. He was also investigated for possession of burglary tools in that he had a tire jack handle. He was only charged with possession of marijuana. Although this misdemeanor conviction occurred while Day was on state parole, his parole was not revoked in view of his serving the 6-month sentence.

05/11/83 (Age 27)	Driving while intoxicated	Fayetteville, North Carolina	Pled guilty, fined $100, 90 days jail, suspended for 1 year, 05/12/82

The defendant was arrested and charged with driving while intoxicated. He stated he was given a Breathalyzer examination and tested .14% blood-alcohol content. He advised he was represented by an attorney when he entered his guilty plea. In addition to the fine, the defendant was further ordered not to operate a motor vehicle on North Carolina highways for six months.

04/25/83 (Age 29)	Felony embezzlement	Raleigh, North Carolina	Dismissed, 09/12/83

The defendant was charged in Case Number 83-CRS17476 with embezzling $4,798.22 in checks from Country Quality Meats, Incorporated. The case was later called, and Day did not appear. Thus, the charges were dismissed with leave. The Wake County Prosecutor's Office advised that if Day were rearrested in North Carolina, the charges could then be refiled. The alleged offense occurred between December 3, 1982, and December 13, 1982.

11/14/83 (Age 29)	Obtaining property by false pretense	Raleigh, North Carolina	Warrant unexecuted	yet

A warrant was issued in Raleigh on November 14, 1983, charging the defendant had obtained various property under false pretense by the use of an American Express credit card made out to Robert J. Day Custom Cut Meat. The alleged offense occurred on August 18, 1982. The total amount of purchases was not noted in the prosecutive information. This warrant is yet outstanding and has not been executed.

"F. O. I. EXEMPT"

FAMILY HISTORY:

Defendant. The defendant was born on February 6, 1954, in Leavenworth, Kansas, the second of four children. The defendant and his family lived in Leavenworth until the defendant was two years of age at which time his father sought work in San Bernardino, California, and the family moved to that city. The defendant grew up in San Bernardino, and his family lived there until Day was 16 years of age at which time the family moved to Bolivar, Missouri, as Day's parents both had relatives in that area. Day lived in Bolivar until his parents' divorce in 1972 when he withdrew from high school during his senior year (age 18) to move to San Francisco, California, to seek employment.

According to the defendant, he obtained a job working with a meat company and lived in San Francisco until 1974 when he was extradited to Boone County, Missouri, to face a drug charge. The offense occurred while Day was in Missouri visiting his family. Day was later convicted of this charge and sent to the state penitentiary where he remained until being paroled on August 10, 1976. According to Day, after being paroled, he continued to live in Jefferson City, Missouri, and got married. According to the defendant, he and his wife lived in Jefferson City until 1980 when his wife sought a divorce, and at that time, Day left Jefferson City to move to Greensboro, North Carolina, to accept employment with Custom Cut Meat Company.

Day stated he lived in Greensboro until 1981 when he was transferred to another store which was located in Fayetteville, North Carolina. Day stated he remained in Fayetteville until some time in 1982 when he was again transferred to Raleigh, North Carolina. Day stated he remained in Raleigh until September 3, 1983, when he left to go to Freeburg, Missouri, to work for a meat company. He stated he lived in Freeburg until February, 1984, when he decided to move to Miami, Florida, as he had a cousin there who could get him a job working as a mechanic at the airport. Day stated he remained in Miami until April, 1984, when he flew back to Missouri to visit with his father. He admitted that while in Missouri, he robbed Empire Bank on April 18, 1984, and was arrested later that same day at the airport in St. Louis.

Family members advised Day had never presented any problem for his parents during his developmental years. He was described as a popular individual in high school. He was the captain of the football team during his last year in high school. His family advised he gets along well with most people and is well-liked. His family could give no speculation as to what caused his involvement in the instant matter. One family member speculated that Day might be involved in drugs, but none of them knew for sure whether he had a drug problem. His family, for the most part, was shocked to learn of his involvement in the robbery.

"F.O.I. EXEMPT"

His father advised that one week prior to the bank robbery, he talked with Day who advised that he did not want to go back to the state penitentiary. Day reportedly told his father that if he could go to a federal prison he would turn himself in, but he definitely did not want to go back to the state penitentiary. His father speculated Day's involvement in the instant matter was the result of his not having any money and not wanting to go back to the state penitentiary.

Father. Robert Lee Day, age 48, resides with his wife, Nancy, at Route 1, Bolivar, Missouri. He is employed as a diesel mechanic for Campbell 66 trucking company.

Mother. Gloria Kay Day, age 48, resides at the Blue Acres Trailer Court, Lot 59, Columbia, Missouri. She has worked for the past 10 years in the computer section of the Veterans Administration Hospital in Columbia.

Brother. Terry Lee Day, age 32, resides with his wife, Vicki, and their two sons at 310 Flint Street, Platte City, Missouri. The defendant's brother is a Missouri State Highway Patrolman stationed at Platte City.

Sister. Pamela Sue Norton, age 28, resides with her daughter at 36 Stonegate Mobile Home Park, Columbia, Missouri. She is divorced from Steve Norton and is employed as a secretary for Shelter Insurance Group in Columbia.

Sister. Cynthia Louise Moon, age 26, resides with her husband, Philip, and their one daughter at an address unknown to the defendant and his family in Birmingham, Alabama. The defendant's sister and family have recently moved to a new location, and that address is not known to the family. She is not employed outside of the home. Her husband is employed by a window framing company.

MARITAL HISTORY:

On October 16, 1976, in Bolivar, Missouri, the defendant married Marilyn Jean Jump. The defendant and his wife attended high school together in Bolivar and also attended church together. Day knew his wife for six or seven years before their marriage. The defendant and his wife lived together until 1980 when his wife obtained a divorce in Jefferson City. The defendant stated the marriage failed due to his not making enough money for his family and having to travel a lot with his job. Defendant's ex-wife has now remarried Mike Madden, and they reside in Austin, Texas. This officer was unable to make contact with defendant's ex-wife. [redacted] children were born to this union.

"F. O. I. EXEMPT"

Son. Jeremy Lee Day, age 7, resides with the defendant's ex-wife and her husband in Austin, Texas.

Son. Cory James Day, age 5, resides with his mother and stepfather in Austin, Texas.

HOME AND NEIGHBORHOOD:

The defendant is somewhat unsure as to where he would reside if not confined. His last address was in Miami, Florida.

EDUCATION:

The defendant last attended Bolivar High School in Bolivar, Missouri, where he withdrew in the fall semester of 1971 while in his senior year. The defendant's grades were, for the most part, average. He had a range of grades from inferior in Algebra I, Science, Plane Geometry, American History, and English to grades of excellent in General Shop and Physical Education. As previouly noted, Day was active in sports while in high school and was seen as a popular student.

Day advised that while confined in the Missouri State Penitentiary in 1974, he completed his General Educational Development (high school equivalency). Verification of this information had not been received at the time of this report.

EMPLOYMENT:

August, 1972, to October, 1972 (1 year and 2 months). The defendant advised that during this period of time, he was employed as a meat cutter for Custom Cut Meat Company at El Camino Road in Millbrae, California. Verification of this employment was attempted, but our inquiry was returned with the notation "addressee unknown."

July 14, 1975, to August 10, 1976 (1 year and 1 month). During this period of time, the defendant was incarcerated at the Missouri Department of Corrections.

August, 1976, to May, 1977 (9 months). During this period of time, Day was employed by Weber Meat Service in Freeburg, Missouri. He was a good employee and would be considered eligible for reemployment.

May, 1978, to February 14, 1980 (1 year and 9 months). The defendant advised that during this period, he was employed by DeBroeck's Big Star Market on Dix Road in Jefferson City, Missouri. Subject stated he was employed as the head meat cutter. This writer attempted to contact this firm but could make no contact with the market. Conceivably, the market is out of business.

"F.O.I. EXEMPT"

September 22, 1980, to December 26, 1980 (3 months). The defendant was employed as a laborer and meat cutter for Diggs Packing House in Columbia, Missouri. He was paid $4.50 per hour. His employment was terminated when he left to go to work for another meat processing company. Day would be considered eligible for reemployment by this firm.

January, 1981, to January, 1983 (2 years). Defendant was employed as a meat cutter for Custom Cut Meats in Charlotte, Fayetteville, and Raleigh, North Carolina. He was paid $225 per week and was considered a "very good worker, pleasant personality." Day's employment was terminated because of a disagreement over a shortage.

May 4, 1983, to October 22, 1983 (5 months). The defendant was employed as a meat cutter for Big Star Market in Raleigh, North Carolina. He was paid $6.89 per hour and reportedly abandoned his job. He would not be eligible for reemployment at this store. The defendant stated he resigned to return to Missouri.

September, 1983, to February, 1984 (5 months). The defendant was employed by Weber's Meat Service at Highway 63 South in Freeburg, Missouri. He was employed as a meat cutter at a wage of $1,000 per month. Subject's employment was terminated as the work slowed down considerably. Day was seen as a good employee and would be considered eligible for reemployment by that firm.

The defendant advised that when released from confinement, it is his hope to go back to work cutting meat.

HEALTH:

Physical. The defendant is 5'11" tall and weighs 172 pounds. He has brown hair and blue eyes. He disclaimed having any tattoos. He has a scar on each of his little fingers from a cut he received from a band saw in 1979. The defendant advised that while in the sixth grade, he had an appendectomy at San Bernardino County Hospital. He stated he had a normal recovery and has no ongoing problems from that surgery. With that exception, the defendant denied ever having any serious injuries or illnesses.

Day indicated his use of alcohol is limited to about two beers per day. The defendant advised he does have a problem with drugs. He stated he first started using amphetamines when he left high school in 1972. He stated that at the time, he was working long hours and took the pills to give him additional energy. He said he used ampnetamines from 1972 to 1974. Day advised that in 1980, after his divorce, he returned to using amphetamines and later began using cocaine. He stated that for a period of time, he used approximately two grams of cocaine per week. He stated he was using amphetamines and cocaine until his involvement in the instant matter. Day stated he was glad he left Florida as there were so many drugs available at a cheap price. He advised that at the time of his involvement in the bank robbery, his only thought was to get money to buy more cocaine.

"F. O. I. EXEMPT"

Mental and Emotional. Although no intelligence test scores were available from subject's school records, Day appears to be of average to above-average intelligence. The defendant advised that in August, 1980, he was confined at the Mid-Missouri Mental Health Center in Columbia, Missouri, as a condition of his state parole. Subject stated he did not receive any insight into his problem from his time spent there.

Subject stated he realizes that in the past he has gotten along all right and has been able to stay off drugs when married and working. He stated that when he was divorced in 1980 and was unable to maintain contact with his sons, he became extremely depressed. He stated he reverted to using amphetamines to lift him from this depression. He stated he also used amphetamines to give him energy when tired.

Although the defendant does not appear to have any serious mental and emotional problems, it would appear he could benefit from counseling to help him with unresolved feelings regarding his divorce and depression surrounding the separation from his sons.

MILITARY SERVICE:

The defendant advised that he has never served in any form of military service.

FINANCIAL CONDITION:

Assets. The defendant advised he has no financial assets.

Liabilities. The defendant indicated the extent of his financial liabilities is unpaid child support from December, 1983, to the present totaling $1,750.

EVALUATIVE SUMMARY:

This 30-year-old, divorced, white male comes to the attention of this Court pursuant to his plea of guilty to bank robbery. Day admitted he robbed the Empire Bank in Springfield to obtain money to purchase cocaine. Taken in the robbery was $3,240, of which $3,154 was recovered from Day at the time of his arrest. Defendant indicated he robbed the bank to get money to buy cocaine. The defendant's father advised the defendant had stated prior to the offense that he did not want to return to the state penitentiary and would prefer to be incarcerated in a federal institution.

Day comes from a family that was separated due to the divorce of Day's parents when he was a senior in high school. He grew up, for the most part, during his developmental years in San Bernardino, California. He also lived in Bolivar, Missouri; North Carolina; and more recently in Miami, Florida. From all reports, Day never presented any problems for his parents during his formative years. He was seen as an outgoing person who is well-liked by others. His family, although shocked at his involvement in the instant matter, is yet very supportive of him.

Day has an 11th grade education, having quit school during his 12th grade year at the time of his parents' divorce. Day has worked, for the most part, during his adult life as a meat cutter. It is Day's intention to return to this trade when released from confinement.

The defendant has been married on one occasion. This marriage lasted for approximately four years. Two children were born to this marriage. They reside with the defendant's ex-wife and her present husband in Austin, Texas.

The defendant is in good physical health. He admittedly has a drug abuse problem. Prior to his arrest, he was using amphetamines and cocaine.

Day has never served in any form of military service. Prior to his involvement in the instant offense, he had prior convictions for driving under the influence of alcohol, possession of under 35 grams of marijuana, and sale of controlled substance (amphetamines). The latter conviction resulted in a 5-year state sentence and a 5-year special parole. Subject was serving that 5-year special parole at the time of his involvement in the instant matter, and a state parole violator's warrant has been issued.

SENTENCING DATA:

The following information was obtained from the Statistical Analysis and Reports Division of the Administrative Office of the United States Courts. National statistics are provided for a 12-month period which ended June 30, 1982, while local statistics are provided for a period between February 29, 1980, and May 29, 1984.

NATIONAL (18 U.S.C. 2113(a))
07/01/81 to 06/30/82

	Number	%	Average
Total Sentenced	696	100	
Imprisoned	598	86	130 months (approximately 10 years)
Probation	61	9	53 months
Split	36	5	
Fine Only	1	1	$500

WESTERN MISSOURI (18 U.S.C. 2113(a))
02/29/80 to 05/29/84

	Number	%	Average
Total Sentenced	34	100	
Imprisoned	32	94	10 years
Probation	2	6	54 months
Fine Only	0	0	

U. S. Parole Commission Release Guidelines (estimated):

Salient Factor Score:	6
Parole Prognosis:	Good
*Offense Severity Rating:	Category Five
Estimated Months to Serve if Incarcerated:	36 - 48 Months

*The Parole Commission, in applying their guidelines for the offense severity rating, will consider the overall circumstances of the present offense behavior.
(United States Parole Commission Procedures Manual 2.20-0.4)

Respectfully submitted,

James D. Sellers
United States Probation Officer

JDS:mch
(Typed 7/25/84)

Approved: _____, Ph.D., Senior Probation Officer

U.S. Department of Justice
United States Parole Commission
5550 Friendship Boulevard
Chevy Chase, Maryland 20815-7201

Notice of Action

Name: DAY, Robert

Register Number: 19440-044 Institution: USM Minneapolis, MN

In the case of the above-named, the following parole action was ordered:

EXPEDITED REVOCATION

Revoke Parole. No credit on the sentence shall be given for the period of time beginning 3/10/97 and ending 5/26/97. Continue to a presumptive parole after service of 16 months on 9/27/98 with the Special Drug Aftercare Condition. You shall participate as instructed by your U.S. Probation Officer in a program approved by the Parole Commission for the treatment of narcotic addiction or drug dependency, which may include testing and examination to determine if you have reverted to the use of drugs. You shall also abstain from the use of alcohol and/or all other intoxicants during and after the course of treatment.

THE ABOVE DECISION IS NOT APPEALABLE.

FINDINGS OF FACT:

The Commission finds as a fact that you violated conditions of release as charged as indicated below:

Charge No. 1 - Law Violations: (a) Careless and Imprudent Driving; (b) Driving While Intoxicated; (c) Failure to Appear.

Basis: Your admission.

Charge No. 2 - Violation of Special Condition (Drug/Alcohol).

Basis: Your admission.

Charge No. 3 - Failure to Report Change in Residence.

Basis: Your admission.

REASONS:

Your parole violation behavior has been rated as Category One severity because it involved administrative violations. Your new salient factor score is 2. You have been in federal confinement as a result of your violation behavior for a total of 2 months as of 7/27/97. Guidelines established by

Date: July 24, 1997 **Clerk: sjk**

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STATE USAGE

NFF SECOND SUBMISSION | APPROXIMATE CLASS | AMPUTATION | SCAR

STATE USAGE

LAST NAME, FIRST NAME, MIDDLE NAME, SUFFIX

DAY, ROBERT JAMES

SIGNATURE OF PERSON FINGERPRINTED

Robert J Day

SOCIAL SECURITY NO.

498629076

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ALIASES/MAIDEN
LAST NAME, FIRST NAME, MIDDLE NAME, SUFFIX

FBI NO.	STATE IDENTIFICATION NO.	DATE OF BIRTH MM DD YY	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
652643N8		02 06 1954	M	W	6 00	172	BLU	BR

1. R. THUMB

2. R. INDEX

3. R. MIDDLE

4. R. RING

5. R. LITTLE

6. L. THUMB

7. L. INDEX

8. L. MIDDLE

9. L. RING

10. L. LITTLE

LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY

L. THUMB

R. THUMB

RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY

FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20537

PRIVACY ACT OF 1974 (P.L. 93-579) REQUIRES THAT FEDERAL, STATE, OR LOCAL AGENCIES INFORM INDIVIDUALS WHOSE SOCIAL SECURITY NUMBER IS REQUESTED WHETHER SUCH DISCLOSURE IS MANDATORY OR VOLUNTARY, BASIS OF AUTHORITY FOR SUCH SOLICITATION, AND USES WHICH WILL BE MADE OF IT.

JUVENILE FINGERPRINT SUBMISSION YES ☐ TREAT AS ADULT YES XX	DATE OF ARREST MM DD YY: 9 9 1997	ORI CONTRIBUTOR: FL060027C FED CORR COMPEX-MED ADDRESS: COLEMAN,FL REPLY DESIRED? YES ☒	
SEND COPY TO: (ENTER ORI)	DATE OF OFFENSE MM DD YY	PLACE OF BIRTH (STATE OR COUNTRY): KANSAS	COUNTRY OF CITIZENSHIP: USA
MISCELLANEOUS NUMBERS	SCARS, MARKS, TATTOOS, AND AMPUTATIONS: (R) SHOULDER "EAGLE" (R) KNEE MINOR SCARS		
	RESIDENCE/COMPLETE ADDRESS: 1221 A 124 COURT	CITY: MIAMI	STATE: FL
OFFICIAL TAKING FINGERPRINTS (NAME OR NUMBER): S Jackson	LOCAL IDENTIFICATION/REFERENCE: 19440-044	PHOTO AVAILABLE? YES XX PALM PRINTS TAKEN? YES ☐	

EMPLOYER: IF U.S. GOVERNMENT, INDICATE SPECIFIC AGENCY. IF MILITARY, LIST BRANCH OF SERVICE AND SERIAL NO.	OCCUPATION
CHARGE/CITATION 1. ESCAPE RETURN/ORIG BANK ROBBERY? LATEST PV-TECHNICAL VIOLATION w/ABSCOUNDING 18:4205(a)	DISPOSITION 1. CAG 10 YRS 16 MONTHS
2.	2.
3	3
ADDITIONAL	ADDITIONAL
ADDITIONAL INFORMATION/BASIS FOR CAUTION	STATE BUREAU STAMP

FD-249 (Rev. 12-1-84) ☆U.S. GPO: 1995—405-015/20001

[redacted]

U.S Department of Justice
United States Parole Commission
5550 Friendship Boulevard
Chevy Chase, Maryland 20815-7201

Notice of Action (Corrected as of 8/8/96)

Name: Day, Robert James

Register Number: 19440-044 **Institution:** Butner FCI

In the case of the above-named, parole action was ordered:

No change in presumptive parole and parole effective 8/22/96 with the Special Drug and Alcohol Aftercare Conditions. You shall participate as instructed by your U.S. Probation Officer in a program approved by the Parole Commission for the treatment of narcotic addiction or drug and/or alcohol dependency, which may include testing and examination to determine if you have reverted to the use of drugs or alcohol. You shall also abstain from the use of alcohol and/or all other intoxicants during and after the course of treatment.

REASONS:

Pursuant to 28 C.F.R. 2.14.

POSTED 8-9-96 A Campbell

Appeals Procedure:
THE ABOVE DECISION IS NOT APPEALABLE.

July 9, 1996 Docket Clerk: knj

U.S Department of Justice
United States Parole Commission
5550 Friendship Boulevard
Chevy Chase, Maryland 20815-7201

Notice of Action

FEB 07 1996

Name: DAY, Robert James

Register Number: 19440-044 **Institution:** FCI Butner

In the case of the above-named parole action was ordered:

Rescind Presumptive Parole date of (November 19, 1995). Continue to a Presumptive Parole (August 22, 1996) with the Special Drug and Alcohol Aftercare Conditions. You shall participate as instructed by your U.S. Probation Officer in a program approved by the Parole Commission for the treatment of narcotic addiction or drug and/or alcohol dependency, which may include testing and examination to determine if you have reverted to the use of drugs or alcohol. You shall also abstain from the use of alcohol and/or all other intoxicants during and after the course of treatment. This requires the additional service of 8 months.

FINDINGS OF FACT:
The Commission finds that you have committed the following violations:

CHARGE NO. 1: **Escape.**
Basis: Your admission to the examiner and CDC findings of 7/24/95.

REASONS:

You escaped from non-secure custody which requires 8-16 months to be added to your original presumptive parole date (November 19, 1995). Plus time in escape status (33 days).

Appeals Procedure:
The above decision is appealable to the National Appeals Board under 28 C.F.R. 2.26:

November 20, 1995 Eastern Region Commissioner: John R. Simpson Docket Clerk: dlw

2-7-96

U.S Department of Justice
United States Parole Commission
5550 Friendship Boulevard
Chevy Chase, Maryland 20815-7201

Notice of Action

RECEIVED
INMATE SYSTEMS
FCI - FPC
OCT 25 1995
BUTNER, NC 27509

Name: Day, Robert James

Register Number: 19440-044 **Institution:** CCM-NC / FCI Butner

In the case of the above-named parole action was ordered:

Pursuant to 28 CFR .34, reopen and retard presumptive reparole date of November 19, 1995, and schedule for a rescission hearing on the next available docket, October, 1995.

REASONS:

On 7/26/95, you were found guilty by the DHO of Escape.

Appeals Procedure:
THE ABOVE DECISION IS NOT APPEALABLE.

10-20-95

October 25, 1995 Eastern Region Commissioner: John R. Simpson Docket Clerk: sds

OCT-25-1995 14:50 COMM CORR-BOP RALEIGH, NC 919 856 4777 P.01/01

U.S Department of J ice
United States Parole C mission
5550 Friendship Boule d
Chevy Chase, Maryland 20815-7201

Notice of Action

Name: DAY, Rob rt James

Register Numbe : 19440-044 Institution: FCI Butner

In the case of the above-n ed parole action was ordered:

Revoke Parole. None of the time spent on parole shall be credited. Continue to a Presumpti : Parole after service of 22 months (November 19, 1995), with the Special Drug d Alcohol Aftercare Conditions. You shall participate as instructed by our U.S. Probation Officer in a program approved by the Parole Commission for the treatment of narcotic addiction or drug and/or alcohol dependency, wh ch may include testing and examination to determine if you have reverted to th use of drugs or alcohol. You shall also abstain from the use of alcohol and/or all other intoxicants during and after the course of treatment.

FINDINGS OF FA T:

The Commission finds as a fact that you violated conditions of release as charged as ind cated below:

CHARGE NO. 1: Violation of Special Conditions (DAPS).

CHARGE NO. 2: Failure to Report Change in Residence.

CHARGE NO. 3: Failure to Report to USPO as Directed.

CHARGE NO. 4: Failure to Report Change in Employment.

Basis f r the above stated charges: Report submitted by USPO Massey dated 1/18/94 a d your admission to examiner.

CHARGE NO. 5: Violation of Law: Felonious Financial Transaction Card Theft; Misdemeanor Fi ancial Transaction Card Theft.

Basis: Reports submitted by USPO Massey dated 1/21/94 and 5/24/94; Judgement and C mmitment Order dated 3/14/94.

Verified by John Tobin, JBlake, LE 12-9-94

Appeals Procedure:
The above decision is a pealable to the National Appeals Board under 28 C.F.R. 2.26:

November 30, 1994 Eastern Region Commissioner: John R. Simpson Docket Clerk: dlw

DLW

LEAVE BLANK

STATE USAGE

TYPE OR PRINT ALL INFORMATION IN BLACK

LAST NAME NAM: DAY | FIRST NAME: ROBERT | MIDDLE NAME: J.

FBI LEAVE BLANK

ALIASES

CONTRIBUTOR ORI: NC039017C FED CORR INST BUTNER, NC

SIGNATURE OF PERSON FINGERPRINTED: x Robert Day

DATE OF BIRTH DOB (Month Day Year): 04-06-54

THIS DATA MAY BE COMPUTERIZED IN LOCAL, STATE AND NATIONAL FILES

DATE: 10-4-95 | SIGNATURE OF OFFICIAL TAKING FINGERPRINTS: [signature]

DATE ARRESTED OR RECEIVED DOA: 10-04-95

SEX	RACE	HGT.	WGT.	EYES	HAIR	PLACE OF BIRTH POB
M	W	5'11"	172	BLU	BRO	KS

YOUR NO. OCA: 19440-044

FBI NO. FBI: 652643N8

SID NO. SID: FL04654

SOCIAL SECURITY NO. SOC: 498629076

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CLASS.

REF.

NCIC CLASS - FPC

CHARGE

FINAL DISPOSITION: Escape Return

CAUTION

1. R. THUMB | 2. R. INDEX | 3. R. MIDDLE | 4. R. RING | 5. R. LITTLE

6. L. THUMB | 7. L. INDEX | 8. L. MIDDLE | 9. L. RING | 10. L. LITTLE

LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY | L. THUMB | R. THUMB | RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY

FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20537

PALM PRINTS TAKEN? YES ☐ NO ☒

PHOTO AVAILABLE? YES ☒ NO ☐

IF ARREST FINGERPRINTS SENT FBI PREVIOUSLY AND FBI NO. UNKNOWN, FURNISH ARREST NO. _____ DATE _____

STATUTE CITATION (SEE INSTRUCTIONS NO. 9) CIT

1.

2.

3.

ARREST DISPOSITION (SEE INSTRUCTION NO. 5) ADN

EMPLOYER: IF U.S. GOVERNMENT, INDICATE SPECIFIC AGENCY. IF MILITARY, LIST BRANCH OF SERVICE AND SERIAL NO.

OCCUPATION

RESIDENCE OF PERSON FINGERPRINTED

SCARS, MARKS, TATTOOS, AND AMPUTATIONS SMT

1 Tattoo Right Shoulder

BASIS FOR CAUTION ICO

DATE OF OFFENSE DOO

SKIN TONE SKN

MISC. NO MNU

ADDITIONAL INFORMATION

FD-249 (REV. 12-29-82)

INSTRUCTIONS

1. UNLESS OTHERWISE PROVIDED BY REGULATION IN YOUR STATE, FINGERPRINTS ARE TO BE SUBMITTED DIRECTLY TO FBI IDENTIFICATION DIVISION. FORWARD IMMEDIATELY FOR MOST EFFECTIVE SERVICE.
2. FINGERPRINTS SHOULD BE SUBMITTED BY ARRESTING AGENCY ONLY; (MULTIPLE PRINTS ON SAME CHARGE SHOULD NOT BE SUBMITTED BY OTHER AGENCIES SUCH AS JAILS, RECEIVING AGENCIES ETC.) REQUESTS COPIES OF FBI IDENTIFICATION RECORD FOR ALL OTHER INTERESTED AGENCIES IN BLOCK BELOW. GIVE COMPLETE MAILING ADDRESS INCLUDING ZIP CODE.
3. TYPE OR PRINT ALL INFORMATION.
4. NOTE AMPUTATIONS IN PROPER FINGER BLOCKS.
5. LIST FINAL DISPOSITION IN BLOCK ON FRONT SIDE. IF NOT NOW AVAILABLE, SUBMIT LATER ON FBI FORM R-84 FOR COMPLETION OF RECORD. IF FINAL DISPOSITION NOT AVAILABLE SHOW PRE-TRIAL OR ARRESTING AGENCY DISPOSITION e.g., RELEASED, NO FORMAL CHARGE, BAIL, TURNED OVER TO. IN THE ARREST DISPOSITION BLOCK PROVIDED ON THIS SIDE.
6. MAKE CERTAIN ALL IMPRESSIONS ARE LEGIBLE, FULLY ROLLED AND CLASSIFIABLE.
7. CAUTION - CHECK BOX ON FRONT IF CAUTION STATEMENT INDICATED. BASIS FOR CAUTION (ICO) MUST GIVE REASON FOR CAUTION, e.g., ARMED AND DANGEROUS, SUICIDAL, ETC.
8. MISCELLANEOUS NUMBER (MNU) - SHOULD INCLUDE SUCH NUMBERS AS MILITARY SERVICE, PASSPORT AND/OR VETERANS ADMINISTRATION (IDENTIFY TYPE OF NUMBER.)
9. PROVIDE STATUTE CITATION, IDENTIFYING SPECIFIC STATUTE (example - PL for PENAL LAW) AND CRIMINAL CODE CITATION INCLUDING ANY SUB-SECTIONS.
10. ALL INFORMATION REQUESTED IS ESSENTIAL.
11. PRIVACY ACT OF 1974 (P.L. 93-579) REQUIRES THAT FEDERAL, STATE, OR LOCAL AGENCIES INFORM INDIVIDUALS WHOSE SOCIAL SECURITY NUMBER IS REQUESTED WHETHER SUCH DISCLOSURE IS MANDATORY OR VOLUNTARY, BASIS OF AUTHORITY FOR SUCH SOLICITATION, AND USES WHICH WILL BE MADE OF IT.

REPLY DESIRED? YES ☑ NO ☐

(REPLY WILL BE SENT IN ALL CASES IF SUBJECT FOUND TO BE WANTED)

IF COLLECT WIRE OR COLLECT TELEPHONE REPLY DESIRED, INDICATE HERE: (WIRE SENT ON ALL UNKNOWN DECEASED)

WIRE REPLY ☐ TELEPHONE REPLY ☐ TELEPHONE NO. AND AREA CODE _____

SEND COPY TO: NAME ORI NUMBER AND ADDRESS

LEAVE BLANK

LEAVE BLANK

TYPE OR PRINT ALL INFORMATION IN BLACK

LAST NAME NAM: DAY | FIRST NAME: Robert | MIDDLE NAME:

FBI LEAVE BLANK

STATE USAGE

ALIASES

CONTRIBUTOR ORI: NC039017C FED CORR INST BUTNER, NC

SIGNATURE OF PERSON FINGERPRINTED: + Robert Day

DATE OF BIRTH DOB: Month 06 Day Year 54

THIS DATA MAY BE COMPUTERIZED IN LOCAL, STATE AND NATIONAL FILES

DATE ARRESTED OR RECEIVED DOA: 9-14-94

SEX	RACE	HGT.	WGT.	EYES	HAIR	PLACE OF BIRTH POB
M	W	5'4"	170	BL	Br	KS

DATE: 9-14-94 | SIGNATURE OF OFFICIAL TAKING FINGERPRINTS: Gina Wood

YOUR NO. OCA: 19440-044

CHARGE: Parole Violator; Bank Robbery

FBI NO. FBI: 652643N8

SID NO. SID: 02065 4

SOCIAL SECURITY NO. SOC: 498 62 6016

FINAL DISPOSITION: 7-20-94, 2099 Days Remaining

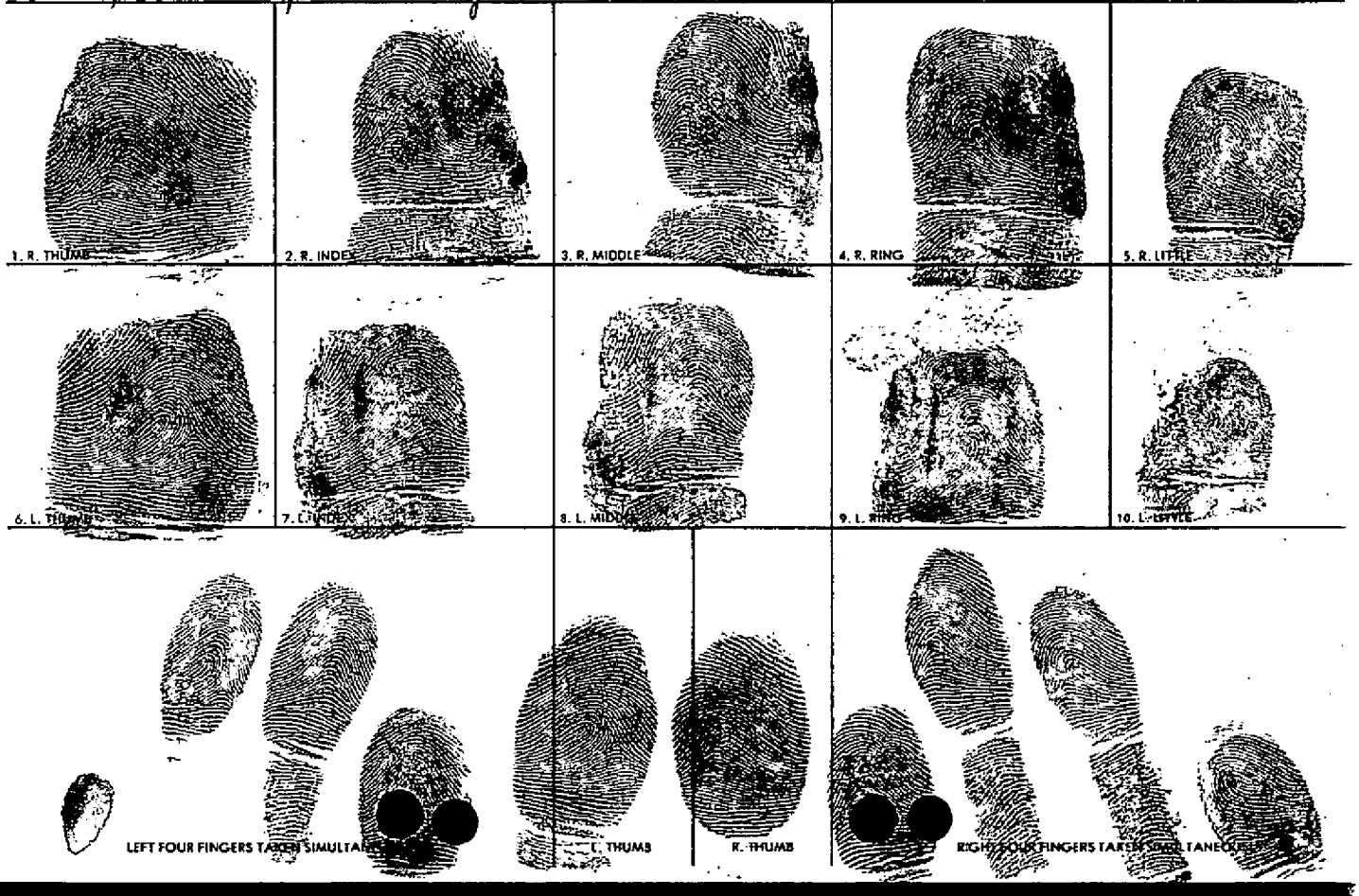
CAUTION

LEAVE BLANK

CLASS.

REF.

NCIC CLASS - FPC



FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20537

PALM PRINTS TAKEN? YES [ ] NO [\]

PHOTO AVAILABLE? YES [\] NO [ ]

IF ARREST FINGERPRINTS SENT FBI PREVIOUSLY AND FBI NO. UNKNOWN, FURNISH ARREST NO. _____ DATE _____

STATUTE CITATION (SEE INSTRUCTIONS NO. 9) CIT

1. 18:2113(A)
2.
3.

ARREST DISPOSITION (SEE INSTRUCTION NO. 5) ADN

EMPLOYER: IF U.S. GOVERNMENT, INDICATE SPECIFIC AGENCY. IF MILITARY, LIST BRANCH OF SERVICE AND SERIAL NO.

OCCUPATION

RESIDENCE OF PERSON FINGERPRINTED

SCARS, MARKS, TATTOOS, AND AMPUTATIONS SMT

None

BASIS FOR CAUTION ICO

DATE OF OFFENSE DOO | SKIN TONE SKN

MISC. NO MNU

ADDITIONAL INFORMATION

FD-249 (REV. 12-29-82)

INSTRUCTIONS

1. UNLESS OTHERWISE PROVIDED BY REGULATION IN YOUR STATE, FINGERPRINTS ARE TO BE SUBMITTED DIRECTLY TO FBI IDENTIFICATION DIVISION. FORWARD IMMEDIATELY FOR MOST EFFECTIVE SERVICE.
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8. MISCELLANEOUS NUMBER (MNU) - SHOULD INCLUDE SUCH NUMBERS AS MILITARY SERVICE, PASSPORT AND/OR VETERANS ADMINISTRATION (IDENTIFY TYPE OF NUMBER.)
9. PROVIDE STATUTE CITATION, IDENTIFYING SPECIFIC STATUTE (example - PL for PENAL LAW) AND CRIMINAL CODE CITATION INCLUDING ANY SUB-SECTIONS.
10. ALL INFORMATION REQUESTED IS ESSENTIAL.
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REPLY DESIRED? YES [\] NO [ ]

(REPLY WILL BE SENT IN ALL CASES IF SUBJECT FOUND TO BE WANTED)

IF COLLECT WIRE OR COLLECT TELEPHONE REPLY DESIRED, INDICATE HERE: (WIRE SENT ON ALL UNKNOWN DECEASED)

WIRE REPLY [ ] TELEPHONE REPLY [ ] TELEPHONE NO. AND AREA CODE _____

SEND COPY TO: NAME ORI NUMBER AND ADDRESS

LEAVE BLANK

☆ U.S.G.P.O. 1992 312-322/40012

U.S. Department of Justice
United States Parole Commission
Chevy Chase, MD 20815

NOTICE OF ACTION

PAROLE FORM H-7
AUG. 85

NAME: Day, Robert

REGISTER NUMBER: 19440-044 INSTITUTION: Bastrop

In the case of the above-named, the following parole action was ordered:

No change in Presumptive Parole; Parole Effective October 18, 1993 with the special drug and alcohol aftercare condition, and you shall abstain from the use of alcohol and/or all other intoxicants both during and after completion of any treatment programs.

(REASONS/CONDITIONS)

THE ABOVE DECISION IS NOT APPEALABLE.

April 21, 1993	SOUTH CENTRAL		fc
(DATE)	(REGION)	(COMMISSIONER)	(DOCKET CLERK)

()INMATE ()PROBATION OFFICER () ()COMMISSION ()FOIA

U.S. Department of Justice
United States Parole Commission
5550 Friendship Boulevard
Chevy Chase, Maryland 20815-7201

Notice of Action

Name: DAY, Robert James Institution: Coleman FCI

Register Number: 19440-044

In the case of the above named the following parole action was ordered.

No change in Presumptive Parole Date of September 27, 1998 and Parole Effective September 27, 1998.

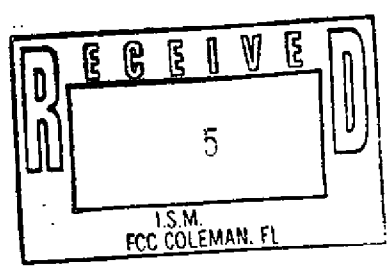
With the special condition(s) as indicated below :
You will be subject to the Special Drug Aftercare Condition. You shall participate as instructed by your U.S. Probation Officer in a program (inpatient or outpatient) approved by the U.S. Parole Commission for the treatment of narcotic addiction or drug dependency, which may include testing and examination to determine if you have reverted to the use of drugs. You shall also abstain from the use of alcohol and/or all other intoxicants during and after the course of treatment.

The decision to grant the Parole Effective Date is **NOT APPEALABLE**.
The decision to add the Special Drug Aftercare Condition is **APPEALABLE**.

REASONS:

Pursuant to 28 C.F.R. §2.14.

cc: U.S. Probation Office
Western District of Missouri
253 U.S. Courthouse
811 Grand Avenue
Kansas City, MO 64106-1970



Date: March 24, 1998 Page 1 of 1 JEH

U.S. Department of Justice
United States Parole Commission
5550 Friendship Boulevard
Chevy Chase, Maryland 20815-7201

Notice of Action

RECEIVE
OCT - 2 1998
U.S.M.

Name: DAY, Robert James Institution: Coleman FCI

Register Number: 19440-044

In the case of the above named the following parole action was ordered.

Reopen.

You shall be subject to the Special Drug Aftercare Condition. You shall participate as instructed by your U.S. Probation Officer in a program (inpatient or outpatient) approved by the U.S. Parole Commission for the treatment of narcotic addiction or drug dependency, which may include testing and examination to determine if you have reverted to the use of drugs. You shall also abstain from the use of alcohol and/or all other intoxicants during and after the course of treatment.

In addition, you will be subject to the Special Community Corrections Center Condition. You shall reside in and participate in a program of the Community Corrections Center as instructed until discharged by the center director, but no later than 120 days from admission.

The decision to add the Special CCC Condition is **appealable.**

You may obtain appeal forms from your caseworker or U.S. Probation Officer and they must be filed with the Commission within thirty days of the date this Notice was sent. Copies of this Notice are sent to your institution and to your probation officer. In certain cases, copies may also be sent to the sentencing court. You are responsible for advising any others, if you so wish.

REASONS:

Special CCC Condition added for release planning purposes, pursuant to 28 C.F.R. §2.28(e).

cc: Kevin L. Connolley
Senior U.S. Probation Officer
Eastern District of North Carolina
2 Princess Street, Suite 308
P.O. Box 2729
Wilmington, NC 28402-2729

Date: October 20, 1998 Clerk: JEH

BOP-COM Page 1 of 1 DAY.194

Cpy to Unit 10-22-9

STATE OF NORTH CAROLINA

In The General Court of Justice
☐ District ☒ Superior Court Division

File No.
83 CRS 17476
83 CRS 77992

Film No
85-14,61

WAKE County RALEIGH Seat of Court (if applicable)

STATE VERSUS

Defendant
ROBERT JAMES DAY

Race	Sex	Age
WHITE	MALE	30

JUDGMENT AND COMMITMENT

☐ Misdemeanor
☒ Fair Sentencing Act Felony
☐ Pre-Fair Sentencing Act Felony

Attorney for State: BOBBIE SMITH
☐ Def. found not indigent
☐ Def. Waived attorney

Attorney for Defendant: FRED HEHRE, III
☐ Retained
☒ Appointed

In open court the defendant appeared for trial on the following File No(s). and Charge(s) (include dates of offenses):

83 CRS 17476 EMBEZZLEMENT 12-3-82

83 CRS 77992 OBTAINING PROPERTY BY FALSE PRETENSES 8/18/82

The defendant ☒ pled guilty to ☐ was found guilty by a jury of. ☐ was found guilty by the court of: ☐ pled no contest to:

Offense(s)	G.S. No.	Felony/Misd	Felony Class	Maximum Prison Term Allowed by Law	Presumptive Term
EMBEZZLEMENT	14-90	FEL	H	TEN (10) YEAR	THREE (3) YEARS
OBTAINING PROPERTY BY FALSE PRETENSES	14-100	FEL	H	TEN (10) YEAR	THREE (3) YEAR

The above listed offenses are consolidated for the purpose of judgment

The Court having considered evidence arguments of counsel and statement of the defendant ORDERS AND ADJUDGES that the defendant be imprisoned

For a term of:
FIVE (5) YEARS
THIS SENTENCE IS RUN CONCURRENTLY WITH ALL OTHER SENTENCES NOW SERVING

In the custody of the
☒ N.C. Dept. of Correction
☐ Sheriff of _____ County

NOTE: For Fair Sentencing Act Felonies, Judge may not impose a minimum and maximum prison term.

☐ The sentence imposed above shall begin at the expiration of all of sentences which the defendant is presently obligated to serve.
☐ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

Case number, county & court in which prior sentence imposed, date sentence imposed

(check all that apply)

☐ The defendant shall serve as a committed youthful offender (CYO) pursuant to G.S. Chapter 148 Article 3B

☐ The defendant should not obtain the benefit of release under G.S. 148-49.15

☒ The defendant shall be given credit for 0 days spent in confinement prior to the date of this judgment

☐ The defendant shall pay the costs

☐ The defendant shall pay a fine of $ ___

☐ Work release is recommended

☐ Immediate work release is recommended

☐ The Court does not recommend restitution or reparation as a condition of attaining work release or parole *(this condition of parole is not applicable to Fair Sentencing Act Felonies.)*

☐ The Court recommends that as a condition of attaining work release or parole *(this condition of parole is not applicable to Fair Sentencing Act Felonies.)* the defendant pay restitution as provided below

☐ The Court recommends that the defendant be required to pay from his work release earnings restitution as provided below

☐ Restitution is to be paid to the Clerk of Superior Court to be disbursed as follows

CERTIFIED TRUE COPY FROM ORIGINAL
Clerk of Superior Court, Wake County
By: _____ Asst. / Deputy Clerk of Superior Court

Fine	Costs	Reimbursement for	Restitution	Total Amount
$	$	Attorney's Fee $	$	$

Name and Address of persons to receive restitution

Date: 03/13/01

AOC-CR-301
Rev. 9/93

Material opposite unmarked squares is to be disregarded as surplusage

MARKED FOR IDENTIFICATION
State's Proposed Exhibit 3
C167783 5/9/01

STATE OF NORTH CAROLINA
In The General Court of Justice
Superior Court Division
Wake County

File No.
83CRS 17476
83CRS 77992
Firm No

STATE VERSUS

Defendant
Robert James Day

TRANSCRIPT OF PLEA

G.S. 15A-1022

The defendant, having offered a plea of guilty and being first duly sworn, makes the following answers to the questions set out below:

	Answers
1. Are you able to hear and understand me?	Yes
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you?	Yes
3. Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other intoxicants? (a) When was the last time you used or consumed any such substance?	No
4. Have you discussed your case fully with your lawyer and are you satisfied with his legal services?	Yes
5. (a) Do you understand that you are pleading (guilty) (~~no contest~~) to the felonies of embezzlement and obtaining property by false pretenses, Class H felonies?	Yes
5. (b) Do you understand that you are pleading (guilty) (no contest) to the misdemeanors of ____?	
6. Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge?	Yes
7. Do you understand that upon your plea you could be imprisoned for a possible maximum sentence of 20 years ____ months (and that the ~~mandatory minimum~~ presumptive sentence is 6 years ____ months)?	Yes
8. Do you understand that you have the right to plead not guilty and be tried by a jury and at such trial to be confronted with and to cross-examine the witnesses against you, and by this plea you give up these and your other constitutional rights relating to trial by jury?	Yes
9. Do you now personally plead (guilty) (~~no contest~~)?	Yes
10. (a) [*If applicable*] Are you in fact guilty?	Yes
(b) [*If applicable*] Do you understand that upon your plea of ~~no contest~~ you will be treated as being guilty whether or not you admit your guilt?	
11. Have you agreed to plead as a part of a plea arrangement? Before you answer, I advise you that the Courts have approved plea negotiating, and if there is such, you may advise me truthfully without fear of incurring my disapproval.	Yes
12. [*If applicable*] The prosecutor and your lawyer have informed the Court that these are all the terms and conditions of your plea. Misdemeanor charges contained in 82CRS50191, 82CRS66453, and 82CRS66452 will be dismissed by the State. The Defendant shall receive an active prison sentence of 5 years, to run concurrent with other sentences presently being served.	
(a) Is this correct as being your full plea arrangement?	Yes
(b) Do you now personally accept this arrangement?	Yes

CERTIFIED COPY FROM ORIGINAL
Clerk of Superior Court, Wake County
By: _____ Assistant / Deputy Clerk of Superior Court
Date: 3/13/11

AOC-CR-300
Rev. 9-83

(over)

	Answer
13. [Other than the plea arrangement between you and the prosecutor] has anyone made any promises or threatened you in any way to cause you to enter this plea against your wishes?	No
14. Do you enter this plea of your own free will, fully understanding what you are doing?	Yes
15. Do you have any questions about what has just been said to you or about anything else connected with your case to this point?	No

I am 30 years of age and have completed the 11½ grade of school. (List any additional education if applicable.)

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. Neither my lawyer nor anyone else has told me to give false answers in order to have the Court accept my plea in this case. The conditions of the plea as stated on the reverse hereof, if any, are accurate.

SWORN AND SUBSCRIBED TO BEFORE ME	Date 1/18/85
Date 1/18/85	Signature of Defendant Robert J. Day
Signature of Deputy of Defendant Clerk of Superior Court Phyllis B. Johnson	

CERTIFICATION BY LAWYER FOR DEFENDANT

As lawyer for the defendant, Robert James Day, I hereby certify that the conditions stated on the reverse hereof, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself upon which the defendant's plea was entered. I further certify that I have fully explained to the defendant the nature and elements of the charges to which he is pleading.

Date 1/18/85	Signature of Attorney for Defendant Frederick W. Hobbs

CERTIFICATION BY PROSECUTOR

As prosecutor for the 10th Judicial District, I hereby certify that the conditions stated on the reverse hereof, if any, are the terms agreed to by the defendant and his lawyer and myself for the entry of the plea by the defendant to the charge in this case.

Date 1/18/85	Signature of Prosecutor Barbara A Smith

PLEA ADJUDICATION

Upon consideration of the record proper, evidence presented, answers of defendant, and statements of the lawyer for the defendant and the prosecutor, the undersigned finds:

1. That there is a factual basis for the entry of the plea.
2. That the defendant is satisfied with his lawyer.
3. That the defendant is competent to stand trial and that the plea is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's plea is hereby accepted by the Court and is ordered recorded.

Date 1/18/85	Signature of Presiding Judge J. M. Reed

STATE OF NORTH CAROLINA
In The General Court of Justice
Superior Court Division
Wake County

File No.
83CRS 77992
File No

STATE VERSUS

Defendant
Robert James Day

INFORMATION
G.S. 15A-644

Date of Offense
8/18/82

Offense in violation of G.S.
14-100

Offense
Obtaining Property by False Pretenses

I, the undersigned prosecutor, upon information and belief allege that on or about the date of offense shown and in the County indicated above, the defendant unlawfully, willfully ~~and~~ feloniously did & Kenwinger, did obtain goods and services from various merchants through the use of an American Express Credit card by means of a false pretense which was calculated to & did deceive. The false pretense consisted of the following: Obtaining a credit card in the name of "Robert J. Day/Custom Cut Meats" stating that he was the business owner, when in fact he was not, and by [redacted] continuing to use said card [redacted] after termination of its validity by due & proper notification.

CERTIFIED TRUE COPY FROM ORIGINAL
Clerk of Superior Court, Wake County

By: _____
Assistant/Deputy Clerk of Superior Court

Date: 3/13/11

Signature of Prosecutor
Barbara A Smith

WAIVER

I, the undersigned defendant, waive the finding and return into Court of a Bill of Indictment and agree that the case may be tried upon the above information.

Date
1/17/85

Signature
Robert J Day

Signature of Attorney for Defendant
Frederick W. Roberts

AOC-CR-123
Rev. 5/82

Department or Agency of Officer

Signature of Attorney

FINAL DISPOSITION REPORT

NAME ON FINGERPRINT CARD SUBMITTED TO SBI (LAST FIRST MIDDLE)	SOCIAL SECURITY NO.	SBI CHECK NUMBER (CKN)
Day Robert James	498-62-7076	A096846

DATE OF BIRTH	SEX	RACE	ARREST NO. (OCA)	DATE ARRESTED OR RECEIVED
2-6-54	M	W	66481	11-14-93

OFFENSES CHARGED AT ARREST

Obtaining Property by False Pretense.

CONTRIBUTOR OF FINGERPRINTS (INCLUDE COMPLETE NAME AND LOCATION OF AGENCY, TOGETHER WITH ORI NUMBER.)

NC002013Y
CITY-COUNTY BUREAU OF IDENTIFICATION
P. O. BOX 550
RALEIGH, N. C. 27602

CERTIFIED TRUE COPY FROM ORIGINAL
Clerk of Superior Court, Wake County

By: _____
Assistant/Deputy Clerk of Superior Court

Date: 3/13/01

RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY

If this warrant for arrest is not served within one hundred and eighty (180) days, it must be returned to the clerk of court in the county in which it was issued with the reason for the failure of service noted thereon. The officer must state all steps taken by his department in attempting to execute the warrant and any information obtained about the whereabouts of the defendant.

RETURN OF SERVICE

I certify that this warrant was received and served as follows:

Date Received	Date Served	Date Returned
10 Dec 87	10 Dec 87	

☒ By arresting the defendant and bringing him before:

Name of Judicial Official

☐ This warrant WAS NOT served for the following reason.

~~AFTER DUE AND DILIGENT SEARCH THE DEFENDANT, WITNESS IS NOT TO BE FOUND IN RALEIGH, NC~~
RALEIGH POLICE DEPARTMENT

Signature of Officer Making Return

Department or Agency of Officer

WCSD Ralph Crawford

RETURN FOLLOWING REDELIVERY

I certify that this warrant was received and served as follows

Date Received	Date Served	Date Returned

☐ By arresting the defendant and bringing him before:

Name of Judicial Official

☐ This warrant WAS NOT served for the following reason.

Signature of Officer Making Return

Department or Agency of Officer

PLEA: ☐ Guilty ☐ Not Guilty ☐ No Contest

VERDICT: ☐ Guilty ☐ Not Guilty

JUDGMENT: It is ordered that Defendant:

☐ pay a fine of $ _____ and costs.

☐ be imprisoned in jail of _____ County for _____ assigned to North Carolina Department of Correction. With defendant's consent, sentence is suspended for _____ on condition(s): that he:

1. ☐ pay a fine of $ _____ and costs.
2. ☐ surrender his operator's license to the Clerk of Superior Court and not operate a motor vehicle on the highways of North Carolina for _____ from this date.
3. ☐ pay the sum of $ _____ to the Clerk of Superior Court for use and benefit of _____
4. ☐ Not violate any laws of the State of North Carolina for _____
5. ☐ Other _____

Defendant probable cause

☐ No probable cause is found as to any charge and this case is dismissed
☒ Probable cause is found and the defendant is bound over to Superior Court for action by the grand jury.

☐ The defendant, in open court, gives notice of appeal to the ☐ District Court ☒ Superior Court.

Date: 12/21/87 Signature: [signature] ☐ Magistrate ☒ District Court Judge

WAIVER OF PROBABLE CAUSE HEARING

The undersigned defendant, with the consent of his attorney, waives his right to a probable cause hearing.

Date

Signature of Defendant

Signature of Attorney

File No.

112 WARRANT FOR ARREST

OBTAINING PROPERTY BY FALSE PRETENSES

Offense in Violation of G.S. 14-100 2632

Date of Offense 18 Aug 1982

The State of North Carolina VS.

Defendant's Name & Address
ROBERT JAMES DAY
916 D Heatherdge Ct
Cary

Race W | Sex M | Date of Birth 29

Defendant's Employer

Complainant (Name, Address or Department, Phone)
Jeff Burns
755 6420
RPD

Witnesses (Names, Addresses, Phone No.'s)
J. Larson Ward
Resident Agent AMEX
245 Peachtree Center Parkway
Suite 260, Atlanta GA
904 - 391-9290

12

STATE OF NORTH CAROLINA Wake County

In the General Court of Justice
District Court Division

To any officer with authority and jurisdiction to execute a warrant for arrest for the offense charged below:

I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant unlawfully, willfully and feloniously did and knowingly and designedly with the intent to cheat and defraud, obtain and attempt to obtain (DID OBTAIN) goods + Services from various Merchants thru L'Humbre / An American Express Card by means of a false pretense which was calculated to deceive and did deceive. (STOLE CARD 9/1001)

The false pretense consisted of the following: OBTAINING a American Express Credit Card in the name of Robert J. Day / Custom Cut Meats, stating he was the Business owner. And upon use of the Card, failed to Comply with the Stipulations of the Card and obtained various goods + services. Failing to make due and Prompt payments upon Lawful demand. And Continuing to use the Card upon Termination of the relationship by the said Robert J. Day.

CERTIFIED TO BE A TRUE COPY OF THE ORIGINAL ON FILE IN THIS OFFICE
Clerk of Superior Court, Wake County

By: _____
Assistant/Deputy Clerk of Superior Court

Date: 3/13/01

in violation of the law referenced on this Warrant.

You are directed to arrest the defendant and bring him without unnecessary delay before a judicial official to answer the charges above.

This warrant is issued upon information furnished under oath by the complainant or complainants listed.

Date 19 Nov 1982

Signature _____

☐ Magistrate ☐ Deputy CSC ☐ Asst. CSC
☐ Clerk of Superior Court

STATE OF NORTH CAROLINA

File No. 94 CRS 4336

WAKE County — RALEIGH Seat Of Court

In The General Court Of Justice

NOTE: *(This form is not to be used for multiple offenses unless they are consolidated for judgment.)*

☐ District ☒ Superior Court Division

STATE VERSUS

Defendant: ROBERT JAMES DAY

JUDGMENT AND COMMITMENT

G.S. 15A-1301

Race	Sex	DOB	Pre-FSA Felony
WHITE	MALE	2/6/54	☐

Attorney For State: SUSAN EDWARDS — ☐ Def. Found Not Indigent ☐ Def. Waived Attorney

Attorney For Defendant: J. DUNN — ☒ Appointed ☐ Retained

☐ DWI Offense — Level Of Punishment (G.S. 20-179):

Driver's License No. (DWI Only):

State (DWI Only):

The defendant ☒ pled guilty to: ☐ was found guilty by the Court of: ☐ was found guilty by a jury of: ☐ pled no contest to:

File No.(s) And Offense(s)	Date Of Offense	G.S. No.	Fel./M.	Class	Max. Term	Presumptive
FINANCIAL TRANACTION CARD THEFT	1/20/94	14-113.9	FEL	J	three	3) YRS. ONE (1) Y

The above offenses are consolidated for the purpose of judgment.

The Court having considered evidence, arguments of counsel and statement of the defendant Orders that the defendant be imprisoned

for a term of: TWO (2) YEARS

in the custody of the ☒ N.C. Dept. of Correction ☐ Sheriff of _____ County

The defendant shall be given credit for -48- days spent in confinement prior to the date of this Judgment as a result of this charge.

☐ The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.

☐ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

(NOTE: *List the Case Number, Date, County And Court In Which Prior Sentence Imposed.)*

(check all that apply)

☐ The defendant shall serve as a committed youthful offender pursuant to G.S. Chapter 148, Article 3B.

☐ The defendant should not obtain the benefit of release pursuant to G.S. 148-49.15.

☐ The defendant shall pay the costs.

☐ The defendant shall pay a fine of $ _____

☐ Immediate work release is recommended pursuant to G.S. 148-33.1. ☐ Work release is recommended. ☐ Work release is not recommended.

☐ With the consent of the defendant, work release is ordered under the conditions set forth in the attached order *(applies to misdemeanants only)*.

☐ The Court does not recommend that the defendant be required to pay restitution or reparation, as a condition of parole if parole is granted, or from his earnings if work release is granted.

☒ The Court recommends that the defendant be required to pay, as a condition of parole if parole is granted, or from his earnings if work release is granted, the items and amounts set out below.

Fine	Costs	Restitution	Reimbursement For Counsel Fee(s) And Other Expenses	Total Amount Due
$	$ 132.00	$	$ 240.00	$ 372.00

CERTIFIED TRUE COPY FROM ORIGINAL
Superior Court, Wake County

Names and address(es) of aggrieved party (parties) to receive restitution *(specify amount if more than one aggrieved party)*

By: _____
Asst. Clerk/Deputy Clerk of Superior Court

Date: 03/13/01

AOC-CR-301, Rev. 3/87 Material opposite unmarked squares is to be disregarded as surplusage.

The Court further recommends:

FOR USE WITH FAIR SENTENCING ACT FELONIES ONLY

The Court has considered the aggravating and mitigating factors in G.S. 15A-1340.4(a) and

- [ ] makes no written findings because the prison term imposed does not require such findings.
- [x] makes no written findings because the prison term imposed is pursuant to a plea arrangement as to sentence under Article 58 of G.S. Chapter 15A.
- [ ] makes written findings set forth on the attached Findings of Factors in Aggravation and Mitigation of Punishment (AOC-CR-303).

AWARD OF FEE TO COUNSEL FOR DEFENDANT

- [x] A hearing was held in open court in the presence of the defendant at which time a fee, including expenses, was awarded the defendant's appointed counsel or assigned public defender.

ORDER OF COMMITMENT

It is ORDERED that the Clerk deliver three certified copies of this Judgment and Commitment to the Sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until he shall have complied with the conditions of release pending appeal.

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*
3/14/94	HON. DEXTER BROOKS	

APPEAL ENTRIES

- [ ] The defendant gives notice of appeal from the judgment of the District Court to the Superior Court. The current pretrial release order shall remain in effect. [ ] except that:

- [ ] The defendant gives notice of appeal from the judgment of the Superior Court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on Form AOC-CR-350.

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*

ORDER OF COMMITMENT AFTER APPEAL

Date Remanded To District Court	*Date Appeal Dismissed*	*Date Withdrawal Of Appeal Filed*	*Date Appellate Opinion Certified*

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the Sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the official named in this Judgment and furnish that official three certified copies of this Judgment and this Order as authority for the commitment and detention of the defendant.

Date	*Signature Of Clerk*
	[ ] *Deputy CSC* [ ] *Assistant CSC* [ ] *Clerk Of Superior Court*

CERTIFICATION

I certify that this Judgment and Commitment with the attachment marked below is a true and complete copy of the original which is on file in this case.

- [ ] Findings Of Factors In Aggravation And Mitigation Of Punishment (AOC-CR-303)
- [ ] Determination Of Sentencing Factors In DWI Cases (AOC-CR-311)
- [ ] Appeal Entries (AOC-CR-350)

Date	*Signature And Seal*
Date Certified Copies Delivered To Sheriff 3/14/94	[ ] *Deputy CSC* [ ] *Assistant CSC* [ ] *Clerk Of Superior Court*

Material opposite unmarked squares is to be disregarded as surplusage.

STATE OF NORTH CAROLINA

File No. 94 CPS 4336

WAKE County — RALEIGH Seat Of Court

In The General Court Of Justice: ☐ District ☒ Superior Court Division

NOTE: *(This form is not to be used for multiple offenses unless they are consolidated for judgment.)*

STATE VERSUS

Defendant: ROBERT JAMES DAY

Race	Sex	DOB	Pre-FSA Felony
WHITE	MALE	2/6/54	☐

JUDGMENT AND COMMITMENT

G.S. 15A-1301

Attorney For State	Def. Found Not Indigent	Def. Waived Attorney	Attorney For Defendant	Appointed	Retained
SUSAN EDWARDS	☐	☐	J. DUNN	☒	☐

DWI Offense	Level Of Punishment (G.S. 20-179)	Driver's License No. (DWI Only)	State (DWI Only)
☐			

The defendant ☒ pled guilty to: ☐ was found guilty by the Court of: ☐ was found guilty by a jury of: ☐ pled no contest to:

File No.(s) And Offense(s)	Date Of Offense	G.S. No.	Fel./M.	Class	Max. Term	Presumptive
FINANCIAL TRANACTION CARD THEFT	1/20/94	14-113.9	FEL	J	three	3) YRS. ONE (1) Y

The above offenses are consolidated for the purpose of judgment.

The Court having considered evidence, arguments of counsel and statement of the defendant Orders that the defendant be imprisoned

for a term of: TWO (2) YEARS

in the custody of the ☒ N.C. Dept. of Correction ☐ Sheriff of _____ County

The defendant shall be given credit for -48- days spent in confinement prior to the date of this Judgment as a result of this charge.

☐ The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.

☐ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

(NOTE: *List the Case Number, Date, County And Court In Which Prior Sentence Imposed.)*

(check all that apply)

☐ The defendant shall serve as a committed youthful offender pursuant to G.S. Chapter 148, Article 3B.

☐ The defendant should not obtain the benefit of release pursuant to G.S. 148-49.15.

☐ The defendant shall pay the costs.

☐ The defendant shall pay a fine of $ _____

☐ Immediate work release is recommended pursuant to G.S. 148-33.1. ☐ Work release is recommended. ☐ Work release is not recommended.

☐ With the consent of the defendant, work release is ordered under the conditions set forth in the attached order *(applies to misdemeanants only).*

☐ The Court does not recommend that the defendant be required to pay restitution or reparation, as a condition of parole if parole is granted, or from his earnings if work release is granted.

☒ The Court recommends that the defendant be required to pay, as a condition of parole if parole is granted, or from his earnings if work release is granted, the items and amounts set out below.

Fine	Costs	Restitution	Reimbursement For Counsel Fee(s) And Other Expenses	Total Amount Due
$	$ 132.00	$	$	$ 132.00

Names and address(es) of aggrieved party (parties) to receive restitution *(specify amount if more than one aggrieved party)*

COPY FROM ORIGINAL
Clerk of Superior Court, Wake County

By: _____
Assistant/Deputy Clerk of Superior Court

Date: 02/09/01

AOC-CR-301, Rev. 3/87 Material opposite unmarked squares is to be disregarded as surplusage.

The Court further recommends:

FOR USE WITH FAIR SENTENCING ACT FELONIES ONLY

The Court has considered the aggravating and mitigating factors in G.S. 15A-1340.4(a) and

☐ makes no written findings because the prison term imposed does not require such findings.

☒ makes no written findings because the prison term imposed is pursuant to a plea arrangement as to sentence under Article 58 of G.S. Chapter 15A.

☐ makes written findings set forth on the attached Findings of Factors in Aggravation and Mitigation of Punishment (AOC-CR-303).

AWARD OF FEE TO COUNSEL FOR DEFENDANT

☒ A hearing was held in open court in the presence of the defendant at which time a fee, including expenses, was awarded the defendant's appointed counsel or assigned public defender.

ORDER OF COMMITMENT

It is ORDERED that the Clerk deliver three certified copies of this Judgment and Commitment to the Sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until he shall have complied with the conditions of release pending appeal.

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*
3/14/94	HON. DEXTER BROOKS	

APPEAL ENTRIES

☐ The defendant gives notice of appeal from the judgment of the District Court to the Superior Court. The current pretrial release order shall remain in effect. ☐ except that:

☐ The defendant gives notice of appeal from the judgment of the Superior Court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on Form AOC-CR-350.

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*

ORDER OF COMMITMENT AFTER APPEAL

Date Remanded To District Court	*Date Appeal Dismissed*	*Date Withdrawal Of Appeal Filed*	*Date Appellate Opinion Certified*

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the Sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the official named in this Judgment and furnish that official three certified copies of this Judgment and this Order as authority for the commitment and detention of the defendant.

Date	*Signature Of Clerk*
	☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

CERTIFICATION

I certify that this Judgment and Commitment with the attachment marked below is a true and complete copy of the original which is on file in this case.

☐ Findings Of Factors In Aggravation And Mitigation Of Punishment (AOC-CR-303)
☐ Determination Of Sentencing Factors In DWI Cases (AOC-CR-311)
☐ Appeal Entries (AOC-CR-350)

Date	*Signature And Seal*
Date Certified Copies Delivered To Sheriff 3/14/94	☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

Material opposite unmarked squares is to be disregarded as surplusage.

STATE OF NORTH CAROLINA

File No. 94CRS4336

WAKE County

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

Robert J. Day

TRANSCRIPT OF PLEA

G.S. 15A-1022

The defendant, having offered a plea of Guilty and being first duly sworn, makes the following answers to the questions set out below:

	Answers
1. Are you able to hear and understand me?	Yes
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you?	Yes
3. Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other intoxicants?	No
(a) When was the last time you used or consumed any such substance?	Sun
4. Have you discussed your case fully with your lawyer and are you satisfied with his legal services?	Yes
5. (a) Do you understand that you are pleading (guilty) ~~(no contest)~~ to the felonies of financial transaction card theft?	Yes
5. (b) Do you understand that you are pleading (guilty) (no contest) to the misdemeanors of NA?	NA
6. Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge?	Yes
7. Do you understand that upon your plea you could be imprisoned for a possible maximum sentence of 3 years NA months (and that the mandatory minimum sentence is NA years NA months) (or you could be fined up to $ NA) (or you could be both imprisoned and fined)?	Yes
8. Do you understand that you have the right to plead not guilty and be tried by a jury and at such trial to be confronted with and to cross-examine the witnesses against you, and by this plea you give up these and your other constitutional rights relating to trial by jury?	Yes
9. Do you understand that, if you are not a citizen of the United States of America, this plea may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law?	NA
10. Do you now personally plead (guilty) (no contest)?	Yes
11. (a) *(if applicable)* Are you in fact guilty?	Yes
(b) *(if applicable)* Do you understand that upon your plea of no contest you will be treated as being guilty whether or not you admit your guilt?	NA
12. Have you agreed to plead as a part of a plea arrangement? Before you answer, I advise you that the Courts have approved plea negotiating, and if there is such, you may advise me truthfully without fear of incurring my disapproval.	Yes

CERTIFIED FROM ORIGINAL

By: _____
Assistant/Deputy Clerk of Superior Court

Date: 3/13/01

AOC-CR-300
Rev. 7/91

(Over)

13. *(if applicable)* The prosecutor and your lawyer have informed the Court that these are all the terms and conditions of your plea. **Answers**

State will not proceed in 94CRS4337 (credit card fraud) Defendant will receive a 2 year active sentence

(a) Is this correct as being your full plea arrangement? Yes
(b) Do you now personally accept this arrangement? Yes

14. (Other than the plea arrangement between you and the prosecutor) has anyone made any promises or threatened you in any way to cause you to enter this plea against your wishes? No

15. Do you enter this plea of your own free will, fully understanding what you are doing? Yes

16. Do you have any questions about what has just been said to you or about anything else connected with your case? No

I am 40 years of age and have completed the 11th grade of school. *(List any additional education, if applicable.)*
Defendant has completed GED

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. Neither my lawyer nor anyone else has told me to give false answers in order to have the Court accept my plea in this case. The conditions of the plea as stated above, if any, are accurate.

SWORN AND SUBSCRIBED TO BEFORE ME	Date 3-14-94
Date 3-14-94	Signature Of Defendant Robert Dunn
Signature Of Deputy Or Assistant CSC	Name Of Defendant (Type Or Print)

CERTIFICATION BY LAWYER FOR DEFENDANT

As lawyer for the defendant named above, I hereby certify that the conditions stated above, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself upon which the defendant's plea was entered. I further certify that I have fully explained to the defendant the nature and elements of the charges to which he is pleading.

Date 3/14/94	Signature Of Lawyer For Defendant Lonnie W. Dunn

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated above, if any, are the terms agreed to by the defendant and his lawyer and myself for the entry of the plea by the defendant to the charge in this case.

Date 3-14-94	Signature Of Prosecutor C Suzanne Edmunds

PLEA ADJUDICATION

Upon consideration of the record proper, evidence presented, answers of defendant, and statements of the lawyer for the defendant and the prosecutor, the undersigned finds:

1. That there is a factual basis for the entry of the plea.
2. That the defendant is satisfied with his lawyer.
3. That the defendant is competent to stand trial and that the plea is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's plea is hereby accepted by the Court and is ordered recorded.

Date 3-14-94	Signature Of Presiding Judge

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
94 CRS 4336

STATE OF NORTH CAROLINA

v.

INDICTMENT - FINANCIAL TRANSACTION CARD THEFT

ROBERT JAMES DAY

The jurors for the State upon their oath present that on or about the 20th day of January, 1994 in Wake County the defendant named above unlawfully, willfully and feloniously did withhold a financial transaction card from the control and possession of H. Frank Grainger, the cardholder, the person named on the face of the card and to whom the card #103086036366001 had been issued by Texaco Oil Company, without the permission of said cardholder and for a dishonest purpose. This act was done in violation of G.S. 14-113.9(a)(1).

E Swan Edmonds
Prosecutor

✓ C.E. Haines, RPD
Witness

The witnesses marked "X" were sworn by the undersigned Foreman of the Grand Jury and, after hearing testimony, this bill was found to be: confession

✓ A TRUE BILL by twelve or more grand jurors, and I the undersigned Foreman of the Grand Jury, attest the concurrence of twelve or more grand jurors in this Bill of Indictment.

_____ NOT A TRUE BILL.

February 21, 1994
Date

Thomas T. Sands
Grand Jury Foreman

CERTIFIED TRUE COPY FROM ORIGINAL
Clerk of Superior Court, Wake County
By: _____
Assistant/Deputy Clerk of Superior Court
Date: 3/13/01

C167783 5/9/01

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 13, 2000**

00C167783 The State of Nevada vs Gregory S Hermanski

June 13, 2000 **9:00 AM** **Initial Arraignment**

INITIAL ARRAIGNMENT
Relief Clerk: BILLIE JO CRAIG
Reporter/Recorder: TINA SMITH Heard By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Hermanski, Gregory S	Defendant
Moreo, Thomas J.	Attorney
Public Defender	Attorney
Roundtree, Stacey	Attorney

JOURNAL ENTRIES

- Ms. Roundtree advised there were two incompetent reports and submitted the second report from Dr. Paglini. Pursuant to NRS 178.425, COURT ORDERED, defendant REMANDED to the custody of the Administrator of the Mental Hygiene and Mental Retardation Division for the Department of Human Resources for detention and treatment at a secure facility operated by the Mental Hygiene and Mental Retardation Division.
L.C.

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **October 04, 2000**

00C167783 The State of Nevada vs Gregory S Hermanski

October 04, 2000 **9:00 AM** **Status Check**

COURT ADMINISTRATION S' REQUEST FOR STATUS CHECK
Relief Clerk: BILLIE JO CRAIG
Reporter/Recorder: TINA SMITH Heard By: Hardcastle, Kathy

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Campbell, Cara L.	Attorney
Khamsi, Bita	Attorney
Public Defender	Attorney

JOURNAL ENTRIES

- FINDINGS (OF COMPETENCY) AND ORDER TO TRANSPORT SIGNED AND FILED IN OPEN COURT. Court noted it received the reports. COURT ORDERED, matter CONTINUED for defendant to be present.
L.C.

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor | COURT MINUTES | October 25, 2000

00C167783 The State of Nevada vs Gregory S Hermanski

October 25, 2000 **9:00 AM** **Status Check**

COURT ADMINISTRATION S' REQUEST FOR STATUS CHECK
Court Clerk: DOROTHY KELLY
Reporter/Recorder: TINA SMITH Heard By: Hardcastle, Kathy

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Public Defender	Attorney
Roundtree, Stacey	Attorney
Villegas, Victoria A.	Attorney

JOURNAL ENTRIES

- COURT ORDERED, matter CONTINUED for deft's presence. Court instructed counsel to call Lakes Crossing.
L.C.
COURT'S ADMINISTRATION'S REQUEST FOR STATUS CHECK

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **November 08, 2000**

00C167783 The State of Nevada vs Gregory S Hermanski

November 08, 2000 **9:00 AM** **Status Check**

COURT ADMINISTRATION S' REQUEST FOR STATUS CHECK
Court Clerk: DOROTHY KELLY
Reporter/Recorder: TINA SMITH Heard By: Hardcastle, Kathy

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Campbell, Cara L.	Attorney
DeJulio, Douglas P.	Attorney
Public Defender	Attorney

JOURNAL ENTRIES

- Deft not transported; therefore, COURT ORDERED, matter CONTINUED.
L.C.
COURT ADMINSTRATION'S REQUEST FOR STATUS CHECK

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **November 14, 2000**

00C167783 The State of Nevada vs Gregory S Hermanski

November 14, 2000 **9:00 AM** **Status Check**

COURT ADMINISTRATION S' REQUEST FOR STATUS CHECK
Relief Clerk: BILLIE JO CRAIG
Reporter/Recorder: TINA SMITH Heard By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Campbell, Cara L.	Attorney
DeJulio, Douglas P.	Attorney
Hermanski, Gregory S	Defendant
Public Defender	Attorney

JOURNAL ENTRIES

- Court noted defendant competent. COURT ORDERED, matter REMANDED TO JUSTICE COURT to start over with a Preliminary Hearing on charges.
CUSTODY
11/20/00 8:00 AM REMANDED TO JUSTICE COURT, DEPT. 1

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **December 11, 2000**

00C167783 The State of Nevada vs Gregory S Hermanski

December 11, 2000 **9:00 AM** **Initial Arraignment** **INITIAL ARRAIGNMENT**
Relief Clerk: GREER JENNISON
Reporter/Recorder: TINA SMITH Heard By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Hermanski, Gregory S	Defendant
Moreo, Thomas J.	Attorney
Public Defender	Attorney

JOURNAL ENTRIES

- DEFENDANT DAY ARRAIGNED, PLED NOT GUILTY and INVOKED THE 60-DAY RULE. COURT ORDERED, matter set for trial.
CUSTODY
2/21/01 9:00 AM CALENDAR CALL - DEPT. IV
2/26/01 10:30 AM JURY TRIAL - DEPT. IV

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **February 21, 2001**

00C167783 The State of Nevada vs Gregory S Hermanski

February 21, 2001 **9:00 AM** **Calendar Call**

CALENDAR CALL
Court Clerk:
DOROTHY KELLY
Reporter/Recorder:
TINA SMITH Heard
By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Campbell, Cara L.	Attorney
Hermanski, Gregory S	Defendant
Khamsi, Bita	Attorney
Public Defender	Attorney

JOURNAL ENTRIES

- AMENDED INFORMATION, MOTION TO AMEND INFORMATION FILED IN OPEN COURT. ORDER TO AMEND INFORMATION SIGNED AND FILED IN OPEN COURT. Ms. Khamsi stated Ms. Dickson informed her she is ready to proceed to trial; she requested a start date of next Tuesday or later. Ms. Campbell stated this is Mr. Fattig's case; trial should take two days with four to six witnesses. COURT ORDERED, matter CONTINUED for trial order.
CUSTODY
02-23-01 9:00 A.M. STATUS CHECK: FINAL TRIAL ORDER

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **February 23, 2001**

00C167783 The State of Nevada vs Gregory S Hermanski

February 23, 2001 **9:00 AM** **Status Check**

STATUS CHECK: FINAL TRIAL ORDER Court Clerk: DOROTHY KELLY Reporter/Recorder: TINA SMITH Heard By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

DeJulio, Douglas P.	Attorney
Hehn, William A.	Attorney
Hermanski, Gregory S	Defendant
Public Defender	Attorney

JOURNAL ENTRIES

- State announced ready for trial. Due to Court's schedule (murder trial), COURT ORDERED, trial date VACATED and RESET.
CUSTODY
02-28-01 9:00 A.M. CALENDAR CALL
03-12-01 10:30 A.M. TRIAL BY JURY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **February 28, 2001**

00C167783 The State of Nevada vs Gregory S Hermanski

February 28, 2001 **9:00 AM** **Calendar Call**

CALENDAR CALL
Court Clerk:
DOROTHY KELLY
Reporter/Recorder:
TINA SMITH Heard
By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Hermanski, Gregory S	Defendant
Public Defender	Attorney
Villegas, Victoria A.	Attorney

JOURNAL ENTRIES

- Both sides announced ready for a one-and-one-half day trial. COURT ORDERED, Trial Date Stands, Deft's Motion to Dismiss Information to be heard before trial.
CUSTODY
03-12-01 10:30 A.M. TRIAL BY JURY...DEFT'S MOTION TO DISMISS INFORMATION

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 12, 2001**

00C167783 The State of Nevada vs Gregory S Hermanski

March 12, 2001 **9:00 AM** **All Pending Motions** **ALL PENDING MOTIONS FOR 3/12/01 Relief Clerk: BILLIE JO CRAIG Reporter/Recorder: LIZ GARCIA Heard By: Kathy Hardcastle**

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Fattig, John T	Attorney
Hehn, William A.	Attorney
Hermanski, Gregory S	Defendant
Public Defender	Attorney

JOURNAL ENTRIES

- DEFT'S MOTION TO DISMISS INFORMATION...JURY TRIAL
Court noted there was no legal basis to dismiss Information. A Supplemental Motion submitted to the Court. COURT ORDERED, Motion to Dismiss for Failure to Preserve Evidence is DENIED. Upon Court's inquiry, Ms. Dickson advised there were negotiations pending the outcome of this Motion. Mr. Hehn advised there was a Guilty Plea Agreement and a Second Amended Information in the file. Ms. Dickson requested matter trail to talk with defendant. COURT ORDERED, matter to TRAIL. RECALLED. Ms. Dickson requested additional time for defendant to make a decision. COURT ORDERED, matter to TRAIL until 1:30 PM today.
RECALLED. Ms. Dickson advised defendant not arraigned on the Amended Information which included the habitual status. Also, there was a question as to the Amended Information indicating in Count II as Burglary while in Possession of a Firearm in the summary even though it was a knife.

COURT ORDERED, the Amended Information AMENDED BY INTERLINEATION to indicate in the summary BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (F). Arguments regarding defendant taking stand and what prior convictions will be used. COURT ORDERED, this Motion and the Supplemental Motion DENIED as there is no legal basis and the Certified JOC of 1984 can be used and others if certified and the State is prepared to present evidence. Ms. Dickson objected. COURT ORDERED, Trial CONTINUED to next day.
CUSTODY
3/13/01 10:30 AM JURY TRIAL

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 13, 2001**

00C167783 The State of Nevada vs Gregory S Hermanski

March 13, 2001 **10:30 AM** **Jury Trial**

TRIAL BY JURY
Relief Clerk: BILLIE JO CRAIG
Reporter/Recorder: LIZ GARCIA Heard By: Hardcastle, Kathy

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Fattig, John T	Attorney
Hermanski, Gregory S	Defendant
Public Defender	Attorney

JOURNAL ENTRIES

- At 11:09 AM, the Jury Panel, counsel and defendant present. At 11:09 AM, Mr. Fattig made his introduction. At 11:10 AM, Ms. Dickson made her introduction. Voir dire oath given at 2:14 PM. Alternate sworn to try the case at 2:16 PM. The Clerk read the Amended Information to the Jury at 2:20 PM. Opening statements by Mr. Fattig. Opening statements by Ms. Dickson. Witnesses sworn and and testified. Exhibits (see Worksheets). COURT ORDERED, EVENING RECESS. OUTSIDE THE PRESENCE OF THE JURY, the Court advised defendant of his right to testify on his own behalf. Defendant stated he understood. Colloquy regarding remaining witnesses and additional certified copies of convictions. At 5:10 PM, Court recessed for the evening.
CUSTODY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 14, 2001**

00C167783 The State of Nevada vs Gregory S Hermanski

March 14, 2001 **10:30 AM** **Jury Trial**

TRIAL BY JURY
Relief Clerk: BILLIE JO CRAIG
Reporter/Recorder: LIZ GARCIA Heard By: Hardcastle, Kathy

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Fattig, John T	Attorney
Hermanski, Gregory S	Defendant
Public Defender	Attorney

JOURNAL ENTRIES

- Jury Instructions settled in Open Court. Counsel stipulated to the presence of the Jury at 10:40 AM. Witnesses sworn and testified. (See Worksheets.) Exhibits (see Worksheets). At 11:54 AM, the State rests. COURT ORDERED, NOON RECESS. At 1:32 PM, counsel stipulated to the presence of the Jury. Testimony continues. At 2:13 PM, defense rests. The Court instructed the Jury on the laws which applied to the case. Closing arguments by Mr. Fattig at 2:27 PM. Closing arguments by Ms. Dickson at 3:16 PM. Rebuttal argument by Mr. Fattig at 3:38 PM. Bailiff sworn to take charge of the Jury at 3:49 PM. Bailiff sworn to take charge of the Alternate at 3:49 PM. OUTSIDE THE PRESENCE OF THE JURY, Ms. Dickson objected to the hearsay statements by the trucker as inadmissible hearsay, detective failed to look for defendant's shirt, and offer to truck driver of $100.00 to take defendant to New Orleans. Court stated its findings. COURT ORDERED, objection OVERRULED. COURT ORDERED, EVENING RECESS.
CUSTODY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 15, 2001**

00C167783 The State of Nevada vs Gregory S Hermanski

March 15, 2001 **10:30 AM** **Jury Trial**

TRIAL BY JURY
Relief Clerk: BILLIE JO CRAIG
Reporter/Recorder: LIZ GARCIA Heard By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Fattig, John T	Attorney
Hermanski, Gregory S	Defendant
Public Defender	Attorney

JOURNAL ENTRIES

- At the hour of 2:08 PM, the Jury returned with a verdict finding Defendant Day GUILTY OF COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON (F) AND COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (F). The Court thanked and excused the Jurors. The State will file for habitual offender treatment. COURT ORDERED, matter referred to P&P for a PSI and SET for Sentencing.
CUSTODY
5/2/01 9:00 AM SENTENCING

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 26, 2001**

00C167783 The State of Nevada vs Gregory S Hermanski

March 26, 2001	**9:00 AM**	**Motion to Amend Information**	**STATE'S MOTION TO AMEND INFORMATION Relief Clerk: BILLIE JO CRAIG Reporter/Recorder: TINA SMITH Heard By: Kathy Hardcastle**

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Hermanski, Gregory S	Defendant
Public Defender	Attorney
Villegas, Victoria A.	Attorney

JOURNAL ENTRIES

- COURT ORDERED, State's Motion to Amend Information is GRANTED. Ms. Dickson objected. ORDER TO AMEND INFORMATION AND SECOND AMENDED INFORMATION SIGNED AND FILED IN OPEN COURT.
CUSTODY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **May 02, 2001**

00C167783 The State of Nevada vs Gregory S Hermanski

May 02, 2001 **9:00 AM** **Sentencing**

SENTENCING
Court Clerk:
DOROTHY KELLY
Relief Clerk: KEITH
REED/kar
Reporter/Recorder:
TINA SMITH Heard
By: Hardcastle, Kathy

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Fattig, John T	Attorney
Hermanski, Gregory S	Defendant
Public Defender	Attorney

JOURNAL ENTRIES

- Joy Mundy-Neal of Parole and Probation present. Court noted the Defendant refused to be interviewed for the Pre-Sentence Investigation Report (PSI). Ms. Dickson stated P & P requested the Deft. not make a statement due to his contention he is not guilty of the charges. DEFENDANT DAY ADJUDGED GUILTY of of COUNT I, ROBBERY WITH USE OF A DEADLY WEAPON (F) and COUNT II, BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (F). COURT ORDERED, matter CONTINUED to review a certified copy of the Judgment of Conviction. CUSTODY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **May 09, 2001**

00C167783 The State of Nevada vs Gregory S Hermanski

May 09, 2001 **9:00 AM** **Sentencing**

SENTENCING
Relief Clerk: BILLIE JO CRAIG
Reporter/Recorder: TINA SMITH Heard By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Fattig, John T	Attorney
Hermanski, Gregory S	Defendant
Public Defender	Attorney

JOURNAL ENTRIES

- Brenda Lewis of the Dept. of P & P present. Ms. Dickson inquired if the Court received the Supplemental PSI. Arguments by counsel regarding habitual treatment. COURT ADJUDGED DEFENDANT DAY GUILTY OF COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON (F) AND CT. II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (F). Parties argued and submitted. Exhibits (see worksheet). COURT ORDERED, in addition to the $25.00 Administrative Assessment Fee and $250.00 DNA Analysis Fee and defendant to submit to a blood and/or saliva test to determine genetic markers or secretor status, Defendant ADJUDGED an HABITUAL OFFENDER. Defendant SENTENCED to a MAXIMUM of THREE HUNDRED (300) MONTHS and a MINIMUM of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Prisons, with THREE HUNDRED EIGHT-TWO (382) DAYS Credit For Time Served. RECALLED LATER. Mr. Fattig request defendant be sentenced in CT. II. The Court advised when a defendant is adjudged an habitual offender, sentence applies to both counts.

NDP

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **February 06, 2002**

00C167783 The State of Nevada vs Gregory S Hermanski

February 06, 2002 **9:00 AM** **Request of Court**

AT THE REQUEST OF THE COURT CLARIFICATN SENTENCE/SUPRE ME CT VR 2/7 Court Clerk: Dorothy Kelly Reporter/Recorder: Tina Smith Heard By: Hardcastle, Kathy

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Noxon, Arthur G.	Attorney
Public Defender	Attorney

JOURNAL ENTRIES

- Ms. Dickson stated the Deft. has not been transported. She further stated there is a motion for reconsideration in the Supreme Court. Court stated it has a remittitur. COURT ORDERED, matter CONTINUED; a Writ has to be prepared to have Deft. transported.
NDC
AT REQUEST OF COURT: CLARIFICATION OF SENTENCE PER SUPREME COURT ORDER

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 26, 2002**

00C167783 The State of Nevada vs Gregory S Hermanski

June 26, 2002 **9:00 AM** **Request**

DEFT'S REQUEST RESENTENCING PURSUANT TO ORDER OF SUPREME COURT /14 Court Clerk: Dorothy Kelly Reporter/Recorder: Tina Smith Heard By: Hardcastle, Kathy

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Noxon, Arthur G.	Attorney
Public Defender	Attorney

JOURNAL ENTRIES

- Court stated an Order to Transport Deft. has to be prepared. State advised it will prepare the Order.
COURT ORDERED, matter CONTINUED.
NDC
DEFT'S REQUEST FOR RE-SENTENCING PURSUANT TO SUPREME COURT ORDER

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **July 25, 2002**

00C167783 The State of Nevada vs Gregory S Hermanski

July 25, 2002 **9:00 AM** **All Pending Motions** **ALL PENDING MOTIONS 07-25-02**
Court Clerk: Dorothy Kelly
Reporter/Recorder: Debra Van Blaricom
Heard By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Hermanski, Gregory S	Defendant
Public Defender	Attorney
Schubert, David	Attorney

JOURNAL ENTRIES

- DEFT'S MOTION FOR A NEW TRIAL...DEFT'S MOTION TO VACATE SENTENCE AS AN HABITUAL CRIMINAL...DEFT'S REQUEST FOR RE-SENTENCING PURSUANT TO SUPREME COURT ORDER

Ms. Dickson stated this was remanded from the Supreme Court for sentencing. She further stated she obtained information that records are not Mr. Day's records; fingerprints attached to a document do not match the Deft.'s. She requested the sentencing be vacated. State requested time to respond. COURT ORDERED, matter CONTINUED. Court advised Ms. Dickson the Deft. does not have to be present for the next Court date. Ms. Dickson responded the Deft. wants to be present. Court directed the State to prepare an Order to Transport Deft. to all proceedings.

NDC

08-14-02 9:00 A.M. (MOTIONS AND REQUEST AS REFLECTED ABOVE)

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **August 14, 2002**

00C167783 The State of Nevada vs Gregory S Hermanski

August 14, 2002 **9:00 AM** **All Pending Motions** **ALL PENDING MOTIONS 08-14-02**
Court Clerk: Dorothy Kelly
Reporter/Recorder: Tina Smith Heard
By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Hermanski, Gregory S	Defendant
Public Defender	Attorney
Schubert, David	Attorney

JOURNAL ENTRIES

- DEFT'S MOTION FOR A NEW TRIAL...DEFT'S MOTION TO VACATE SENTENCE AS AN HABITUAL CRIMINAL...DEFT'S REQUEST FOR RE-SENTENCING PURSUANT TO SUPREME COURT ORDER...AT THE REQUEST OF THE COURT: ADDRESS REQUEST FOR TRANSCRIPT OF VOIR DIRE

Mr. Schubert requested a continuance as Deputy District Attorney, Scott Mitchell, is on vacation; COURT, SO ORDERED.

NDC

08-28-02 9:00 A.M. MOTIONS AND REQUESTS AS REFLECTED ABOVE

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor | COURT MINUTES | August 28, 2002

00C167783 The State of Nevada vs Gregory S Hermanski

August 28, 2002	**9:00 AM**	**All Pending Motions**	**ALL PENDING MOTIONS 8-28-02 Relief Clerk: Alan Castle Reporter/Recorder: Tina Smith Heard By: Kathy Hardcastle**

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Hermanski, Gregory S	Defendant
Lieberman, Gary H.	Attorney
Public Defender	Attorney
Schubert, David	Attorney

JOURNAL ENTRIES

- DEFT'S MOTION FOR NEW TRIAL...DEFT'S MOTION TO VACATE SENTENCE AS A HABITUAL CRIMINAL...DEFT'S MOTION FOR RE-SENTENCING PURSUANT TO SUPREME COURT ORDER...AT THE REQUEST OF THE COURT: ADDRESS REQUEST OF VOIR DIRE Deft's motion to dismiss Count pursuant to habitual criminal statute, NRS 207.010 FILED IN OPEN COURT. Following colloquy regarding Deft's correct identity, COURT ORDERED, ALL MATTERS CONTINUED. FURTHER ORDERED, Deft. does not need remain here and is to be sent back to NDC. 10/2/02 9:00 AM DEFT'S MOTION FOR NEW TRIAL...DEFT'S MOTION TO VACATE SENTENCE AS A HABITUAL CRIMINAL...DEFT'S MOTION FOR RE-SENTENCING PURSUANT TO SUPREME COURT ORDER...AT THE REQUEST OF THE COURT: ADDRESS REQUEST OF VOIR DIRE...DEFT'S MOTION TO DISMISS COUNT PURSUANT TO HABITUAL CRIMINAL STATUTE, NRS 207.010

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **September 09, 2002**

00C167783 The State of Nevada vs Gregory S Hermanski

September 09, 2002 **9:00 AM** **Motion**

DEFT'S MTN FOR A NEW TRIAL/21
Relief Clerk: Denise Husted
Reporter/Recorder: Tina Smith Heard
By: Hardcastle, Kathy

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Bauer, Elizabeth B.	Attorney
Dickson, Dianne	Attorney
Public Defender	Attorney

JOURNAL ENTRIES

- COURT ORDERED, motion CONTINUED.
NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **October 02, 2002**

00C167783 The State of Nevada vs Gregory S Hermanski

October 02, 2002 **9:00 AM** **All Pending Motions**

ALL PENDING MOTIONS 10-02-02
Court Clerk: Dorothy Kelly
Reporter/Recorder: Tina Smith Heard
By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Mitchell, Scott S.	Attorney
Public Defender	Attorney

JOURNAL ENTRIES

- DEFT'S MOTION FOR A NEW TRIAL...DEFT'S MOTION TO VACATE SENTENCE AS AN HABITUAL CRIMINAL...DEFT'S REQUEST FOR RE-SENTENCING PURSUANT TO SUPREME COURT ORDER...AT THE REQUEST OF THE COURT: ADDRESS REQUEST FOR TRANSCRIPT OF VOIR DIRE...DEFT'S MOTION TO DISMISS COUNT PURSUANT TO HABITUAL CRIMINAL STATUTE, NRS 207.010...DEFT'S MOTION FOR A NEW TRIAL

State's Opposition to Defendant's Motion to Vacate Sentence as an Habitual Criminal and State's Opposition to Defendant's Motion for New Trial FILED IN OPEN COURT. COURT ORDERED, Judgment of Conviction to be AMENDED BY INTERLINEATION to reflect Deft. found guilty pursuant to Jury Verdict. Ms. Dickson stated she has new evidence whereby the Deft. happened upon Mr. Beck who submitted an affidavit stating he was working with the Deft. on the day in question. Mr. Mitchell stated that as to the Motion to Vacate Sentence as an Habitual Criminal, he concurs with the motion; the State wants to resentence Deft., since he was not the person he was sentenced under. He further stated the Deft. admitted he is not Robert James Day; he is Gregory

Scott Hermanski and from running an FBI identity, he is a twelve-time convicted felon and has an outstanding warrant from North Carolina and felony convictions from Florida and a Federal conviction. Mr. Mitchell further stated that Robert Day is someone the Deft. met, and because the Deft. pulled identity fraud in Court, the State will file new charges for perjury and identity fraud. Mr. Mitchell requested a new sentencing date be set and requested time to obtain ID materials from the other jurisdictions; the Deft. has convictions from 1969. Court stated it will leave everything as is and ORDERED, matter CONTINUED sixty (60) days. Court instructed the State to obtain information and when it is responded to the Court will decide what to do. Mr. Mitchell stated he wants a new Pre-Sentence Report and wants to have the Deft. at the jail. Ms. Dickson stated the Deft. does not want to talk to the Division of Parole and Probation; the State had Deft's fingerprints from day one.
NDC
12-04-02 9:00 A.M. MOTIONS AS REFLECTED ABOVE

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **December 04, 2002**

00C167783 The State of Nevada vs Gregory S Hermanski

December 04, 2002 **9:00 AM** **All Pending Motions**

ALL PENDING MOTIONS 12-04-02
Court Clerk: Dorothy Kelly
Reporter/Recorder: Tina Smith Heard
By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Hermanski, Gregory S	Defendant
Mitchell, Scott S.	Attorney
Public Defender	Attorney

JOURNAL ENTRIES

- DEFT'S MOTION FOR A NEW TRIAL...DEFT'S MOTION TO VACATE SENTENCE AS AN HABITUAL CRIMINAL...DEFT'S REQUEST FOR RE-SENTENCING PURSUANT TO SUPREME COURT ORDER...AT THE REQUEST OF THE COURT: ADDRESS REQUEST FOR TRANSCRIPT OF VOIR DIRE...DEFT'S MOTION TO DISMISS COUNT PURSUANT TO HABITUAL CRIMINAL STATUTE, NRS 207.010...DEFT'S MOTION FOR A NEW TRIAL

Objection FILED IN OPEN COURT. Ms. Dickson stated the Deft. wants to file a motion objecting to the proceedings. As to the Motion to Vacate Sentence, Mr. Mitchell stated all parties are in agreement Deft. is Gregory Hermanski; he was sentenced as Robert Day; sentencing should be vacated, a new sentencing date set and a new Pre-Sentence Report prepared. He further stated the Deft. has a record that requires this Court to sentence him as a violent habitual criminal; he has two bank robbery certifications and one is on the way. Mr. Mitchell stated the State is prepared to say the Deft. has eleven (11) felony convictions; he requested the prior opposition be withdrawn as the State has

verified Mr. Hermanski is not Robert James Day. Court noted the Deft. lied to the Court. Ms. Dickson stated there has been another motion filed by the Deft. Court stated it does not recognize motions filed by the Defendant; they are to be presented to his attorney. Ms. Dickson stated the Motion for a New Trial was based on confirmation the Deft. had a parole violation at the time he ran from police; she requested the copy of documentation and the Birth Certificate be made part of the record....(Defendant's Exhibits A and B). Court stated the Deft. could have made that known to counsel; it is not new evidence. Ms. Dickson stated a witness, Mr. Beck, was located in prison. COURT ORDERED, Deft's Motion for New Trial is DENIED. As to Habitual Criminal Charges, Ms. Dickson stated that is a jury question. Court stated the Deft. has misrepresented who he is; his name is Gregory Scott Hermanski. Mr. Mitchell stated the Deft's FBI number is 888420G. COURT ORDERED, matter REFERRED to the Division of Parole and Probation for a new Pre-Sentence Report and set for sentencing. COURT FURTHER ORDERED, Deft's Motion to Vacate Sentence as an Habitual Criminal is GRANTED; Deft's Request for Re-Sentencing Pursuant to Supreme Court Order is MOOT; At the Request of Court: Address Request for Transcript of Voir Dire is OFF CALENDAR; Deft's Motion to Dismiss Count Pursuant to Habitual Criminal Statute NRS 207.010 is MOOT. Due to Defendant's outburst in Court, Court stated it will hear the motion set for December 16th, without him; Defendant IS NOT TO BE PRESENT IN COURT ON December 16TH.
NDC
12-16-02 9:00 A.M. DEFT'S PRO PER MOTION TO DISMISS COUNSEL/APPOINT COUNSEL

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **December 16, 2002**

00C167783 The State of Nevada vs Gregory S Hermanski

December 16, 2002 **9:00 AM** **Motion to Dismiss**

DEFT'S PRO PER
MTN TO DISMISS
CNSL/APPOINT
CNSL/25 Relief
Clerk: Denise Husted
Reporter/Recorder:
Tina Smith Heard
By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Hart, Marty	Attorney
Public Defender	Attorney

JOURNAL ENTRIES

- Ms. Dickson advised the Court that the Defendant no longer wants her to represent him due to confusion regarding factual allegations of the Defendant's identity. COURT ORDERED, independent counsel is appointed to review the ineffective assistance of counsel claim; matter set for confirmation of counsel.
NDC
CLERK'S NOTE: Dept. IV Judicial Executive Assistant to notify appropriate counsel of Court date.
12/23/02 9:00 AM CONFIRMATION OF COUNSEL

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **December 23, 2002**

00C167783 The State of Nevada vs Gregory S Hermanski

December 23, 2002 **9:00 AM** **Motion for Confirmation of Counsel** **CONFIRMATION OF COUNSEL/WOMMER Relief Clerk: Denise Husted Reporter/Recorder: Tina Smith Heard By: Hardcastle, Kathy**

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Bauer, Elizabeth B.	Attorney
Dickson, Dianne	Attorney
Public Defender	Attorney

JOURNAL ENTRIES

- Ms. Dickson stated this matter is not at the post conviction stage yet, however there is a disagreement regarding factual allegations. Court directed Mr. Wommer to review the file prior to sentencing and matter CONTINUED to that date. Ms. Dickson stated she will give the file to Mr. Wommer.
NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **January 22, 2003**

00C167783 The State of Nevada vs Gregory S Hermanski

January 22, 2003 **9:00 AM** **All Pending Motions** **ALL PENDING MOTIONS 01-22-03**
Court Clerk: Dorothy Kelly Heard By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Hart, Marty	Attorney
Wommer, Paul E.	Attorney

JOURNAL ENTRIES

- CONFIRMATION OF COUNSEL (WOMMER)...SENTENCING
Carolyn Butts present for the Division of Parole and Probation (P&P). Ms. Dickson stated P&P is requesting a 30-day continuance; COURT, SO ORDERED. Court noted Mr. Wommer previously confirmed as counsel.
NDC
02-26-03 9:00 A.M. SENTENCING

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **February 26, 2003**

00C167783 The State of Nevada vs Gregory S Hermanski

February 26, 2003 **9:00 AM** **Sentencing**

SENTENCING
Court Clerk: Carole D'Aloia
Reporter/Recorder: Carrie Hansen Heard
By: Hardcastle, Kathy

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Hehn, William A.	Attorney
Hermanski, Gregory S	Defendant
Wommer, Paul E.	Attorney

JOURNAL ENTRIES

- Officer C. Butts of the Division of Parole and Probation (P&P) present. Mr. Wommer advised Defendant was not transported and matter will need to be continued. Mr. Wommer further advised that Court appointed him since Ms. Dickson had a conflict and Mr. Wommer CONFIRMED as counsel. COURT ORDERED, matter CONTINUED and instructed the State to prepare an Order to Transport.
CUSTODY (COC)

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 26, 2003**

00C167783 The State of Nevada vs Gregory S Hermanski

March 26, 2003 **9:00 AM** **Sentencing** **SENTENCING**
Court Clerk: Dorothy Kelly Heard By: Hardcastle, Kathy

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Hart, Marty	Attorney
Wommer, Paul E.	Attorney

JOURNAL ENTRIES

- Carolyn Butts present for the Division of Parole and Probation. Mr. Wommer stated he substituted in as counsel for the Deft; he and the Deft. have been in contact. He further stated he has been in trial and has not been able to see the Deft. in the High Desert yet; the Deft. was not transported today. COURT ORDERED, matter CONTINUED; State to prepare an Order to Transport.
NDC
SENTENCING

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **April 30, 2003**

00C167783 The State of Nevada vs Gregory S Hermanski

April 30, 2003 **9:00 AM** **Sentencing**

SENTENCING
Court Clerk: Dorothy Kelly
Reporter/Recorder: Carrie Hansen Heard
By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Hermanski, Gregory S	Defendant
Mitchell, Scott S.	Attorney
Wommer, Paul E.	Attorney

JOURNAL ENTRIES

- William Lizura present for the Division of Parole and Probation (P&P). DEFT. HERMANSKI ADJUDGED GUILTY OF CT. I ROBBERY WITH USE OF A DEADLY WEAPON (F) AND CT. II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (F). Court heard argument as to Deft's Habitual Criminal status. Mr. Mitchell noted Defendant's prior felonies and stated that under the law, the maximum penalty has to be imposed; it is not discretionary. Mr. Wommer stated he substituted in as counsel for sentencing; Ms. Dickson represented the Deft. previously. Mr. Wommer read Defendant's statement in Court. Court directed Mr. Wommer to put the matters contained in Deft's statement in a motion. Mr. Mitchell provided Court with certified copies of Deft's Judgment of Convictions along with other paperwork reflecting Deft's past convictions. DEFT. HERMANSKI ADJUDGED GUILTY AS A HABITUAL OFFENDER IN COUNTS I AND II. In addition to the $25 Administrative Assessment Fee and $150 DNA Fee, COURT ORDERED, Deft. SENTENCED in COUNT I to LIFE in the Nevada Department of Corrections WITHOUT the Possibility of Parole and in COUNT II to LIFE in the Nevada Department of Corrections WITHOUT the Possibility of Parole;

Count II to run CONCURRENTLY with Count I with NO Credit for Time Served; Deft. to submit to a test to determine genetic markers. Court advised counsel he can file the appropriate motion as to credit for time served while Deft. serving Federal time.

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **May 12, 2003**

00C167783 The State of Nevada vs Gregory S Hermanski

May 12, 2003 **9:00 AM** **Request**

DEFT'S REQUEST TO CLARIFY APPOINTMENT OFCOUNSEL/31
Relief Clerk: Billie Jo Craig
Reporter/Recorder: Carrie Hansen Heard
By: Kathy Hardcastle

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Bauer, Elizabeth B.	Attorney
Dickson, Dianne	Attorney
Public Defender	Attorney
Roger, David J.	Attorney
Wommer, Paul E.	Attorney

JOURNAL ENTRIES

- COURT ORDERED, defendant's PRESENCE WAIVED today. Ms. Dickson requested clarification of who represents defendant. Mr. Wommer advised he was appointed to represent defendant only for the ineffectiveness of counsel problem. Court noted it had appointed Mr. Wommer to represent defendant.
NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor	COURT MINUTES	January 31, 2005

00C167783 The State of Nevada vs Gregory S Hermanski

January 31, 2005	9:00 AM	Motion to Withdraw as Counsel	DEFT'S PRO PER MTN TO WITHDRAW AS COUNSEL /32 Court Clerk: Alan Castle Reporter/Recorder: Loree Gallegos Heard By: Jennifer Togliatti

HEARD BY: COURTROOM:

COURT CLERK:

RECORDER:

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- Matter submitted. COURT ORDERED, petition GRANTED. By way of this minute order State to prepare the order and notify all interested parties.
NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **September 21, 2005**

00C167783 The State of Nevada vs Gregory S Hermanski

September 21, 2005 **9:00 AM** **Petition for Writ of Habeas Corpus** **DEFT'S PTN FOR WRIT OF HABEAS CORPUS /33 Court Clerk: Alan Castle Reporter/Recorder: Kristen Lunkwitz Heard By: Togliatti, Jennifer**

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT: Benedict, Susan M. Attorney

JOURNAL ENTRIES

- At request of State, COURT ORDERED, matter CONTINUED.
NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **October 24, 2005**

00C167783 The State of Nevada vs Gregory S Hermanski

October 24, 2005 **9:00 AM** **All Pending Motions** **ALL PENDING MOTIONS 10-24-05**
Relief Clerk: Judy McFadden
Reporter/Recorder: Kristen Lunkwitz
Heard By: Jennifer Togliatti

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- DEFT'S PRO PER MOTION FOR PRISONER TRANSPORTATION ORDER...DEFT'S PETITION FOR WRIT OF HABEAS CORPUS
STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR PRISONER TRANSPORTATION FILED IN OPEN COURT. Deft. not present. Conference at Bench. Following Conference at Bench, Court informed it had explained to State and Ms. De La Garza regarding Court's time restraint regarding Deft's Petition for Writ of Habeas Corpus and that Court expects to begin medical leave in ten days that will last two months. Court stated it would need more time to prepare or have another Judge rule. COURT ORDERED, Motion for transport DENIED. Court stated regarding Petition for Writ, it must get up to speed on the case; ineffectual assistance of counsel is the 3rd ground for relief. FURTHER ORDERED, supplemental response from State; matter set for decision. Court directed State to supplement its Opposition to assist Court in addressing the 3rd ground. Court stated Deft. alleges habitual criminal and violent criminal statute did not enable him to challenge conviction. NDC
12/21/05 9:00 AM DECISION: DEFT'S PETITION FOR WRIT OF HABEAS CORPUS/STATE'S

00C167783

SUPPLEMENT TO OPPOSITION

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **December 21, 2005**

00C167783 The State of Nevada vs Gregory S Hermanski

December 21, 2005 **9:00 AM** **Decision**

DECISION: DEFT'S PETITION FOR WRIT OF HABEAS CORPUS /36 Court Clerk: Alan Castle Reporter/Recorder: Kristen Lunkwitz Heard By: Brennan, James

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Dickson, Dianne	Attorney
Keenan, Nell	Attorney
Public Defender	Attorney

JOURNAL ENTRIES

- Upon State's inquiry regarding decision, Court stated the matter in on for decision, and Court has reviewed the petition and may have some questions. Ms. Dickson advised the Deft's motion to appear for oral argument was denied and Deft. has filed another motion regarding that denial. Further, Ms. Dickson represented the Deft. previously and notes the Deft. is well educated and articulate. Also, noted by Ms. Dickson is that the Deft's petition may have merit, but the Defendant himself would be the one to argue those merits. COURT FINDS the Court that previously denied the motion to appear for argument should hear the motion to reconsider and ORDERED, CONTINUED and set for hearing motion to reconsider appearance of Defendant for oral argument on petition. FURTHER, Deft's presence is WAIVED until such time as there is further order of the Court requiring Deft's presence.
NDC

1/9/06 9:00 AM DEFT'S PRO PER MOTION TO RECONSIDER APPEARANCE FOR ORAL ARGUMENT - IN RE DEFT'S PETITION FOR WRIT OF HABEAS CORPUS

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **January 09, 2006**

00C167783 The State of Nevada vs Gregory S Hermanski

January 09, 2006	**9:00 AM**	**Motion to Reconsider**	**DEFT'S PRO PER MOTION TO RECONSIDER TRANSPORT DEFT FOR ORAL ARGUMENTS /37 Court Clerk: Cheryl Case Relief Clerk: Cynthia Georgilas/cg Reporter/Recorder: Kristen Lunkwitz Heard By: Jennifer Togliatti**

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Benedict, Susan M.	Attorney
Dickson, Dianne	Attorney

JOURNAL ENTRIES

- Ms. Dickson advised she represented Defendant at trial and advised Defendant has real issues and would like to be transported in order to present them to this Court. COURT ORDERED, motion DENIED. Colloquy regarding Defendant's Writ. Court STATED it has reviewed Writ once before but will review Writ again, as well as procedural history and set for Status Check.
NDC
01-18-06 9:00 AM STATUS CHECK: DEFT'S PETITION FOR WRIT OF HABEAS CORPUS

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **January 18, 2006**

00C167783 The State of Nevada vs Gregory S Hermanski

January 18, 2006 **9:00 AM** **Status Check**

STATUS CHECK: DEFT'S WRIT OF HABEAS CORPUS
Court Clerk: Alan Castle
Reporter/Recorder: Kristen Lunkwitz
Heard By: Jennifer Togliatti

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT: Pesci, Giancarlo Attorney

JOURNAL ENTRIES

- Court FINDS still considering and ORDERED, matter CONTINUED for Decision.
NDC
1/30/06 9:00 AM DECISION: DEFT'S PETITION FOR WRIT OF HABEAS CORPUS

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **January 30, 2006**

00C167783 The State of Nevada vs Gregory S Hermanski

January 30, 2006 **9:00 AM** **Decision**

DECISION: DEFT'S PETITION FOR WRIT OF HABEAS CORPUS /36 Court Clerk: Alan Castle/ac Relief Clerk: Kathy Streuber Reporter/Recorder: Kristen Lunkwitz Heard By: Togliatti, Jennifer

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT: Pesci, Giancarlo Attorney

JOURNAL ENTRIES

- COURT ORDERED, matter CONTINUED for further consideration. FURTHER, Deft's presence WAIVED for these proceedings.
NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **February 03, 2006**

00C167783 The State of Nevada vs Gregory S Hermanski

February 03, 2006 **9:00 AM** **Decision**

DECISION: DEFT'S PETITION FOR WRIT OF HABEAS CORPUS /36 Court Clerk: Alan Castle Relief Clerk: Katherine Streuber/ks Reporter/Recorder: Kristen Lunkwitz Heard By: Jennifer Togliatti

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT: Keenan, Nell Attorney

JOURNAL ENTRIES

- COURT ORDERED, Deft's petition is DENIED. By way of this minute order State to prepare the order and notify all interested parties.
NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 27, 2006**

00C167783 The State of Nevada vs Gregory S Hermanski

March 27, 2006 **9:00 AM** **Motion**

PETITIONERS PRO PER MOTION FOR REHEARINGON DECISION ENTERED MARCH 3, 2006/39 Relief
Clerk: Melissas Swinn
Reporter/Recorder: Janice David Heard
By: Stephen Huffaker

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT: Brierly, Tracey J. Attorney

JOURNAL ENTRIES

- Defendant not present as he is currently housed at the Nevada Department of Corrections. Court reviewed documents, stated its findings and ORDERED, motion DENIED.
NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **August 23, 2006**

00C167783 The State of Nevada vs Gregory S Hermanski

August 23, 2006	**9:00 AM**	**Motion to Stay**	**DEFT'S PRO PER MTN TO STAY PROCEEDINGS &MTN FOR APPOINTMENT OF COUNSEL /40 Court Clerk: Alan Castle Relief Clerk: Kathy Klein/kk Reporter/Recorder: Kristen Lunkwitz Heard By: Jennifer Togliatti**

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT:

Brierly, Tracey J.	Attorney
Dickson, Dianne	Attorney

JOURNAL ENTRIES

- Court waived Deft's presence. Ms. Dickson appeared on behalf of the Deft. in support of Deft's motion. COURT STATED FINDINGS and ORDERED, motion DENIED. State to prepare the order. CASE CLOSED.
NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **February 22, 2010**

00C167783 The State of Nevada vs Gregory S Hermanski

February 22, 2010 **9:00 AM** **Motion**

DEFT'S PRO PER MTN TO CORRECT AN ILLEGALSENTENCE OR IN THE ALT MTN TO MODIFY/41 Court Clerk: Alan Paul Castle Reporter/Recorder: Cheryl Carpenter Heard By: Jennifer Togliatti

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT: Morgan, Shawn A. Attorney

JOURNAL ENTRIES

- Court waived Defendant's presence, as this Court does not entertain oral arguments in these types of proceedings and determination made specifically on the pleadings. Matter submitted. COURT Finds this Court agrees with State's opposition and ORDERED, motion DENIED. By way of this minute order State to prepare the Findings of Fact, Conclusions of Law that track the State's opposition and notify all interested parties. CASE CLOSED.
NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **April 05, 2010**

00C167783 The State of Nevada vs Gregory S Hermanski

April 05, 2010	**9:00 AM**	**Motion to Reconsider**	**DEFT'S PRO PER MTN TO RECONSIDER /42 Court Clerk: Alan Paul Castle/ac Relief Clerk: Shelly Landwehr Reporter/Recorder: Yvette Lester Heard By: Jennifer Togliatti**

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

PARTIES PRESENT: Rinetti, Dena I. Attorney

JOURNAL ENTRIES

- Court waived Defendant's presence, as this Court does not entertain oral arguments in these types of proceedings and determination made specifically on the pleadings. COURT FINDS no legal cause and ORDERED, motion DENIED. State to prepare the order denying motion and notify interested parties. CASE CLOSED.
NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **May 09, 2011**

00C167783 The State of Nevada vs Gregory S Hermanski

May 09, 2011 **8:30 AM** **Motion**

HEARD BY: Cadish, Elissa F. **COURTROOM:** RJC Courtroom 15B

COURT CLERK: Denise Trujillo; Monique Alberto

RECORDER: Jessica Ramirez

REPORTER:

PARTIES PRESENT:

State of Nevada	Plaintiff
Westmeyer, Daniel	Attorney

JOURNAL ENTRIES

- DEFT'S MOTION TO CORRECT AN ILLEGAL SENTENCE OR, IN THE ALTERNATIVE, MOTION FOR MODIFICATION OF SENTENCE

Without benefit of argument, COURT stated findings and ORDERED, Motion DENIED.

NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 06, 2011**

00C167783 The State of Nevada vs Gregory S Hermanski

June 06, 2011 **8:30 AM** **All Pending Motions**

HEARD BY: Cadish, Elissa F. **COURTROOM:** RJC Courtroom 15B

COURT CLERK: Monique Alberto

RECORDER: Jessica Kirkpatrick

REPORTER:

PARTIES PRESENT:

State of Nevada	Plaintiff
Westmeyer, Daniel	Attorney

JOURNAL ENTRIES

- DEFENDANT'S PRO PER MOTION FOR LEAVE TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO CORRECT AN ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE...DEFENDANT' PRO PER MOTION FOR LEAVE TO FILE DEFENDANT'S RESPONSE TO STATE'S OPPOSITION TO DEFENDANT'S PRO PER MOTION TO CORRECT AN ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE

Without benefit of argument, COURT stated her findings and ORDERED, Deft's Pro Per Motion's DENIED.

NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 29, 2011**

00C167783 The State of Nevada vs Gregory S Hermanski

June 29, 2011 **8:30 AM** **Motion**

HEARD BY: Cadish, Elissa F. **COURTROOM:** RJC Courtroom 15B

COURT CLERK: Keith Reed; Denise Trujillo

RECORDER: Jessica Ramirez

REPORTER:

PARTIES PRESENT:

Nance, Aaron M.	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- NOTICE OF MOTION/MOTION FOR EXTENSION OF TIME

COURT noted the State has not filed the notice of entry of order from May 20, 2011 and ORDERED, Motion DENIED as MOOT; State to file the notice of entry of order from 5/20/2011 and send copy to Deft; Deft. will have 10 days under the rules after the notice of entry to file any motions for reconsideration that may be warranted.

NDC

CLERK'S NOTE: Minutes corrected this date. 7/6/11 dt

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **July 06, 2011**

00C167783 The State of Nevada vs Gregory S Hermanski

July 06, 2011 **8:30 AM** **Motion**

HEARD BY: Cadish, Elissa F. **COURTROOM:** RJC Courtroom 15B

COURT CLERK: Keith Reed

RECORDER: Jessica Kirkpatrick

REPORTER:

PARTIES PRESENT:

Nance, Aaron M.	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Court noted the motion is premature because the order from May 20, 2011 has not been entered, stated findings and ORDERED, motion for reconsideration DENIED.

NDC

CLERK'S NOTE: The above minute order has been distributed to: Gregory S. Hermanski #69140, NNCC, POB 7000, Carson City, Nv. 89702

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **August 01, 2011**

00C167783 The State of Nevada vs Gregory S Hermanski

August 01, 2011 **8:30 AM** **Motion For Reconsideration**

HEARD BY: Cadish, Elissa F. **COURTROOM:** RJC Courtroom 15B

COURT CLERK: Susan Jovanovich

RECORDER: Jessica Ramirez

REPORTER:

PARTIES PRESENT:

Ferreira, Amy L.	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Deft. not present; incarcerated in the Nevada Department of Corrections (NDC). Court stated based on the Notice of Appeal having been filed in this matter, the Court does not have jurisdiction to entertain this motion. Additionally, if the Court considered the pleadings on the merits, Court will make findings, including that there were no facts of law presented in the relief being requested, and deny the motion. State to prepare the order.

NDC

CLERK'S NOTE: The above minute order has been distributed to: Gregory S. Hermanski #69140, NNCC, P.O. BOX 7000, Carson City, NV. 89702. /// sj

THE CONFIDENTIAL PRE-SENTENCE INVESTIGATION REPORT WILL FOLLOW VIA U.S. MAIL

Certification of Copy and Transmittal of Record

State of Nevada }
County of Clark } **SS:**

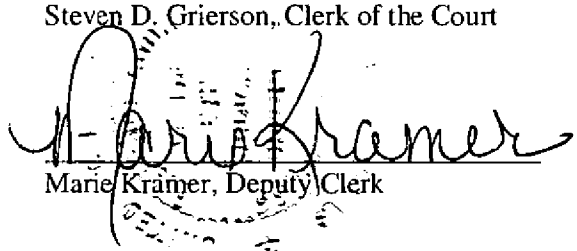
Pursuant to the Supreme Court order dated June 21, 2011, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the above referenced case. The record comprises of five volumes with pages numbered 1 through 1058.

STATE OF NEVADA	)	
	)	
Plaintiff(s),	)	Case No: 00C167783
	)	Dept No: VI
vs.	)	
	)	
GREGORY S. HERMANSKI	)	
	)	
Defendant(s),	)	
	)	
	)	
	)	
	)	
	)	

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 12 day of August 2011.

Steven D. Grierson, Clerk of the Court



Marie Kramer, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
August 12, 2011 2:47 p.m.
Tracie K. Lindeman

GREGORY S. HERMANSKI,
Appellant(s),
vs.

STATE OF NEVADA,
Respondent(s),

Case No: 00C167783
SC No: 58688

RECORD ON APPEAL
VOLUME
4

ATTORNEY FOR APPELLANT
GREGORY S. HERMANSKI # 69140
PROPER PERSON
P.O. BOX 7000
CARSON CITY, NV 89702

ATTORNEY FOR RESPONDENT
DAVID ROGER, ESQ.
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NEVADA 89101

Docket 58688 Document 2011-24627

00C167783 STATE OF NEVADA VS. GREGORY S. HERMANSKI

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00C167783 The State of Nevada vs Gregory S Hermanski

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4	05/24/2011	DEFENDANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO CORRECT AN ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE	884 - 889
4	08/11/2006	DEFENDANT'S MOTION TO STAY PROCEEDINGS AND MOTION FOR APPOINTMENT OF COUNSEL	763 - 778
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00C167783 The State of Nevada vs Gregory S Hermanski

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3	10/01/2002	MOTION FOR A NEW TRIAL	505 - 515
3	10/05/2005	MOTION FOR PRISONER TRANSPORTATION ORDER	690 - 693
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00C167783 The State of Nevada vs Gregory S Hermanski

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Shirley B. Parraguirre
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ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
SUSAN BENEDICT
Deputy District Attorney
Nevada Bar #005873
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI, aka Robert James Day,
#1679345

Defendant.

Case No. C167783
Dept No. IX

ORDER DENYING DEFENDANT'S PRO PER MOTION TO RECONSIDER MOTION FOR PRISONER TRANSPORTATION

DATE OF HEARING: 1/9/06
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 9th day of January, 2006, the Defendant not being present, DIANNE DICKSON, Deputy Public Defender, the Plaintiff being represented by DAVID ROGER, District Attorney, through SUSAN BENEDICT, Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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IT IS HEREBY ORDERED that the Defendant's Pro Per Motion to Reconsider Motion for Prisoner Transportation, shall be, and it is denied.

DATED this 18th day of January, 2006.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

SUSAN BENEDICT
Deputy District Attorney
Nevada Bar #005873

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ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

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Shirley B. Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY HERMANSKI,
a.k.a. Robert James Day,
#1679345

Defendant.

CASE NO: C167783

DEPT NO: IX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 2-3-06
TIME OF HEARING: 9:00 A.M.

THIS CAUSE having come on for hearing before the Honorable JENNIFER P. TOGLIATTI, District Judge, on the 3rd day of February, 2006, the Petitioner not being present, Proceeding in Forma Pauperis, the Respondent being represented by DAVID ROGER, District Attorney, by and through NELL KEENAN, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On December 7, 2000, an Information was filed charging Gregory Scott

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Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include the additional count charging Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with 382 days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

2. Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate that Defendant's adjudication as a habitual criminal was pursuant to NRS 176.015(1)(c), and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

3. Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering this the district court vacated Defendant's sentence and conducted another sentencing hearing. In response the State also filed a notice of intent to seek punishment of Defendant as a habitual criminal pursuant to NRS 207.012 on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and

[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

4. Defendant filed a timely appeal from the Amended Judgment of Conviction, case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in case No. 41405, affirming Defendant's conviction. Remittitur was issued on July 27, 2004.

5. Defendant filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. Defendant filed a Motion for Prisoner Transport on October 5, 2005. The State's response was filed on October 24, 2005. On October 24, 2005, the Court heard argument and denied Defendant's Motion for Prisoner Transport. The Court also ordered a supplemental response from the State regarding Defendant's Ground 3 of his Petition which alleges ineffective assistance of counsel at his resentencing under his birth name. The State's Supplemental Response regarding Defendant's Ground 3 was filed on December 8, 2005.

6. This Court heard argument on Defendant's Petition on February 3, 2006.

7. Defendant's trial counsel was effective throughout the proceedings.

8. Defendant's counsel did not know during the pendency of Defendant's case that Defendant had lied about his identity when he assumed the identity of Robert James Day.

9. Contrary to Defendant's allegation Defendant's counsel did in fact make mitigation arguments on his behalf during his sentencing.

10. Contrary to Defendant's allegation Defendant's counsel also argued on his behalf regarding the question of Defendant's habitual offender status. Notwithstanding counsel's arguments, Defendant's prior convictions as presented to the court by the State in the form of certified copies of his convictions were constitutionally sound and, as such, Defendant was adjudicated accordingly: "[a]ll right. *Pursuant to statute then with the requisite certified copies of the prior convictions*, one [sic] count I, you are hereby adjudicated a habitual offender. On Count II, you are hereby adjudicated a habitual offender. . . . " [Emphasis added.] RT 4-30-03, p. 7. Since there is no indication from the

record that the Court believed that the certified copies of Defendant's prior convictions were constitutionally infirm on their face, the implication is that they were in fact constitutionally sound and there was not much more that Defendant's counsel could say on his behalf.

11. Since Defendant consciously and intentionally perjured himself when he admitted to the prior felony convictions of Robert James Day he is now estopped from complaining about the negative effects he allegedly suffered since he was the one who caused the error.

12. Defendant's subsequent denial on the record that any of the convictions listed in the pre-sentence report were his does not constitute proof by a preponderance of the evidence that the certified judgments of conviction were constitutionally infirm, particularly given that all of the felony convictions in question were attributed to Defendant based on his fingerprints and other identifying factors via local and federal (FBI) records.

13. Defendant failed to show that but for his counsel's alleged failure to advise the court of Defendant's medical status or his alleged psychological problems that there is a reasonable probability that the court would have sentenced him to less time.

14. With regard to Defendant's mental problems as mentioned in the pre-sentence report, the Court also had the same pre-sentence report at its disposal at the time of sentencing so it is of no consequence that Defendant's counsel did not offer it as mitigation because the Court was already aware of it. See Pre-Sentence Report, 2-20-03, p. 6.

15. The Court was well aware of the three sentencing options at its disposal notwithstanding the State's request for the maximum penalty of life without the possibility of parole.

16. Defendant's reliance on his alleged mental illness and physical problems do not take away from the fact that he was convicted by a jury after trial. Nor do these points lessen the impact of the certified judgments of conviction regarding Defendant's prior convictions as presented by the State which justify adjudicating Defendant as a habitual criminal pursuant to NRS 207.012.

//

17. Given the quantity of Defendant's previous felony convictions as presented to the Court by the State in the form of certified judgments of conviction, coupled with the gravity of Defendant's most recent conviction, the sentence of life without the possibility of parole was most certainly warranted and justified.

18. Defendant has failed to show that his trial counsel's representation fell below an objective standard of reasonableness or that had Defendant's counsel advised the Court of Defendant's health status or alleged prior mental problems that it would have sentenced him to less time as permitted by NRS 207.012.

19. Defendant received effective assistance of appellate counsel.

20. To the extent that Defendant is alleging that both the Court and the State violated Defendant's due process rights when they "allowed" him to perjure himself by testifying under a false identity, the Nevada Supreme Court in its Order of Affirmance of Defendant's conviction (Supreme Court No. 41405) already rejected this argument when it stated:

> Hermanski was responsible for introducing perjured testimony into his trial by testifying under oath that he was Robert James Day. Furthermore, during direct examination Hermanski perpetuated the fraud by admitting to offenses of which Day was convicted. Hermanski also argues that had the jury known his true identity, the jury would have concluded "Hermanski was not the same violent-type person as Day." Hermanski's assertion is ludicrous. Hermanski had more violent felony convictions on his record than Robert James Day. [Footnote omitted.] Obviously, Hermanski considered it in his best interest to portray himself as Robert James Day, a person whose criminal record was less extensive than his own. We conclude that Hermanski will not now be heard to complain that the jury convicted him under a false identity that he assumed.

Order of Affirmance, No. 41405, p. 2-3.

21. The State, as argued in its Answering Brief to the Nevada Supreme Court, was only made aware of Defendant's true identity after he was remanded by the District Court for resentencing under his true name, therefore, Defendant's claims are wholly without merit.

22. Defendant has not shown, nor is there is any need, for the Court to receive evidence or take testimony from any party before ruling on Defendant's Petition. There is no need to consider facts outside of the record, therefore, Defendant need not be present.

23. Defendant's request for an evidentiary hearing was premature given that after consideration of Defendant's arguments in his Petition the holding of such a hearing is not warranted.

24. Defendant's Petition was not supported by specific factual allegations, which, if true, would entitle him to relief.

CONCLUSIONS OF LAW

1. In order to assert a claim for ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the Defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

2. In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at

846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

3. Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not the defendant has demonstrated by "strong and convincing proof" that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). 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).

4. This 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, 94 Nev. at 675, 584 P.2d at 711. In essence, 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.

5. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

6. Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing Strickland, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., citing Strickland, 466 U.S. at 687-89, 694.

7. There is a strong presumption that appellate 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. The federal courts have held that a claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; 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). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

8. 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). In Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983), the Supreme Court recognized that part of professional diligence and competence involves "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. The Court also held that, "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.

9. Since Defendant intentionally and knowingly perjured himself regarding his true identity and the prior felony convictions of his alias, he is now estopped from complaining of the negative effects he suffered since he was the one who caused this error. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002).

10. Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001); see McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); see also Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993).

11. A defendant must be present at those hearings in which the Court deems it necessary to expand the record. See Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002).

12. A defendant is entitled to an evidentiary hearing if his Petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). "The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required." NRS 34.770(1). However, "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); (*citing* Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981)).

13. Furthermore, NRS 34.770 reads in pertinent part:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.

Accordingly, it is for the Court to determine whether a hearing is required and, after consideration of Defendant's Petition and the State's Opposition and Supplemental

Response, no such hearing is in fact required. Defendant's request for an evidentiary hearing was premature and, ultimately, unnecessary.

14. The Nevada Supreme Court has held that use of a criminal defendant's prior conviction to enhance his sentence is permissible as long as the State satisfies its initial burden of production by presenting prima facie evidence that the prior conviction existed. Dressler v. State, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96 (1991). A certified copy of the conviction constitutes prima facie evidence of the existence of the prior conviction and a Judgment of Conviction is presumed to be constitutionally sound on its face. Id. at 693, 697. The Nevada Supreme Court has also held that a criminal defendant can challenge or rebut the 'presumption of regularity' of a prior judgment of conviction by establishing by a preponderance of the evidence that the prior conviction is 'constitutionally infirm.' Id. at 698.

15. Defendant's denial on the record that any of the convictions listed in the pre-sentence report were his does not constitute proof by a preponderance of the evidence that any of the certified judgments of conviction were constitutionally infirm, particularly since all the felony convictions in question were attributed to Defendant based on his fingerprints and other identifying factors via local and federal (FBI) records. Means v. State, 103 P.3d 25 (2004).

16. Defendant was properly adjudicated a habitual criminal pursuant to NRS 207.012.

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ORDER

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

DATED this 15th day of March, 2006.

Jennifer P. Togliatti
DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411

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DISTRICT COURT

CLARK COUNTY, NEVADA

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CLERK

GREGORY HERMANSKI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C167783
Dept No: IX

NOTICE OF ENTRY OF DECISION AND ORDER

PLEASE TAKE NOTICE that on March 3, 2006, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on March 6, 2006.

SHIRLEY B. PARRAGUIRRE, CLERK OF COURT

By: B Wendel
Brandi J. Wendel, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 6 day of March 2006, I placed a copy of this Notice of Entry of Decision and Order in:

The bin(s) located in the Office of the County Clerk of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division

☑ The United States mail addressed as follows:
Gregory Hermanski # 69140
P.O. Box 650
Indian Springs, NV 89018

B Wendel
Brandi J. Wendel, Deputy Clerk

ORIGINAL

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ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED
MAR 3 8 45 AM '06
Shirley B. Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY HERMANSKI,
a.k.a. Robert James Day,
#1679345

Defendant.

CASE NO: C167783

DEPT NO: IX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 2-3-06
TIME OF HEARING: 9:00 A.M.

THIS CAUSE having come on for hearing before the Honorable JENNIFER P. TOGLIATTI, District Judge, on the 3rd day of February, 2006, the Petitioner not being present, Proceeding in Forma Pauperis, the Respondent being represented by DAVID ROGER, District Attorney, by and through NELL KEENAN, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On December 7, 2000, an Information was filed charging Gregory Scott

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Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include the additional count charging Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with 382 days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

2. Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate that Defendant's adjudication as a habitual criminal was pursuant to NRS 176.015(1)(c), and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

3. Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering this the district court vacated Defendant's sentence and conducted another sentencing hearing. In response the State also filed a notice of intent to seek punishment of Defendant as a habitual criminal pursuant to NRS 207.012 on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and

[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

4. Defendant filed a timely appeal from the Amended Judgment of Conviction, case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in case No. 41405, affirming Defendant's conviction. Remittitur was issued on July 27, 2004.

5. Defendant filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. Defendant filed a Motion for Prisoner Transport on October 5, 2005. The State's response was filed on October 24, 2005. On October 24, 2005, the Court heard argument and denied Defendant's Motion for Prisoner Transport. The Court also ordered a supplemental response from the State regarding Defendant's Ground 3 of his Petition which alleges ineffective assistance of counsel at his resentencing under his birth name. The State's Supplemental Response regarding Defendant's Ground 3 was filed on December 8, 2005.

6. This Court heard argument on Defendant's Petition on February 3, 2006.

7. Defendant's trial counsel was effective throughout the proceedings.

8. Defendant's counsel did not know during the pendency of Defendant's case that Defendant had lied about his identity when he assumed the identity of Robert James Day.

9. Contrary to Defendant's allegation Defendant's counsel did in fact make mitigation arguments on his behalf during his sentencing.

10. Contrary to Defendant's allegation Defendant's counsel also argued on his behalf regarding the question of Defendant's habitual offender status. Notwithstanding counsel's arguments, Defendant's prior convictions as presented to the court by the State in the form of certified copies of his convictions were constitutionally sound and, as such, Defendant was adjudicated accordingly: "[a]ll right. *Pursuant to statute then with the requisite certified copies of the prior convictions*, one [sic] count I, you are hereby adjudicated a habitual offender. On Count II, you are hereby adjudicated a habitual offender. . . . " [Emphasis added.] RT 4-30-03, p. 7. Since there is no indication from the

record that the Court believed that the certified copies of Defendant's prior convictions were constitutionally infirm on their face, the implication is that they were in fact constitutionally sound and there was not much more that Defendant's counsel could say on his behalf.

11. Since Defendant consciously and intentionally perjured himself when he admitted to the prior felony convictions of Robert James Day he is now estopped from complaining about the negative effects he allegedly suffered since he was the one who caused the error.

12. Defendant's subsequent denial on the record that any of the convictions listed in the pre-sentence report were his does not constitute proof by a preponderance of the evidence that the certified judgments of conviction were constitutionally infirm, particularly given that all of the felony convictions in question were attributed to Defendant based on his fingerprints and other identifying factors via local and federal (FBI) records.

13. Defendant failed to show that but for his counsel's alleged failure to advise the court of Defendant's medical status or his alleged psychological problems that there is a reasonable probability that the court would have sentenced him to less time.

14. With regard to Defendant's mental problems as mentioned in the pre-sentence report, the Court also had the same pre-sentence report at its disposal at the time of sentencing so it is of no consequence that Defendant's counsel did not offer it as mitigation because the Court was already aware of it. See Pre-Sentence Report, 2-20-03, p. 6.

15. The Court was well aware of the three sentencing options at its disposal notwithstanding the State's request for the maximum penalty of life without the possibility of parole.

16. Defendant's reliance on his alleged mental illness and physical problems do not take away from the fact that he was convicted by a jury after trial. Nor do these points lessen the impact of the certified judgments of conviction regarding Defendant's prior convictions as presented by the State which justify adjudicating Defendant as a habitual criminal pursuant to NRS 207.012.

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17. Given the quantity of Defendant's previous felony convictions as presented to the Court by the State in the form of certified judgments of conviction, coupled with the gravity of Defendant's most recent conviction, the sentence of life without the possibility of parole was most certainly warranted and justified.

18. Defendant has failed to show that his trial counsel's representation fell below an objective standard of reasonableness or that had Defendant's counsel advised the Court of Defendant's health status or alleged prior mental problems that it would have sentenced him to less time as permitted by NRS 207.012.

19. Defendant received effective assistance of appellate counsel.

20. To the extent that Defendant is alleging that both the Court and the State violated Defendant's due process rights when they "allowed" him to perjure himself by testifying under a false identity, the Nevada Supreme Court in its Order of Affirmance of Defendant's conviction (Supreme Court No. 41405) already rejected this argument when it stated:

> Hermanski was responsible for introducing perjured testimony into his trial by testifying under oath that he was Robert James Day. Furthermore, during direct examination Hermanski perpetuated the fraud by admitting to offenses of which Day was convicted. Hermanski also argues that had the jury known his true identity, the jury would have concluded "Hermanski was not the same violent-type person as Day." Hermanski's assertion is ludicrous. Hermanski had more violent felony convictions on his record than Robert James Day. [Footnote omitted.] Obviously, Hermanski considered it in his best interest to portray himself as Robert James Day, a person whose criminal record was less extensive than his own. We conclude that Hermanski will not now be heard to complain that the jury convicted him under a false identity that he assumed.

Order of Affirmance, No. 41405, p. 2-3.

21. The State, as argued in its Answering Brief to the Nevada Supreme Court, was only made aware of Defendant's true identity after he was remanded by the District Court for resentencing under his true name, therefore, Defendant's claims are wholly without merit.

22. Defendant has not shown, nor is there is any need, for the Court to receive evidence or take testimony from any party before ruling on Defendant's Petition. There is no need to consider facts outside of the record, therefore, Defendant need not be present.

23. Defendant's request for an evidentiary hearing was premature given that after consideration of Defendant's arguments in his Petition the holding of such a hearing is not warranted.

24. Defendant's Petition was not supported by specific factual allegations, which, if true, would entitle him to relief.

CONCLUSIONS OF LAW

1. In order to assert a claim for ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the Defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

2. In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at

846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

3. Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not the defendant has demonstrated by "strong and convincing proof" that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). 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).

4. This 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, 94 Nev. at 675, 584 P.2d at 711. In essence, 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.

5. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

6. Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing Strickland, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., citing Strickland, 466 U.S. at 687-89, 694.

7. There is a strong presumption that appellate 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. The federal courts have held that a claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; 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). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

8. 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). In Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983), the Supreme Court recognized that part of professional diligence and competence involves "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. The Court also held that, "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.

9. Since Defendant intentionally and knowingly perjured himself regarding his true identity and the prior felony convictions of his alias, he is now estopped from complaining of the negative effects he suffered since he was the one who caused this error. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002).

10. Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001); see McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); see also Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993).

11. A defendant must be present at those hearings in which the Court deems it necessary to expand the record. See Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002).

12. A defendant is entitled to an evidentiary hearing if his Petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). "The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required." NRS 34.770(1). However, "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); (*citing* Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981)).

13. Furthermore, NRS 34.770 reads in pertinent part:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.

Accordingly, it is for the Court to determine whether a hearing is required and, after consideration of Defendant's Petition and the State's Opposition and Supplemental

Response, no such hearing is in fact required. Defendant's request for an evidentiary hearing was premature and, ultimately, unnecessary.

14. The Nevada Supreme Court has held that use of a criminal defendant's prior conviction to enhance his sentence is permissible as long as the State satisfies its initial burden of production by presenting prima facie evidence that the prior conviction existed. Dressler v. State, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96 (1991). A certified copy of the conviction constitutes prima facie evidence of the existence of the prior conviction and a Judgment of Conviction is presumed to be constitutionally sound on its face. Id. at 693, 697. The Nevada Supreme Court has also held that a criminal defendant can challenge or rebut the 'presumption of regularity' of a prior judgment of conviction by establishing by a preponderance of the evidence that the prior conviction is 'constitutionally infirm.' Id. at 698.

15. Defendant's denial on the record that any of the convictions listed in the pre-sentence report were his does not constitute proof by a preponderance of the evidence that any of the certified judgments of conviction were constitutionally infirm, particularly since all the felony convictions in question were attributed to Defendant based on his fingerprints and other identifying factors via local and federal (FBI) records. Means v. State, 103 P.3d 25 (2004).

16. Defendant was properly adjudicated a habitual criminal pursuant to NRS 207.012.

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ORDER

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

DATED this 15th day of March, 2006.

Jennifer P. Togliatti
DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411

jr

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Gregory Scott Hermanski,
AKA, Robert James Day,
NDOC #69140
High Desert State Prison
PO Box 650
Indian Springs, Nevada 89018

Shirley B Parraguirre

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DISTRICT COURT FILED

CLARK COUNTY, NEVADA

GREGORY SCOTT HERMANSKI,

Petitioner,

v.

THE STATE OF NEVADA, et al.,

Respondents.

_____/

Case No. C167783

Dept. No. IX

3/27/06

PETITIONER'S MOTION FOR REHEARING ON DECISION ENTERED MARCH 3, 2006

COME NOW, the petitioner, Gregory Scott Hermanski, and acting in proper person, respectfully moves this Honorable Court, to enter an Order granting him a rehearing on this petition for writ of habeas corpus (post-conviction) decided on February 3, 2006.

THIS Motion is made and based upon all papers, pleadings, and documents on file with the Clerk of this Court and attached points and authorities, District Court Rule 13.

DATED this 13th day of March 2006.

Submitted Respectfully,

Gregory Scott Hermanski

Gregory Scott Hermanski,
Petitioner
NDOC #69140

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POINTS AND AUTHORITIES

"FACTS"

1. On December 3, 2006, petitioner filed a Motion to Dismiss counsel Dianne M. Dickson. Wherein he alleged that counsel was aware of petitioner's true identity when she permitted petitioner to be tried under a false identity, and advised petitioner to testify falsely during trial.

2. On December 16, and 23, 2002, a hearing was held regarding said Motion to Dismiss counsel, however, over objection of petitioner, petitioner was not permitted to be present. See Criminal Minutes, at page 15 & 16.

3. Petitioner alleges that, to date Ms. Dickson has never responded to petitioner's allegations contained in both his Motion to Dismiss counsel and Ground I of the instant petition for writ of habeas corpus.

4. Thus, petitioner asserts that the Court went outside/expanded the record of these proceedings in determining that "Defendant's counsel did not know during the pendency of defendant's case that the defendant had lied about his identity when he assumed the identity of Robert James Day." See "Finding Of Facts, Conclusion Of Law And Order," at page 3.

5. Petitioner further asserts that the Court's refusal to allow petitioner's presence at the hearing regarding the Motion to Dismiss counsel, and petition for writ of habeas corpus, resulted in depriving petitioner an opportunity to examine and/or rebut whatever information the Court relied upon in making such "finding of facts."

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LEGAL ARGUMENT

In the case of Gebers v State, 118 Nev. 500, 50 P.3d 1092(2002), the Supreme Court of Nevada determined that "a defendant must be present at those hearings in which the Court deems it necessary to expand the record."

WHEREFORE, Petitioner respectfully request that this Honorable Court enter an Order vacating the Order denying petition for writ of habeas corpus entered March 3, 2006, and grant petitioner a re-hearing on his petition for writ of habeas corpus (post-conviction).

DATED this 13th day of March 2006.

Submitted Respectfully,

Gregory Scott Hermanski,
Petitioner
NDOC #69140

In Pro se

CERTIFICATE OF MAILING

I HEREBY certify that on this 13th day of March 2006, I served the foregoing Petitioner's Motion For Rehearing On Decision Entered March 3, 2006, by placing same in the U.S. mail postage fully prepaid, addressed to:

David Roger, District Attorney
200 S. Third Street
Las Vegas, NV 89155

Gregory Scott Hermanski,
Petitioner
NDOC #69140

Gregory Scott Hermanski
A/K/A Robert James Day #69140
High Desert State Prison
P.O. Box 650
Indian Springs, NV
89018

LEGAL MAIL

CONFIDENTIAL

Shirley B. Parraguirre, County Clerk
200 Lewis Ave.
P.O. Box 551601
Las Vegas, NV 89155-1601

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DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY HERMANSKI,
a/k/a Robert James Day,
#1679345

Defendant.

CASE NO: C167783

DEPT NO: IX

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR REHEARING

DATE OF HEARING: 3-27-06
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through H. LEON SIMON, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion For Rehearing.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include the additional count charging Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with 382 days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate that Defendant's adjudication as a habitual criminal was pursuant to NRS 176.015(1)(c), and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering this the district court vacated Defendant's sentence and conducted another sentencing hearing.

---

[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

In response the State also filed a notice of intent to seek punishment of Defendant as a habitual criminal pursuant to NRS 207.012 on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

Defendant filed a timely appeal from the Amended Judgment of Conviction, case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in case No. 41405, affirming Defendant's conviction. Remittitur was issued on July 27, 2004.

Defendant filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. Defendant filed a Motion for Prisoner Transport on October 5, 2005. The State's response was filed on October 24, 2005. On October 24, 2005, the Court heard argument and denied Defendant's Motion for Prisoner Transport. The Court also ordered a supplemental response from the State regarding Defendant's Ground 3 of his Petition which alleges ineffective assistance of counsel at his re-sentencing under his true/birth name. The State filed its Supplemental Response on December 8, 2005. On February 3, 2006, the court denied Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). A Findings of Fact, Conclusions of Law and Order was filed on March 3, 2006.

Defendant filed his instant Motion for Rehearing on March 17, 2006. The State's Opposition is as follows.

ARGUMENT

DEFENDANT'S MOTION FOR REHEARING IS NOT PROPERLY BEFOR THIS COURT

This Court just ruled upon Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) on February 3, 2006, and, as memorialized in detail in the court's Findings of Fact, Conclusions of Law and Order filed on March 3, 2006, determined that Defendant's trial and appellate counsel were effective throughout the proceedings. Since Defendant has

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not shown that the Court has overlooked or misapprehended any issue of fact or law, the State submits that Defendant's Motion for Rehearing should be denied. See NRAP 40(a).

CONCLUSION

For the foregoing reasons, the State respectively requests that Defendant's Motion for Rehearing regarding his Post-Conviction Habeas Petition be DENIED.

DATED this 23rd day of March, 2006.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Craig L. Hendricks for
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 24th day of March, 2006, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY SCOTT HERMANSKI, AKA
ROBERT JAMES DAY #69140
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89018

BY /s/ J. Robertson
Secretary for the District Attorney's Office

HLS/SA/jr

16

Gregory Scott Hermanski
aka Robert James Day #69140
Defendant/In Propria Persona
Post Office Box 650 [HDSP]
Indian Springs, Nevada. 89018

FILED
MAR 21 2 47 PM '06
Shirley B. Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

GREGORY SCOTT HERMANSKI

Defendant.

Case No. C167783
Dept. No. IX
Docket _____

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, That the Petitioner/Defendant, GREGORY SCOTT HERMANSKI, in and through his proper person, hereby appeals to the Supreme Court of Nevada from the ORDER denying and/or dismissing the

PETITION FOR WRIT OF HABEAS CORPUS (Post-Conviction)

ruled on the 3rd day of MARCH, 2006.

Dated this 23rd day of MARCH, 2006.

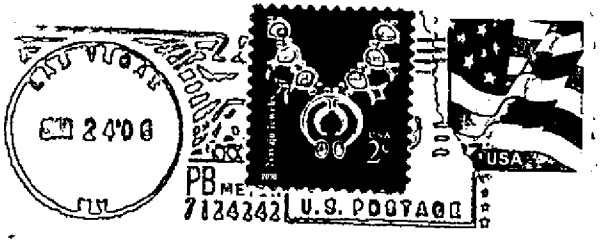
Respectfully Submitted,

Gregory S. Hermanski

GREGORY SCOTT HERMANSKI

MAR 27 2006
COUNTY CLERK

Orezon S. Hermanski
a/k/a Robert James Day #69140
N.D.S.P.
P.O. Box 650
Indian Springs, NV 89018



LEGAL MAIL

CONFIDENTIAL

Shirley B. Parraguirre
County Clerk
200 S. Third St.
P.O. Box 551601

ORIGINAL

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DISTRICT COURT

CLARK COUNTY, NEVADA

CLERK

STATE OF NEVADA, Plaintiff(s), vs. GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY, Defendant(s),	Case No: C167783 Dept No: IX

CASE APPEAL STATEMENT

1. Appellant(s): GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY

2. Judge: JENNIFER TOGLIATTI

3. All Parties, District Court:

Plaintiff, THE STATE OF NEVADA

Defendant(s), GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY

4. All Parties, Appeal:

Appellant(s), GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY

Respondent, THE STATE OF NEVADA

5. Appellate Counsel:

Appellant/Proper Person
Gregory Scott Hermanski #69140
P.O. Box 650
Indian Springs, NV 89018

Respondent
David Roger, District Attorney
200 Lewis Ave.
Las Vegas, NV 89101
(702) 671-2700

6. District Court Attorney, Appointed

7. On Appeal, N/A

8. Forma Pauperis, N/A

9. Date Commenced in District Court: 06/08/00

Dated This 28 day of March 2006.

Shirley B. Parraguirre, Clark County Clerk

By: Robin J. Mills

Robin J. Mills, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

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9

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
TRACEY J. BRIERLY
Deputy District Attorney
Nevada Bar #006237
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

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APR 11 9 35 AM '06
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
GREGORY HERMANSKI, aka
Robert James Day,
#1679345
Defendant.

Case No. C167783
Dept No. IX

ORDER DENYING PETITIONER'S MOTION FOR REHEARING ON DECISION ENTERED MARCH 3, 2006

DATE OF HEARING: 3/27/06
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 27th day of March, 2006, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by DAVID ROGER, District Attorney, through TRACEY J. BRIERLY, Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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///

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IT IS HEREBY ORDERED that the Petitioner's Motion for Rehearing on Decision Entered March 3, 2006, shall be, and it is denied.

DATED this 7th day of April, 2006.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

TRACEY J. BRIERLY
Deputy District Attorney
Nevada Bar #006237

jr

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JOCP
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

FILED
JUL 27 9 29 AM '06
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,aka,
Gregory Scott Hermanski, #1679345

Defendant.

Case No: C167783

Dept No: IX

SECOND AMENDED
JUDGMENT OF CONVICTION

The Defendant previously appeared before the Court with counsel and having previously been found guilty by a jury to the crime(s) of **COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON (Felony) and COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony)**, in violation of NRS 207.012, 193.165 and 207.012; thereafter, on the 11th day of May, 2001, the Defendant was present in Court for sentencing with counsel wherein the Jury found the Defendant guilty thereof by reason of the Juries Verdict.

THEREAFTER, on the 30th day of April, 2003, the Defendant appeared in court with his counsel, PAUL WOMMER, ESQUIRE, and pursuant to a hearing/proceeding, and good cause appearing to amend Judgment of Conviction; now therefor,

IT IS ORDERED THAT: Defendant ROBERT JAMES DAY, aka, Gregory Scott Hermanski, is sentenced as Habitual Violent Felon under NRS 207.012 on COUNT I and as

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JUDGMENT ENTERED
JUL 28 2006

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Habitual Criminal under NRS 207.012(b) on COUNT II, and is sentenced in COUNT I to LIFE in the Nevada Department of Corrections WITHOUT the Possibility of Parole and in COUNT II to LIFE in the Nevada Department of Corrections WITHOUT the Possibility of Parole; Count II to run CONCURRENTLY with Count I with NO Credit for Time Served; Deft. to submit to a test to determine genetic markers. Court advised counsel he can file the appropriate motion as to credit for time served while Deft. serving Federal time.

The Court FURTHER ORDERED, that Defendant pay the $25.00 Administration Fee and $150.00 DNA Analysis Fee.

DATED this 25th day of July, 2006.

Jennifer P. Togliatti

DISTRICT JUDGE

JENNIFER P. TOGLIATTI

jr

152

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 47011

2006 AUG 10 P 2:36

District Court Case No. C167783

CLERK

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction as instructed."

Judgment, as quoted above, entered this 13th day of July, 2006.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 8th day of August, 2006.

Janette M. Bloom, Supreme Court Clerk

By: J. Richards
Chief Deputy Clerk

JUDGMENT ENTERED

AUG 11 2006

CE-01 S16

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47011

FILED

JUL 13 2006

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT JUDGMENT OF CONVICTION

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Appellant was prosecuted, sentenced, and convicted under the name Robert James Day. However, appellant's real name is Gregory Scott Hermanski. On March 15, 2001, a jury convicted appellant of robbery with the use of a deadly weapon and burglary while in possession of a deadly weapon. The district court entered a judgment of conviction on May 18, 2001. Based on the prior convictions of the true Robert James Day, the district court adjudicated appellant a habitual criminal and sentenced him to a maximum of 300 months and a minimum of 120 months in the Nevada State Prison.

On June 8, 2001, appellant filed a timely notice of appeal, and on November 15, 2001, this court affirmed the judgment of conviction in

06-14593

part and remanded in part. Although we affirmed the conviction, we remanded for corrections to the sentence and judgment of conviction.[1]

Subsequent to our order of remand, it was discovered that appellant was not Robert James Day, but rather Gregory Scott Hermanski. The district court vacated appellant's sentence and conducted another sentencing hearing. On December 26, 2002, the State filed a notice of intent to seek punishment of appellant as a habitual felon pursuant to NRS 207.012, based on appellant's prior convictions. On April 30, 2003, the district court adjudicated appellant a habitual felon and sentenced him to serve two concurrent life sentences in the Nevada State Prison without the possibility of parole. The amended judgment of conviction was entered on May 16, 2003. This court affirmed the amended judgment of conviction on appeal.[2] The remittitur issued on July 27, 2004.

On July 13, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On March 3, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must

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[1]Day v. State, Docket No. 38028 (Order of Affirmance in Part and Remand in Part, November 15, 2001).

[2]Hermanski v. State, Docket No. 41405 (Order of Affirmance, July 1, 2004).

demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that there is a reasonable probability of a different outcome in the proceedings.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4]

First, appellant claimed that his trial counsel was ineffective for failing to advise the district court during the trial that his name was really Gregory Scott Hermanski and advising him to admit to the prior convictions. Appellant claimed that his trial counsel knew or should have known his true name and that the jury's decision was based upon appellant's perjured testimony that Robert James Day's convictions were his. Appellant claimed that if his true name had been known that he would never have testified at trial.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that his trial counsel knew or should have known that his name was Gregory Scott Hermanski. Appellant was aware at all times of his true name and his failure to reveal his true name to the district court can only be imputed to him. Appellant cannot be heard to complain that the jury convicted him under a false identity that he assumed.[5] Further, appellant failed to demonstrate that there was a reasonable probability of

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[3]Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[4]Strickland, 466 U.S. at 697.

[5]See Rhyne v. State, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002) (recognizing that a defendant who invited the error would be estopped from raising the error as a claim on appeal).

a different outcome if he had not testified at trial—appellant was positively identified by the victim of the robbery and found to be in possession of an amount of money similar to that taken during the robbery a short time after the robbery.[6] Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his counsel at resentencing was ineffective for failing to challenge the validity of the prior convictions used to adjudicate him a habitual felon and failing to argue for a sentence lesser than life without the possibility of parole. Appellant claimed that counsel should have presented as mitigating evidence the fact that he has a mental illness, he was fifty-one years old, and he was terminally ill with hepatitis C and in need of a liver transplant.

Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that any of the prior convictions were invalid, and thus, he failed to demonstrate than any challenge to the prior convictions would have been successful. Appellant failed to demonstrate that any potential arguments that counsel could have made would have had a reasonable probability of a different sentencing outcome. The presentence investigation report sets forth appellant's date of birth and indicates that appellant's "lengthy history of psychiatric difficulties" was a mitigating factor. Therefore, we conclude that the district court did not err in denying this claim.

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[6]The victim testified that approximately $1000 was taken. Appellant was found in possession of approximately $1000 in the area of the crime shortly after the crime had occurred. When appellant was initially stopped by a police officer, he fled from the police officer upon mention of a "robbery."

Next, appellant claimed that his appellate counsel was ineffective. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.[7] Appellate counsel is not required to raise every non-frivolous issue on appeal.[8] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[9]

First, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court abused its discretion in denying his motion for a new trial. Appellant failed to demonstrate that he was prejudiced. Appellant failed to indicate what arguments should have been made, and thus, appellant failed to demonstrate that this issue had any reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel should have filed a reply brief setting forth more argument on the issue of whether the State had violated his due process rights by allowing appellant to testify under a false name. Appellant claimed that the State knew his true name at the time of trial. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's claim that the State knew that appellant was

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[7]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing to Strickland v. Washington, 466 U.S. 668 (1984)).

[8]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[9]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

testifying under a false name is only speculation, and he failed to demonstrate that the State actually knew appellant was committing perjury during the trial. Appellant further failed to demonstrate that any further arguments on this issue would have changed the outcome of the appeal. Therefore, we conclude that the district court did not err in denying this claim.

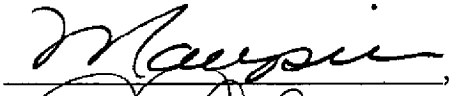
Third, appellant claimed that his appellate counsel was ineffective for failing to argue on appeal that Robert James Day's convictions were used during the second sentencing proceeding and that the judgment of conviction set forth that he was adjudicated a habitual criminal pursuant to NRS 207.010 for the crime of burglary while in possession of a deadly weapon when the State only provided notice that they were seeking adjudication under NRS 207.012.

Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that Robert James Day's prior convictions were used or relied upon by the district court in the second sentencing proceeding. Further, the record demonstrates that appellant was provided notice that the State was seeking adjudication as a habitual felon under NRS 207.012. It appears from this court's review of the record on appeal that the amended judgment of conviction contains a clerical error when it sets forth that appellant was sentenced as a habitual criminal pursuant to NRS 207.010 on the count of burglary while in possession of a deadly weapon. Because the felonies of both robbery with the use of a deadly weapon and burglary while in possession of a deadly weapon qualify for habitual felon treatment under NRS 207.012 and because the State provided notice that this was the statute under which they were seeking habitual felon adjudication, it appears that reference to NRS 207.010 in

relation to the burglary count is a clerical error.[10] In order to curtail any further confusion in this regard, we remand this matter to the district court for the limited purpose of correcting the judgment of conviction to read that appellant was adjudicated a habitual felon under NRS 207.012 for both the robbery and burglary counts.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[11] Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction as instructed.



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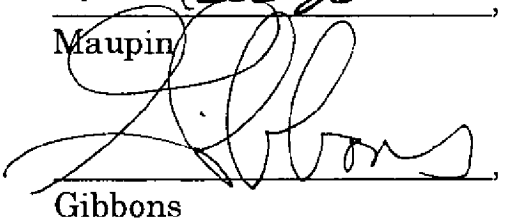
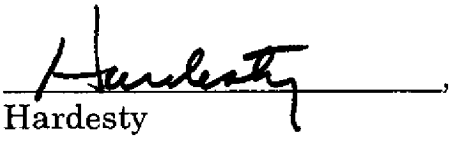
Maupin



_____, J.
Gibbons



_____, J.
Hardesty

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[10]See NRS 207.012(2).

[11]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Jennifer Togliatti, District Judge
Gregory Scott Hermanski
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 47011

District Court Case No. C167783

REMITTITUR

TO: Shirley Parraguirre, Clark County Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: August 8, 2006

Janette M. Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. Jennifer Togliatti, District Judge
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Gregory Scott Hermanski

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on AUG 10 2006.

BRANDI J. WENDEL
Deputy County Clerk

06-16283

153

FILED
Aug 11 12 16 PH '06
Shirley B. Parraguirre
CLERK

GREGORY SCOTT HERMANSKI, aka
Robert James Day #69140
P.O. BOx 650
Indian Springs, NV. 89018

Defendant in Pro se

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. GREGORY SCOTT HERMANSKI, aka Robert James Day, #1679345 Defendant.	Case No. C167783 Dept. No. ~~II~~ IX 8-23-06

DEFENDANT'S MOTION TO STAY PROCEEDINGS
AND MOTION FOR APPOINTMENT OF COUNSEL

NOW COMES, the Defendant, GREGORY SCOTT HERMANSKI, aka ROBERT JAMES DAY, and respectfully submits the foregoing Motion to Stay Proceedings and Motion for Appointment of Counsel. Which said motion is based upon the foregoing Memorandum of Points and Authorities and all paper, pleadings and documents on file herein.

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CMC

DATED: this 7 day of ~~XXXX~~ August 2006.

Gregory S. Hermanski
Gregory Scott Hermanski, aka
Robert James Day

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AUG 10 2006
COUNTY CLERK

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MEMORANDUM OF POINTS AND AUTHORITIES
(Statement of the case)

On July 13, 2005, defendant filed a proper person post-conviction petition for a writ of habeas corpus.in this Honorable Court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, this court declined to appoint counsel to represent defendant or to conduct an evidentiary hearing. On March 13, 2006, this court denied defendant's petition and defendant appealrd to the Supreme Court of Nevada in Supreme Court no. 47011.

On JUly 13, 2006, the Supreme Court entered "Order of Affirmance and Limited Remand to Correct Judgment of Conviction". (See Order, attached as defendant's Exhibit "A").

In it's Order the Supreme Court determined that:

> "Because the felonies of robbery with the use of a deadly weapon and burglary while in possession of a deadly weapon qualify for habitual felon treatment under NRS 207.012 and 'because the State provided notice that this was the statute under which they were seeking habitual felon adjudication', it appears that reference to NRS 207.010 in relation to the burglary count is a clerical error". (See, Attached Order at pages 6 and 7). (emphasis added).

The Supreme Court further determined that:

> "In order to curtail any further confusion in this regard, we remand this matter to the district court for the limited purpose of correcting the judgment of conviction to read that appellant was adjudicated a habitual felon under NRS 207.012 for both the robbery and burglary counts". (See attached Order , exhibit "A", at page 7).

However, defendant asserts, and the record will show, that said "Notice" is defective. While said "Notice" cites to NRS 207.012 (governing habitual felon proceedings) said Notice also makes reference to "Habitual Criminal" on at least five (5) seperate occasions. Indeed the State specifically

advised the court:

> "...the State Of Nevada will ask the court to sentence the defendant as an "Habitual Criminal" (See, "Notice of Intent to Seek Punishment as a Habitual Criminal", Exhibit "B", pages 2-3).

Defendant further asserts that because the Supreme Court based it's decision to remand the case upon it's determination that the State provided notice that it was seeking habitual felon adjudication, defendant objects to any such amendment/correction of the judgment of conviction on ground that the State's "Notice" is vague and ambiguous and, as such, does not satisfy the "Notice Requirement" of the 5th amendment and is in violation of defendant's right to due process under the 5th amendment of the United States Constitution.

Defendant further asserts that due to the confusion created by the State's "Notice", defendant's ability to proceed in this case was severely impaired.

Thus, defendant asks that this Honorable Court be mindful of the fact that defendant is a layman with limited knowledge of the law, and that, this court construe this motion liberally and not hold defendant to the professionalism of an attorney.

Defendant further asks this Honorable Court that due to the complex constitutional questions presented herein, and in the interests of justice, that this Honorable Court enter an order to stay these proceedings and to appoint counsel to examine the matter and properly present it to this court.

WHEREFORE, defendant prays this Honorable Court, in the interests of justice, will grant this motion to stay these proceedings and appoint counsel.

Respectfully Submitted,

Dated this 7 day of August, 2006.

Gregory Scott Hermanski

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "DEFENDANT'S MOTION TO STAY PROCEEDINGS AND MOTION FOR APPOINTMENT OF COUNSEL" was sent via US Mail to:

David Roger, District Attorney
200 Lewis Ave.
Las Vegas, NV 89155-2212

dated this 8 day of ~~XXXX~~ August, 2006.

Gregory Scott Hermanski

Exhibit "A"

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47011

FILED

JUL 13 2006

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT JUDGMENT OF CONVICTION

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Appellant was prosecuted, sentenced, and convicted under the name Robert James Day. However, appellant's real name is Gregory Scott Hermanski. On March 15, 2001, a jury convicted appellant of robbery with the use of a deadly weapon and burglary while in possession of a deadly weapon. The district court entered a judgment of conviction on May 18, 2001. Based on the prior convictions of the true Robert James Day, the district court adjudicated appellant a habitual criminal and sentenced him to a maximum of 300 months and a minimum of 120 months in the Nevada State Prison.

On June 8, 2001, appellant filed a timely notice of appeal, and on November 15, 2001, this court affirmed the judgment of conviction in

part and remanded in part. Although we affirmed the conviction, we remanded for corrections to the sentence and judgment of conviction.[1]

Subsequent to our order of remand, it was discovered that appellant was not Robert James Day, but rather Gregory Scott Hermanski. The district court vacated appellant's sentence and conducted another sentencing hearing. On December 26, 2002, the State filed a notice of intent to seek punishment of appellant as a habitual felon pursuant to NRS 207.012, based on appellant's prior convictions. On April 30, 2003, the district court adjudicated appellant a habitual felon and sentenced him to serve two concurrent life sentences in the Nevada State Prison without the possibility of parole. The amended judgment of conviction was entered on May 16, 2003. This court affirmed the amended judgment of conviction on appeal.[2] The remittitur issued on July 27, 2004.

On July 13, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On March 3, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must

---

[1]Day v. State, Docket No. 38028 (Order of Affirmance in Part and Remand in Part, November 15, 2001).

[2]Hermanski v. State, Docket No. 41405 (Order of Affirmance, July 1, 2004).

demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that there is a reasonable probability of a different outcome in the proceedings.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4]

First, appellant claimed that his trial counsel was ineffective for failing to advise the district court during the trial that his name was really Gregory Scott Hermanski and advising him to admit to the prior convictions. Appellant claimed that his trial counsel knew or should have known his true name and that the jury's decision was based upon appellant's perjured testimony that Robert James Day's convictions were his. Appellant claimed that if his true name had been known that he would never have testified at trial.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that his trial counsel knew or should have known that his name was Gregory Scott Hermanski. Appellant was aware at all times of his true name and his failure to reveal his true name to the district court can only be imputed to him. Appellant cannot be heard to complain that the jury convicted him under a false identity that he assumed.[5] Further, appellant failed to demonstrate that there was a reasonable probability of

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[3]Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[4]Strickland, 466 U.S. at 697.

[5]See Rhyne v. State, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002) (recognizing that a defendant who invited the error would be estopped from raising the error as a claim on appeal).

a different outcome if he had not testified at trial—appellant was positively identified by the victim of the robbery and found to be in possession of an amount of money similar to that taken during the robbery a short time after the robbery.[6] Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his counsel at resentencing was ineffective for failing to challenge the validity of the prior convictions used to adjudicate him a habitual felon and failing to argue for a sentence lesser than life without the possibility of parole. Appellant claimed that counsel should have presented as mitigating evidence the fact that he has a mental illness, he was fifty-one years old, and he was terminally ill with hepatitis C and in need of a liver transplant.

Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that any of the prior convictions were invalid, and thus, he failed to demonstrate than any challenge to the prior convictions would have been successful. Appellant failed to demonstrate that any potential arguments that counsel could have made would have had a reasonable probability of a different sentencing outcome. The presentence investigation report sets forth appellant's date of birth and indicates that appellant's "lengthy history of psychiatric difficulties" was a mitigating factor. Therefore, we conclude that the district court did not err in denying this claim.

---

[6]The victim testified that approximately $1000 was taken. Appellant was found in possession of approximately $1000 in the area of the crime shortly after the crime had occurred. When appellant was initially stopped by a police officer, he fled from the police officer upon mention of a "robbery."

Next, appellant claimed that his appellate counsel was ineffective. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.[7] Appellate counsel is not required to raise every non-frivolous issue on appeal.[8] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[9]

First, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court abused its discretion in denying his motion for a new trial. Appellant failed to demonstrate that he was prejudiced. Appellant failed to indicate what arguments should have been made, and thus, appellant failed to demonstrate that this issue had any reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel should have filed a reply brief setting forth more argument on the issue of whether the State had violated his due process rights by allowing appellant to testify under a false name. Appellant claimed that the State knew his true name at the time of trial. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's claim that the State knew that appellant was

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[7]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing to Strickland v. Washington, 466 U.S. 668 (1984)).

[8]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[9]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

testifying under a false name is only speculation, and he failed to demonstrate that the State actually knew appellant was committing perjury during the trial. Appellant further failed to demonstrate that any further arguments on this issue would have changed the outcome of the appeal. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue on appeal that Robert James Day's convictions were used during the second sentencing proceeding and that the judgment of conviction set forth that he was adjudicated a habitual criminal pursuant to NRS 207.010 for the crime of burglary while in possession of a deadly weapon when the State only provided notice that they were seeking adjudication under NRS 207.012.

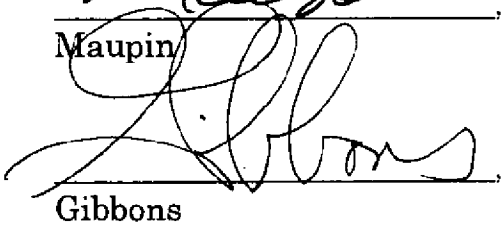
Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that Robert James Day's prior convictions were used or relied upon by the district court in the second sentencing proceeding. Further, the record demonstrates that appellant was provided notice that the State was seeking adjudication as a habitual felon under NRS 207.012. It appears from this court's review of the record on appeal that the amended judgment of conviction contains a clerical error when it sets forth that appellant was sentenced as a habitual criminal pursuant to NRS 207.010 on the count of burglary while in possession of a deadly weapon. Because the felonies of both robbery with the use of a deadly weapon and burglary while in possession of a deadly weapon qualify for habitual felon treatment under NRS 207.012 and because the State provided notice that this was the statute under which they were seeking habitual felon adjudication, it appears that reference to NRS 207.010 in

relation to the burglary count is a clerical error.[10] In order to curtail any further confusion in this regard, we remand this matter to the district court for the limited purpose of correcting the judgment of conviction to read that appellant was adjudicated a habitual felon under NRS 207.012 for both the robbery and burglary counts.

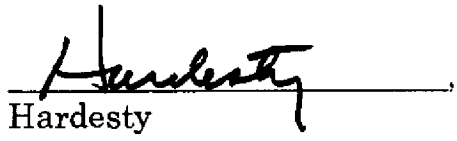
Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[11] Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction as instructed.

_____, J.
Maupin



_____, J.
Gibbons



_____, J.
Hardesty

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[10]See NRS 207.012(2).

[11]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

NOTC
STEWART L. BELL
Clark County District Attorney
Nevada Bar #000477
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

FILED

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CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI, aka Robert James Day, #1679345

Defendant.

Case No. C167783
Dept. No. IV

NOTICE OF INTENT TO SEEK PUNISHMENT AS A HABITUAL CRIMINAL

TO: GREGORY SCOTT HERMANSKI, aka Robert James Day, Defendant; and

TO: SHARON DICKINSON, Deputy Public Defender , Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that pursuant to NRS 207.012, the STATE OF NEVADA will seek punishment of Defendant GREGORY SCOTT HERMANSKI, aka Robert James Day, as an habitual criminal as said Defendant has been found guilty of ROBBERY WITH USE OF A DEADLY WEAPON (Felony – NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony – NRS 205.060, 193.165): in the above-entitled action.

That since the Defendant has been found guilty of ROBBERY WITH USE OF A DEADLY WEAPON (Felony – NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony – NRS 205.060, 193.165), the STATE

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Exhibit "B"
page 1 OF 4

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NOTC
STEWART L. BELL
Clark County District Attorney
Nevada Bar #000477
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI, aka Robert James Day, #1679345

Defendant.

Case No. C167783
Dept. No. IV

NOTICE OF INTENT TO SEEK PUNISHMENT AS A HABITUAL CRIMINAL

TO: GREGORY SCOTT HERMANSKI, aka Robert James Day, Defendant; and

TO: SHARON DICKINSON, Deputy Public Defender , Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that pursuant to NRS 207.012, the STATE OF NEVADA will seek punishment of Defendant GREGORY SCOTT HERMANSKI, aka Robert James Day, as an habitual criminal as said Defendant has been found guilty of ROBBERY WITH USE OF A DEADLY WEAPON (Felony – NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony – NRS 205.060, 193.165): in the above-entitled action.

That since the Defendant has been found guilty of ROBBERY WITH USE OF A DEADLY WEAPON and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON, the STATE OF NEVADA will ask the court to sentence the Defendant as an

Exhibit "B"
page 2 of 4

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Habitual Criminal based upon the following felony convictions, to-wit:

1. That in 1969, the Defendant was convicted in the State of Florida, for the crime of Attempt Larceny of Auto, in Case No. 69C-565.

2. That in 1971, the Defendant was convicted in the State of Florida, for the crime of Larceny of Motor Vehicle, in Case No. 71-3390.

3. That in 1971, the Defendant was convicted in the State of Florida, for the crime of Breaking and Entering, in Case No. 71-3828.

4. That in 1972, the Defendant was convicted in the State of Florida, for the crime of Burglary, in Case No. 71-3110.

5. That in 1977, the Defendant was convicted in the State of Florida, for the crime of Buying or Receiving Stolen Property, in Case No. 74-7116.

6. That in 1978, the Defendant was convicted in the State of Florida, for Probation Violation, Driving Under the Influence, Federal District Court, in Case No. 766-192.

7. That in 1981, the Defendant was convicted in the State of Florida, for the crimes of Possession of Cocaine and Carrying Concealed Firearm, in Case No. 79-2816CF.

8. That in 1984, the Defendant was convicted in the State of Florida, for the crime of Bank Robbery, in Case No. 81-6119-CR-JAG.

9. That in 1986, the Defendant was convicted in the State of Florida, for the crime of Aggravated Assault, in Case No. 85-784CF.

10. That in 1987, the Defendant was convicted in the State of Florida, for the crimes of Counts I and II, Bank Robbery with Use of a Firearm in the Commission of a Robbery, and Counts III and IV, Bank Robbery With Use of a Firearm in the commission of a Robbery, U.S. District Court, Southern District of Florida, in Case No. 85-662-CR-KING.

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Exhibit "B"
page 3 of 4

11. That in 1998, the Defendant was convicted in the State of Florida, for the crime of Armed Burglary and Armed Robbery, in Case No. 94-24164C.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the State's NOTICE OF INTENT TO SEEK PUNISHMENT AS A HABITUAL CRIMINAL is hereby acknowledged this 26 day of December, 2002.

DIANE DICKSON, Deputy Public Defender
ATTORNEY FOR DEFENDANT
455-5112

BY
Justa Johnson
Secretary, District Attorney's Office

SSM/jj

Exhibit "B"
page 4 of 4

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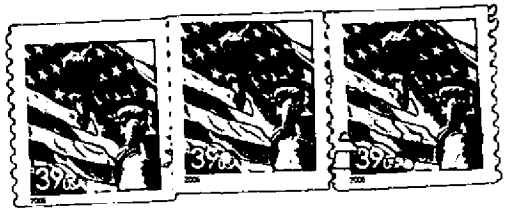
Robert Day 69140
High Desert State Prison
P.O. Box 650
Indian Springs, NV
89018



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CLERK

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI,
a/k/a Robert James Day,
#1679345

Defendant.

CASE NO: C167783

DEPT NO: IX

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO STAY PROCEEDINGS AND MOTION FOR APPOINTMENT OF COUNSEL

DATE OF HEARING: 8-23-06
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through H. LEON SIMON, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To Stay Proceedings And Motion For Appointment Of Counsel.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include the additional count charging Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with 382 days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate that Defendant's adjudication as a habitual criminal was pursuant to NRS 176.015(1)(c), and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering that the district court vacated Defendant's sentence and conducted another sentencing hearing.

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[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

In response the State also filed a notice of intent to seek punishment of Defendant as a habitual criminal pursuant to NRS 207.012 on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

Defendant filed a timely appeal from the Amended Judgment of Conviction, case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in case No. 41405, affirming Defendant's conviction. Remittitur was issued on July 27, 2004.

Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. Defendant filed a Motion for Prisoner Transport on October 5, 2005. The State's response was filed on October 24, 2005. On October 24, 2005, the Court heard argument and denied Defendant's Motion for Prisoner Transport. The Court also ordered a supplemental response from the State regarding Defendant's Ground 3 of his Petition which alleges ineffective assistance of counsel at his re-sentencing under his true/birth name. The State filed its Supplemental Response on December 8, 2005. On February 3, 2006, the court denied Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). A Findings of Fact, Conclusions of Law and Order was filed on March 3, 2006. A Notice of Entry of Decision and Order was filed on March 6, 2006.

On Marcy 17, 2006, Defendant filed a Motion for Rehearing. The State filed its Opposition on March 23, 2006. On March 27, 2006, Defendant's motion was denied.

Defendant filed a Notice with the Nevada Supreme Court appealing the District Court's denial of his Post-Conviction Petition for Writ of Habeas Corpus. On July 13, 2006, the Nevada Supreme Court filed an Order of Affirmance and Limited Remand to Correct Judgment of Conviction (case No. 47011). The Supreme Court remanded Defendant's case to the District Court for the sole purpose of amending the Judgment of Conviction to read that Defendant was adjudicated a habitual offender pursuant to NRS 207.012 for both the robbery and burglary counts. Remittitur was issued on or about July 18, 2006.

Pursuant to the Supreme Court's Order a Second Amended Judgment of Conviction was filed on July 28, 2006.

Defendant filed his instant motion on August 11, 2006. The State's Opposition is as follows.

ARGUMENT

DEFENDANT IS NOT ENTITLED TO APPOINTMENT OF AN ATTORNEY AND A STAY IN PROCEEDINGS IS UNWARRANTED

In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings. In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution."

NRS 34.750 provides, in pertinent part:

> "[a] petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily,* the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
>
> (a) The issues are difficult;
> (b) The Defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery." (emphasis added).

Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel. McKague specifically held that with the exception of NRS 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death], one does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164.

The Nevada Supreme Court has observed that a defendant "must show that the requested review is not frivolous before he may have an attorney appointed." Peterson v.

Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)). Defendant has failed to make this requisite showing, therefore, his request for appointment of counsel should be denied.

Further, a stay in the court's issuance of a Second Amended Judgment of Conviction as per the Order of the Nevada Supreme Court in case No. 47011 is unwarranted. Defendant contends that the State's Notice of Intent to Seek Punishment as a Habitual Criminal as filed on December 26, 2002, was defective and therefore failed to satisfy the notice requirement. Defendant fails to note, however, that the Notice of December 26, 2002, properly and adequately reflected the State's request for the Habitual Criminal adjudication of Defendant pursuant to NRS 207.012 and that the State provided the requisite number of certified copies of Defendant's previous judgments of conviction to satisfy NRS 207.012 regardless of whether the State called such adjudication "habitual criminal" or "habitual felon." Further, the State only sought Defendant's adjudication as a habitual offender under NRS 207.010 when it still believed that Defendant's name (and accompanying prior criminal history) was that of Robert James Day. As soon as it was discovered that Defendant's birth name was Gregory Scott Hermanski the State filed a new Notice (that of December 26, 2002 – Defendant's Exhibit B) reflecting its intent to seek Defendant's adjudication as a habitual offender pursuant to NRS 207.012. As such, Defendant's argument is wholly without merit.

Finally, Defendant's request for a stay is moot as this court, as per the Nevada Supreme Court's Order of July 13, 2006, filed a Second Amended Judgment of Conviction on July 28, 2006.

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CONCLUSION

Based on the aforementioned arguments, the State respectfully requests that this court DENY Defendant's Motion for Appointment of Counsel and for a Stay in the Proceedings.

DATED this 22nd day of August, 2006.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Craig L. Hendricks
H., LEON SIMON
Deputy District Attorney
Nevada Bar #000411

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 22nd day of August, 2006, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY SCOTT HERMANSKI, aka
ROBERT JAMES DAY #69140
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89018

BY /s/ J. Robertson
Secretary for the District Attorney's Office

SO/HLS/jr

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA Plaintiff(s), vs. GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY, Defendant(s),	Case No: C167783 Dept No: IX

CASE APPEAL STATEMENT

1. Appellant(s): GREGORY SCOTT HERMANSKI

2. Judge: JENNIFER TOGLIATTI

3. All Parties, District Court:

Plaintiff, THE STATE OF NEVADA

Defendant(s), GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY

4. All Parties, Appeal:

Appellant(s), GREGORY SCOTT HERMANSKI

Respondent, THE STATE OF NEVADA

5. Appellate Counsel:

Appellant/Proper Person
Gregory Scott Hermanski #69140
P.O. Box 650
Indian Springs, NV 89018

Respondent
David Roger, District Attorney
200 Lewis Ave.
Las Vegas NV 89101
(702) 671-2700

6. District Court Attorney, Appointed

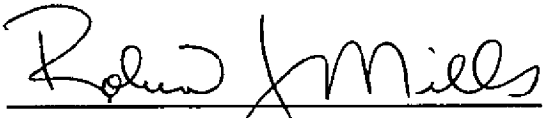
7. On Appeal, N/A

8. Forma Pauperis, N/A

9. Date Commenced in District Court: June 8, 2000

Dated This 28 day of August 2006.

Shirley B. Parraguirre, Clark County Clerk

By: 

Robin J. Mills, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

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Gregory Scott Hermanski
A/K/A Robert James Day 69140
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

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Shirley B. Parraguirre
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District Court
Clark County, Nevada

Gregory Scott Hermanski,
A/K/A Robert James Day,
Defendant.

Case No. C167783
Dept. No. IX

VS.

The State of Nevada,
Plaintiff.

NOTICE OF APPEAL

Notice is hereby given that the defendant, Gregory Scott Hermanski, in and through his proper person, hereby appeals to the Supreme Court of Nevada from the Second Amended Judgment of Conviction entered on or about July 28, 2006 and from Order denying defendant's "Motion to Stay Proceedings and Motion for Appointment of Counsel" entered on or about August 23, 2006.

Dated this 24 day of August, 2006.

Gregory S. Hermanski
Gregory Scott Hermanski

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ORDR

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
TRACEY J. BRIERLY
Deputy District Attorney
Nevada Bar #006237
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

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Shirley B. Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GEGORY SCOTT HERMANSKI, aka Robert James Day,
#1679345

Defendant.

Case No. C167783
Dept No. IX

ORDER DENYING DEFENDANT'S MOTIO TO STAY PROCEEDINGS AND MOTION FOR APPOINTMENT OF COUNSEL

DATE OF HEARING: 8/23/06
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 23rd day of August, 2006, the Defendant not being present, Dianne Dickson, Deputy Public Defender, the Plaintiff being represented by DAVID ROGER, District Attorney, through TRACEY J. BRIERLY, Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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IT IS HEREBY ORDERED that the Defendant's Motion to Stay Proceedings and Motion for Appointment of Counsel, shall be, and it is denied.

DATED this 28th day of August, 2006.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

TRACEY J. BRIERLY
Deputy District Attorney
Nevada Bar #006237

jr

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IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 47963

District Court Case No. C167783

FILED

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CLERK

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER this appeal DISMISSED."

Judgment, as quoted above, entered this 3rd day of October, 2006.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 31st day of October, 2006.

Janette M. Bloom, Supreme Court Clerk

By: J. Richards
Chief Deputy Clerk

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JUDGMENT ENTERED
NOV 0 3 2006

CE-01

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47963

FILED

OCT 0 3 2006

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

ORDER DISMISSING APPEAL

This is a proper person appeal from an order of the district court denying a second amended judgment of conviction and an order denying a motion for stay and appointment of counsel. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Appellant was prosecuted, sentenced, and convicted under the name Robert James Day. However, appellant's real name is Gregory Scott Hermanski. On March 15, 2001, a jury convicted appellant of robbery with the use of a deadly weapon and burglary while in possession of a deadly weapon. The district court entered a judgment of conviction on May 18, 2001. Based on the prior convictions of the true Robert James Day, the district court adjudicated appellant a habitual criminal and sentenced him to a maximum of 300 months and a minimum of 120 months in the Nevada State Prison.

On June 8, 2001, appellant filed a timely notice of appeal, and on November 15, 2001, this court affirmed the judgment of conviction in

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part and remanded in part. Although we affirmed the conviction, we remanded for corrections to the sentence and judgment of conviction.[1]

Subsequent to our order of remand, it was discovered that appellant was not Robert James Day, but rather Gregory Scott Hermanski. The district court vacated appellant's sentence and conducted another sentencing hearing. On December 26, 2002, the State filed a notice of intent to seek punishment of appellant as a habitual felon pursuant to NRS 207.012, based on appellant's prior convictions. On April 30, 2003, the district court adjudicated appellant a habitual felon and sentenced him to serve two concurrent life sentences in the Nevada State Prison without the possibility of parole. The amended judgment of conviction was entered on May 16, 2003. This court affirmed the amended judgment of conviction on appeal.[2] The remittitur issued on July 27, 2004.

Appellant next pursued a post-conviction petition for a writ of habeas corpus challenging the validity of his judgment of conviction and sentence. The district court denied the petition. On appeal, this court affirmed the decision of the district court to deny the petition, but remanded the matter for the limited purpose of correcting a clerical error in the judgment of conviction—the amended judgment of conviction

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[1]Day v. State, Docket No. 38028 (Order of Affirmance in Part and Remand in Part, November 15, 2001).

[2]Hermanski v. State, Docket No. 41405 (Order of Affirmance, July 1, 2004).

mistakenly stated that appellant was adjudicated a habitual criminal pursuant to NRS 207.010 for the burglary count, when in fact a review of the record revealed that he was adjudicated a habitual felon pursuant to NRS 207.012.[3] On July 27, 2006, the district court entered a second amended judgment of conviction correcting the clerical error in the judgment of conviction.

Appellant has filed the instant appeal from the second amended judgment of conviction and from a subsequent order of the district court denying a motion for stay and appointment of counsel. This court's review of this appeal reveals defects. First, there is no basis for an appeal from the second amended judgment of conviction because the district court fully complied with this court's order; the district court only corrected the clerical error identified by this court in the post-conviction appeal proceedings.[4]

Further, this appeal contains a jurisdictional defect. The right to appeal is statutory; where no statute or court rule provides for an

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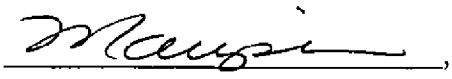
[3]Hermanski v. State, Docket No. 47011 (Order of Affirmance and Limited Remand to Correct Judgment of Conviction, July 13, 2006).

[4]The issue of whether there was a clerical error was decided in the post-conviction appeal. The doctrine of the law of the case prevents revisitation of this issue. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

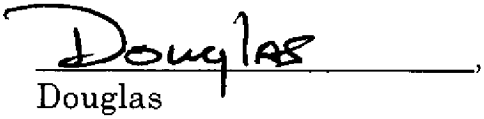
appeal, no right to appeal exists.[5] No statute or court rule provides for an appeal from an order of the district court denying a motion for stay and appointment of counsel. Accordingly, we

ORDER this appeal DISMISSED.

_____, J.
Gibbons



_____, J.
Maupin



_____, J.
Douglas

cc: Hon. Jennifer Togliatti, District Judge
Gregory Scott Hermanski
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[5]Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990).

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 47963

District Court Case No. C167783

REMITTITUR

TO: Shirley Parraguirre, Clark County Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: October 31, 2006

Janette M. Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. Jennifer Togliatti, District Judge
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Gregory Scott Hermanski

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on November 9, 2006.

ROBIN MILLS
Deputy County Clerk

06-21158

Robert Day
S.D.C.C.
P O Box 208 # 69140
Indian Springs NV 89070-0208

Defendant Pro Se

FILED
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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

2/22/10

THE STATE OF NEVADA,

Plaintiff,

vs.

Gregory Scott Hermanski
A/K/A Robert James Day

Defendant.

Case No. C167783X
Dept. No. IX
DATE OF HEARING:
TIME OF HEARING:

NOTICE OF MOTION AND MOTION TO CORRECT AN ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE

COMES NOW, Defendant, Gregory Scott Hermanski (Defendant), by and through his proper person, and hereby submits for this Court's review and consideration, the above and foregoing Motion To Correct An Illegal Sentnece Or In The Alternative Motion For Modification of Sentence (Motion).

This Motion is brought pursuant to the provisions of Nevada Revised Statutes (NRS), 176.555, and is based upon all the papers, documents, pleadings, transcripts, and exhibit's on file herein, as well as the attached Points and Authorities in support hereof; and oral argument at the time of hearing set to have the matter placed on this Court's calendar, as Defendant does specifically

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CLERK OF THE COURT

request that this Court conduct an adequate hearing of this Motion as concerns the facts and the law set forth herein this Motion.

NOTICE OF MOTION

TO: The State of Nevada, and the Office of the District Attorney, counsel for the Plaintiff, YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that, the above named Defendant will bring on for hearing the above and foregoing Motion To Correct An Illegal Sentence Or In The Alternative Motion For Modification of Sentence, in Department ____, of the Eighth Judicial District Court, at the hour of ___ O'Clock ___.M., or as soon as the matter can be heard by the Court.

You are hereby NOTICED that your failure to respond and/or to otherwise oppose this Motion, will be deemed by the Defendant as your consenting to the granting of the relief requested by the Defendant herein. That, the proceedings of the foregoing Motion must proceed pursuant to the District Court rules (DCR), Rule 13 et seq., and the Eighth Judicial District Court Rules (EJDCR), Rule 3.20, to afford the Defendant with the full panoply protection of the Due Process and Equal Protection of the law, as set forth in the Fifth (5th), and Fourteenth (14th), Amendments to the United States Constitution, and Article 1 § 8 of the Nevada Constitution.

Respectfully submitted:

Dated this 25 day of January, 2010.

Gregory S. Hernandez
Defendant Pro Se

POINTS AND AUTHORITIES

ARGUMENT

I.

"A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot be used as a vehicle for challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing." **Edwards v. State**, 112 Nev. 704, 708, 918 P.2d 321, 324 (Nev. 1996).

The Court in Edwards clearly established the appropriate procedure for challenging an illegal sentence. The Nevada Supreme Court (Nev. Sup. Ct.), has stated that the district court has the right to correc an illegal sentence at any time. **Passanisi v. State**, 108 Nev. 318, 321, 831 P.2d 1371, 1372 (Nev. 1992); see also NRS 176.555.

Defendant contends that the sentence imposed is facially invalid for the following reasons: Defendant contends that the imposition/adjudication of the habitual/recidivist enhancement penalty is illegal, as contemplated under NRS 176.555. As such this Court has the authority/jurisdiction to correct the same at any time

Defendant states that the habitual/recidivist enhancement penalty is illegal, due to the failure of the sentencing court to have, correctly imposed sentence on the substantive charge first. See: **Burns v. State**, 88 Nev. 215, 220, 495 P.2d 602, 606-07 (Nev. 1972). Thus, without Defendant being sentenced on the substantive crime charged "first", the district court did not have jurisdiction/subject matter jurisdiction, to impose the habitual/recid-

...

ivist penalty sentence upon the Defendant.

The gate way to the habitual/recidivist enhancement penalty sentence, as contemplated under the plain language of NRS 207.016 et seq., is a sentnece imposed for the principal crime first. This as NRS 207.016(1) states impart as follows:

> NRS 207.016 Procedure; trial of primary offense; prior convictions
> 1. "A conviction pursuant to NRS 207.010, 207.012, or 207.014 operates only to increase, not to reduce, the sentence otherwise provided by law for the principal crime."

The plain language "the sentence otherwise provided by law for the principal crime", of NRS 207.016(1), means the substantive crime charged, as delineated in Burns, 88 Nev. at 220, 495 P.2d at 606-07.

Nevada law creates a liberty interest in sentencing procedures that is protected by Due Process. See: **Walker v. Deeds**, 50 F.3d 670, 672 (9th Cir. 1995).

The definition of sentence as defined by Blacks Law Dictionary Eighth Edition Bryan A. Garner, Editor In Chief at page 1393 States:

> "The judgment that a court formally pronounces after finding a criminal defendant guilty; The punishment imposed on a criminal wrongdoer."

Thus, the sentencing procedure for the habitual/recidivist enhancement penalty is/must proceed as follows:

1. Formal pronouncement of the substantive crime charged of guilt;
2. The punishment imposed on the substantive crime charged;
3. The court then vacating the sentence imposed on

...

the substantive crime charged;
(the court must vacate the sentence on the substantive crime charged so that the defendant does not receive two (2), on a single crime charged);

4. Then the court imposes the habitual/recidivist enhancement penalty.

The failure of the district court to impose the sentence on the substantive crime charged, leaves the Defendant sentenced soley on the habitual/recidivist enhancement penalty, which the Defendant cannot stand convicted on, this as the habitual/recidivist enhancement penalty is not an offense. See: **Wynn v. State**, 96 Nev. 673, 678, 615 P.2d 946, 949 (Nev. 1980). Thus, simply put in order for the Defendant to stand convicted of a crime, upon which then the sentencing court can impose, the habitual/recidivist enhancement penalty; the court must sentence on the substantive crime charged first.

Wherefore, this Court must reverse the adjudication that the Defendant received for the habitual criminal/recidivist penalty, and re-sentence Defendant soley on the substantive crime charged.

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IN THE ALTERNATIVE MOTION FOR

MODIFICATION OF SENTENCE

II.

Defendant does hereby seek themodification of his habitual/ recidivist sentence imposed by this Court, as more fully set forth in the attached Judgment of Conviction.

The Defendant seeks modification of the sentence imposed for the habitual/recidivist enhancement penalty, pursuant to the holdings of the Nevada Supreme Court (Nev. Sup. Ct.), in **Burns v. State**, 88 Nev. at 220, 495 P.2d at 606-07.

Defendant state's that this Court has jurisdiction to so modify Defendant's sentence pursuant to **State v. eighth Judicial Dist. In and For Clark County**, 677 P.2d 1044 (Nev. 1984).

Defendant firsts sets forth that this Court must modify his sentence since, this Court failed to sentence the Defendant on the substantive crime charged. Again, the Nev. Sup. Ct. in Burns, 88 Nev. at 220, 495 P.2d at 606-07 held as follows:

> "The 25-year sentence, however, may not stand. Preliminarily, as this court said in Hollander v. State, 82 Nev. 345, 353, 418 P.2d 802, 807 (1966): 'The trial court **must** sentence on the substantive crime charged . . ., and then invoke the recidivist statute to determine the penalty.'" (Emphasis added).

The record does reflect that the Defendant was not sentenced on the substantive crime charged, the court simply adjudged the Defendant guilty of the substantive crime charged, and then invoked the recidivist statute, and imposed the penalty under said statute. In Burns, supra, it is clear that the district court **must** sentence on the substantive crime charged first, and that imposing said

...

sentence on the substantive crime charged first, **is not** discretionary on the partof the district court, this as the Defendant does have a liberty interest in sentencing procedures. **Walker**, 50 F.3d at 672. Additionally, the word **must**, as utilized in Burns, 88 Nev. at 220, 495 P.2d at 606-07, is mandatory language, and such language imposes a specific sentencing duty on the district court. Compare: NRS 0.025, and **Tarango v. State Indus. Ins. System**, 117 Nev. 444, 25 P.3d 175 (Nev. 2001).

Thus, Defendant states that he has a protected liberty interest under the DUE PROCESS CLAUSE of the Fifth (5th), and Fourteenth (14th), Amendments to the United States Constitution to be correctly sentence to the substantive crime/offense first. Stated simply, "a State creates a protected liberty interest by placing substantive limitations on official discretion. **Olim v. Wakinekona**, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747 (1983); A State may do this in a number of ways. ... Our past decisions suggest, however, that the most common manner in which a State creates liberty interest is by establishing "substantive predicates" to govern official decision making, **Hewitt v. Helms**, 459 U.S. 460, 472, 103 S.Ct. 864, 871 (1983); and further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met. **Kentucky Dept. of Corrections v. Thompson**, 490 U.S. 454, 462, 109 S.Ct. 1904, 1909 (1989).

In Burns, supra, the Nev. Sup. Ct. clearly utilized substantive predicates, to govern the district court's in the State of Nevada, in sentencing on the substantive crime charged first, and then invoking the recidivist statute ... . Id. at 88 Nev. at 220, ...

495 P.2d at 606-07.

Since the trial court imposed a separate sentence only on the crime of the prior felony convictions, it would appear to make the prior felony convictions the substantive crime charged/offense standing alone, which it is not. The trial court **must** sentence on the substantive crime charged, and then invoke the recidivist statute to determine the penalty. **Hollander v. State**, 82 Nev. 345, 353, 418 P.2d 802, 805 (Nev. 1966).

Again, this manner of imposing sentence on the substantive crime charged, is **not** a discretionary matter of the district court. The district court "**must**" impose sentence on the substantive crime charged. **Burns**, supra, and **Hollander**, supra. Sentencing the Defendant on the substantive crime charged first, is a liberty interest protected under Nevada law. **Walker**, supra.

Thus, just as in Burns, supra, that the 25 year sentence could not stand, here Defendant's Life without possibility of parole, habitual/recidivist sentence cannot stand. This as to allow said sentence to stand would make the recidivist/habitual criminal sentence a substantive **offense**, which **it is not**. **Hollander**, 82 Nev. at 353, 418 P.2d at 805.

Wherefore, pursuant to State v. Eighth Judicial Dist. ... 100 Nev. at 95-96, 677 P.2d at 1047, 1048, this Court has the authority/jurisdiction to modify Defendant's sentence, to correct a judgment or sentence founded on mistake is in accord with the constitutional consideration underlying the sentencing process.

...

...

...

CONCLUSION

Wherefore, Defendant prays that this Court will ensue to correct the imposition of sentence on the recidivist/habitual enhancement penalty.

It is suggested that a proper sentence in this case would read:

"That, Defendant, Gregory Scott Hermanski, is guilty of the crime of Count I: Robbery w/use of deadly weapon, NRS 200.380, 193.165 Count II: Burglary while in possession of a deadly weapon, NRS 205.060, and the recidivist/habitual criminal sentence is hereby vacated."

Wherefore, this Court must reverse the adjudication that the Defendant received for the habitual/recidivist enhancement penalty, and resentence Defendant **solely** on the substantive crime charged. **Burns**, supra.

Respectfully submitted:

Dated this 25 day of January, 2010.

Gregory S. Hermanski
Defendant Pro Se

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CERTIFICATE OF SERVICE BY MAILING

I, Gregory Scott Hermanski, hereby certify, pursuant to NRCP 5(b), that on this ___ day of _____, 20___, I mailed a true and correct copy of the foregoing, " Notice of Motion And Motion To Correct An Illegal Sentence Or In The ... by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

District Attorney
Clark County, Nevada
200 Lewis Ave.
P O Box 552212
Las Vegas NV 89155-2212

CC:FILE

DATED: this ____ day of _____, 20___.

Gregory S. Hermanski #69140
Gregory S. Hermanski
209 In Propria Personam
Post Office box ~~650~~ [~~HDSP~~] SDCC
Indian Springs, Nevada ~~89018~~ 89070
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Notice of Motion And Motion To Correct An Illegal Sentence Or In The ...
(Title of Document)

filed in District Court Case number C167783X

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Gregory S. Hermanski
Signature

1-26-10
Date

Gregory Scott Hermanski
Print Name

Defendant Pro Se
Title

ORIGINAL

9

JOCP
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

FILED
JUL 27 9 29 AM '06
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,aka,
Gregory Scott Hermanski, #1679345

Defendant.

Case No: C167783
Dept No: IX

SECOND AMENDED
JUDGMENT OF CONVICTION

The Defendant previously appeared before the Court with counsel and having previously been found guilty by a jury to the crime(s) of **COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON (Felony) and COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony)**, in violation of NRS 207.012, 193.165 and 207.012; thereafter, on the 11th day of May, 2001, the Defendant was present in Court for sentencing with counsel wherein the Jury found the Defendant guilty thereof by reason of the Juries Verdict.

THEREAFTER, on the 30th day of April, 2003, the Defendant appeared in court with his counsel, PAUL WOMMER, ESQUIRE, and pursuant to a hearing/proceeding, and good cause appearing to amend Judgment of Conviction; now therefor,

IT IS ORDERED THAT: Defendant ROBERT JAMES DAY, aka, Gregory Scott Hermanski, is sentenced as Habitual Violent Felon under NRS 207.012 on COUNT I and as

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Habitual Criminal under NRS 207.012(b) on COUNT II, and is sentenced in COUNT I to LIFE in the Nevada Department of Corrections WITHOUT the Possibility of Parole and in COUNT II to LIFE in the Nevada Department of Corrections WITHOUT the Possibility of Parole; Count II to run CONCURRENTLY with Count I with NO Credit for Time Served; Deft. to submit to a test to determine genetic markers. Court advised counsel he can file the appropriate motion as to credit for time served while Deft. serving Federal time.

The Court FURTHER ORDERED, that Defendant pay the $25.00 Administration Fee and $150.00 DNA Analysis Fee.

DATED this 25th day of July, 2006.

DISTRICT JUDGE

JENNIFER P. TOGLIATTI

jr

Robert Day #69140
SPCC
P.O. Box 208
Indian Springs, NV.
89070-0208

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CLERK OF THE COURT

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
H. LEON SIMON
Chief Deputy District Attorney
Nevada Bar #000411
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI,
a/k/a Robert James Day,
#1679345

Defendant.

CASE NO: C167783

DEPT NO: IX

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE

DATE OF HEARING: February 22, 2010
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through H. LEON SIMON, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include notice of its intent to seek treatment of Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with 382 days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate that Defendant's adjudication as a habitual criminal was pursuant to NRS 176.015(1)(c), and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering this, the district court vacated Defendant's sentence and conducted another sentencing

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[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

hearing. In response, the State also filed a notice of intent to seek punishment of Defendant as a habitual criminal pursuant to NRS 207.012 on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

Defendant filed a timely appeal from the Amended Judgment of Conviction, case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in case No. 41405, affirming Defendant's conviction. Remittitur was issued on July 27, 2004.

Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. Defendant filed a Motion for Prisoner Transport on October 5, 2005. The State's response was filed on October 24, 2005. On October 24, 2005, the Court heard argument and denied Defendant's Motion for Prisoner Transport. The Court also ordered a supplemental response from the State regarding Defendant's Ground 3 of his Petition which alleges ineffective assistance of counsel at his re-sentencing under his true birth name. The State filed its Supplemental Response on December 8, 2005. On February 3, 2006, the court denied Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). A Findings of Fact, Conclusions of Law and Order was filed on March 3, 2006. A Notice of Entry of Decision and Order was filed on March 6, 2006.

On March 17, 2006, Defendant filed a Motion for Rehearing. The State filed its Opposition on March 23, 2006. On March 27, 2006, Defendant's motion was denied.

Defendant filed a Notice with the Nevada Supreme Court appealing the District Court's denial of his Post-Conviction Petition for Writ of Habeas Corpus. On July 13, 2006, the Nevada Supreme Court filed an Order of Affirmance and Limited Remand to Correct Judgment of Conviction (case No. 47011). The Supreme Court remanded Defendant's case to the District Court for the sole purpose of amending the Judgment of Conviction to read that Defendant was adjudicated a habitual offender pursuant to NRS 207.012 for both the robbery and burglary counts. Remittitur was issued on August 8, 2006.

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Pursuant to the Supreme Court's Order a Second Amended Judgment of Conviction was filed on July 27, 2006.

Defendant filed a Motion To Stay Proceedings And Motion For Appointment Of Counsel on August 11, 2006. The State filed its Opposition on August 22, 2006. On August 23, 2006, Defendant's motion was denied. Defendant filed a Notice of Appeal on August 28, 2006 from the Second Amended Judgment of Conviction and the District Court's Order denying his Motion to Stay Proceedings And Motion For Appointment of Counsel (case No. 47963). On October 3, 2006, the Nevada Supreme Court filed an order, dismissing Defendant's appeal. Remittitur was issued on October 31, 2006.

Defendant filed his instant motion on February 9, 2010. The State's Opposition is as follows.

ARGUMENT

I. DEFENDANT'S SENTENCE IS LEGAL.

NRS 176.555 states that "[t]he court may correct an illegal sentence at anytime." See also Passanisi v. State, 108 Nev. 318, 321, 831 P.2d 1371, 1372 (1992). However, the grounds to correct an illegal sentence are interpreted narrowly under a limited scope. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996); see also Haney v. State, 124 Nev. Adv. Op. 40, 185 P.3d 350, 352 (2008). "A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot be used as a vehicle for challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing." Edwards, 112 Nev. at 708, 918 P.2d at 324.

"Motions to correct illegal sentences address only the facial legality of a sentence." Edwards, 112 Nev. at 708, 918 P.2d at 324. Motions to correct illegal sentences evaluate whether the sentence imposed on the defendant is "'at variance with the controlling statute, or "illegal" in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided.'" Id. (citing Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)). Other claims attacking the conviction or

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sentence must be raised by a timely filed direct appeal or a timely filed Petition for a Post-Conviction Writ of Habeas Corpus per NRS 34.720-34.830, or other appropriate motion. See Edwards, 112 Nev. at 708, 918 P.2d at 324.

Here, Defendant was adjudicated and sentenced as a habitual felon. NRS 207.012 provides the punishment for habitual felons as:

> 1. A person who:
> (a) Has been convicted in this State of a felony listed in subsection 2; and
> (b) Before the commission of that felony, was twice convicted of any crime which under the laws of the situs of the crime or of this State would be a felony listed in subsection 2, whether the prior convictions occurred in this State or elsewhere, is a habitual felon and shall be punished for a category A felony by imprisonment in the state prison:
> (1) For life without the possibility of parole;
> (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
> (3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.
> NRS 207.012(1)

Here, Defendant was sentenced to two concurrent life sentences without the possibility of parole for his two felony convictions, both felonies being listed in subsection 2 of NRS 207.012. In addition, it has been well established that Defendant had been previously convicted of at least eleven felonies in other states, with 2 or more of those being felonies listed in subsection 2 of NRS 207.012. As such, Defendant's sentence is clearly within the statutory limitations and is facially legal per Edwards. Furthermore, Defendant misunderstands how the habitual felon statute operates. A conviction pursuant to NRS 207.012 increases the sentence otherwise provided by law for the principal crimes. NRS 207.016(1). Defendant was not convicted of being a habitual felon, but rather, he was adjudicated and sentenced as a habitual felon after being convicted of two felonies in the State of Nevada with numerous prior felony convictions. The district court sentenced Defendant on the two felonies he was convicted of in Nevada, and his sentence was enhanced pursuant to being adjudged as a habitual felon, per NRS 207.012. Accordingly, Defendant's claims are completely meritless and his motion should be denied.

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II. DEFENDANT IS NOT ENTITLED TO A MODIFICATION OF HIS SENTENCE.

Generally, a district court lacks jurisdiction to modify a sentence once a defendant has started serving it. Passanisi v. State, 108 Nev. 318, 322, 831 P.2d 1371, 1373 (1992). However, a court does have authority to modify sentences "when a court has made '*a mistake in rendering a judgment which works to the extreme detriment of the defendant.*'" Passanisi, 108 Nev. at 322, 831 P.2d at 1373 (emphasis in original).

The Nevada Supreme Court has articulated limited grounds where a district court may modify a defendant's sentence: "[T]he district court has jurisdiction to modify [defendant's] sentence ... if (1) the district court actually sentenced appellant based on a materially false assumption of fact that worked to appellant's extreme detriment, and (2) the particular mistake at issue was of the type that would rise to the level of a violation of due process." Passanisi, 108 Nev. at 323, 831 P.2d at 1374. See also Edwards v. State, 112 Nev. 704, 707, 918 P.2d 321, 324 (1996). The Passanisi Court added further: "'[N]ot every mistake or error which occurs during sentencing gives rise to a due process violation ... a due process violation arises only when the errors result in "materially untrue" assumptions about a *defendant's record.*'" Passanisi, 108 Nev. at 323, 831 P.2d at 1373 (emphasis in original).

Here, Defendant is not entitled to a sentence modification. First, the district court is without authority to modify Defendant's sentence because he has already started serving it. Second, the district court did not sentence Defendant based on a materially false assumption of fact that worked to his extreme detriment. Defendant does not make such a showing. Instead, he merely claims that the court did not sentence him on the substantive crimes charged. As discussed in the above section, this claim is untrue and without merit. It is based on Defendant's misunderstanding of the law. The court did not treat Defendant's prior felony convictions as an offense to which it imposed a separate sentence than the sentence for Defendant's 2 felony convictions in Nevada. Rather, the court invoked the habitual felon statute (NRS 207.012) in determining the penalty when it sentenced Defendant. Therefore, Defendant's motion should be denied.

CONCLUSION

Based on the aforementioned arguments, the State respectfully requests that this court DENY Defendant's Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence.

DATED this 19th day of February, 2010.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Ravi Bawa for
H. LEON SIMON
Chief Deputy District Attorney
Nevada Bar #000411

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 19th day of February, 2010, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY SCOTT HERMANSKI, aka
ROBERT JAMES DAY #69140
SO. DESERT CORRECTIONAL CENTER
P.O. BOX 208
INDIAN SPRINGS, NEVADA 89018

BY /s/ J. Robertson
Secretary for the District Attorney's Office

SH/HLS/jr

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CLERK OF THE COURT

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
SHAWN MORGAN
Deputy District Attorney
Nevada Bar #0010935
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI,
aka Robert James Day,
#1679345

Defendant.

Case No. C167783
Dept No. IX

ORDER DENYING DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE

DATE OF HEARING: 2/22/10
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 22nd day of February, 2010, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by DAVID ROGER, District Attorney, through SHAWN MORGAN, Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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CLERK OF THE COURT

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IT IS HEREBY ORDERED that the Defendant's Motion to Correct Illegal Sentence or in the Alternative Motion for Modification of Sentence, shall be, and it is denied.

DATED this 2nd day of ~~February~~ March, 2010.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

SHAWN MORGAN
Deputy District Attorney
Nevada Bar #0010935

jr

167

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Gregory Scott Hermanski
A/K/A Robert James Day # 69140
SDCC
P.O. Box 208
Indian Springs, NV 89070

FILED
MAR 25 2010
CLERK OF COURT

District Court
Clark County, Nevada

4-5-10

State of Nevada,
plaintiff,

vs

Case No. C167783
Dept. No. IX

Gregory Scott Hermanski,
a/k/a Robert James Day,
defendant

Motion for Reconsideration

Comes Now defendant Gregory Scott Hermanski, by and through his proper person, and hereby submits for this court's review the above and foregoing "Motion for Reconsideration" of this court's order entered March 9, 2010 denying defendant's motion to correct an illegal sentence or, in the alternative, motion for modification of sentence.

This motion is brought pursuant to the provisions of NRS 176.555 and NRAP Rule 4D, and is based upon all papers, documents, pleadings,

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CLERK OF THE COURT

transcripts and exhibits on file herein, as well as the attached memorandum of points and authorities in support hereof:

Points and Authorities

(Statement of the Case)

In defendant's motion to correct an illegal sentence, defendant argues that this court was without subject matter jurisdiction to impose an habitual offender "enhancement" without first having pronounced a sentence for the robbery and burglary counts the jury convicted him of. Indeed, although defendant stands convicted of the robbery and burglary charges, he never recieved any sentence pursuant and in relation to the jury's verdict. His only and sole sentence was the habitual offender "enhancement". A comparable situation would be a defendant charged with robbery w/use of a deadly weapon recieving the enhancement for the weapon but no sentence for the robbery. In order for the court to pronounce an "enhancement" it must first pronounce a sentence for the substantive crime charged and then invoke the enhancement.

In the State's Opposition to defendant's motion to correct an illegal sentence at page 5, the state offers that "The district court sentenced defendant on the two felonies he was convicted of in Nevada, and his sentence was enhanced pursuant to being adjudged

as a habitual felon, per NRS. 207.012." (See, State's Opposition at page 5, lines 24-26).

However, a review of the record of these proceedings, including sentencing transcript and Judgment of Conviction, clearly demonstrate that the state has misled this Honorable Court to believe that defendant was sentenced pursuant to the robbery and burglary convictions when, in fact, the court's sole pronouncement of sentence was the habitual offender "enhancement". (See attached sentencing transcript).

(Argument)

Pursuant to the provisions of Rule 40 of the Nevada Rules of Appellate Procedure, this Honorable Court has the authority to reconsider it's judgment when it can be demonstrated that said judgment was based on the court's having "overlooked or misapprehended any issue of fact or law". See, N.R.A.P. 40(a).

In the case at bar, the court agreed with the state's opposition and denied defendant's motion to correct an illegal sentence. See, minute order 02/22/2010.

However, the basis for the State's opposition is the unfounded allegation that defendant recieved any sentence for his robbery and burglary convictions when, in fact, he had not.

Conclusion

Because the court clearly based it's decision on the argument of the state that defendant recieved a sentence pursuant to the robbery and burglary convictions when, in fact, he had not, defendant asserts that this court based it's decision in this case as result of a "misapprehended fact" and, as such, this court should reconsider it's decision.

Respectfully Submitted,

Dated this 22 day of March, 2010 Gregory S. Hermanski

Gregory Scott Hermanski,
defendant, pro se.

Certificate of Service

I, Gregory Scott Hermanski, hereby certify, pursuant to NRCP 5(b) that on this 22 day of March, 2010, I mailed a true and correct copy of the foregoing Motion for Reconsideration by depositing same in the Southern Desert Correctional Center Legal Library, First Class Postage fully prepaid and addressed as follows:

District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

Dated this 22 day of March, 2010

Gregory S. Hermanski

Gregory Scott Hermanski

TRAN

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CLARK COUNTY
DISTRICT COURT

THE STATE OF NEVADA,

PLAINTIFF,

VS.

GREGORY SCOTT HERMANSKI, (TN), aka ROBERT JAMES DAY,

DEFENDANT.

CASE NO. C167783

DEPT. NO. IV

BEFORE THE HONORABLE KATHY HARDCASTLE, DISTRICT JUDGE

WEDNESDAY, APRIL 30, 2003; 9:00 A.M.

RECORDER'S TRANSCRIPT RE:
SENTENCING

APPEARANCES:

FOR THE STATE: MARTY HART, ESQ.
Deputy District Attorney

SCOTT MITCHELL, ESQ.
Deputy District Attorney

FOR THE DEFENDANT: PAUL WOMMER, ESQ.

DIANNE DICKSON, ESQ.
Deputy Public Defender

FOR THE DEPARTMENT OF PAROLE AND PROBATION: B. LIZURA

RECORDED BY: CARRIE HANSEN, COURT RECORDER

WEDNESDAY, APRIL 30, 2003; 9:00 A.M.

THE COURT: C167783, State of Nevada versus Gregory Scott Hermanski.

Mr. Hermanski is at the Nevada Department of Corrections. Was he not transported?

MR. WOMMER: He's present.

MR. HART: Your Honor, Mr. Mitchell from our office has this.

THE COURT: Okay. This is Mr. Day's -- he's present. Are we ready to go forward with sentencing?

MR. WOMMER: We are, your Honor.

THE COURT: All right. Mr. Hermanski, pursuant to jury verdict March 15, 2001, on the charge, Count I, robbery, felony, and Count II, burglary while in possession of deadly weapon, felony, you are hereby adjudicated guilty of those crimes. And State has previously submitted the certified copies of convictions. I'll hear argument before I make a determination on habitual offender.

MR. MITCHELL: Your Honor, the first and most important thing the State would say here is that under the law, if you have convictions of the nature of Mr. Hermanski's, which is certain predicate crimes that are considered violent crimes, the State of Nevada requires and does not even give discretion to the Court or the DA on whether to file or pursue this or in sentencing to sentence the defendant to anything but this. The State of Nevada requires a sentence of life in prison or, I believe, well, it's set forth in the pre-sentence report there. But the important thing to remember is that this is not discretionary. All I've got to prove here is that he has these predicate convictions, and he has more than the predicate convictions. He's

got not only two prior robbery convictions, he's got three prior separate robbery with use convictions. And he was convicted here of another robbery with use.

So, under the law, the maximum penalty that the Court -- the maximum penalty has to be imposed. It's not discretionary, and I think the pre-sentence report is misleading in that respect because it makes it seem as if it is discretionary. So, the habitual criminal penalty outlined on Page 7 of the pre-sentence report is what we're asking for. And I think that actually I think that this is a case where life in prison without the possibility of parole is justified.

This man has an unbelievable criminal record. I've got judgments of convictions going back to 1969 here. And it looks like he's got 11 prior felony convictions before he committed the crime that's before your Honor today, and the Court heard the facts in this case. He's also got numerous arrests for everything from murder to all sorts of thievery and drug offenses. But this is one man who is not retrievable. He cannot be reclaimed from a life of crime. He's shown for three decades plus that this is what he's dedicated to. And in fact, he committed perjury in front of this Court when he took the stand and claimed that his name was Robert James Day. And he just happened to pick another convicted felon who is also a dedicated criminal that he met somewhere back east while serving time. And he got sentenced under that name of that other criminal, but he was willing to do that to avoid the consequences of his actions because he didn't want the Court to know that as Gregory Hermanski he was much worse than Robert James Day.

I ask the Court to impose a sentence of life in prison without the possibility of parole. He has shown that if he's let out of custody he will go and he will rob somebody and he'll use a weapon and whether or not violence is used will

only depend on whether the victim resists. But there's no question what he will do if he's given a chance because for 33 years now he's been proving that fact conclusively. And I will say no more.

THE COURT: All right. Mr. Wommer?

MR. WOMMER: As the Court's aware, the case has a long and twisted history. The Court appointed me for post conviction relief purposes to determine whether or not Ms. Dickson was ineffective during her representation of him. After reviewing the matters, I determined it would be best if I substituted in for sentencing purposes.

Your Honor, in regard to the report itself, I call the Court's attention to Page 6 regarding the credit for time served. There's a mathematical error there. He's really entitled to 365 more days because the time period from 5/25/2001 to 2/26/2003 really should be on additional year. Moreover, on page 4, there is an error in one of the priors. That top charge relating to the date July 31, 1996, indicates that the crime occurred on that date. Well, if you look in conjunction with Page 3, the last entry where he was at the federal penitentiary at Atlanta, Georgia, the last line indicates that he wasn't released. His mandatory release date was September 30, 1996, but the crime in Dade County occurred on July 31, 1996. It couldn't have been him.

Moreover, in order to preserve all of his appellate remedies, including his remedies in the federal system, he's asked me to read a statement into the record, if I may.

THE COURT: You may.

MR. WOMMER: May it please the Court, in February and March 2001, the

State filed motions to amend the Information in this case to include a count under NRS 207.010 alleging the defendant to be a habitual criminal and listing his alleged prior felony convictions. The State now concedes that these prior felony convictions are not actually those of this defendant. The defendant was convicted after jury trial of the primary offenses and, thereafter, sentenced to 10 to 25 years as a habitual offender; however, due to deficiencies in the adjudication in sentence, the Supreme Court of Nevada remanded the case back to this Court for further proceedings.

Subsequent to remand, the State now seeks punishment of the defendant under yet another habitual statute alleging him at this time to be a habitual felon under NRS 207.012 and alleging yet another completely different set of alleged prior felony convictions. Pursuant to NRS 207.016, a court under NRS 207.012 may be separately filed after conviction of the primary offense but at least 15 days prior to sentencing. Thus, it is clear that the legislature intended that habitual criminal enhancement be charged prior to sentencing because it affects the sentencing stage of the proceeding. In the case of Crutcher versus Eighth Judicial District Court, 903 P.2d 823 Nev. 1995, defendant was improperly adjudicated a habitual criminal because the information filed by the State did not seek to impose habitual criminal enhancement and did not list Crutcher's prior felony convictions.

THE COURT: Put this in a motion. This is not a statement.

MR. WOMMER: I understand what the Court is saying, your Honor. I will file it in a written form.

THE COURT: Okay. I was just looking through the file. I don't have the certified copies for some reason in the file. I don't know if they were placed somewhere else. Do you have other copies?

MR. MITCHELL: Your Honor, yes. Let me give you everything I've got here, and I would note in response to one thing that Mr. Wommer started saying or talked about with respect to --

THE COURT: I'm not concerned about that. Do you have the certified copies there?

MR. MITCHELL: Yes. But with regard to credit for time served, he's not entitled to any because he was on federal parole for bank robbery when he committed this crime. When you commit a crime when you're on parole, you don't get credit for time served. And, Judge, in these felony convictions that I'm going to give you, the top three are the robbery convictions even though they're not in chronological order.

THE COURT: All right. And you've reviewed these Mr. Wommer?

MR. WOMMER: Yes.

THE COURT: All right.

MR. WOMMER: The statute does not enable the defense to challenge the validity of the convictions.

THE COURT: Anything else on behalf of Mr. Day?

MR. WOMMER: No. Submit it.

THE COURT: All right. Mr. Day, is there anything you wish to state -- Mr. Hermanski, is there anything you wish to state before I impose sentence?

THE DEFENDANT: Yes, ma'am. First of all, while the State lists a lot of prior convictions against me, I just don't believe that those are all of my prior convictions. I've looked at the pre-sentence report and there's a lot of charges in there that I've never seen before. For instance, the homicide, I have never in my life been ever

anywhere charged with a homicide. That one robbery/burglary that Mr. Wommer mentioned, I've never been charged with that. I was sitting in the United States Penitentiary Atlanta when that crime occurred.

THE COURT: I don't see a homicide in here.

THE DEFENDANT: Yes, ma'am. I don't know what page number it is, but it mentions a homicide. I've never been charged with a homicide. In as far as I know, none of those charges that the State are saying are my prior convictions are mine. I don't know. I don't believe they are. All I know is that they're alleging charges that I know I've never been charged with before.

MR. MITCHELL: Your Honor --

THE COURT: Anything else?

MR. MITCHELL: No. I said that that was an arrest, one of his many arrests. The convictions are --

THE COURT: All right. Anything else, Mr. Day?

THE DEFENDANT: No.

THE COURT: All right. Pursuant to statute then with the requisite certified copies of the prior convictions, one Count I, you are hereby adjudicated a habitual offender. On Count II, you are hereby adjudicated an habitual offender. And on each count, in addition to the $25 administrative assessment fee and the $150 DNA analysis fee, you are sentenced to a term of life without the possibility of parole, Count II to run concurrent to Count I. You shall submit to a test to determine genetic markers. And there'll be zero days credit for time served. You can file an appropriate motion regarding whether or not he would be entitled to credit for time served when he was on federal parole at the time.

THE DEFENDANT: Ma'am, I've been in jail for three years on this case.

THE COURT: All right.

MS. DICKSON: Your Honor, may I just make a record about one matter, and that is with respect to the motions for new trial.

THE COURT: No. You're not counsel of record anymore.

MS. DICKSON: I understand that, your Honor.

THE COURT: All right. Anything else?

MR. HERMANSKI: Your Honor, can I please --

THE COURT: Sit down, Mr. Hermanski.

(Whereupon, proceedings were concluded.)

* * * * * *

ATTEST: I do hereby certify that the foregoing is a true and accurate transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Janice R. Liston

JANICE R. LISTON
Court Recorder

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing Respondent's Supplemental Appendix was made on March 1, 2004 by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

Paul E. Wommer, Esq.
Law Offices of Paul E. Wommer
625 South Sixth Street
Las Vegas, Nevada 89101

Employee, Clark County
District Attorney's Office

TUFTELAND/english/

Robert Day #69140
In pro se
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018

FILED
MAR 25 2010
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

State of Nevada,
Plaintiff,

vs.
Gregory Scott Hermanski,
A/K/A Robert James Day
Defendant.

Case No. C167783
Dept. No. IX
Docket _____

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, That the Petitioner/Defendant, Gregory Scott Hermanski, in and through his proper person, hereby appeals to the Supreme Court of Nevada from the ORDER denying and/or dismissing the Motion to correct an illegal sentence or, in the alternative, motion for modification of sentence

ruled on the 9th day of March, 20 10

Dated this 18 day of march, 20 10.

Respectfully Submitted,

Gregory S. Hermanski

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MAR 24 2010
CLERK OF THE COURT

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, certify pursuant to NRCP 5(b), that on this 22 day of March, 2010, I served the foregoing Notice of Appeal by mailing a true and correct copy thereof in a sealed envelope, upon which first class postage was fully prepaid, addressed to:

District Attorney's Office
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

and that there is regular communication by mail between the place of mailing and the recipient address.

Gregory S. Hermanski
Inmate Name (Print)
NDOC NO. 69140
Gregory S. Hermanski
Inmate Signature
PLAINTIFF, In Propria Persona

ROBERT DAY, #69140
PO BOX 208
INDIAN SPRINGS, NV 8907[illegible]-0208

FILED

MAR 27 2010

CLERK OF COURT

ASTA

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff(s), vs. GREGORY SCOTT HERMANSKI aka Robert James Day, Defendant(s),	Case No: C167783 Dept No: IX

CASE APPEAL STATEMENT

1. Appellant(s): GREGORY SCOTT HERMANSKI aka Robert James Day

2. Judge: JENNIFER TOGLIATTI

3. Appellant(s): GREGORY SCOTT HERMANSKI aka Robert James Day

Counsel:

Gregory Hermanski #69140
P.O. Box 208
Indian Springs, NV 89070

4. Respondent: THE STATE OF NEVADA

Counsel:

David Roger, District Attorney
200 Lewis Ave.
Las Vegas, NV 89101
(702) 671-2700

5. Respondent's Attorney Licensed in Nevada: Yes

6. Appellant Represented by Appointed Counsel In District Court: Yes

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: June 8, 2000

10. Brief Description of the Nature of the Action: Criminal

    Type of Judgment or Order Being Appealed: Misc. Order

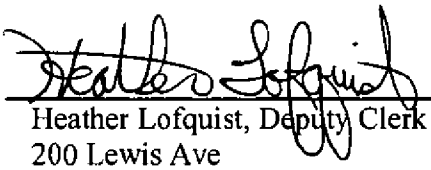
11. Previous Appeal: Yes

    Supreme Court Docket Number(s): 38028, 41405, 47011, 47963

12. Child Custody or Visitation: N/A

Dated This 27 day of March 2010.

Steven D. Grierson, Clerk of the Court

By: 

Heather Lofquist, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

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CLERK OF COURT

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DENA RINETTI
Deputy District Attorney
Nevada Bar #009897
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI, aka Robert James Day,
#1679345

Defendant.

Case No. C167783
Dept No. IX

ORDER DENYING DEFENDANT'S PRO PER MOTION TO RECONSIDER

DATE OF HEARING: 4/5/10
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 5th day of April, 2010, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by DAVID ROGER, District Attorney, through DENA RINETTI, Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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CLERK OF THE COURT

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IT IS HEREBY ORDERED that the Defendant's Pro Per Motion to Reconsider, shall be, and it is denied.

DATED this 7th day of April, 2010.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

DENA RINETTI
Deputy District Attorney
Nevada Bar #009897

jr

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FILED

OCT 11 2010

CLERK OF COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 55718
District Court Case No. C167783

00C167783
CCJA
NV Supreme Court Clerks Certificate/Judgn
985673

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 9th day of September, 2010.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this October 05, 2010.

Tracie Lindeman, Supreme Court Clerk

By: Amanda Ingersoll
Deputy Clerk

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IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55718

FILED

SEP 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a motion to modify or correct sentence.[1] Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

In his motion filed on February 9, 2010, appellant claimed that the habitual criminal enhancement was illegal because the district court failed to first sentence him for the underlying offenses. Appellant failed to demonstrate that the district court relied on mistaken assumptions regarding his criminal record that worked to his extreme detriment. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Appellant's claim was outside the scope of a motion to correct an illegal sentence as the sentence was facially legal, see NRS 207.012(1)(b), and appellant failed to demonstrate that the district court was not a

[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

competent court of jurisdiction. See Edwards, 112 Nev. at 708, 918 P.2d at 324. We therefore conclude that the district court did not err in denying appellant's motion. Accordingly, we

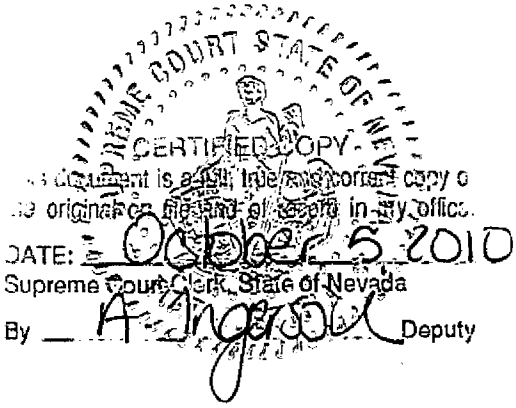
ORDER the judgment of the district court AFFIRMED.

Hardesty, J.

Douglas, J.

Pickering, J.

cc: Hon. Jennifer Togliatti, District Judge
Gregory Scott Hermanski
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk


SUPREME COURT STATE OF NEVADA
CERTIFIED COPY
document is a full, true and correct copy o
the original on file and of record in my office.
DATE: October 5 2010
Supreme Court Clerk, State of Nevada
By A Angerson Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 55718
District Court Case No. C167783

REMITTITUR

TO: Steven Grierson, District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: October 05, 2010

Tracie Lindeman, Clerk of Court

By: Amanda Ingersoll
Deputy Clerk

cc (without enclosures):
Hon. Jennifer Togliatti, District Judge
Attorney General/Carson City
Clark County District Attorney
Gregory Scott Hermanski

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on OCT 11 2010.

HEATHER LOFQUIST
Deputy District Court Clerk

10-25796

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Gregory Scott Hermanski, #69140
A/K/A Robert James Day
P.O. Box 7000
Carson City, NV 89702
defendant, pro se

FILED
APR 25 2011
CLERK OF COURT

District Court
Clark County, Nevada

00C167783
MOT
Motion
1372737

The State of Nevada,
plaintiff,
-v-
Gregory Scott Hermanski,
A/K/A Robert James Day,
defendant.

Case No: C167783
Dept. No: ~~IX~~ VI
Date of Hearing: 5/9/2011
time of Hearing:

RECEIVED
APR 25 2011
CLERK OF THE COURT

"Notice of Motion and Motion to Correct An Illegal Sentence or, in the Alternative, Motion for Modification of Sentence"

Comes Now defendant, Gregory Scott Hermanski, A/K/A Robert James Day, hereinafter, "Defendant", by and through his proper person, and hereby submits for this Honorable Court's review and consideration, the above and foregoing "Motion to Correct an Illegal Sentence or, in the alternative, Motion for Modification of Sentence.

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CLERK OF THE COURT

This motion is brought pursuant to the provisions of Nevada Revised Statutes (NRS) 176.555, and is based upon all papers and pleadings, documents, transcripts, and any exhibits on file herein, as well as the attached Points and Authorities in support hereof, and Oral Argument at the time of hearing set to have the matter placed on this court's calendar, as defendant does specifically request that this court conduct an adequate hearing of this motion as concerns the facts and the law set forth herein this motion.

Notice of Motion

TO: The State of Nevada and the Office of the District Attorney, counsel for the plaintiff, PLEASE TAKE NOTICE that the above named defendant will bring on for Hearing the above and foregoing Motion to Correct an Illegal Sentence, or in the alternative, Motion for Modification of Sentence, in Dept. IX of the Eighth Judicial District Court at a time and date to be set by the court.

Further, you are hereby provided NOTICE that your failure to respond and/or to otherwise oppose this motion will be deemed by defendant as your consenting to the granting of the relief requested by the defendant herein, and and that the proceedings of the foregoing motion must proceed pursuant to the District Court Rules, (DCR) Rule 13 et. seq., and the Eighth Judicial District Court Rules, (EJDCR) Rule 3.20, to afford the defendant with the

full panoply protection of Due Process and Equal Protection of the law, as set forth in the fifth, (5th), and fourteenth (14th) Amendments to the United States Constitution, and Article 1, § 8 of the Nevada Constitution.

Respectfully Submitted,

Dated this 18 day of April, 2011.

Gregory S Hermanski

Gregory Scott Hermanski
defendant, pro se

Points and Authorities

(Statement of Relevant Facts)

On or about April 22, 2000, defendant Gregory Scott Hermanski, a/k/a Robert James Day, was arrested and subsequently charged by way of Information with one count of "Robbery w/use of a deadly weapon" (NRS 200.380, 193.165) and one count of "Burglary while in possession of a deadly weapon," (NRS 205.060).

On February 21, 2000 the state filed motion pursuant to NRS 173.095(1) seeking leave to amend the Information to include a count pursuant to NRS 207.010 (habitual criminal), wherein the prior felony convictions of the true Robert James Day were listed.

On March 13, 2001 defendant's trial commenced before a a jury wherein defendant was tried as "Robert James Day". On March 15, 2001 the jury returned it's verdict of guilty as to both counts.

On March 26, 2001 the state filed motion pursuant to NRS 173.095(1) seeking leave to amend the Information to include additional prior felony conviction of the true Robert James Day.

On April 30, 2001 defendant was adjudicated guilty as to both counts and adjudicated an habitual offender based on the prior felony convictions of the true Robert James Day and was sentenced to two concurrent terms of one hundred twenty (120) months to three hundred (300) months, with credit for three hundred eighty two (382) days time served. Judgment of

Conviction was entered May 18, 2001.

Defendant filed timely appeal to the Nevada Supreme Court, case no. 38028. On November 15, 2001 the Nevada Supreme Court affirmed defendant's conviction, but remanded the case for corrections to the sentence and judgment of conviction

However, prior to re-sentencing pursuant to remand Order, on July 19, 2002, defendant filed "Motion to Vacate Sentence as an Habitual Criminal" wherein defendant demonstrated to the court that his sentence as an habitual criminal was based upon incorrect information concerning defendant's true identity and prior felony convictions, [1] and defendant specifically requested as remedy that the court "re-sentence defendant, not as an habitual criminal, but simply on the charges for which he was convicted." See, Motion, page 3.

On December 4, 2002, the court Ordered that said motion to vacate sentence as an habitual criminal be "Granted". However, re-sentencing was continued pending pre-sentence report.

On December 26, 2002 the state filed "Notice of Intent to Seek Punishment as a Habitual Criminal", citing to NRS 207.012 (Habitual Felon). (However, it must be noted that the state failed to seek leave of of the court, pursuant to NRS 173.095 (1), to amend the information to include a count pursuant to NRS 207.012 (habitual felon), and list therein defendant's prior felony convictions).

[1] Defendant was sentenced pursuant to "second amended information" dated March 26, 2001 which contained count pursuant to NRS 207.010 (Habitual Criminal). However, the prior felony convictions listed therein were actually that of the true Robert James Day, and not that of defendant.

On April 30, 2003, the court adjudicated defendant as an habitual violent felon pursuant to NRS 207.012 and sentenced defendant to two concurrent life terms without the possibility of parole, with no credit for time already served. An amended Judgment of Conviction was entered May 16, 2003. 2/

Defendant filed timely appeal from the amended Judgment of Conviction, case no. 41405. The Supreme Court affirmed the amended Judgment of Conviction July 1, 2004, and Remittitur issued July 27, 2004.

On July 18, 2005 defendant filed petition for Writ of Habeas Corpus (Post Conviction). On February 3, 2006 the court denied defendant's petition for Writ of Habeas Corpus. a findings of fact and conclusions of law and Order was filed March 3, 2006. a Notice of Entry of Decision and Order was filed March 6, 2006.

Defendant filed timely appeal to the Nevada Supreme Court, case no. 47011, appealing the district court's denial of defendant's post conviction petition for Writ of Habeas Corpus. On July 13, 2006 the Nevada Supreme Court affirmed the district court's denial of defendant's post conviction petition for Writ of Habeas Corpus, but again remanded the case for corrections to the Judgment of Conviction. Remittitur issued August 8, 2006.

2/ It must be noted that the court failed to vacate it's previous Order granting defendant's request to be "re-sentenced" "simply on the charges for which he was convicted" contained in his "motion to to vacate sentence as an habitual criminal" prior to re-sentencing defendant as an habitual violent felon.

On July 27, 2006 a Second Amended Judgment of Conviction was filed, and defendant filed a motion to stay proceedings and motion for appointment of counsel on August 11, 2006. On August 23, 2006 defendant's motions to stay proceedings and for appointment of counsel was denied and defendant filed timely appeal to the Nevada Supreme Court, case no. 47963. On October 3, 2006 the Nevada Supreme Court filed Order dismissing defendant's appeal, and Remittitur issued October 31, 2006.

On February 9, 200 defendant filed "Motion to Correct an Illegal Sentence or, in the alternative, Motion for Modification of Sentence". In said motion defendant argued that the court was without jurisdiction to impose habitual criminal enhancement without first having sentenced defendant to the substantive charges.

On February 19, 2010 the State filed it's Opposition, and on March 9, 2010 the district court entered Order denying defendant's motion to correct an illegal sentence or, in the alternative, motion for Modification of Sentence.

On March 25, 2010 defendant filed Motion for Reconsideration. On April 8, 2010 the district court denied said motion and defendant filed a timely appeal to the Nevada Supreme Court, case no. 55718.

On September 9, 2010 the Nevada Supreme Court entered Order of affirmance, and Remittitur issued on or about ~~September~~ October 1, 2010.

The instant motion to correct an illegal sentence or, in the alternative, Motion for Modification of Sentence followed:

(Argument)

"The court may correct an illegal sentence at any time" NRS 176.555. See, also, Passanisi v. State, 108 Nev 318, 321, 831 P.2d 1371, 1372 (1992). However, the grounds to correct an illegal sentence are interpreted narrowly under a limited scope. See, Edwards v. State, 112 Nev 704, 708, 918 P.2d 321, 324 (1996) See, also, Haney v. State, 124 Nev Adv. Op. 40, 185 P3d 350, 352 (2008), "A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot be used for challenging the validity of judgment or sentence based on alleged errors occurring at trial or sentencing. Edwards, supra, at 112 Nev 708, 918 P.2d 324.

"Motions to correct illegal sentences address only the facial legality of a sentence", Edwards, supra, and the court must determine whether the sentence imposed is "at variance with the controlling statute, or illegal in the sense that the court goes beyond it's authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided" Id, citing, Allen v. United States, 495 A2d. 1145, 1149 (D.C. 1985).

In the instant case defendant contends that the court went beyond it's authority by acting without jurisdiction in adjudicating and sentencing defendant as an habitual felon, and in support thereof, defendant would offer as follows:

Nevada's habitual criminal statutes creates a liberty interest for defendant because it sets forth a statutory procedure

that must be followed by the district court. If that procedure is not followed or is circumvented, then defendant's due process rights are violated. See, Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, and Campbell v. Blodgett 997 F.2d 512, 522 (9th Cir. (1992), cert. denied, ____ U.S. ____, 114 S.Ct. 1337, 127 L.ed.2d 685 (1994), and it's progeny, Walker v. Deeds, 50 F.3d. 670 (9th Cir 1995).

In the instant case the statutory procedures governing habitual criminal proceedings was not followed:

Nevada Revised Statutes (NRS) 207.012 (2) provides in part: "The district attorney 'shall' include a count under this section in any information or 'shall' file a notice of habitual felon if an indictment is found...." (emphasis added).

In the instant case no indictment was found. Defendant was tried by jury, convicted, and sentenced pursuant to information. Thus, the plain language of NRS 207.012 (2) clearly mandates that the information in this case include a count pursuant to NRS 207.012 (habitual felon).

However, instead of seeking leave of the court pursuant to NRS 173.095 (1) and NRS 207.012 (2) to amend the second amended information dated March 26, 2001 to include a count pursuant to NRS 207.012 (habitual felon), the State merely filed "Notice of Intent to Seek Punishment as a Habitual Criminal".

Defendant contends and argues to this Honorable Court that the state's "notice" does not satisfy the mandatory requirements of NRS 207.012 (2) and, as such, is without force and effect to confer jurisdiction/subject matter jurisdiction upon

the court to adjudicate and sentence defendant as an habitual felon.

As such, defendant contends that because the state failed to seek leave of the court to amend the second amended information to include a count pursuant to NRS 207.012 (habitual felon) and listing defendant's prior felony convictions, the court acted without proper jurisdiction / subject matter jurisdiction in adjudicating and sentencing defendant as an habitual felon pursuant to NRS 207.012.

Indeed, the Nevada Supreme Court has previously determined that a defendant was improperly adjudicated a habitual criminal where the state had not filed an information seeking to impose habitual criminal enhancement and listing defendant's prior felony convictions. See, Crutcher v. Eighth Judicial District Court, 111 Nev. 1286, 903 P.2d. 823 (1995).

Thus, defendant contends that his due process rights secured under the 5th and 14th amendments of the United States Constitution and Article 1, §8 of the Nevada Constitution were violated when the habitual criminal procedures mandated pursuant to NRS 207.012 (2) were not followed and resulted in the court acting without proper jurisdiction / subject matter jurisdiction in adjudicating and sentencing defendant as an habitual felon.

Wherefor, defendant prays that this Honorable Court will grant defendant's motion contained herein and Order that the sentence imposed, as well as adjudication as an habitual felon, be vacated, and that the court re-sentence defendant simply on the charges for which he was convicted pursuant to the jury's verdict.

Motion for Modification of Sentence

Defendant does hereby seek the modification of his sentence imposed by this court as more fully set forth in the attached Judgment of Conviction.

The court's jurisdiction is invoked pursuant to State v. Eighth Judicial District Court, in and for Clark County, 677 P.2d 1044 (Nev. 1984).

Generally, a district court lacks jurisdiction to modify a sentence once a defendant has started serving it. Passanisi v. State, 108 Nev. 318, 322, 831 P.2d 1371, 1373 (1992). However, a court does have authority to modify sentences "when a court has made 'a mistake in rendering a judgment which works to the extreme detriment of the defendant'" Passanisi, 108 Nev at 322, 831 P.2d at 1373 (emphasis in original).

In the instant case defendant filed "motion to vacate Sentence as an Habitual Criminal" wherein defendant specifically requested that the court "re-sentence defendant, not as an habitual criminal, but simply on the charges for which he was convicted."

On December 4, 2002, the court "Ordered" that said motion to vacate sentence as an habitual criminal be "Granted". However, upon re-sentencing, the court again sentenced defendant, not "simply on the charges for which he was convicted, but as an "Habitual Violent Felon" under NRS 207.012 on Count I and as "Habitual Criminal" under NRS 207.012(b) on Count II and

sentenced defendant to two concurrent life terms without the possibility of parole.

Defendant asserts that his due process rights secured under the 5th and 14th amendments of the United States Constitution and Article 1, §8 of the Nevada Constitution were violated when the court mistakenly re-sentenced defendant as an habitual criminal, notwithstanding fact that the court had previously granted defendant's request to be re-sentenced "not as an habitual criminal, but simply on the charges for which he was convicted" contained in defendant's motion to vacate sentence as an habitual criminal."

Defendant further asserts that the court's disregard of it's previous Order granting defendant's motion to vacate sentence as an habitual criminal was a "mistake" which "worked to the extreme detriment of defendant". Pursuant to the statutes in effect at the time of the instant offenses for which defendant was convicted, the maximum sentence defendant could have recieved was two to fifteen years on each count, and the increased sentence of life without possibility of parole works to the extreme detriment of defendant.

Conclusion

Wherefor, defendant prays this Honorable Court will grant defendant's motion contained herein, and Order that defendant's habitual offender sentence be modified to reflect that defendant is adjudicated guilty pursuant to the findings of the jury and

sentence defendant pursuant to the jury's verdict.

Respectfully Submitted,

signed this 18 day of April, 2011

Gregory Scott Hermanski
A/K/A Robert James Day
defendant, pro se

Certificate of Service

I, Gregory Scott Hermanski, hereby certify, pursuant to NRCP 5(b) that on this 18 day of April, 2011, I mailed a true and correct copy of the foregoing "Notice of Motion and Motion to Correct an Illegal Sentence or, In the Alternative, Motion for Modification of Sentence" by depositing same in the Northern Nevada Correctional Center Legal Library, First Class postage pre-paid, addressed as follows:

District Attorney
200 Lewis Ave.
P.O. Box 552212

dated this 18 day of April, 2011

Gregory Scott Hermanski II 69140
A/K/A Robert James Day
P.O. Box 7000
Carson City, NV 89702

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Notice of Motion And Motion To Correct An Illegal Sentence Or In The ...
(Title of Document)

filed in District Court Case number C167783X

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Gregory S. Hermanski
Signature

4-18-10
Date

Gregory Scott Hermanski
Print Name

Defendant Pro Se
Title

ORIGINAL

9

JOCP
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

FILED
JUL 27 9 29 AM '06
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,aka,
Gregory Scott Hermanski, #1679345

Defendant.

Case No: C167783

Dept No: IX

SECOND AMENDED
JUDGMENT OF CONVICTION

The Defendant previously appeared before the Court with counsel and having previously been found guilty by a jury to the crime(s) of **COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON (Felony) and COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony)**, in violation of NRS 207.012, 193.165 and 207.012; thereafter, on the 11th day of May, 2001, the Defendant was present in Court for sentencing with counsel wherein the Jury found the Defendant guilty thereof by reason of the Juries Verdict.

THEREAFTER, on the 30th day of April, 2003, the Defendant appeared in court with his counsel, PAUL WOMMER, ESQUIRE, and pursuant to a hearing/proceeding, and good cause appearing to amend Judgment of Conviction; now therefor,

IT IS ORDERED THAT: Defendant ROBERT JAMES DAY, aka, Gregory Scott Hermanski, is sentenced as Habitual Violent Felon under NRS 207.012 on COUNT I and as

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Habitual Criminal under NRS 207.012(b) on COUNT II, and is sentenced in COUNT I to LIFE in the Nevada Department of Corrections WITHOUT the Possibility of Parole and in COUNT II to LIFE in the Nevada Department of Corrections WITHOUT the Possibility of Parole; Count II to run CONCURRENTLY with Count I with NO Credit for Time Served; Deft. to submit to a test to determine genetic markers. Court advised counsel he can file the appropriate motion as to credit for time served while Deft. serving Federal time.

The Court FURTHER ORDERED, that Defendant pay the $25.00 Administration Fee and $150.00 DNA Analysis Fee.

DATED this 25th day of July, 2006.

DISTRICT JUDGE

JENNIFER P. TOGLIATTI

jr

Gregory Scott Hermansyc. #69140
A/K/A Robert James Day
N.N.C.C.
P.O. Box 7000
Carson City, NV 89702

( )

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CLERK OF THE COURT

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
THOMAS CARROLL
Chief Deputy District Attorney
Nevada Bar #004232
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI,
aka, Robert James Day, #1679345

Defendant.

CASE NO: C167783

DEPT NO: VI

STATE'S OPPOSITION TO DEFENDANT'S PRO PER MOTION TO CORRECT ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE

DATE OF HEARING: MAY 9, 2011
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through THOMAS CARROLL, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in State's Opposition to Defendant's Pro Per Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include notice of its intent to seek treatment of Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with three hundred eighty-two 382 days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, Case Number 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate that Defendant's adjudication as a habitual criminal was pursuant to NRS 176.015(1)(c), and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering this, the district court vacated Defendant's sentence and conducted another sentencing

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[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

hearing. In response, the State also filed a Notice Of Intent To Seek Punishment of Defendant as a habitual criminal pursuant to NRS 207.012 on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and sentenced him to two (2) concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

Defendant filed a timely appeal from the Amended Judgment of Conviction, Case Number 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in Case Number 41405, affirming Defendant's conviction. Remittitur was issued on July 27, 2004.

Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. The Court also ordered a supplemental response from the State regarding Defendant's Ground 3 of his Petition which alleges ineffective assistance of counsel at his re-sentencing under his true birth name. The State filed its Supplemental Response on December 8, 2005. On February 3, 2006, the court denied Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). A Findings of Fact, Conclusions of Law and Order was filed on March 3, 2006. A Notice of Entry of Decision and Order was filed on March 6, 2006.

On March 17, 2006, Defendant filed a Motion for Rehearing. The State filed its Opposition on March 23, 2006. On March 27, 2006, Defendant's motion was denied.

Defendant filed a Notice with the Nevada Supreme Court appealing the District Court's denial of his Post-Conviction Petition for Writ of Habeas Corpus. On July 13, 2006, the Nevada Supreme Court filed an Order of Affirmance and Limited Remand to Correct Judgment of Conviction (Case Number 47011). The Supreme Court remanded Defendant's case to the District Court for the sole purpose of amending the Judgment of Conviction to read that Defendant was adjudicated a habitual offender pursuant to NRS 207.012 for both the robbery and burglary counts. Remittitur was issued on August 8, 2006.

Pursuant to the Supreme Court's Order a Second Amended Judgment of Conviction was filed on July 27, 2006.

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Defendant filed a Motion To Stay Proceedings And Motion For Appointment Of Counsel on August 11, 2006. The State filed its Opposition on August 22, 2006. On August 23, 2006, Defendant's motion was denied. Defendant filed a Notice of Appeal on August 28, 2006 from the Second Amended Judgment of Conviction and the District Court's Order denying his Motion to Stay Proceedings And Motion For Appointment of Counsel (Case Number 47963). On October 3, 2006, the Nevada Supreme Court filed an order, dismissing Defendant's appeal. Remittitur was issued on October 31, 2006.

On February 9, 2010, Defendant filed a Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence. The Motion was denied by the District Court on February 22, 2010. On March 25, 2010, Defendant filed a Notice of Appeal. On September 9, 2010, the Nevada Supreme Court affirmed the District Court's denial of Defendant's Motion to Correct an Illegal Sentence and found that his sentence was legal. Remittitur was issued on October 5, 2010.

On April 25, 2011, Defendant filed the instant and Second Motion to Correct an Illegal Sentence or, in the Alternative Motion for Modification of Sentence to which the State responds as follows.

ARGUMENT

1. DEFENDANT'S MOTION IS BARRED BY THE LAW OF THE CASE

Defendant motion claims that he sentence was illegal. However, Defendant already raised this same motion on February 9, 2010 and its denial was affirmed by the Nevada Supreme Court on September 9, 2010. When an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993); see also Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); Pellegrini, 117 Nev. at 860, 34 P.3d at 519; McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996). 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 subsequently made after reflection

upon the previous proceedings." Hogan, 109 Nev. at 952, 860 P.2d at 710 (citing Hall, 91 Nev. 314, 535 P.2d 797); see also McNelton, 115 Nev. 396, 990 P.2d 1263. Here, this challenge to the legality of his sentence has already been decided on the merits by the Nevada Supreme Court on appeal, and thus, is barred by the law of the case doctrine and must be dismissed.

CONCLUSION

Based on the aforementioned arguments, the State respectfully requests that this Court deny Defendant's Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence.

DATED this 6th day of May, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Thomas Carroll
THOMAS CARROLL
Chief Deputy District Attorney
Nevada Bar #004232

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 6th day of May, 2011, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY SCOTT HERMANSKI #69140
aka Robert James Day
NORTHERN NEVADA CORRECTIONAL CENTER
P.O. BOX 7000
CARSON CITY, NV 89702

BY: /s/ C. Cintola
C. Cintola
Employee of the District Attorney's Office

CH/TC/cc

Gregory Scott Hermanski, #69140
A/K/A Robert James Day
P.O. Box 7000
Carson City, NV 89702
defendant, pro se.

FILED
2011 MAY 19 A 10:45
CLERK OF THE COURT

District Court
Clark County, Nevada

00C167783
SUPP
Supplemental
1421244

The State of Nevada,
plaintiff,
-vs-

Case No. C167783X
Dept. No. VI

Gregory Scott Hermanski,
A/K/A Robert James Day,
defendant.

Supplemental Points and Authorities in support of Motion to Correct an illegal sentence or, in the alternative, Motion for Modification of Sentence

COMES NOW the defendant, Gregory Scott Hermanski, A/K/A Robert James Day, (hereinafter, "defendant") by and through his proper person, and hereby submits the

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CLERK OF THE COURT

following Supplemental Points and Authorities in support of defendant's "Motion to Correct an Illegal Sentence or, in the alternative, Motion for Modification of Sentence". These Supplemental Points and Authorities are based upon all papers and pleadings on file and any oral argument deemed necessary at the time of hearing on said Motion.

Argument

"The law is thoroughly established, not only by the common law, but also under constitutional and statutory provisions in all jurisdictions, that there can be no conviction for or punishment of a crime without a formal and sufficient accusation; that, in the absence thereof, a court acquires no jurisdiction whatever, and if it assumes jurisdiction such trial and conviction would be a nullity; that the accusation must charge an offense; that it must charge the particular offense for which the accused is to be tried, and it must be made in the particular form and mode required by the law." In the matter of the Application of Ralph E. Waterman for a Writ of Habeas Corpus, 29 nev. 288, 89 P. 291 Supreme Court of Nevada, 1907. (emphasis added), cited in In re Alexander, 80 nev 354, 357, 359, 393 P.2d 615, 616, 617, (1964), see also, Williams v. Municipal Judge of the City of Las Vegas, Nevada, 85 nev 425, 456 P.2d 440, 442 (1969).

In the instant case, defendant asserts that the "form and mode of the accusation" required by law pursuant to NRS 207.012 (2) was not followed by the state and, as such, defendant argues to this Honorable Court that the court was without jurisdiction/subject matter jurisdiction to adjudicate and sentence defendant as an habitual felon.

Defendant further asserts that he was prejudiced by improper adjudication as an habitual felon because it acted to enhance defendant's sentence beyond that which otherwise would have been authorized solely by the jury's verdict.

Conclusion

Defendant concludes that his rights to due process and equal protection of the law, as set forth in the fifth (5th) and fourteenth (14th) Amendments to the United States Constitution and Article 1, § 8 of the Nevada Constitution were violated when he was adjudicated and sentenced as an habitual felon. Defendant therefor requests that this Honorable Court grant defendant's motion contained herein and Order that the sentence imposed as well as adjudication as an habitual felon be vacated, and that the court re-sentence defendant simply on the charges for which he was convicted pursuant to the jury's verdict.

signed this 5th day of May, 2011,

Respectfully Submitted,
Gregory S. Hermanski
Gregory Scott Hermanski
defendant, pro se

Certificate of Service

I, Gregory Scott Hermanski, hereby certify, pursuant to NRCP 5(b) that on this 5 day of May, 2011, I mailed a true and correct copy of the foregoing "Supplemental Points and Authorities in Support of Motion to Correct an Illegal Sentence or, In the Alternative, Motion for Modification of Sentence" by depositing same in the Northern Nevada Correctional Center Legal Library, first class postage pre-paid, addressed as follows:

Office of the District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV. 89155

dated this 5th day of May, 2011

Gregory S. Hermanski

Gregory Scott Hermanski #69140
A/K/A Robert James Day
N.N.C.C.
P.O. Box 7000
Carson City, NV 89702

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, Supplemental Points and Authorities

(Title of Document)

filed in case number: C167783

☑ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 5-5-11

Gregory S. Hermanski
(Signature)

Gregory Scott Hermanski
(Print Name)

defendant, pro se
(Attorney for)

Affirmation
Revised December 15 2006

Gregory Scott Hermansici #69140
NNCC
P.O. Box 7000
Carson City, NV
89702

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FILED
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CLERK OF THE COURT

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DANIEL WESTMEYER
Deputy District Attorney
Nevada Bar #0010273
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

00C167783
ORDD
Order Denying
1429002

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI,
aka, Robert James Day, #1679345

Defendant.

Case No. C167783
Dept No. VI

ORDER DENYING DEFENDANT'S PRO PER MOTION TO CORRECT ILLEGAL SENTENCE OR, IN THE ALTERNATIVE, MOTION FOR MODIFICATION OF SENTENCE

DATE OF HEARING: 05/09/11
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 9th day of May, 2011, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by DAVID ROGER, District Attorney, through DANIEL WESTMEYER, Deputy District Attorney, and without benefit of argument, COURT stated its findings that Defendant has made the same arguments previously rejected and affirmed on Appeal, and good cause appearing therefor,

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CLERK OF THE COURT

COURT ORDERED, Motion DENIED.

DATED this 16th day of May, 2011.

Elissa F. Cadish

DISTRICT JUDGE

TR.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

DANIEL WESTMEYER
Deputy District Attorney
Nevada Bar #0010273

pm

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Gregory Scott Hermanski #69140
A/K/A Robert James Day
N.N.C.C., P.O. Box 7000
Carson City, NV 89702
(defendant, pro se)

FILED
MAY 24 2011
CLERK OF COURT

00C167783
MOT
Motion
1428760

District Court
Clark County, Nevada

H.D. 6/6/2011

The State of Nevada,
plaintiff,
-vs-
Gregory Scott Hermanski,
defendant.

Case No. C167783 X
Dept. No. VI

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MAY 20 2011
CLERK OF THE COURT

Defendant's Motion for leave to file "Defendant's Response to State's Opposition to defendant's Pro Per Motion to Correct an Illegal Sentence or in the Alternative Motion for Modification of Sentence"

Now comes the defendant, Gregory Scott Hermanski, by and through his proper person, and hereby moves this Honorable Court for leave to file "Defendant's Response to State's Opposition to defendant's Pro Per Motion to Correct an Illegal sentence or in the alternative Motion for Modification of sentence".

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

Points and Authorities

(Statement of the case)

On April 25, 2011, defendant filed "motion to correct an illegal sentence or in the alternative, motion for modification of sentence" pursuant to Nevada Revised Statutes (NRS) 176.555 and State v. Eighth Judicial District Court, In and for Clark County, 677 P.2d 1044 (1984).

Subsequently, on May 6, 2011 the state filed it's Opposition thereto, and hearing on the matter was held on May 9, 2011. However, defendant was not served with a copy of the State's Opposition until May 11, 2011. Indeed, the state had not mailed it's opposition to defendant until May 9, 2011. (a copy of the envelope which contained the "State's Opposition" bearing the post mark May 9, 2011 is attached hereto).

(argument)

Defendant submits that pursuant to the due process and equal protection guarantee of the fifth (5th) and Fourteenth (14th) amendments to the United States Constitution

and Article 1, § 8 of the Nevada Constitution defendant is entitled to file a responsive pleading to the State's Opposition.

Conclusion

Defendant submits that the State's failure to provide defendant with a copy of it's opposition in a timely manner prevented defendant from filing a responsive pleading in a timely manner;

Wherefor, defendant moves this Honorable Court for leave to file "Defendant's Response to State's Opposition to Defendant's Pro Per Motion to Correct an Illegal Sentence or in the Alternative Motion for Modification of Sentence".

Respectfully Submitted,

dated this 16 day of May, 2011.

Gregory S Hermanski

Gregory Scott Hermanski
defendant, pro se

Certificate of Service

I, Gregory Scott Hermanski, hereby certify pursuant to NRCP 5(b), that on this 16 day of May, 2011, I served the foregoing "Defendant's motion for leave to file defendant's Respose to State's Opposition to defendant's Pro Per motion to correct an illegal sentence or in the alternative motion for modification of sentence", by depositing a true and correct copy of same in the prison legal library in a sealed envelope, first class postage fully pre-paid, and addressed to:

Office of the District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

and that there is regular communication between the place of mailing and the recipient address.

signed this 16 day of May, 2011. Gregory S. Hermanski

Gregory Scott Hermanski

Gregory Scott Hermanski 69140
A/K/A Robert James Day
N.N.C.C., P.O. Box 7000
Carson City, NV 89702
(defendant, pro se).

District Court
Clark County, Nevada

The State of Nevada,
plaintiff,
-vs-

Case No. C167783X
Dept. No. VI

Gregory Scott Hermanski,
defendant.

Notice of Motion

TO: The State of Nevada and the office of the district attorney, counsel for plaintiff, PLEASE TAKE NOTICE that the above named defendant will bring on for hearing "Defendant's motion for leave to file Supplemental Points and authorities in support of motion to correct an illegal sentence or in the alternative, motion for modification of sentence" and "Defendant's motion for leave to file defendant's response to state's Opposition to defendant's pro per motion to correct an illegal sentence or

RECEIVED
MAY 20 2011
CLERK OF THE COURT

in the alternative, motion for modification of sentence", and "Defendant's Response to State's Opposition to defendant's pro per motion to correct an illegal sentence or in the alternative motion for modification of sentence," in Department VI of the Eighth Judicial District Court at a time and date to be set by the court.

Further, you are hereby provided notice that your failure to respond and/or to otherwise oppose these motions will be deemed by defendant as to your consenting to the granting of the relief requested by the defendant therein, and that the proceedings of the foregoing motions must proceed pursuant to the District Court Rules, (DCR) Rule 13 et. seq. and the Eighth Judicial District Court Rules, (EJDCR) Rule 3.20, to afford defendant with the full panoply protections of Due Process and equal protection of the law as set forth in the fifth (5th) and fourteenth (14th) Amendments to the United States Constitution and Article 1, §8 of the Nevada Constitution.

Respectfully Submitted,

signed this 16 day of May, 2011.

Gregory S. Hermanski

Gregory Scott Hermanski
defendant, pro se

Certificate of Service

I, Gregory Scott Hermanski, hereby certify pursuant to NRCP 5(b), that on this 16 day of May, 2011 I served the foregoing "Notice of Motion" by depositing a true and correct copy of same in the prison legal library in a sealed envelope, first class postage fully prepaid, and addressed to:

Office of the District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

and that there is a regular line of communication between the place of mailing and the recipient address.

signed this 16 day of May, 2011, Gregory S Hermanski
Gregory Scott Hermanski

DAVID ROGER, *District Attorney*
Office of the District Attorney
200 LEWIS AVENUE
P.O. BOX 552212
LAS VEGAS, NV 89155-2212

PRESORTED FIRST CLASS

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GREGORY SCOTT HERMANSKI #69140
aka Robert James Day
NORTHERN NEVADA CORRECTIONAL
CENTER
P.O. BOX 7000
CARSON CITY, NV 89702

82 BRDFN11 89702

Gregory Scott Hermanski, #69140
A/K/A Robert James Day
N.N.C.C., P.O. Box 7000
Carson City, NV 89702

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Gregory Scott Hermanski #69140
A/K/A Robert James Day
N.N.C.C., P.O. Box 7000
Carson City, NV 89702

FILED
MAY 24 2011
CLERK OF COURT

District Court
Clark County, Nevada

00C167783
MOT
Motion
1428747

The State of Nevada,
plaintiff,
-vs-
Gregory Scott Hermanski,
defendant.

Case No. C167783X
Dept. No. VI
H.D. 6/16/2011

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MAY 20 2011
CLERK OF THE COURT

"Defendant's motion for leave to file Supplemental Points and Authorities in support of motion to correct an illegal sentence or in the alternative motion for modification of sentence"

COMES NOW defendant Gregory Scott Hermanski, by and through his proper person, and hereby moves this court for leave to file "Supplemental Points and Authorities in support of motion to correct an illegal sentence or in the alternative motion for modification of sentence. This motion is made and based upon

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all papers, pleading, and documents on file herein, as well as any oral argumet this court deems necessary.

In support of the foregoing, defendant would show as follows:

In defendant's "motion to Correct an illegal sentence or in the alternative, motion for modification of sentence", defendant argued that the state's failure to properly "accuse" defendant of being an habitual felon deprived the court of jurisdiction / subject matter jurisdiction to adjudicate and sentence defendant as an habitual felon. However, defendant inadvertently failed to provide the court with legal authority in support thereof, believing that the concept of jurisdiction conveyed by proper accusation was universally accepted.

Wherefor, defendant asks that this Honorable Court recognize that defendant is a layman with limited knowledge of the law, and grant defendant leave to file his "Supplemental Points and Authorities in support of motion to correct an illegal sentence or in the alternative motion for modification of sentence.

Respectfully Submitted,

signed this 16 day of May, 2011. Gregory S. Hermanski

Gregory Scott Hermanski
(defendant, pro se)

Certificate of Service

I, Gregory Scott Hermanski, hereby certify pursuant to NRCP 5(b) that on the 16 day of May, 2011, I served a copy of the foregoing "Defendant's motion for leave to file Supplemental Points and Authorities in support of motion to correct an illegal sentence or, in the alternative, motion for modification of sentence" by depositing a true and correct copy of same in the prison legal library mail, first class postage fully pre-paid and addressed to:

Office of the District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

and that there is a regular line of communication between the place of mailing and the recipient address.

signed this 16 day of May, 2011.

Gregory S. Hermanski

Gregory Scott Hermanski

Gregory Scott Hermanski 69140
A/K/A Robert James Day
N.N.C.C., P.O. Box 7000
Carson City, NV 89702
(defendant, pro se).

District Court
Clark County, Nevada

The State of Nevada,
plaintiff,
-vs-

Case No. C167783 X
Dept. No. VI

Gregory Scott Hermanski,
defendant.

Notice of Motion

TO: The State of Nevada and the office of the district attorney, counsel for plaintiff, PLEASE TAKE NOTICE that the above named defendant will bring on for hearing "Defendant's motion for leave to file Supplemental Points and authorities in support of motion to correct an illegal sentence or in the alternative, motion for modification of sentence" and "Defendant's motion for leave to file defendant's response to State's Opposition to defendant's pro per motion to correct an illegal sentence or

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MAY 20 2011
CLERK OF THE COURT

in the alternative, motion for modification of sentence", and "Defendant's Response to State's Opposition to defendant's pro per motion to correct an illegal sentence or in the alternative motion for modification of sentence," in Department UI of the Eighth Judicial District Court at a time and date to be set by the court.

Further, you are hereby provided notice that your failure to respond and/or to otherwise oppose these motions will be deemed by defendant as to your consenting to the granting of the relief requested by the defendant therein, and that the proceedings of the foregoing motions must proceed pursuant to the District Court Rules, (DCR) Rule 13 et. seq. and the Eighth Judicial District Court Rules, (EJDCR) Rule 3.20, to afford defendant with the full panoply protections of Due Process and equal protection of the law as set forth in the fifth (5th) and fourteenth (14th) Amendments to the United States Constitution and Article 1, 8a of the Nevada Constitution.

Respectfully Submitted,

signed this 16 day of May, 2011. Gregory S. Hermanski

Gregory Scott Hermanski
defendant, pro se

Certificate of Service

I, Gregory Scott Hermanski, hereby certify pursuant to NRCP 5(b), that on this 16 day of May, 2011 I served the foregoing "Notice of Motion" by depositing a true and correct copy of same in the prison legal library in a sealed envelope, first class postage fully prepaid, and addressed to:

Office of the District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

and that there is a regular line of communication between the place of mailing and the recipient address.

signed this 16 day of May, 2011, Gregory S. Hermanski
Gregory Scott Hermanski

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FILED

MAY 24 2011

CLERK OF COURT

Gregory Scott Hermanski, #69140
A/K/A Robert James Day
N.N.C.C., P.O. Box 7000
Carson City, NV 89702
(defendant, pro se)

00C167783
RSPN
Response
1428772

District Court
Clark County, Nevada

The State of Nevada,
plaintiff,

-vs-

Case No. C167783X
Dept. No. VI

Gregory Scott Hermanski,
defendant.

RECEIVED
MAY 20 2011
CLERK OF THE COURT

Defendant's Response to State's Opposition to defendant's pro per motion to correct an illegal sentence or in the alternative, motion for Modification of Sentence"

comes now, the defendant, Gregory Scott Hermanski, by and through his proper person, and hereby submits the attached points and authorities in defendant's response to State's Opposition to defendant's pro per motion to correct an illegal sentence or in the alternative, motion for modification of

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sentence.

Defendant's "Response" is made and based on all papers and pleadings on file herein, the attached points and authorities in support hereof, and any oral argument the court deems necessary at the time of hearing.

Points and Authorities

Argument:

1. "The State offers nothing to demonstrate that the facts presented on appeal were substantially the same as that presented in defendant's motion to correct an illegal sentence or motion for modification of sentence."

"The law of 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. 535 P. 2d 797 (1975). See also, Walker v. State, 85 Nev. 337, 343, 445 P. 2d 34, 38 (1969). (emphasis added).

In the State's Opposition, the state argues that "defendant's motion is barred by the law of the case." However, the state offers nothing to demonstrate that the facts presented on appeal were substantially the same as that presented in defendant's motion to correct an illegal sentence or motion for modification of sentence.

As such, the state has offered nothing for this Honorable

Court to conclude that defendant's motion is barred by law of the case.

Conclusion

Wherefor, defendant asks that the court decide this case on the merits and grant defendant's motion to correct an illegal sentence or, in the alternative, motion for modification of sentence.

Respectfully Submitted,

dated this 16 day of May, 2011.

Gregory Scott Hermanski

Gregory Scott Hermanski
(defendant, pro se)

Certificate of Service

I, Gregory Scott Hermanski, hereby certify pursuant to NRCP 5(b) that on this 16 day of May, 2011 I served the foregoing "Defendant's Response to "State's Opposition to defendant's pro per motion to correct an illegal sentence or in the alternative, motion for modification of sentence" by depositing a true and correct copy of same in the prison legal library in a sealed envelope, first class postage fully pre-paid and addressed to:

Office of the District Attorney
200 Lewis Ave
P.O. Box 552212
Las Vegas, NV 89155-2212

and that there is a regular line of communication between the place of mailing and the recipient address.

signed this 16 day of May, 2011. Gregory S. Hermanski

Gregory Scott Hermanski

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CLERK OF THE COURT

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
THOMAS CARROLL
Chief Deputy District Attorney
Nevada Bar #004232
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI,
aka Robert James Day, #1679345

Defendant.

CASE NO: C167783

DEPT NO: VI

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE DEFENDANT'S RESPONSE TO STATE'S OPPOSITION TO DEFENDANT'S PRO PER MOTION TO CORRECT ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE

DATE OF HEARING: JUNE 6, 2011
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through THOMAS CARROLL, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in State's Opposition to Defendant's Motion for Leave to File Defendant's Response to State's Opposition to Defendant's Pro Per Motion to Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence.

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

///

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include notice of its intent to seek treatment of Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with three hundred eighty-two (382) days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate that Defendant's adjudication as a habitual criminal was pursuant to NRS 176.015(1)(c), and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering this, the district court vacated Defendant's sentence and conducted another sentencing

---

[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

hearing. In response, the State also filed a notice of intent to seek punishment of Defendant as a habitual criminal pursuant to NRS 207.012 on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

Defendant filed a timely appeal from the Amended Judgment of Conviction, Case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in Case No. 41405, affirming Defendant's conviction. Remittitur was issued on July 27, 2004.

Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. The Court also ordered a supplemental response from the State regarding Defendant's Ground 3 of his Petition which alleges ineffective assistance of counsel at his re-sentencing under his true birth name. The State filed its Supplemental Response on December 8, 2005. On February 3, 2006, the Court denied Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). A Findings of Fact, Conclusions of Law and Order was filed on March 3, 2006. A Notice of Entry of Decision and Order was filed on March 6, 2006.

On March 17, 2006, Defendant filed a Motion for Rehearing. The State filed its Opposition on March 23, 2006. On March 27, 2006, Defendant's motion was denied.

Defendant filed a Notice with the Nevada Supreme Court appealing the District Court's denial of his Post-Conviction Petition for Writ of Habeas Corpus. On July 13, 2006, the Nevada Supreme Court filed an Order of Affirmance and Limited Remand to Correct Judgment of Conviction (Case No. 47011). The Supreme Court remanded Defendant's case to the District Court for the sole purpose of amending the Judgment of Conviction to read that Defendant was adjudicated a habitual offender pursuant to NRS 207.012 for both the robbery and burglary counts. Remittitur was issued on August 8, 2006.

Pursuant to the Supreme Court's Order a Second Amended Judgment of Conviction was filed on July 27, 2006.

///

Defendant filed a Motion To Stay Proceedings And Motion For Appointment Of Counsel on August 11, 2006. The State filed its Opposition on August 22, 2006. On August 23, 2006, Defendant's motion was denied. Defendant filed a Notice of Appeal on August 28, 2006 from the Second Amended Judgment of Conviction and the District Court's Order denying his Motion to Stay Proceedings And Motion For Appointment of Counsel (Case No. 47963). On October 3, 2006, the Nevada Supreme Court filed an order, dismissing Defendant's appeal. Remittitur was issued on October 31, 2006.

On February 9, 2010, Defendant filed a Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence. The Motion was denied by the District Court on February 22, 2010. On March 25, 2010, Defendant filed a Notice of Appeal. On September 9, 2010, the Nevada Supreme Court affirmed the District Court's denial of Defendant's Motion to Correct an Illegal Sentence and found that his sentence was legal. Remittitur was issued on October 5, 2010.

On April 25, 2011, Defendant filed a second Motion to Correct an Illegal Sentence or, in the Alternative Motion for Modification of Sentence to which the State filed a response. The motion was denied by the District Court on May 9, 2011 and the Order of Denial was entered on May 20, 2011.

On May 24, 2011, the instant Motion for Leave to File Defendant's Response to State's Opposition to Defendant's Pro Per Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence to which the State responds as follows.

ARGUMENT

THERE IS NO BASIS TO GRANT DEFENDANT'S MOTION

The State opposes Defendant's motion on the ground that there is simply no basis to grant it. On May 9, 2011, the District Court denied Defendant's Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence ("Motion to Correct Illegal Sentence"). The Order of Denial was entered on May 20, 2011. Accordingly, there is no reason to grant Defendant's motion for leave to file Defendant's response to the State's

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opposition, and thus, the instant motion is moot. NCAA v. Univ. Nev. Reno, 97 Nev. 56, 624 P.2d 10 (1981).

CONCLUSION

Based on the aforementioned arguments, the State respectfully requests that this Court deny Defendant's Motion for Leave to File Defendant's Response to State's Opposition to Defendant's Pro Per Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence.

DATED this 2nd day of June, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Thomas Carroll
THOMAS CARROLL
Chief Deputy District Attorney
Nevada Bar #004232

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 2nd day of June, 2011, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY SCOTT HERMANSKI, #69140
aka Robert James Day
NORTHERN NEVADA CORRECTIONAL CENTER
P.O. BOX 7000
CARSON CITY, NV 89702

BY: /s/ C. Cintola
C. Cintola
Employee of the District Attorney's Office

CH/TC/cc

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06/02/2011 10:03:12 AM

CLERK OF THE COURT

OPPS

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
THOMAS CARROLL
Chief Deputy District Attorney
Nevada Bar #004232
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI,
aka Robert James Day, #1679345

Defendant.

CASE NO: C167783

DEPT NO: VI

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO CORRECT ILLEGAL SENTENCE OR IN THE ALTERNATIVE MOTION FOR MODIFICATION OF SENTENCE

DATE OF HEARING: JUNE 6, 2011
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through THOMAS CARROLL, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in State's Opposition to Defendant's Motion for Leave to File Supplemental Points and Authorities in Support of Motion to Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence.

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

///

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include notice of its intent to seek treatment of Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with three hundred eighty-two (382) days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate that Defendant's adjudication as a habitual criminal was pursuant to NRS 176.015(1)(c), and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering this, the district court vacated Defendant's sentence and conducted another sentencing

---

[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

hearing. In response, the State also filed a notice of intent to seek punishment of Defendant as a habitual criminal pursuant to NRS 207.012 on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

Defendant filed a timely appeal from the Amended Judgment of Conviction, Case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in Case No. 41405, affirming Defendant's conviction. Remittitur was issued on July 27, 2004.

Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. The Court also ordered a supplemental response from the State regarding Defendant's Ground 3 of his Petition which alleges ineffective assistance of counsel at his re-sentencing under his true birth name. The State filed its Supplemental Response on December 8, 2005. On February 3, 2006, the court denied Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). A Findings of Fact, Conclusions of Law and Order was filed on March 3, 2006. A Notice of Entry of Decision and Order was filed on March 6, 2006.

On March 17, 2006, Defendant filed a Motion for Rehearing. The State filed its Opposition on March 23, 2006. On March 27, 2006, Defendant's motion was denied.

Defendant filed a Notice with the Nevada Supreme Court appealing the District Court's denial of his Post-Conviction Petition for Writ of Habeas Corpus. On July 13, 2006, the Nevada Supreme Court filed an Order of Affirmance and Limited Remand to Correct Judgment of Conviction (case No. 47011). The Supreme Court remanded Defendant's case to the District Court for the sole purpose of amending the Judgment of Conviction to read that Defendant was adjudicated a habitual offender pursuant to NRS 207.012 for both the robbery and burglary counts. Remittitur was issued on August 8, 2006.

Pursuant to the Supreme Court's Order a Second Amended Judgment of Conviction was filed on July 27, 2006.

///

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Defendant filed a Motion To Stay Proceedings And Motion For Appointment Of Counsel on August 11, 2006. The State filed its Opposition on August 22, 2006. On August 23, 2006, Defendant's motion was denied. Defendant filed a Notice of Appeal on August 28, 2006 from the Second Amended Judgment of Conviction and the District Court's Order denying his Motion to Stay Proceedings And Motion For Appointment of Counsel (Case No. 47963). On October 3, 2006, the Nevada Supreme Court filed an order, dismissing Defendant's appeal. Remittitur was issued on October 31, 2006.

On February 9, 2010, Defendant filed a Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence. The Motion was denied by the District Court on February 22, 2010. On March 25, 2010, Defendant filed a Notice of Appeal. On September 9, 2010, the Nevada Supreme Court affirmed the District Court's denial of Defendant's Motion to Correct an Illegal Sentence and found that his sentence was legal. Remittitur was issued on October 5, 2010.

On April 25, 2011, Defendant filed a second Motion to Correct an Illegal Sentence or, in the Alternative Motion for Modification of Sentence to which the State filed a response. The motion was denied by the District Court on May 9, 2011 and the Order of Denial was entered on May 20, 2011.

On May 24, 2011, the instant Motion for Leave to File Supplemental Points and Authorities in Support of Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence to which the State responds as follows.

ARGUMENT

THERE IS NO BASIS TO GRANT DEFENDANT'S MOTION

The State opposes Defendant's motion on the ground that there is simply no basis to grant it. On May 9, 2011, the District Court denied Defendant's Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence ("Motion to Correct Illegal Sentence"). The Order of Denial was entered on May 20, 2011. Accordingly, there is no reason to grant Defendant's motion for leave to file supplemental points and authorities to

///

the motion to correct illegal sentence, and thus, the instant motion is moot. NCAA v. Univ. Nev. Reno, 97 Nev. 56, 624 P.2d 10 (1981).

CONCLUSION

Based on the aforementioned arguments, the State respectfully requests that this Court deny Defendant's Motion for Leave to File Supplemental Points and Authorities in Support of Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence.

DATED this 2nd day of June, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Thomas Carroll
THOMAS CARROLL
Chief Deputy District Attorney
Nevada Bar #004232

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 2nd day of June, 2011, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY SCOTT HERMANSKI, #69140
aka Robert James Day
NORTHERN NEVADA CORRECTIONAL CENTER
P.O. BOX 7000
CARSON CITY, NV 89702

BY: /s/ C. Cintola
C. Cintola
Employee of the District Attorney's Office

CH/TC/cc

5

$20

FILED
JUN 16 2011
CLERK OF COURT

Gregory Scott Hermanski
N.N.C.C., P.O. Box 7000
Carson City, NV 89702

District Court
Clark County, Nevada

The State of Nevada,
plaintiff,

v.

Case No. C167783
Dept. No. VI

Gregory Scott Hermanski,
defendant.

HD: June 29, 2011

Notice of Motion / Motion for Extension of Time

Comes Now the defendant, Gregory Scott Hermanski, by and through his proper person, and hereby respectfully moves this Honorable Court for an Extension of Time to file defendant's "Motion for Reconsideration" of this court's Order entered May, 20 2011, on ground that the court has failed to provide defendant with a copy of said Order as of this date: June 7, 2011.

As such, defendant would further ask that the court direct that the Clerk of Court provide defendant with a copy of said Order and that defendant be permitted ten (10) days

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CLERK OF THE COURT

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MOT
Motion
1473679

from the date defendant recieves said Order in which to file his "Motion for Reconsideration".

This motion is made and based on all papers, pleadings, and documents on file herein, as well as the attached Memorandum of Points and Authorities in support hereof, and any oral argument the court deems necessary.

NOTICE OF MOTION

To: the State of Nevada and the Office of the District Attorney, counsel for the plaintiff: PLEASE TAKE NOTICE that defendant Gregory Scott Hermanski will bring on for hearing "Motion for Extension of Time" in Dept. VI of the Eighth Judicial District Court at a time and date to be set by the Court.

signed this 7th day of June, 2011

Gregory S. Hermanski

Gregory Scott Hermanski

Points and Authorities

Defendant submits that pursuant to the due process and equal protections guarantee of the Fifth (5th) and fourteenth (14th) amendments to the United States Constitution and Article 1, § 8 of the Nevada Constitution, defendant is entitled to ask for an extension of time within which to submit his motion for reconsideration of this Court's Order entered in this case on May 20, 2011.

Conclusion

Wherefor, defendant Gregory Scott Hermanski asks that this court grant his motion for extension of time because the court failed to provide defendant with a copy of the court's Order of May 20, 2011 in a timely manner.

Respectfully Submitted,

signed this 7th day of ~~May~~ June, 2011

Gregory S. Hermanski

Gregory Scott Hermanski
(defendant, pro se).

Certificate of Service

I, Gregory Scott Hermanski, hereby certify pursuant to NRCP 5(b) that on this 7th day of June, 2011 I served the foregoing "Notice of Motion / Motion for Extension of Time" by depositing a true and correct copy of same in the prison legal library in a sealed envelope, first class postage fully pre-paid, and addressed to:

Office of the District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

and that there is a regular line of communication between the place of mailing and the recipient address.

signed this 7th day of June, 2011

Gregory S. Hermanski
Gregory Scott Hermanski
(defendant, pro se)

Gregory Scott Hermanski #69140
N.N.C.C., P.O. Box 7000
Carson City, NV 89702

NORTHERN NEVADA CORRECTIONAL CENTER

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Master

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Clerk of the Court
200 Lewis Ave., Third Floor
Las Vegas, NV 89155-1160

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Page 908

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JUN 8
NRCC MAIL ROOM

Gregory Scott Hermanski, #69140
A/K/A Robert James Day.
N.N.C.C.
P.O. Box 7000
Carson City, NV 89702

FILED
JUN 21 2011
CLERK OF COURT

56

7/6/11 8:30a

District Court
Clark County, Nevada

00C167783
MOT
Motion
1480716

State of Nevada,
plaintiff,
-vs-

Case No. C167783X
Dept. No. VI

Gregory Scott Hermanski,
defendant.

Motion for Reconsideration

Comes Now defendant, Gregory Scott Hermanski, by and through his proper person, and hereby moves this Honorable court pursuant to the provisions of NRS 176.555 and NRAP Rule 40, for reconsideration of this court's Order denying defendant's "motion to correct an illegal sentence or, in the alternative, motion for modification of sentence" entered on the 20 day of May, 2011.

This motion is based on all papers, pleadings, documents,

12

transcripts and exhibits on file herein, as well as the attached Memorandum of Points and Authorities in support hereof, and any oral argument the court deems necessary at the time of hearing.

Points and Authorities

Pursuant to the provisions of Rule 40, Nevada Rules of Appellate Procedure, this court has the authority to review and reconsider it's judgment when it can be demonstrated that said judgment was based on the court's having "over-looked or misapprehended any issue of fact or law." See, N.R.A.P. 40 (a).

In the case at bar, defendant has presented a claim of "subject-matter jurisdiction" which, under the law, cannot be barred, waived, or forfeited. As such, defendant would respectfully suggest that "law of the case doctrine" does not apply here, and this court has the authority to review and reconsider it's judgment as is more fully set forth herein.

The state has argued that defendant's motion is barred under the law of the case doctrine, and this court has denied defendant's motion. Obviously, the court feels the state is correct.

However, in defendant's prior appeal the Nevada Supreme Court made no specific finding as to whether this court had subject-matter jurisdiction to adjudicate and sentence defendant as an habitual felon. Indeed, the Supreme Court merely concluded that defendant "failed to demonstrate that the district court was not a competent court of jurisdiction". See attached, "Order of Affirmance", dated September 9, 2010.

"In order for law of the case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication." Dictor v. Creative Management Services, 126 Nev. Rep. 4, 223 P.3d 332, (Nev. 2010), see, also, Snow-Erlin v. United States, 470 F.3d 804, 807 (9th Cir. 2006). However, "the doctrine does not bar a district court from hearing and adjudicating issues not previously decided", see, id., "and does not apply if the issues presented in a subsequent appeal differ from those presented in a previous appeal." Emeterio v. Clint Hurt and Assocs, 114 Nev. 1031, 1034, 967 P.2d 432, 434 (Nev. 1998); Bone v. City of Lafayette, Ind., 919 F.2d 64, 66 (7th Cir. 1990) ("Subjects an appellate court does not discuss, because the parties did not raise them, do not become law of the case by default").

In the instant case, the Supreme Court did not "explicitly" nor by "necessary implication", address and decide whether the State's failure to properly accuse defendant of being an habitual felon, in a manner consistent with NRS 207.012(2), acted to deprive the district court of subject matter jurisdiction to adjudicate and sentence defendant as an habitual felon pursuant to NRS 207.012.

Thus, defendant would proffer that law of the case doctrine does not apply in the case at bar. Not only has defendant demonstrated that the Supreme Court has not addressed and decided the issues presented herein on prior appeal, but defendant would further argue that, contrary to the state's position that defend-

ant's motion is barred by law of the case, "Estoppel may not prevent an objection to subject matter jurisdiction, because such an objection to subject matter jurisdiction may be raised ~~but~~ any time, by any party or the court," Intercontinental Travel Marketing v. F.D.I.C., 45 F.3d 1278, 1286 (9th Cir 1995), citing, Brady Development Corp. v. Resolution Trust Corp., 14 F.3d 998, 1007 (4th Cir 1994).

In Colwell v. State, 118 Nev. 807, 59 P.3d 463 (Nev. 2002), the Nevada Supreme Court determined that "subject matter jurisdiction is not waivable, and a court's lack of such jurisdiction can be raised for the first time on appeal," 118 Nev. at 812, 59 P.3d at 467, see also, Swan v. Swan, 106 Nev 464, 469, 796 P.2d 221, 224 (Nev. 1990).

Moreover, "the doctrines of waiver and estoppel do not apply to subject matter jurisdiction determinations," Bueford v. Resolution Trust Corp, 991 F.2d 481, 485 (8th Cir 1993), and, "subject matter jurisdiction.... can never be forfeited or waived", United States v. Cotton, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

Thus, defendant argues that his motion to correct an illegal sentence is not barred by ~~law~~ of the case doctrine since defendant cannot "by his own conduct or otherwise, be estopped from raising the issue of subject matter jurisdiction", Feise v. Resolution Trust Corp., 815 F. Supp, 344, 345 (C.D. Cal. 1993).

Conclusion

Based on the facts, applicable law and argument presented herein, defendant asks this court to find that defendant has demonstrated that the law of the case doctrine/estoppel do not apply in the case at bar and, therefor, reconsideration of defendant's motion on the merits presented therein is warranted.

WHEREFORE, defendant Gregory Scott Hermanski, respectfully moves this Honorable Court to enter it's Order granting reconsideration and any such further relief as the court may deem defendant is entitled to.

executed this 14 day of June, 2011.

Respectfully Submitted,
Gregory S. Hermanski
Gregory Scott Hermanski
(defendant, pro se)

Gregory Scott Hermanski, # 0069140
A/K/A Robert James Day
N.N.C.C., P.O. Box 7000
Carson City, NV 89702

RECEIVED
JUN 20 2011
CLERK OF THE COURT

District Court
Clark County, Nevada

The State of Nevada,
plaintiff,
-v-

Case No. C167783X
Dept. No. VI

Gregory Scott Hermanski,
defendant.

NOTICE OF MOTION

To: The State of Nevada and the Office of the District attorney, counsel for plaintiff, please take notice that the above named defendant will bring on for hearing "Motion for Reconsideration" in Department VI of the Eighth Judicial District Court at a time and date to be set by the court. (attached hereto).

Further, you are hereby provided notice that your failure to respond and/or to otherwise oppose said motion will be deemed by defendant as to your consenting of the granting of the relief requested by the defendant therein, and that the proceed-

ings of the foregoing motion must proceed pursuant to District Court Rules, (DCR) Rule 13, et. seq., and the Eighth Judicial District Court Rules, (EJDCR) Rule 3.20, to afford defendant with the full panoply protections of due process and equal protection of the law as set forth in the fifth (5th) and fourteenth (14th) Amendments to the United States Constitution and Article 1, §8 of the Nevada Constitution.

Respectfully Submitted,

executed this 14 day of June, 2011. Gregory S. Hermanski

Gregory Scott Hermanski
(defendant, pro se)

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55718

FILED

SEP 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a motion to modify or correct sentence.[1] Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

In his motion filed on February 9, 2010, appellant claimed that the habitual criminal enhancement was illegal because the district court failed to first sentence him for the underlying offenses. Appellant failed to demonstrate that the district court relied on mistaken assumptions regarding his criminal record that worked to his extreme detriment. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Appellant's claim was outside the scope of a motion to correct an illegal sentence as the sentence was facially legal, see NRS 207.012(1)(b), and appellant failed to demonstrate that the district court was not a

[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

competent court of jurisdiction. See Edwards, 112 Nev. at 708, 918 P.2d at 324. We therefore conclude that the district court did not err in denying appellant's motion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.

Douglas, J.

Pickering, J.

cc: Hon. Jennifer Togliatti, District Judge
Gregory Scott Hermanski
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

Certificate of Service

I, Gregory Scott Hermanski, hereby certify, pursuant to NRCP 5 (b), that on this 14 day of June, 2011, I mailed a true and correct copy of the foregoing "Notice of Motion" with attached "Motion for Reconsideration" by depositing same in the Northern Nevada Correctional Center Legal Library, First Class Postage fully pre-paid, addressed as follows:

Office of the District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

and that there is a regular line of communication between the place of mailing and recipient address.

executed this 14 day of June, 2011.

Gregory S. Hermanski

Gregory Scott Hermanski
(defendant, pro se)

Affirmation

(Pursant to NRS. 239B.030)

I, Gregory Scott Hermanski, do hereby affirm that the preceeding "Notice of Motion" with attached "Motion for Reconsideration" does not contain the Social Security number of any person. Said motions are filed in case no. C167783X, State v. Hermanski.

executed this 14 day of June, 2011.

Gregory S. Hermanski

Gregory Scott Hermanski

(defendant, pro se)

69140
Gregory Scott Hermanski, #69140
N.N.C.C., P.O. Box 7000
Carson City, NV 89702

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S/O

Gregory Scott Hermanski, # 69140
N.N.C.C., P.O. Box 7000
Carson City, NV 89702

FILED
JUN 24 2011
CLERK OF COURT

District Court
Clark County, Nevada

The State of Nevada,
plaintiff,

-vs-

Gregory Scott Hermanski,
defendant.

Case no. C167783X
Dept. no. VI

Notice of Appeal

Notice is hereby given that defendant, Gregory Scott Hermanski, in and through his proper person, appeals to the Supreme Court of Nevada from the Order denying his "Motion to Correct an Illegal Sentence or, in the alternative, Motion for Modification of Sentence" entered in the above styled cause on May 20, 2011.

Respectfully Submitted,

executed this 16 day of June, 2011. Gregory S. Hermanski

Gregory Scott Hermanski
(defendant, pro se).

00C167783
NOASC
Notice of Appeal (criminal)
1488962

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JUN 24 2011
CLERK OF THE COURT

Certificate of Service

I, Gregory Scott Hermanski, do hereby certify pursuant to N.R.C.P. 5 (b), that on this 16 day of June, 2011, I served the foregoing "Notice of Appeal" by depositina a true and correct copy of same, in a sealed envelope, first class postage fully prepaid, in the Northern Nevada Correctional Center legal library, and addressed to:

Office of the District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

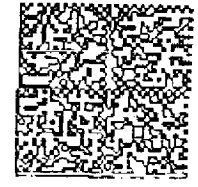
and that there is a regular line of communication between the place of mailing and the recipient address.

signed this 16 day of June, 2011. Gregory S. Hermanski

Gregory Scott Hermanski
defendant, pro se

Gregory Scott Hermanski #69140
N.N.C.C., P.O. Box 7000
Carson City, NV 89702

FIRST CLASS



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200 Lewis Ave, Third Floor
Las Vegas, NV 89155-1160

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FILED

JUN 28 2011

CLERK OF COURT

ASTA

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff(s), vs. GREGORY SCOTT HERMANSKI aka Robert James Day, Defendant(s),	Case No: C167783 Dept No: IV

00C167783
ASTA
Case Appeal Statement
1494416

CASE APPEAL STATEMENT

1. Appellant(s): Gregory Scott Hermanski aka Robert James Day

2. Judge: Elissa Cadish

3. Appellant(s): Gregory Scott Hermanski aka Robert James Day

Counsel:

Gregory Hermanski #69140
P.O. Box 7000
Carson City, NV 89702

4. Respondent: The State of Nevada

Counsel:

David Roger, District Attorney
200 Lewis Ave.
Las Vegas, NV 89101
(702) 671-2700

5. Respondent's Attorney Licensed in Nevada: Yes

6. Appellant Represented by Appointed Counsel In District Court: Yes

2

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: June 8, 2000

10. Brief Description of the Nature of the Action: Criminal

Type of Judgment or Order Being Appealed: Misc. Order

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 38028, 41405, 47011, 47963, 55718

12. Child Custody or Visitation: N/A

Dated This 28 day of June 2011.

Steven D. Grierson, Clerk of the Court

By: _____

Heather Lofquist, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

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06/28/2011 02:37:05 PM

CLERK OF THE COURT

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
THOMAS M. CARROLL
Chief Deputy District Attorney
Nevada Bar #004232
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI,
aka Robert James Day,
#1679345

Defendant.

CASE NO: 00C167783

DEPT NO: VI

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR EXTENSION OF TIME

DATE OF HEARING: June 29, 2011
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through THOMAS M. CARROLL, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion for Extension of Time.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include notice of its intent to seek treatment of Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with 382 days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate under which statute Defendant was adjudicated as a habitual criminal, and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering this, the district court vacated Defendant's sentence and conducted another sentencing hearing. In response, the State also filed a notice of intent to seek punishment of Defendant

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[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

as a habitual criminal pursuant to NRS 207.012 on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

Defendant filed a timely appeal from the Amended Judgment of Conviction, case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in case No. 41405, affirming Defendant's conviction. Remittitur was issued on July 27, 2004.

Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. The Court also ordered a supplemental response from the State regarding Defendant's Ground 3 of his Petition which alleges ineffective assistance of counsel at his re-sentencing under his true birth name. The State filed its Supplemental Response on December 8, 2005. On February 3, 2006, the court denied Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). A Findings of Fact, Conclusions of Law and Order was filed on March 3, 2006. A Notice of Entry of Decision and Order was filed on March 6, 2006.

On March 17, 2006, Defendant filed a Motion for Rehearing. The State filed its Opposition on March 23, 2006. On March 27, 2006, Defendant's motion was denied.

Defendant filed a Notice with the Nevada Supreme Court appealing the District Court's denial of his Post-Conviction Petition for Writ of Habeas Corpus. On July 13, 2006, the Nevada Supreme Court filed an Order of Affirmance and Limited Remand to Correct Judgment of Conviction (case No. 47011). The Supreme Court remanded Defendant's case to the District Court for the sole purpose of amending the Judgment of Conviction to read that Defendant was adjudicated a habitual offender pursuant to NRS 207.012 for both the robbery and burglary counts. Remittitur was issued on August 8, 2006.

Pursuant to the Supreme Court's Order a Second Amended Judgment of Conviction was filed on July 27, 2006.

Defendant filed a Motion To Stay Proceedings And Motion For Appointment Of Counsel on August 11, 2006. The State filed its Opposition on August 22, 2006. On August

23, 2006, Defendant's motion was denied. Defendant filed a Notice of Appeal on August 28, 2006 from the Second Amended Judgment of Conviction and the District Court's Order denying his Motion to Stay Proceedings And Motion For Appointment of Counsel (case No. 47963). On October 3, 2006, the Nevada Supreme Court filed an order, dismissing Defendant's appeal. Remittitur was issued on October 31, 2006.

On February 9, 2010, Defendant filed a Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence. The Motion was denied by the District Court on February 22, 2010. On March 25, 2010, Defendant filed a Notice of Appeal. On September 9, 2010, the Nevada Supreme Court affirmed the District Court's denial of Defendant's Motion to Correct an Illegal Sentence and found that his sentence was legal. Remittitur was issued on October 5, 2010.

On April 25, 2011, Defendant filed a second Motion to Correct an Illegal Sentence or, in the Alternative Motion for Modification of Sentence to which the State filed a response. The motion was denied by the District Court on May 9, 2011 and the Order of Denial was entered on May 20, 2011.

On June 16, 2011, Defendant filed the instant motion to which the State response as follows.

ARGUMENT

THERE IS NO BASIS IN WHICH TO GRANT DEFENDANT'S MOTION

Defendant seeks an extension of time in order to "receive" the District Court's May 20, 2011 order denying his second motion to correct/modify his sentence. Defendant wishes to receive the Court's order for the purpose of preparing a motion to reconsider. However, no extension should be granted for several reasons.

First, there is no need to "reconsider" this issue it is barred by the doctrine of law of the case. Defendant already raised this issue of his sentence's legality for the first time on February 9, 2010 and its denial was affirmed by the Nevada Supreme Court on September 9, 2010. When an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Hogan v. Warden,

109 Nev. 952, 959, 860 P.2d 710, 715 (1993); see also Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); Pellegrini, 117 Nev. at 860, 34 P.3d at 519; McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996). 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 subsequently made after reflection upon the previous proceedings." Hogan, 109 Nev. at 952, 860 P.2d at 710 (citing Hall, 91 Nev. 314, 535 P.2d 797); see also McNelton, 115 Nev. 396, 990 P.2d 1263. Here, this challenge to the legality of his sentence has already been decided on the merits by the Nevada Supreme Court on appeal, and thus, is barred by the law of the case doctrine and must be dismissed.

Defendant raised this issue a second time, albeit unsuccessfully, on April 25, 2011. The District Court again denied the motion. Now, Defendant seeks this extension of time, ultimately, for the purpose of bring the matter before the Court for a third time. Since the issue has been long resolved by the Nevada Supreme Court, per Hall, this motion should be denied.

Additionally, even assuming Defendant could overcome the law of the case doctrine, Defendant has not taken the proper steps under EJDCR 2.24, which governs a reconsideration of a motion. EJDCR 2.24 reads:

> ***(a) No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefore, after notice of such motion to the adverse parties.***
> (b) A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to NRCP 50(b), 52(b), 59, or 60, must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion. A motion for reconsideration does not toll the 30-day period for filing a notice of appeal from a final order or judgment.

(emphasis added). Here, Defendant has already filed two unsuccessful motions to correct an illegal sentence. Defendant has not obtained leave of the court to file a Motion to Reconsider. Because Defendant failed to comply with EJDCR 2.24(a), there is no reason in

which he should be granted leave to review the Court's order denying his latest motion to correct an illegal sentence.

In light of the fact that the Nevada Supreme Court has review the matter on the merits and the District Court reviewed the issue twice, the State requests that the Court make a finding that Defendant has engaged in vexatious litigation pursuant to NRS 209.451(1)(d) so that the State can seek a revocation of Defendant's good time credits.

CONCLUSION

For all the foregoing reasons, Defendant's Motion for Extension of Time should be denied.

DATED this 28th day of June, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/MICHAEL N. O'CALLAGHAN for
THOMAS M. CARROLL
Chief Deputy District Attorney
Nevada Bar #004232

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 28th day of June, 2011, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY SCOTT HERMANSKI #69140
a/k/a Robert James Day
NNCC
PO BOX 7000
CARSON CITY NV 89702

/s/P. Manis
Secretary for the District Attorney's Office

HAMNERC/TMC/pm

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CLERK OF THE COURT

OPPS

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
THOMAS M. CARROLL
Chief Deputy District Attorney
Nevada Bar #004232
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- GREGORY SCOTT HERMANSKI, aka Robert James Day, #1679345 Defendant.	CASE NO: 00C167783 DEPT NO: VI

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION

DATE OF HEARING: July 6, 2011
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through THOMAS M. CARROLL, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion for Reconsideration.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include notice of its intent to seek treatment of Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with 382 days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate under which statute Defendant was adjudicated as a habitual criminal, and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering this, the district court vacated Defendant's sentence and conducted another sentencing hearing. In response, the State also filed a notice of intent to seek punishment of Defendant

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[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

as a habitual criminal pursuant to NRS 207.012 on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

Defendant filed a timely appeal from the Amended Judgment of Conviction, case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in case No. 41405, affirming Defendant's conviction. Remittitur was issued on July 27, 2004.

Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. The Court also ordered a supplemental response from the State regarding Defendant's Ground 3 of his Petition which alleges ineffective assistance of counsel at his re-sentencing under his true birth name. The State filed its Supplemental Response on December 8, 2005. On February 3, 2006, the court denied Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). A Findings of Fact, Conclusions of Law and Order was filed on March 3, 2006. A Notice of Entry of Decision and Order was filed on March 6, 2006.

On March 17, 2006, Defendant filed a Motion for Rehearing. The State filed its Opposition on March 23, 2006. On March 27, 2006, Defendant's motion was denied.

Defendant filed a Notice with the Nevada Supreme Court appealing the District Court's denial of his Post-Conviction Petition for Writ of Habeas Corpus. On July 13, 2006, the Nevada Supreme Court filed an Order of Affirmance and Limited Remand to Correct Judgment of Conviction (case No. 47011). The Supreme Court remanded Defendant's case to the District Court for the sole purpose of amending the Judgment of Conviction to read that Defendant was adjudicated a habitual offender pursuant to NRS 207.012 for both the robbery and burglary counts. Remittitur was issued on August 8, 2006.

Pursuant to the Supreme Court's Order a Second Amended Judgment of Conviction was filed on July 27, 2006.

Defendant filed a Motion To Stay Proceedings And Motion For Appointment Of Counsel on August 11, 2006. The State filed its Opposition on August 22, 2006. On August

23, 2006, Defendant's motion was denied. Defendant filed a Notice of Appeal on August 28, 2006 from the Second Amended Judgment of Conviction and the District Court's Order denying his Motion to Stay Proceedings And Motion For Appointment of Counsel (case No. 47963). On October 3, 2006, the Nevada Supreme Court filed an order, dismissing Defendant's appeal. Remittitur was issued on October 31, 2006.

On February 9, 2010, Defendant filed a Motion To Correct Illegal Sentence Or In The Alternative Motion For Modification Of Sentence. The Motion was denied by the District Court on February 22, 2010. On March 25, 2010, Defendant filed a Notice of Appeal. On September 9, 2010, the Nevada Supreme Court affirmed the District Court's denial of Defendant's Motion to Correct an Illegal Sentence and found that his sentence was legal. Remittitur was issued on October 5, 2010.

On April 25, 2011, Defendant filed a second Motion to Correct an Illegal Sentence or, in the Alternative Motion for Modification of Sentence to which the State filed a response. The motion was denied by the District Court on May 9, 2011 and the Order of Denial was entered on May 20, 2011.

On June 21, 2011, Defendant filed the instant motion to reconsider to which the State response as follows.

ARGUMENT

THERE IS NO BASIS IN WHICH TO GRANT DEFENDANT'S MOTION

Defendant wishes the Court reconsider its May 20, 2011 order denying his second motion to correct/modify his sentence. However, this motion should be denied for the following reasons.

First, there is no need to "reconsider" this issue it is barred by the doctrine of law of the case. Defendant already raised this issue of his sentence's legality for the first time on February 9, 2010 and its denial was affirmed by the Nevada Supreme Court on September 9, 2010. When an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993); see also Hall v. State, 91 Nev. 314, 315-16,

535 P.2d 797, 798-99 (1975); Pellegrini, 117 Nev. at 860, 34 P.3d at 519; McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996). 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 subsequently made after reflection upon the previous proceedings." Hogan, 109 Nev. at 952, 860 P.2d at 710 (citing Hall, 91 Nev. 314, 535 P.2d 797); see also McNelton, 115 Nev. 396, 990 P.2d 1263. Here, this challenge to the legality of his sentence has already been decided on the merits by the Nevada Supreme Court on appeal, and thus, is barred by the law of the case doctrine and must be dismissed.

Defendant raised this issue a second time, albeit unsuccessfully, on April 25, 2011. The District Court again denied the motion. Now, Defendant seeks a motion for reconsideration in order to bring the matter before the Court for a third time. Since the issue has been long resolved by the Nevada Supreme Court, per Hall, this motion should be denied.

Additionally, even assuming Defendant could overcome the law of the case doctrine, Defendant has not taken the proper steps under EJDCR 2.24, which governs a reconsideration of a motion. EJDCR 2.24 reads:

> ***(a) No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefore, after notice of such motion to the adverse parties.***
> (b) A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to NRCP 50(b), 52(b), 59, or 60, must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion. A motion for reconsideration does not toll the 30-day period for filing a notice of appeal from a final order or judgment.

(emphasis added). Here, Defendant has already filed two unsuccessful motions to correct an illegal sentence and Defendant failed to obtain leave of the Court to file this motion. Furthermore, Defendant has not shown that the Court overlooked or misapprehended any material issue of law or fact; therefore there is no reason for the Court to reconsider its prior

ruling. See NRAP 40(a). Thus, since Defendant failed to comply with EJDCR 2.24(a), the motion should be denied.

In light of the fact that the Nevada Supreme Court has review the matter on the merits and the District Court reviewed the issue twice, the State requests that the Court make a finding that Defendant has engaged in vexatious litigation pursuant to NRS 209.451(1)(d) so that the State can seek a revocation of Defendant's good time credits.

CONCLUSION

For all the foregoing reasons, Defendant's Motion for Reconsideration should be denied.

DATED this 29th day of June, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/THOMAS M. CARROLL
THOMAS M. CARROLL
Chief Deputy District Attorney
Nevada Bar #004232

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 29th day of June, 2011, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY SCOTT HERMANSKI #69140
a/k/a Robert James Day
NNCC
PO BOX 7000
CARSON CITY NV 89702

/s/P. Manis
Secretary for the District Attorney's Office

HAMNERC/TMC/pm

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CLERK OF THE COURT

NEOJ

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DANIEL WESTMEYER
Deputy District Attorney
Nevada Bar #010273
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI,
aka, Robert James Day, #1679345

Defendant.

Case No. C167783

Dept No. VI

NOTICE OF ENTRY OF ORDER

TO: GREGORY SCOTT HERMANSKI, aka, Robert James Day, Defendant in proper person

YOU WILL PLEASE TAKE NOTICE that an Order was entered in the above-entitled action, a copy of which is attached hereto.

DATED this 7th day of July, 2011.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Daniel Westmeyer
DANIEL WESTMEYER
Deputy District Attorney
Nevada Bar #010273

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CERTIFICATE OF MAILING

I hereby certify that service of the NOTICE OF ENTRY OF ORDER was made the 7th day of July, 2011, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

GREGORY SCOTT HERMANSKI, #69140
aka, Robert James Day
NNCC
PO BOX 7000
CARSON CITY, NV 89702

BY /s/ C. Cintola
Secretary for the District Attorney's Office

cc

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ORIGINAL

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CLERK OF THE COURT

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DANIEL WESTMEYER
Deputy District Attorney
Nevada Bar #0010273
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

00C167783
ORDD
Order Denying
1429002

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI,
aka, Robert James Day, #1679345

Defendant.

Case No. C167783
Dept No. VI

ORDER DENYING DEFENDANT'S PRO PER MOTION TO CORRECT ILLEGAL SENTENCE OR, IN THE ALTERNATIVE, MOTION FOR MODIFICATION OF SENTENCE

DATE OF HEARING: 05/09/11
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 9th day of May, 2011, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by DAVID ROGER, District Attorney, through DANIEL WESTMEYER, Deputy District Attorney, and without benefit of argument, COURT stated its findings that Defendant has made the same arguments previously rejected and affirmed on Appeal, and good cause appearing therefor,

///

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COURT ORDERED, Motion DENIED.

DATED this 16th day of May, 2011.

Elissa F. Cadish

DISTRICT JUDGE

T.P.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

DANIEL WESTMEYER
Deputy District Attorney
Nevada Bar #0010273

pm

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
August 12, 2011 2:47 p.m.
Tracie K. Lindeman

GREGORY S. HERMANSKI,
Appellant(s),
vs.

STATE OF NEVADA,
Respondent(s),

Case No: 00C167783
SC No: 58688

RECORD ON APPEAL
VOLUME
3

ATTORNEY FOR APPELLANT
GREGORY S. HERMANSKI # 69140
PROPER PERSON
P.O. BOX 7000
CARSON CITY, NV 89702

ATTORNEY FOR RESPONDENT
DAVID ROGER, ESQ.
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NEVADA 89101

00C167783 STATE OF NEVADA VS. GREGORY S. HERMANSKI

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I N D E X

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VOL	DATE	PLEADING	PAGE NUMBER:
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4	05/19/2011	SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO CORRECT AN ILLEGAL SENTENCE OR, IN THE ALTERNATIVE, MOTION FOR MODIFICATION OF SENTENCE	867 - 872
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ORIGINAL

FILED
JUL 19 1 15 PM '02
Shirley B. Parraguirre
CLERK

ORDR
MORGAN D. HARRIS
MARCUS D. COOPER
Nevada Bar #2290
309 South Third St., #226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA Plaintiff, vs. ROBERT JAMES DAY, Defendant.	CASE NO. C167783X DEPT. NO. IV

ORDER FOR TRANSCRIPT

Upon the ex parte application of the above-named Defendant, ROBERT JAMES DAY, by and through his attorney, DIANNE M. DICKSON, Deputy Public Defender, and good cause appearing therefor,

IT IS HEREBY ORDERED that the Court Reporter prepare and deliver to the Clark County Public Defender, at State expense, a copy of the transcript of the proceedings, jury Voir Dire, held on March 13, 2001, in Case No. C167783X in District Court Department No. IV.

DATED this 17th day of July, 2002.

DISTRICT JUDGE

Submitted by:
CLARK COUNTY PUBLIC DEFENDER

By
DIANNE M. DICKSON, #5620
DEPUTY PUBLIC DEFENDER

RECEIVED
JUL 19 2002
COUNTY CLERK

SIS

0001
MARCUS D. COOPER
PUBLIC DEFENDER
Nevada Bar No. 2290
309 South Third Street
Las Vegas, NV 89155
702-455-4685
Attorney for Defendant

FILED
AUG 27 1 22 PM '02
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	CASE NO. C167783 DEPT. NO. IV

DECLARATION OF DEFENDANT

COMES NOW the defendant, Robert James Day, through his attorney, DIANNE M. DICKSON, Deputy Public Defender, and hereby files the attached Declaration in support of various motions pending before this Court.

MARCUS D. COOPER
CLARK COUNTY PUBLIC DEFENDER

By _____
DIANNE M. DICKSON, #5620
Deputy Public Defender,

RECEIVED
AUG 27 2002
COUNTY CLERK

Declaration

Robert James Day, defendant in the above entitled matter, makes the following Declaration:

1. I, Robert James Day, am the defendant in the above entitled matter;

2. My true name is Gregory Scott Hermanski;

3. At the time of my arrest, when asked my name by police I refused to answer;

4. The reason I refused to provide police with my name was because I was a fugitive, wanted by federal authorities for bank robbery / parole violation and feared that a fugitive warrant had been issued by the U.S. Parole Commission for my arrest;

5. Upon search incident to my arrest in the instant case the police discovered in my wallet a Birth Certificate bearing the name "Robert James Day". (See attached, "Certificate of Live Birth" bearing the name Robert James Day);

6. Consequently, I was fingerprinted and booked into Clark County Detention Center under the alias name "Robert James Day";

7. The sole reason for my decision to testify during my trial in the instant case was to rebut the State's evidence related to "Flight";

8. During trial I testified that the reason I ran from police was because I was a federal fugitive and not because I was guilty of the robbery in the instant case. (See, Trial Trans., VOL. II, p. 55).

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief. (NRS 171.102 and NRS 208.165).

Executed this 15th day of August, 2002.

Robert James Day

Robert James Day #1679345
Clark County Detention Center
Las Vegas, NV 89101
(defendant/In Propria Personam)

RECEIPT OF A COPY of the foregoing Declaration of Defendant is hereby acknowledged this 27 day of August, 2002.

CLARK COUNTY DISTRICT ATTORNEY

By

79

FILED IN OPEN COURT
AUG 28 2002
SHIRLEY B. PARRAGUIRRE, CLERK
BY Alan Castle
DEPUTY
ALAN CASTLE

0001
MARCUS D. COOPER
PUBLIC DEFENDER
Nevada Bar No. 2290
309 South Third Street
Las Vegas, NV 89155
702-455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	CASE NO. C167783 DEPT. NO. IV DOCKET C DATE OF HEARING: 8/28/02

MOTION TO DISMISS COUNT PURSUANT TO HABITUAL CRIMINAL STATUTE, NRS 207.010

COMES NOW the defendant, Robert James Day, through his attorney, DIANNE M. DICKSON, Deputy Public Defender, and hereby files the attached Motion To Dismiss Count Pursuant To Habitual Criminal Statute, NRS 207.010.

DATED this 28th day of August, 2002.

MARCUS D. COOPER
CLARK COUNTY PUBLIC DEFENDER

By
DIANNE M. DICKSON, #5620
Deputy Public Defender,

RECEIVED
AUG 28 2002
COUNTY CLERK

S17

Robert James Day #1679345
(defendant / in propria personam)
Clark County Detention Center
Las Vegas, NV 89101

District Court
Clark County, Nevada

The State of Nevada,
plaintiff,
-vs-
Robert James Day,
#1679345 defendant.

Case No. C167783
Dept. No. IV
Docket C

Motion to Dismiss Count Pursuant to
Habitual Criminal Statute, NRS 207.010

May it please the Court:

Comes Now the defendant, Robert James Day, and acting in proper person and through his attorney, Dianne M. Dickson, Deputy Public Defender, would hereby respectfully move this Honorable Court to Dismiss the count with respect to the Habitual Criminal allegation contained in the Information in the instant case.

This motion is made and based on all papers,

pleadings, documents on file with the clerk, and the attached Memorandum of Points and Authorities.

Respectfully Submitted,

Dated this 12 day of August, 2002. Robert J. Day

Robert James Day #1679345

Memorandum of Points and Authorities

Summary of Relevant Facts:

1. Following trial by jury the defendant was adjudicated guilty. The state sought Habitual Criminal sanctions against defendant, submitting certified copies of prior judgments of conviction, and in support thereof, fingerprints of the individual convicted in those cases.

2. Subsequent to defendant's original sentence on May 9, 2001 defendant obtained from the clerk copies of the documents submitted by the State to support the Habitual Criminal allegations.

3. In reviewing these documents the defense learned that these prior convictions are <u>not</u> those of this defendant.

4. The defense requested that the Las Vegas Metropolitan Police Department perform a fingerprint analysis of the fingerprints taken from the defendant

at the time of his arrest in the instant case on April 22, 2000, and the fingerprints submitted in conjunction with the alleged prior criminal records.

5. Cheryl Stubblefield, a Senior Law Enforcement Support Technician in the Fingerprint Bureau has issued a report indicating that the fingerprints submitted in conjunction with the alleged prior criminal records do not match those of this defendant.

Legal Argument:

The defendant asks that the court dismiss the Habitual Criminal allegation contained in the Information on ground that the State has not met it's burden of proving, beyond a reasonable doubt, the prior convictions alleged in the Habitual Criminal allegation. This motion is governed by NRS 207.010 which provides in part: "The trial judge may, at his discretion, dismiss a count under this section which is included in any Indictment or Information".

Furthermore, it is well settled that "at the hearing of the person alleged to be an habitual criminal two facts must be proved: (1) identity of the person; and (2) conviction of prior felonies." Howard v. State, 83 Nev. 53 (1967). The State's proof must be "beyond a reasonable doubt." Hollander v. State, 82 Nev. 345 (1966).

Conclusion

Because the fingerprints submitted by the State in support of the certified prior judgments of conviction are not identical with those of defendant in the instant case, the State has not met it's burden of proving the prior convictions beyond a reasonable doubt and the defendant asks that the court exercise it's discretion under NRS 207.010 and dismiss the Habitual Criminal allegation and sentence defendant on the charges for which he was convicted.

WHEREFOR, defendant respectfully moves this Honorable Court to grant his motion to dismiss the Habitual Criminal count contained in the Information.

Dated this 15th day of August, 2002.

Robert James Day #1679345
(defendant / In Propria Personam)

RECEIPT OF COPY of the foregoing Motion To Dismiss Count Pursuant To Habitual Criminal Statute, NRS 207.010is hereby acknowledged this 28 day of August, 2002.

CLARK COUNTY DISTRICT ATTORNEY

By

22

14

0001
MARCUS D. COOPER
PUBLIC DEFENDER
Nevada Bar No. 2290
309 South Third Street
Las Vegas, NV 89155
702-455-4685
Attorney for Defendant

FILED
AUG 30 9 22 AM '02
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	CASE NO. C167783 DEPT. NO. IV DOCKET C DATE OF HEARING: 9/9/02

MOTION FOR A NEW TRIAL

COMES NOW the defendant, Robert James Day, through his attorney, DIANNE M. DICKSON, Deputy Public Defender, and hereby files this Motion For A New Trial. This motion is based upon the Memorandum of Points and Authorities and argument of counsel at the time set for the hearing on the motion.

DATED this 29th day of August, 2002.

MARCUS D. COOPER
CLARK COUNTY PUBLIC DEFENDER

By _____
DIANNE M. DICKSON, #5620
Deputy Public Defender,

MC

RECEIVED
AUG 30 2002
COUNTY CLERK

21

S16

Robert James Day #1679345
defendant/in proper person
Clark County Detention Center
Las Vegas, Nevada 89101

District Court
Clark County, Nevada

The State of Nevada,
plaintiff,

-vs-

Robert James Day,
#1679345 defendant.

Case No. C167783
Dept No. IV
Date of Hearing:
Time of Hearing:

Motion for a New Trial
NRS 176.515 (4)

COMES NOW the defendant, Robert James Day, and proceeding in proper person hereby respectfully moves this Honorable Court for an Order granting his motion for a new trial.

This motion is made and based on all papers, pleadings, and documents on file with the clerk of court, incorporated by reference herein, as well as

Memorandum of Points and Authorities, and any oral argument permitted at the hearing.

Executed and dated this 28th day of August, 2002.

Respectfully Submitted,

Robert J. Day

Robert James Day #1679345
(defendant/in proper person)
Clark County Detention Center
Las Vegas, Nevada 89101

Memorandum of Points and Authorities

Summary of Relevant Facts

On April 22, 2000 defendant was arrested and charged with Robbery w/use of a deadly weapon and Buralary while in possession of a deadly weapon. At the time of his arrest defendant believed a federal warrant for his arrest existed, (Tr Trans., Vol II, p. 32.) and when asked by police his name defendant chose to remain silent. Police, however, discovered a birth certificate in defendant's wallet in the name "Robert James Day" and defendant was consequently booked into Clark County Detention Center under the name Robert James Day.

At the time defendant was booked into Clark Co. Detention Center he was required to provide a sample of his fingerprints to the State, ostensibly for the purpose of confirming the identity of defendant and to retrieve the defendant's criminal records through N.C.I.C. . However, it appears that the criminal record received by the State which was subsequently provided to the defense was not that of this defendant!

Prior to trial and over defense objection the State sought and was granted leave to introduce evidence of defendant's alleged prior felony convictions. (Trans., March 12, 2001, p. 6.)

During trial, and in the presence of the jury, although the State was granted leave to address only the 1984 bank robbery conviction, the district attorney made reference to "multiple" robberies as well as the 1984 bank robbery conviction. Tr. Trans., Vol. II, page 78.

On March 15, 2001 the jury returned verdict of guilty. Subsequent to the jury's verdict the State amended the Information to include a count under the habitual criminal statute, alleging, in part, that defendant was previously convicted of the aforesaid bank robbery in Missouri in 1984.

On May 9, 2001 defendant appeared for sentencing in the instant case. At that time the State introduced documentation in support of the habitual criminal allegation, including records purporting to be documentation of defendant's prior felony convictions. In conjunction with the records the State submitted fingerprints of the person who was arrested and convicted of the 1984 bank robbery in Missouri. See, State's Exhibit, May 9, 2001.

After hearing argument and over objection of defense, the court adjudicated defendant as an habitual criminal and sentenced defendant to a maximum term of imprisonment of three

hundred (300) months, with a minimum term of one hundred twenty (120) months. At the time of defendant's sentencing the State knew that the records submitted in support of the habitual criminal allegation were not those of this defendant! (F.N.1).

Subsequent to defendant's conviction and sentence, defendant has obtained evidence through a fingerprint analysis performed and conducted by the Las Vegas Metropolitan Police Department's Fingerprint Bureau that defendant is not the person whose prior felony convictions were introduced at his trial and sentencing. Defendant's fingerprints, which were taken at the time of his arrest in this case, were compared with those which were submitted by the State in conjunction with the habitual criminal proceedings. The result of that analysis conclusively demonstrates that not only is defendant not the person who was arrested and convicted in the 1984 bank robbery in Missouri, but it also indicates that the

---

(F.N. 1) A review of the presentence report in this case dated May 8, 2001 clearly establishes that the State knew that defendant's true name is Gregory Scott Hermanski. Thus, it is inconcievable that the State did not know that the records submitted was not that of this defendant.

entire criminal history relied upon by the State and provided the defendant through discovery, is not that of this defendant! See Attached "Fingerprint Comparison Report" of Cheryl Stubblefield, Senior Law Enforcement Support Technician, dated 3/20/2002.

Following the defendant's conviction, defendant appealed. The Supreme Court of Nevada remanded the case because of deficiencies in defendant's Judgment and Sentence. Defendant is presently awaiting re-adjudication and re-sentence.

Summary of the Argument

Defendant argues that the State's introduction of prior felony convictions not belonging to defendant acted to deprive defendant of a fair trial.

Legal Argument

Defendant seeks new trial pursuant to NRS 176.515(4) which provides: "A motion for a new trial based on any 'other grounds' must be made within 7

after verdict or finding of guilt or within such further time as the court may fix during the 7 day period".

Defendant asserts that because the Supreme Court of Nevada has invalidated the judgment in this case and remanded it to the District Court for re-adjudication, the 7 day period "after the finding of guilt" does not begin until defendant is re-adjudicated and judgment entered. See, Green v. State, 81 Nev. 595, 407 P.2d 719 (Nev. 1965), (defendant could present to trial court another motion for new trial after reversal of order granting a new trial and remand, "where judgment had not yet been entered on verdict of guilty" and second motion was presented in good faith without thought of harassment or delay. (NRS 175.535). Thus, this motion is timely and the court has jurisdiction.

District Judges in criminal cases have had traditional authority to grant motions for a new trial based upon an independent evaluation of the evidence. Washington v State, 655 P.2d 531 (Nev. 1982).

"Historically, Nevada has empowered the trial court in a criminal case where the evidence of

guilt is conflicting, to independently evaluate the evidence and order another trial if it does not agree with the jury's conclusion that the defendant has been proven guilty beyond a reasonable doubt. State v. Busscher, 81 Nev 587, 407 P.2d 715 (1965); see also, Green v. State, supra.

Prior to trial and over defense objection, the State was granted leave to introduce at defendant's trial evidence of defendant's alleged prior felony convictions. Jury Instruction No. 7 instructs the jury that defendant's prior felony convictions were ~~were~~ to be considered "only as it may affect defendant's 'believability' as a witness".

The evidence presented herein clearly establishes that the prior felony convictions revealed to the jury are not those of this defendant. Thus, the State unfairly called into question defendant's "believability as a witness".

Moreover, because a defendant has no access to criminal records independent of discovery provided by the State, a defendant is at the mercy of the State to provide "correct" information.

In the case at bar defendant was provided incorrect information concerning the prior felony

convictions and, as result, was prejudiced in his ability to prepare for trial, and defendant asks this court to make an independent evaluation of this case and order a new trial.

Executed and dated this 28 day of August, 2002.

Respectfully Submitted,

Robert O. Day

Robert James Day #1679345
(defendant/in propria personam)
Clark County Detention Center
Las Vegas, Nevada 89101

Certificate of Service

I, Robert James Day, hereby certify that a true and correct copy of the foregoing "motion for a new trial" was hand-delivered to the district attorney in open court on August 28, 2002.

Executed and dated this 28th day of August, 2002

Robert J. Day

Robert James Day #1679345
Clark County Detention Center
Las Vegas, Nevada 89101

Las Vegas Metropolitan Police
Department
400 East Stewart Avenue
Las Vegas, Nevada 89101-2984
(702) 795-3111

JERRY
KELLER,
Sheriff

To Whom it May Concern:

Per the request of RUBEN AQUINO, INVESTIGATOR, from CLARK COUNTY, NEVADA, a fingerprint comparison was performed in the AFIS Section of the LVMPD Fingerprint Bureau on the following individual(s):

ROBERT JAMES DAY, AKA = GREGORY SCOTT HERMANSKI (ID #1679345)

The documents used in this fingerprint comparison were:

- LVMPD FINGERPRINTS DATED 4-22-00
- FINGERPRINTS (XEROX COPY) FROM FEDERAL CORRECTIONS COMPLEX-MED, COLEMAN, FL DATED 9-9-97
- FINGERPRINTS (XEROX COPY) FROM FEDERAL CORRECTIONS INST., BUTNER, NC DATED 10-2-95 AND 9-14-94

The findings from this comparison are as follows:

LVMPD FINGERPRINTS ARE NOT IDENTICAL WITH THE FEDERAL CORRECTIONS XEROX COPIES OF PRINTS THAT WERE SUPPLIED BY INVESTIGATOR RUBEN AQUINO.

Please contact the technician listed below should you require any further information regarding this fingerprint comparison.

Cheryl Stubblefield/4960
Name/P#
Senior Law Enforcement Support Technician
AFIS Section, Fingerprint Bureau
229-30-2

3-20-2002
Date

Partners with the Community

LAS VEGAS, NEVADA

FINGERPRINT CARD

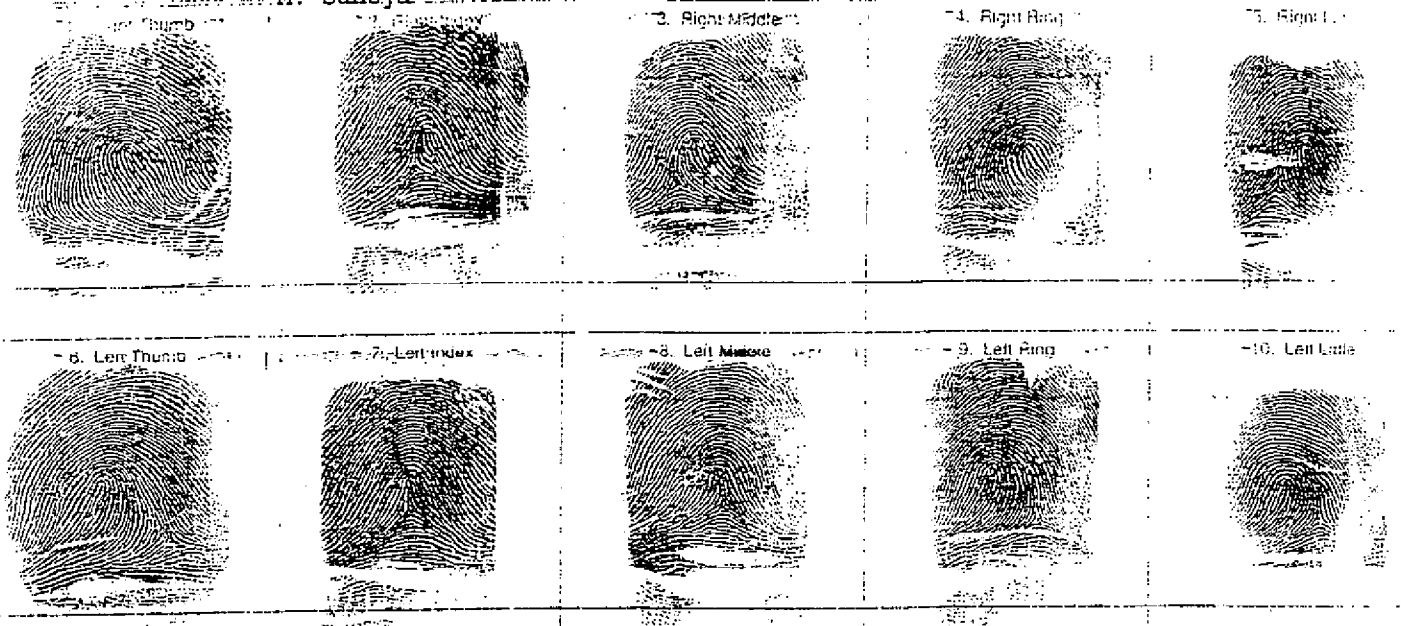
DAY, ROBERT JAMES 01679345

W M 02061954 511 180 GRY BRO

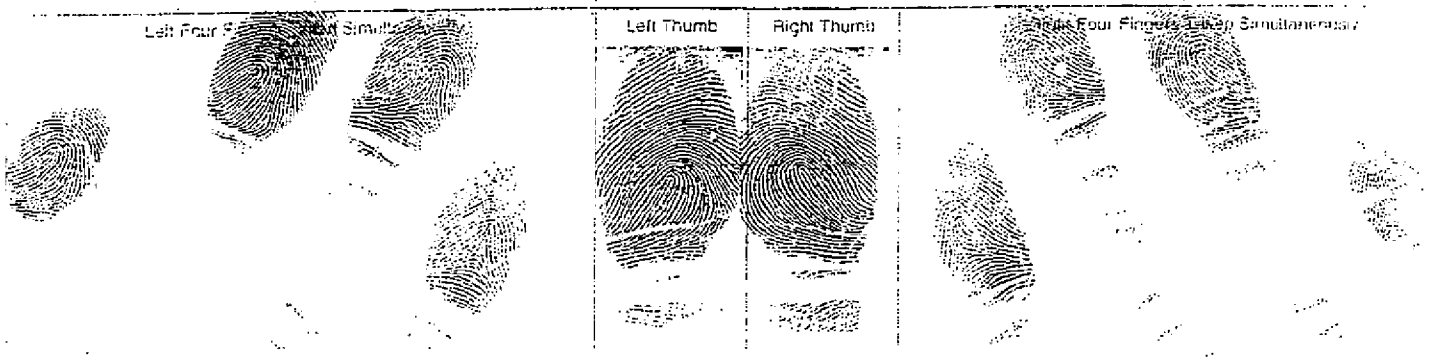
04/22/00

6297

M. Sanoja



DB 50X50G8 1133S5 #lvmpdtp1 19:52:46 [redacted] 5701L #lvslarp2 20000422-20:10



This is to certify that the document is a true and accurate copy of the original document now in the possession of the Las Vegas Metropolitan Police Department

2-25-02 C. Stubblefield 4960

Date Signature & P#

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TYPE OR PRINT ALL INFORMATION IN BLACK

FBI LEAVE BLANK

LAST NAME NAM: DAY

FIRST NAME: Robert

MIDDLE NAME:

STATE USAGE

ALIASES

CONTRIBUTOR ORI: NC039017C FED CORR INST BUTNER, NC

SIGNATURE OF PERSON FINGERPRINTED: Robert Lee Day

DATE OF BIRTH DOB: 04 01 [illegible]

THIS DATA MAY BE COMPARED WITH LOCAL, STATE AND NATIONAL FILES

DATE: 9.16.94

SIGNATURE OF OFFICIAL TAKING FINGERPRINTS: [signature]

DATE ARRESTED OR RECEIVED DOA: 9-16-94

SEX: M

RACE: W

HGT: 5'7"

WGT: 170

EYES: GRN

HAIR: BRN

PLACE OF BIRTH POB: KS

CHARGE

Parole Violator: Bank Robbery

FINAL DISPOSITION

7-20-94 2099 Days Remaining

SID NO. SID: [illegible]

FBI NO. FBI: [illegible]

SOCIAL SECURITY NO. SOC: 497 62 [illegible]

MNU: 79660-046

LEAVE BLANK

CLASS:

REF:

NCIC CLASS - FPC

CAUTION

1 R. THUMB 2 R. INDEX 3 R. MIDDLE 4 R. RING 5 R. LITTLE

6 L. THUMB 7 L. INDEX 8 L. MIDDLE 9 L. RING 10 L. LITTLE

LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY L. THUMB R. THUMB RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY

LEAVE BLANK | CRIMINAL | (STAPLE HERE) | LEAVE BLANK

STATE USAGE

NFF SECOND SUBMISSION | APPROXIMATE CLASS | AMPUTATION | SCAR

STATE USAGE

LAST NAME, FIRST NAME, MIDDLE NAME, SUFFIX

DAY, ROBERT JAMES

SIGNATURE OF PERSON FINGERPRINTED

Robert J Day

SOCIAL SECURITY NO.

498629076

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ALIASES/MAIDEN
LAST NAME, FIRST NAME, MIDDLE NAME, SUFFIX

FBI NO.	STATE IDENTIFICATION NO.	DATE OF BIRTH MM DD YY	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
652643N8		02 06 1954	M	W	6 00	172	BLU	BR

1. R. THUMB

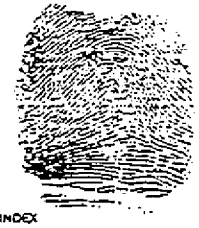
2. R. INDEX

3. R. MIDDLE

4. R. RING

5. R. LITTLE

6. L. THUMB


7. L. INDEX

8. L. MIDDLE

9. L. RING

10. L. LITTLE

LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY

L. THUMB

R. THUMB

RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY

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TYPE OR PRINT ALL INFORMATION IN BLACK

FBI LEAVE BLANK

LAST NAME NAM: DAY | FIRST NAME: ROBERT | MIDDLE NAME: J.

STATE USAGE

ALIASES

CONTRIBUTOR OCA: NC0390170 FED CORR INST BUTNER, NC

SIGNATURE OF PERSON FINGERPRINTED: Robert Day

DATE OF BIRTH DOB: 04-06-54

THIS DATA MAY BE COMPUTERIZED IN LOCAL, STATE AND NATIONAL FILES

DATE ARRESTED OR RECEIVED DOA: 10-04-95 | SEX: M | RACE: W | HGT: 5'11" | WGT: 172 | EYES: BLU | HAIR: GRY | PLACE OF BIRTH POB: KS

DATE: 10-4-95 | SIGNATURE OF OFFICIAL TAKING FINGERPRINTS

YOUR NO. OCA: 1940-044

CHARGE

FBI NO. FBI: 652645N8

SID NO. SID: NC2060542

SOCIAL SECURITY NO. SOC: 498629076

FINAL DISPOSITION: Escape. Return

CAUTION

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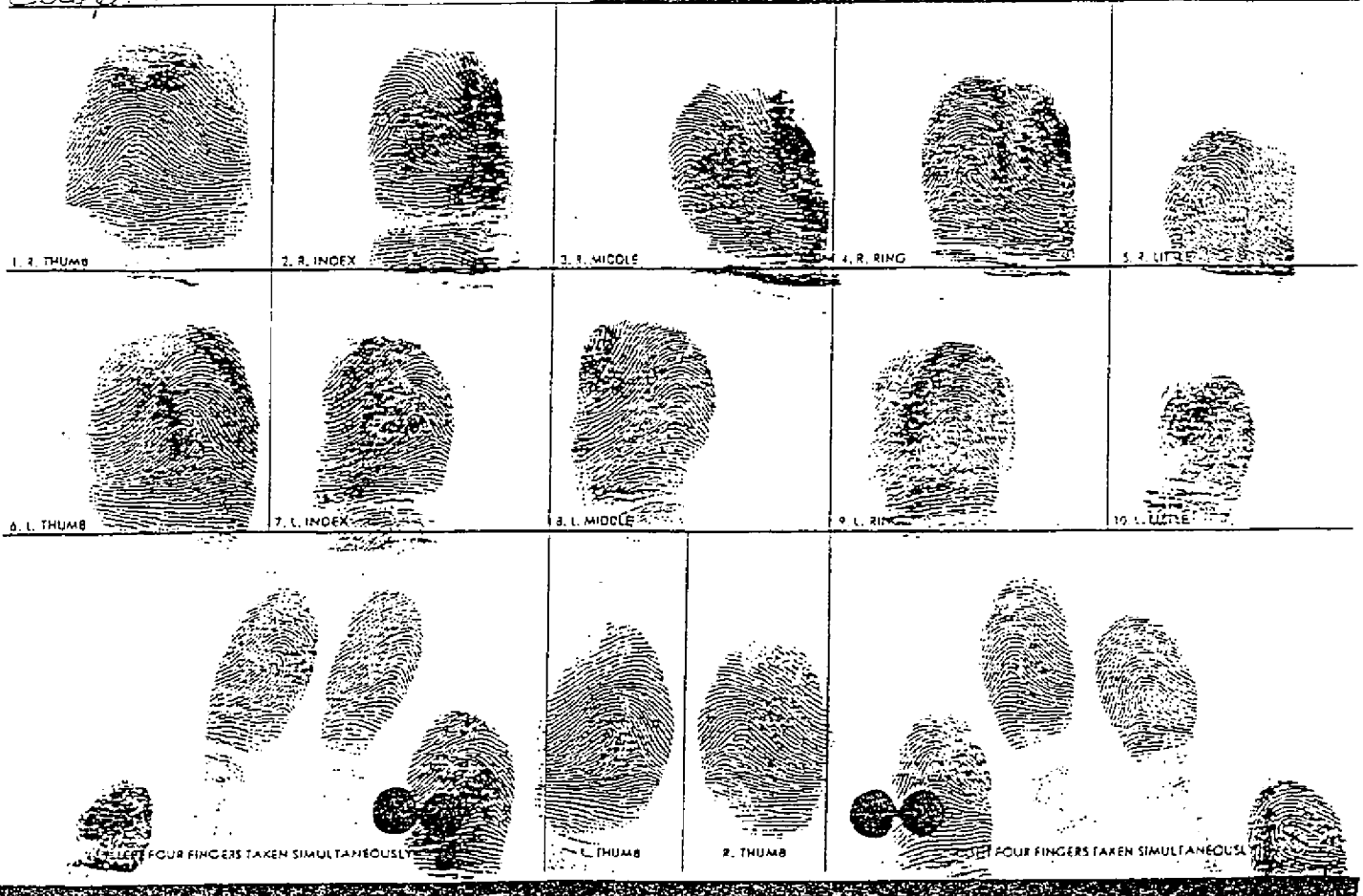
CLASS.

REF.

NCIC CLASS - FPC



NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office has set the foregoing Motion For A New Trial on September 9, 2002, at the hour of 9:00 a.m. in Department IV of the Eighth Judicial District Court or as soon thereafter as counsel may be heard.

DATED this 29th day of August, 2002.

CLARK COUNTY PUBLIC DEFENDER

By _____
DIANNE M. DICKSON, #5620
DEPUTY PUBLIC DEFENDER

RECEIPT OF A COPY of the foregoing Motion For A New Trial and Notice of Motion is hereby acknowledged this 30 day of August, 2002.

CLARK COUNTY DISTRICT ATTORNEY

By _____

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

ORIGINAL

FILED
SEP 26 3 57 PM '02
Shirley B. Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV

ORDER FOR PRODUCTION OF INMATE
ROBERT JAMES DAY, BAC #69140

DATE OF HEARING: 10/2/02
TIME OF HEARING: 9:00 A.M.

TO: GEORGE GRIGAS, Warden of the High Desert State Prison;

TO: JERRY KELLER, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by STEWART L. BELL, District Attorney, through SCOTT S. MITCHELL, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that GEORGE GRIGAS, Warden of the High Desert State Prison shall be, and is, hereby directed to produce ROBERT JAMES DAY, Defendant in Case No. C167783, on a charge of Robbery With Use of a Deadly Weapon and Burglary While in Possession of a Deadly Weapon wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said Defendant is currently incarcerated in the High Desert State Prison, located in Indian Springs, Nevada, and his presence will be required in Las Vegas, Nevada, commencing on

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Wednesday, October 2, 2002, at the hour of 9:00 o'clock A.M. and continuing until completion of the prosecution's case against the said Defendant.

IT IS FURTHER ORDERED that JERRY KELLER, Sheriff of Clark County, Nevada, shall accept and retain custody of the said Defendant in the Clark County Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County, or until the further Order of this Court; or in the alternative shall make all arrangements for the transportation of the said Defendant to and from the Nevada State Prison facility which are necessary to insure the Defendant's appearance in Clark County pending completion of said matter, or until further Order of this Court.

DATED this 26 day of September, 2002.

DISTRICT JUDGE

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY Scott S. Mitchell
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

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MORGAN D. HARRIS
PUBLIC DEFENDER
Nevada Bar No. 1879
309 South Third Street
Las Vegas NV 89155
702-455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	CASE NO. C167783X DEPT. NO. IV DATE OF HEARING: 10/02/02 TIME OF HEARING: 9:00

MOTION FOR A NEW TRIAL

COMES NOW Defendant, ROBERT JAMES DAY, by and through his attorney, DIANNE M. DICKSON, Deputy Public Defender, and hereby seeks an order from this Court for a new trial. This motion is based upon the Memorandum of Points and Authorities and argument at the time set for hearing on the motion.

DATED this 1st day of October, 2002.

MORGAN D. HARRIS
CLARK COUNTY PUBLIC DEFENDER

By _____
DIANNE M. DICKSON, #5620
Deputy Public Defender

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MEMORANDUM OF POINTS AND AUTHORITIES

Summary Of Relevant Facts

Mr. Day was charged with Robbery With Use Of A Deadly Weapon and Burglary While In Possession Of A Deadly Weapon for an offense which occurred on April 22, 2000, when the Parkway Inn Motel was robbed shortly before 1:00 p.m. Karen Walker, an employee of the motel, testified that an individual came behind the counter where she was working and removed all of the paper money from two cash drawers while holding a small knife. Ms. Walker gave the description of the robber as having gray hair, a mustache, approximately her height and age (5'5" and 52 years old), wearing blue jeans and a blue and white T-shirt. When Ms. Walker was asked whether or not the person had any tatoos, she said no. Mr. Day's arms are covered in tatoos. Mr. Day is also 5'11" and was 46 years old.

Approximately twenty to thirty minutes later and about a half mile away, Sgt. Flaherty saw Mr. Day walking among the trucks at the truck stop by the Wild Wild West Casino. Sgt. Flaherty said that Mr. Day fit the description because he was wearing blue jeans and had gray hair. Sgt. Flaherty parked his vehicle partially in front of a truck where Mr. Day was standing talking to the truck driver. Sgt. Flaherty had some conversation with Mr. Day and the truck driver, following which Mr. Day took off running South across Tropicana and climbed into another truck where he tried to hide. When Mr.Day was apprehended and searched, Sgt. Flaherty found one thousand eighteen dollars and fifty-five cents crumpled up in his pocket. Mr. Day also had a small pocket knife with a two inch blade. Karen Walker was brought to the area of Mr. Day's arrest,

was told by the police that they believed they had the person who had robbed her in custody and, while sitting in a police car approximately forty feet away from Mr. Day who was in handcuffs and surrounded by police, she identified him as the robber. The defense learned for the first time at time of trial that one of the police officers gave Ms. Walker a picture of Mr. Day, which picture she kept and the possession of which may well have tainted her in court identification of Mr. Day.

Mr. Day testified that he had been in Las Vegas for approximately three months and that during that period of time he worked as a lumper at the Wild Wild West Truckstop, though he would occasionally go out on the road with truck drivers. In fact, he said that he had returned the day before his arrest from a week on the road where he had earned $560.00. Mr. Day said that on April 22nd, he had obtained a job as a lumper along with two other men, working for a truck driver whose name he did not know unloading furniture in the area of Craig Road. Upon their return to the truck stop, Mr. Day and the other lumpers folded up the moving pads and cleaned up the back of the truck while the truck driver went to cash his comp check so that he could pay the lumpers. While waiting for the driver to return, Mr. Day became involved in a craps game in the back of the truck with four other lumpers, none of whom he knew by name. Mr. Day was winning at craps and, after he made his point, he quickly grabbed up the pot that he had won, stuffed the money in his pockets and went to talk to the truck driver who had just returned. He said that the truck driver paid him and that he was still speaking to the truck driver when Sgt. Flaherty approached. Initially, Mr. Day thought that Sgt. Flaherty was security from Wild

Wild West, because the lumpers frequently had problems with security chasing them from the property. When he found that St. Flaherty was a police officer, he ran because he believed that he was going to be arrested for his parole violation.

Because of his continuous incarcerations since April 22, 2000, Mr. Day was never able to go back to the truck stop to try to locate the unnamed individuals he had worked with. Defense counsel and her investigator tried to locate these people, but, armed with only a photograph of Mr. Day and not knowing whom they were looking for, they were unsuccessful in finding the witnesses who had worked with Mr. Day on April 22, 2000, though a witness was located who confirmed that Mr. Day worked as a lumper at that truck stop.

After his conviction, Mr. Day was sentenced by this Court as a habitual criminal and was sent to High Desert State Prison. While he was at High Desert State Prison, he was approached by a gentlemen named Jones Beck. Mr. Beck said he recognized Mr. Day and that he remembered working with Mr. Day on April 22, 2000. Mr. Beck was one of the two lumpers who worked with Mr. Day in moving the furniture and who was present at the scene waiting for the truck driver to return and pay them. Mr. Beck has signed an affidavit which is attached hereto regarding the matters that Mr. Beck would have testified to if his identity had been known at the time of trial and which he will testify to if Mr. Day is granted a new trial.

Legal Argument

The Defendant seeks a new trial based on the grounds of newly discovered evidence. This motion is governed by NRS 176.515. The standards for determining whether Mr. Day is entitled to a new

trial are set forth in Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). In order to justify a new trial, the newly discovered evidence must be: (1) newly discovered; (2) material to the defense; (3) such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; (4) non-cumulative; (5) such as to render a different result upon retrial; (6) not only an attempt to contradict, impeach or discredit a former witness, unless the witness is so important that a different result would be reasonably probable and (7) the best evidence the case admits. All of those requirements are met in this case as discussed below.

The evidence which the defense has discovered is certainly newly discovered. As indicated during the trial in this matter, Mr. Day did not know the names of the persons with whom he worked as a lumper. Mr. Day discovered the identity of Beck when he was sent to the state prison where he saw Mr. Beck and recognized him as one of the men he had worked with on April 22, 2000. This all occurred within the past month.

The fact that the defense has discovered a witness who can provide an alibi to Mr. Day for the time of the offense, who can corroborate Mr. Day's testimony that he was working as a lumper for the unknown truck driver on the morning of April 22, 2000, and who can confirm that Mr. Day was gambling shortly before the police officer appeared on the scene are certainly matters which are material to the defense. If anything, the testimony of this other lumper is at least as, if not more, compelling than would be the testimony of the unknown truck driver whom the defense had been trying to locate throughout this case.

While preparing for the case, the defense attempted to locate other lumpers who could corroborate Mr. Day's testimony. Defense counsel's investigator went to the area of the truck stop on more than one occasion and showed a picture of Mr. Day to the lumpers and truck drivers, attempting to find the people who had worked with Mr. Day. As the Court knows, the defense was partially successful in that it found Robert Beasley, who testified at trial and confirmed that Mr. Day worked as a lumper, but Mr. Beasley had no knowledge of the events of April 22, 2000. The investigator was not able to find anyone who worked with Mr. Day on April 22, 2000. Because Mr. Day was incarcerated, obviously he could not go to the area and attempt to locate people he had worked with. Despite reasonable diligence, the defense was not able to locate Mr. Powell until after sentencing.

The evidence which has been discovered is non-cumulative. No other witness testified to support Mr. Day's testimony. The need for corroboration was particularly important in this case as Mr. Day was impeached by a prior felony record and thus had problems with credibility to the jury.

It is likely that if Mr. Day is granted a new trial, the jury which hears this additional testimony will render a different result. The State's case consists of: an identification of Mr. Day by Karen Walker, though that identification is tainted by the fact that she said that the robber had no tatoos when Mr. Day clearly and obviously is covered with tatoos and by the fact that she was given a picture of Mr. Day on the day of the offense, which she has had to study throughout the pendency of these proceedings; the fact that Mr. Day ran when Sgt. Flaherty tried to apprehend him, which Mr. Day

explained by testifying that he believed that he would be arrested for violating the conditions of his parole for his Federal Bank Robbery conviction; and the fact that Mr. Day had over a thousand dollars in his pockets at the time of arrest, which money was crumpled into a ball. The jury in this case deliberated for several hours before finally managing to reach a verdict in this case. Obviously, the jury had some questions about the strength of the State's case and it is probable that the verdict would have been different had they had the benefit of this vital witness.

With respect to the sixth requirement that the newly discovered evidence be more than an attempt to contradict, impeach or discredit a former witness, this evidence is not offered for any such purpose. This is an independent witness not called for purposes of impeachment of any of the other testimony or witnesses.

Finally, the evidence proposed, the testimony of a witness to the events of April 22, 2000, who will testify of his own knowledge, is certainly the best evidence which can be presented on this question.

The Defendant requests that the Court grant him a new trial

DATED this 1st day of October, 2002.

CLARK COUNTY PUBLIC DEFENDER

By: _____
DIANNE M. DICKSON
DEPUTY PUBLIC DEFENDER
NEVADA BAR #5620

AFFT
MARCUS D. COOPER
PUBLIC DEFENDER
Nevada Bar No. 2290
309 South Third Street
Las Vegas NV 89155
702-455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,	)	CASE NO. C167783X
Plaintiff,	)	DEPT. NO. IV
vs.	)	
ROBERT JAMES DAY,	)	
Defendant.	)	

AFFIDAVIT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, JONES BERNARD BECK, being first duly sworn, do depose and say:

1. That I know Robert James Day through miscellaneous part-time employment, such as washing trucks and loading/unloading furniture and other cargo, at or near the Wild Wild West Truck Stop, located on Tropicana Ave., Las Vegas, Nevada.

2. That I was approached by Robert James Day the day before the incident alleged here and was asked if I was interested in moving furniture for a trucker that had recently arrived with cargo.

3. That I agreed to move furniture with Robert James Day the following morning. The furniture was going to be delivered to a residence near Craig Road and moved into a house. The move would take approximately 3-4 hours and I was to be paid forty-dollars

JB

($40.00).

4. That I met with Robert James Day the following morning to move furniture. Prior to meeting with the truck driver, I accompanied Robert James Day and another white male adult, whose name I do not recall, to the McDonald's across the street and got breakfast. After eating breakfast, Robert James Day, the unknown white male and I walked back across West Tropicana Ave. to the Wild Wild West truck stop to meet with the truck driver.

5. That we (Mr. Day, the other white male, the truck driver and I) arrived at a residence on or near Craig Road and unloaded the furniture. The move took approximately 3-4 hours.

6. That we arrived back at the Wild Wild West truck stop on or before 12:00 noon.

7. That we were informed by the truck driver that he was going to cash a check and return shortly to pay us. In the mean time, the three of us folded the moving blankets/pads. Also at this time, we were joined by two (2) black male adults. I believe that one of the black male adults called himself "Clarence." All of the others engaged in gambling; I did not.

8. That approximately 45 minutes to an hour later, the truck driver returned and paid the three of us for the moving services rendered. I was paid forty-dollars ($40.00); I do not know how much money Mr. Day received.

9. That after I was paid, the unknown white male and I decided to go to get some beer. We walked over to a nearby convenience store, which I believe was the Shell Service Station, and bought some beer.

10. That on the way back to the truck stop, I observed a security vehicle parked in front of the truck I had helped to unload; I also

observed several police cars in the McDonald's parking lot which was across the street from the truck stop. At that time I observed Robert James Day being taken into custody and he was standing near the rear of the police vehicles.

11. That I did not want to get involved and immediately left the area.

12. That I did not see or talk to Robert James Day until I saw him incarcerated at High Desert State Prison. It was at this time that I was informed by Robert James Day that he was arrested and convicted of robbing the motel located on Industrial Road.

13. That I do not recall how long it took to walk to and from the convenience store to buy beer, but I do not believe that Robert James Day could have robbed the motel during the time that I was gone. It would have taken Robert James Day longer to walk to the motel than the time period that it took me to leave and come back from buying beer. I was just coming back from the convenience store when I observed Robert James Day in custody.

Jones B. Beck
Jones Bernard Beck

SUBSCRIBED AND SWORN TO before me this 15th day of Oct, 2002.

Notary Public in and for said County and State

ROBEN V. AQUINO JR.
Notary Public - Nevada
No. 99-27559-1
My appt. exp. Mar. 5, 2003

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office has set the foregoing Motion For A New Trial on October 2, 2002, at the hour of 9:00 a.m. in Department IV of the Eighth Judicial District Court or as soon thereafter as counsel may be heard.

DATED this 1st day of October, 2002.

CLARK COUNTY PUBLIC DEFENDER

By _____
DIANNE M. DICKSON, #5620
DEPUTY PUBLIC DEFENDER

RECEIPT OF A COPY of the foregoing Motion For A New Trial and Notice of Motion is hereby acknowledged this 1 day of October, 2002.

CLARK COUNTY DISTRICT ATTORNEY

By _____

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

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FILED IN OPEN COURT
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SHIRLEY B. PARRAGUIRRE, CLERK
BY Dorothy Kelly
DOROTHY KELLY DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL

DATE OF HEARING: 10/2/02
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through SCOTT S. MITCHELL, Chief Deputy District Attorney, and files this State's Opposition to Defendant's Motion for New Trial.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if

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deemed necessary by this Honorable Court.

DATED this 1st day of October, 2002.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY Scott S. Mitchell
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

MEMORANDUM

On or about April 22, 2000, Robert Day (Defendant) was arrested and charged with Robbery With Use of a Deadly Weapon and Burglary While in Possession of a Deadly Weapon. Prior to trial, the State filed and Amended Information alleging habitual criminal status. A Second Amended Information was filed subsequent to trial, again alleging habitual criminal status, but modifying the prior convictions alleged. Defendant went to trial in March, 2001. On March 15, 2001, Defendant was found guilty by a jury on both counts.

On May 2, 2001, at Defendant's initial Sentencing Hearing, the Court noted Defendant refused to be interviewed for the Pre-Sentence Investigation Report (PSI) and the matter was continued in order to review a certified copy of a Judgment of Conviction. Defendant was sentenced on May 9, 2001, and over Defendant's objection, the Court ordered that he be treated as an habitual criminal. Defendant was sentenced to the maximum term of 300 months and a minimum of 120 months with 382 days credit for time served.

On or about July 23, 2002, Defendant, through counsel, filed a Motion For a New Trial on the grounds of alleged newly discovered evidence.

I. Defendant Does Not Meet The Standard for a New Trial Pursuant to NRS 176.515

Defendant's Motion for a New Trial is based on an allegation that there is new evidence that the State knew or should have known about regarding Defendant's parole violation. Specifically, Defendant argues that the State should have known of Defendant's

warrant for arrest for absconding from parole at the time of trial. Defendant was allegedly notified that a detainer had been lodged against him because of his parole violation. These are bare naked allegations unsupported by the record which do not entitle him to relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Defendant is mistaken in his belief that he warrants a new trial. The standard for the granting of a new trial under NRS 175.515 has been articulated by the Nevada State Supreme Court in Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279 (1991), in which the Court held that a district court may grant a new trial on the ground of newly discovered evidence which is such as to render a different result probable on retrial. NRS 176.515(1).

The grant or denial of a new trial on this ground is within the trial court's discretion and will not be reversed absent its abuse. McCabe v. State, 98 Nev. 604, 655 P.2d 536 (1982). To establish a basis for a new trial on this ground, the evidence must be (1) newly discovered; (2) material to the defense; (3) such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; (4) non-cumulative; (5) such as to render a different result probable upon retrial; (6) not only an attempt to contradict, impeach or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and (7) the best evidence the case admits. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991 If any one of these criteria is absent, the defendant is not entitled to a new trial and the trial court should deny the motion for a new trial.). McLemore v. State, 94 Nev. 237, 577 P.2d 871 (1978). See U.S. v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980). Defendant has failed to show that this alleged new evidence would render a different result probable upon retrial. Defendant has also failed to establish that this alleged new evidence is the best evidence the case admits. Therefore Defendant fails on at least two of the criteria and accordingly, does not warrant a new trial.

II. The Jury Rendered Its Verdict Based on All of the Evidence, Not Just What Was in Defendant's Mind at the Time He Fled From the Police

In Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994) the Nevada Supreme Court stated, "it is exclusively within the province of the trier of fact to weigh evidence and pass on the

credibility of witnesses and their testimony." See also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) ("It is well established in this state that it is the function of the jury to weigh the credibility of the identifying witness."); Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) ("In all criminal proceedings the weight and sufficiency of the evidence are questions for the jury, and its verdict will not be disturbed upon appeal if there is evidence to support it.").

Defendant argues that the State's case was predominantly based on the fact that Defendant ran when approached by the police. At trial, Defendant testified that he ran from the police because he feared he would have to return to prison because he allegedly thought he would be caught for parole violation. The jury considered this issue at trial and rejected it. Defendant may have had several reasons for not wanting to be detained by the police. He may have not wanted to be caught because he was fleeing from a criminal act; he may have not wanted to be caught because he had outstanding warrants. There may have been several reasons Defendant fled, but for him to try and distinguish what was in his mind at the time he fled from the police has no bearing on the evidence that was presented at trial, which was considered by the jury, and ultimately provided for Defendant's conviction on both charges.

CONCLUSION

For the foregoing reasons, Defendant's Motion For A New Trial should be denied.

DATED this 1st day of October, 2002.

Respectfully submitted,
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY /s/ Scott S. Mitchell
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Opposition to Defendant's Motion to Vacate Sentence as an Habitual Criminal, was made this 10th day of October, 2002, by facsimile transmission to:

DIANNE M. DICKSON, Deputy Public Defender
455-5112

BY Aileen Cooling
Employee of the District Attorney's Office

/ajc

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

ORIGINAL

FILED IN OPEN COURT
OCT 0 2 2002
SHIRLEY B. PARRAGUIRRE, CLERK
BY Dorothy Kelly
DOROTHY KELLY DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO VACATE SENTENCE AS AN HABITUAL CRIMINAL

DATE OF HEARING: 10/2/02
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through SCOTT S. MITCHELL, Chief Deputy District Attorney, and files this State's Opposition to Defendant's Motion to Vacate Sentence as an Habitual Criminal.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if

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deemed necessary by this Honorable Court.

DATED this _____ day of October, 2002.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

POINTS AND AUTHORITIES

MEMORANDUM

On or about April 22, 2000, Robert Day (Defendant) was arrested and charged with Robbery With Use of a Deadly Weapon and Burglary While in Possession of a Deadly Weapon. Defendant was found guilty of both charges.

Prior to trial, the State filed and Amended Information alleging habitual criminal status. A Second Amended Information was filed subsequent to trial, again alleging habitual criminal status, but modifying the prior convictions alleged. Defendant was sentenced on May 9, 2001, and over Defendant's objection, the court ordered that he be treated as an habitual criminal.

Defendant was sentenced to the maximum term of 300 months and a minimum of 120 months with 382 days credit for time served.

I. Defendant Fails to Put Forth Any Grounds Upon Which to Vacate His Classification As An Habitual Criminal

Defendant's Motion to Vacate Sentence As An Habitual Criminal is based on an allegation that his classification as an habitual criminal was erroneous because he allegedly is not the Robert James Day represented in the certified copies of his past Judgments of Conviction submitted by the State. In fact, he claims to be Gregory Scott Hermanski in a signed Declaration (dated August 15, 2002) attached to his Pro Per Motion to Dismiss Count Pursuant to Habitual Criminal Statute, NRS 207.010.

Defendant claims that the certified copies of his prior convictions which were submitted by the State, are not actually his. The certified copies of records show Defendant's prior felony convictions for bank robbery, controlled substance violations, embezzlement and obtaining property by false pretenses, and financial transaction theft. Defendant argues that because one set of fingerprints attached to one of the certified copies do not match those he claims to be his, he is entitled to have the court vacatc his sentence as an habitual criminal. Defendant is mistaken. NRS 207.010.1.(b) stipulates that,

> Any felony, [sic] who has previously been three times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony ..., is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison: ....

Because the statute requires three certified copies of prior felony convictions to support a classification of a defendant as an habitual criminal, the State met this threshold requirement pursuant to NRS 207.010. The State provided four certified copies of judgments of conviction (JOB) with conflicting fingerprints attached to one of the JOCs, and indeciperable partial fingerprints attached to another JOB.

> 1975 Missouri: Count I Transfer of Controlled Substance; Count II Sale of Controlled Substance; Sentenced to five years in Department of Corrections
> 1982; North Carolina: Embezzlement and Obtaining Property by False Pretenses; Sentenced to five years 1984 Missouri: Bank Robbery; Sentenced to 10 years
> 1994 North Carolina: Financial Transaction Card Theft; Sentenced to two years in the N.C. Department of Correction

One set of fingerprints attached to the JOB from the 1984 Bank Robbery conviction in Missouri is clearly different from Defendant's fingerprints taken on April 22, 2000, for the instant offense. On the 1982 JOB from North Carolina, the attached fingerprints consist of only a partial picture of three fingers from Defendant's right hand. Even if the Court were to find the 1984 Bank Robbery conviction is not attributable to Defendant, there are three JOCs attributed to Defendant's past criminal history which cannot be refuted based on thc fingerprint analysis provided by Stubblefield as claimed in Defense Counsel's Declaration

attached to Defendant's Motion to Vacate Sentence.

II. Defendant Cannot Complain of An Error He Has Caused Himself

A [d]efendant may not consciously invite district court action perceived as favorable to him and then claim it as error on appeal." Sidote v. State, 94 Nev. 762, 587 P.2d 1317 (1978). During his trial, Defendant made no objection or attempt to have the State bring him to trial under his alleged real name, Gregory Scott Hermanski. In fact, Defendant, to date, has filed all motions and other court documents under the name, Robert James Day, which also bear a written signature of said Robert James Day.

Further, Defendant admitted in trial by sworn testimony and by letter read into record at his sentencing hearing that he was in fact Robert James Day, and that he was convicted of prior bank robberies and criminal acts involving credit cards in 1984 and 1994. The following is a colloquy between Defendant and his attorney during the trial on the instant charges.

Ms. Dickson:	Mr. Day, could you tell the ladies and gentlemen of the jury your name please?
Defendant:	My name is Robert Jamie Day
	* * *
Ms. Dickson:	Where are you from originally?
Defendant:	I'm from Kansas, Leavenworth, Kansas. I was born in Leavenworth, Kansas.
	* * *
Ms. Dickson:	Mr. Day, you've had some troubles in your life, is that correct?
Defendant:	Yes, ma'am.
Ms. Dickson:	And as a result of that, you've been convicted of some crimes, is that correct?
Defendant:	Yes, ma'am.
Ms. Dickson:	Back in 1984, were you convicted of a bank robbery?
Defendant:	Yes, ma'am.
Ms. Dickson:	And in 1994, were you convicted of two charges involving some credit cards?
Defendant:	Yes, ma'am.
Ms. Dickson:	And as a result of those convictions, did you serve a sentence?

Defendant: Yes, ma'am.

Recorder's Transcript Re: Trial by Jury,March 14, 2001; Day 2, Volume II, pp. 36-37.

Additionally, the following is an excerpt from Defendant's Statement read into the record at Defendant's Sentencing Hearing:

> Ms. Dickson: Your honor, Mr. Day has asked me to read his statement to the Court. He was feeling a little too nervous to read it himself. This is his statement: Your Honor, may it please the Court.
>
> * * *
>
> Judge, if you'll notice in each of my arrests in over a 30-year period, in each case within a matter of weeks of my arrest, I've pled guilty and received a prison sentence within weeks.

Recorder's Transcript Re: Sentencing; Wednesday, May 9, 2001, pp. 8-9

Clearly from the record, Defendant has admitted his prior felony convictions as presented by the state in the form of certified copies of Defendant's prior felony convictions. Further Defendant raised no objections to these records during his trial nor did he raise any objections during his sentencing hearing.

It is inappropriate for Defendant to now come to the court complaining of error based on his classification as an habitual criminal under the certified records of Robert James Day. Defendant took his chances of being tried under an alias and now that his risk has not paid off, he claims error as being classified as an habitual criminal for the past acts of Robert James Day. As noted above in Sidote, Defendant cannot now claim error for a situation he chose, and currently chooses to remain in through these proceedings.

In sum, to date, Defendant has provided sworn testimony claiming he is Robert James Day, Defendant has admitted in open court that he committed prior felonies over a 30-year period attributable to Robert James Day, and finally, most recently, Defendant has submitted a declaration that he is not Robert James Day, but actually, Gregory Scott Hermanski.

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CONCLUSION

For the foregoing reasons, Defendant's Motion to Vacate Sentence as an Habitual Criminal should be denied.

DATED this 1st day of October, 2002.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY Scott Mitchell
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Opposition to Defendant's Motion to Vacate Sentence as an Habitual Criminal, was made this 1st day of October, 2002, by facsimile transmission to:

DIANNE M. DICKSON, Deputy Public Defender
455-5112

BY Aileen Collins
Employee of the District Attorney's Office

/ajc

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CLERK

MOT
Robert James Day, #69140
(Defendant, In Proper Person)
High Desert State Prison
P.O. Box 650

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff,	)	
vs.	)	Case No. C167783X
	)	Dept No. IV
ROBERT JAMES DAY, Defendant.	)	Docket C

MOTION TO DISMISS COUNSEL AND APPOINTMENT OF SUBSTITUTE COUNSEL

DATE OF HEARING: 12/16/02
TIME OF HEARING: 9:00am

COMES NOW the Defendant, Robert James Day, and proceeding in proper person, hereby respectfully moves this Honorable Court for an Order granting his motion to dismiss counsel, Dianne M. Dickson, Esq., Deputy Public Defender, and for the appointment of substitute counsel.

This motion is made and based on all papers, pleadings, and documents on file with the Clerk of Court, Memorandum of Points and Authorities, the attached "Affidavit of Defendant", and any Oral argument at the time of hearing if deemed necessary by the court.

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CMC

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Executed and dated this 25 day of November, 2002.

Robert J. Day

Robert James Day, #69140
Defendant, In Proper Person

MEMORANDUM OF POINTS AND AUTHORITIES

(Statement of the Case)

On or about April 22, 2000, Robert James Day, hereinafter "Defendant", was charged by way of Information with Count I, Robbery With Use of Deadly Weapon, Count II, Burglary While In Possession of a Deadly Weapon. Jury Trial commenced on March 13, 2001 and on March 15, 2001 the jury returned it's verdict of "Guilty" as to both counts. On May 9, 2001 Defendant was sentenced as an "Habitual Criminal" to a maximum term of 300 months, with a minimum term of 120 months in the Nevada Department of Corrections. A direct appeal was taken and on November 15, 2001 the Supreme Court remanded this case for re-adjudication and re-sentencing which is currently scheduled for December 4, 2002, and at that time, Oral arguments will be heard on Motions for New trial.

(Statement of the Issues)

In the case at bar a conflict of interest exists between the Defendant and his court appointed counsel, Dianne M. Dickson, Deputy Public Defender, which has greatly prejudiced Defendant and has resulted in irreparable harm to his defense.

Prior to trial, and over defense objection, the State was granted leave to introduce at trial evidence of Defendant's alleged prior felony convictions for impeachment purposes. Defendant advised Ms. Dickson, prior to trial, that the prior felony convictions sought to be introduced by the State were NOT his own,

and that his true name is "GREGORY SCOTT HERMANSKI". However, Ms. Dickson did nothing to prevent the State from pursuing this course of action or to bring this information to the attention of the court.

Subsequent to remand of this case, Defendant filed, through his attorney, Dianne M. Dickson, a pro per motion for a new trial based on his claim that he was prejudiced as result of the prior felony convictions being used in his trial, and the State has responded that Defendant "made no objection or attempt to have the State bring him to trial under his alleged real name, Gregory Scott Hermanski". (See, State's Response To Defendant's Motion For New Trial, at p.3).

Because Ms. Dickson has indicated to Defendant that she will not be willing to admit at oral argument on pro per motion for new trial that Defendant, in fact, advised her as to his true identity prior to trial, (See the attached "Affidavit of Defendant"), Defendant asserts that a conflict of interest exists in this case and that any further proceedings with Ms. Dickson as Attorney of Record will further prejudice Defendant and deny the Defendant his Constitutional rights, to effective assistance of counsel.

LEGAL ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantees a criminal defendant a right to court appointed counsel if he is financially unable to retain private counsel. The extent of this right extends from the time that judicial proceed-

ings have been initiated against the accused through sentencing, Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, and appeal, Douglas v. California, 372 U.S. 353, 83 S.Ct. 814.

The Sixth Amendment of the United States Constitution guarantees an accused in criminal prosecutions "assistance of counsel" for his defense, means of "effective assistance", as distinguished from bad faith, sham, mere pretense, or want of opportunity for conferences and preparation. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; Geders v. U.S., 425 U.S. 80, 96 S.CT. 1330, 47 L.Ed.2d 592.

In the case at bar, Defendant's right to effective assistance of counsel has been violated by Ms. Dickson's failure to have Defendant tried under his true name and thereby prevented the jury from hearing evidence of the prior felony convictions used in Defendant's trial. Ms. Dickson's unwillingness to argue, in response to the State's position that Defendant made no attempt to be brought to trial under his true name, that Defendant, in fact, provided her with information concerning his true identity, but that she failed to act upon it, clearly indicates that a conflict of interest exists in this case..

"Conflict of interest" may exist, for sixth amendment purposes, whenever defense counsel is so situated that the caliber of his services may be substantially diluted. U.S.C.A. Const. Amend. 6. People v. Hardy, 825 P.2d 781.

It would be unreasonable to expect Ms. Dickson to offer arguement which could possibly tend to demonstrate her own ineffectiveness, and Ms. Dickson's unwillingness to do so clearly estab-

lishes her intent to try to protect her own interests at the expense of Defendant's.

Furthermore, Ms. Dickson's failure to advise the court as to Defendant's true identity resulted in violations of Supreme Court Rules as follows:

1. S.C.R. 151, Competence;

2. S.C.R. 153, Diligence;

3. S.C.R. 154, Communication;

4. S.C.R. 172(1)(d), Candor toward the Tribunal;

5. S.C.R. 173(2), Fairness to opposing party and counsel;

6. S.C.R. 181(1)(2), Truthfulness in statements to others.

Defendant asserts that this conflict of interest would be further exacerbated as Defendant would be calling Ms. Dickson as a witness, under oath, in future legal actions to correct his illegal confinement and conviction. S.C.R. 178 is abundantly clear that a lawyer shall not act as an advocate where the lawyer is likely to be called as a witness.

CONCLUSION

Based on the foregoing motion and attached affidavit, it is clear that a conflict of interest exists in this case, and Defendant will suffer further irreparable harm if Ms. Dickson is permitted to continue in these proceedings. In fact, Defendant hereby places the State on actual notice that Defendant is innocent of these charges and litigates the present motion from the passion of someone who has been wrongfully accused, convicted,

sentenced, and imprisoned unlawfully.

WHEREFORE, Defendant prays this Honorable Court will issue an Order dismissing Ms. Dickson as Attorney of Record in this case and appoint substitute counsel for any further proceedings in this matter.

Dated this 27 day of November, 2002.

Respectfully Submitted,

Robert James Day, #69140
Defendant, in proper person

AFFT
Robert James Day, #69140
(Defendant, In Proper Person)
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
Plaintiff,)
vs.) Case No. C167783X
) Dept No. IV
ROBERT JAMES DAY,) Docket C
Defendant.)

AFFIDAVIT OF DEFENDANT

State of Nevada)
) ss:
County of Clark)

I, Robert James Day, a/k/a, Gregory Scott Hermanski, being first duly sworn, do depose and say:

1. That I am the defendant/affiant in the above entitled action, and;

2. That my true name is Gregory Scott Hermanski, and;

3. That I make this affidavit in support of the foregoing "Motion To Dismiss Counsel And For Appointment Of New Counsel" to demonstrate that a conflict of interest exists in this case which requires appointment of new counsel, and;

4. That upon my arrest in this case I had in my possession

a Birth Certificate in the name of, and belonging to, "Robert James Day" who gave it to me, and;

5. That upon my arrest, when asked my name by police I did not respond out of fear of arrest under an outstanding federal warrant issued by the United States Parole Commission for violation of my federal parole, and;

6. That when I was booked into Clark County Detention Center I discovered that I was being booked and charged under the name "Robert James Day", presumably because the arresting officer assumed my name was the same as that reflected on the Birth Certificate which police took from my pocket, and;

7. That at no time during my arrest did I tell police, or even infer, that I was, in fact, "Robert James Day", and;

8. That upon being booked into Clark County Detention Center I was required by police to provide a sample of my fingerprints by placing my hands on a scanning machine which, I am advised, has direct link to F.B.I. Labratory computer systems for identification, and;

9. That throughout the proceedings in this case, I have acted at all times in the belief that, although the State was proceeding against me under an alias name, that the State has known from the outset of this case that I am, in fact, Gregory Scott Hermanski, based on my having provided the State with a sample of my fingerprints, and;

10. That at the outset of Ms. Dickson's representation of me in this case I advised her that the name "Robert James Day" was an alias name, and;

11. That prior to trial I advised Ms. Dickson of names and

phone numbers (per her request) of truck drivers who had previously employed me to contact as possible defense witnesses, but explained that they would not know me as "Robert Day" because my true name was "Gregory Scott Hermanski", and;

12. That when I advised Ms. Dickson that I am "Gregory Scott Hermanski" she asked me "Who is Robert Day?", and I advised her that "Robert Day" is a friend of mine who I met while I was in federal prison serving a twenty (20) year sentence for bank robbery, and;

13. That Ms. Dickson thereafter advised me that although she was able to contact the truck drivers who had previously employed me, while they did, in fact, remember me, that the information they were able to provide would not assist me in my defense, and;

14. That prior to trial Ms. Dickson advised me that if my case went to trial the State would be introducing evidence to show that I ran from police when I was arrested because I had guilty knowledge of the crime, and;

15. That I explained to Ms. Dickson (and testified at trial) that I ran from police because there was an outstanding warrant for my arrest for federal parole violation and that I did not understand why no federal detainer had been lodged against me, and;

16. That, although Ms. Dickson was aware of my true name, she failed to investigate to determine if a federal warrant for my arrest existed, and;

17. That Ms. Dickson further advised me that the State was offering to agree to a 3-10 year sentence if I plead guilty to robbery, and that if I refused, the State would seek Habitual

Criminal sanctions if I was convicted, and;

18. That Ms. Dickson further advised me that the Habitual Criminal allegation was based on prior felony convictions consisting of bank robbery, credit card offenses, and controlled substance offenses, and;

19. That I advised Ms. Dickson that while I had, in fact, been convicted of bank robbery, I did not have prior felony convictions for the other prior offenses, and;

20. That I further advised Ms. Dickson that I would decline the State's offer because I am sick with hepatitis C and feared I would not survive a 3-10 year sentence, but would re-consider the State's offer if the State would agree to reducing the minimum portion of the sentence to 2 years, and;

21. That Ms. Dickson thereafter advised me that the State rejected my proposal of a 2 year minimum sentence and again advised me that the State would be seeking Habitual Criminal sanctions, and;

22. That upon learning that the State rejected my proposal I advised Ms. Dickson that if the court denied my then pending motions to dismiss, that I would accept the State's offer, and;

23. That on March 12, 2001 I appeared for hearing on motions to dismiss, and upon the court's denial of those motions, Ms. Dickson provided me with copies of the plea agreement and the Amended Information which contained the Habitual Criminal allegations for my review prior to entering a guilty plea, and;

24. That upon my review of the Habitual Criminal allegations I advised Ms. Dickson that, with the exception of the prior bank robbery conviction, the prior felony convictions contained there-

in were not my own, and that I would therefore decline the State's offer, and;

25. That upon Ms. Dickson advising the court that the case would proceed to trial, the court then heard arguments concern-prior felony convictions the State sought to use for impeachment purposes, and at that time the State advised the court that it only had certified judgment of conviction for the 1984 bank robbery conviction, and;

26. That on March 13, 2001 trial commenced, and at the conclusion of the day's testimony the State again advised the court that it only had certified judgment of conviction for the 1984 bank robbery conviction and, at that time, I attempted to advise the court that the prior convictions the State did not have certified judgments of conviction for were not mine, but the court advised me to direct that concern to Ms. Dickson, and;

27. That on March 13, 2001 when visited by Ms. Dickson at the jail, I again advised her that the prior convictions other than the bank robbery were not mine, and at that time, Ms. Dickson told me not to worry about the priors because the State could not raise them if it did not have the certified judgments of conviction, and;

28. That on March 13, 2001 while being visited by Ms. Dickson at the jail, Ms. Dickson advised me that I was to admit to having been previously convicted in the 1984 bank robbery case, and that if I denied that prior conviction the State would then be entitled to introduce the certified judgment of conviction to impeach me and thereby destroy the credibility of my testimony, and;

29. That on March 14, 2001, prior to the jury being brought in, the State announced that it had received the certified judgments of conviction in the other prior felony convictions, and;

30. That upon the State's advising the court that it had received the additional certified judgments of conviction, Ms. Dickson advised me that when I testified, I would have to admit to those prior convictions as well, because "the State has the paperwork on them", and;

31. That when I testified during trial I admitted to the prior felony convictions based on the advice of my attorney, Dianne M. Dickson, even though I knew it to be untrue, because I trusted the advice of my attorney, and;

32. That subsequent to my trial, but prior to sentencing, I was provided a copy of the Pre-sentence Report which contained my true name as an "alias" and brought this information to the attention of Ms. Dickson, and;

33. That during the pendancy of my direct appeal in this case, Ms. Dickson provided me with a copy of the "Exhibit" submitted by the State in support of the Habitual Criminal allegation which contained the certified copy of the judgment of conviction in the 1984 bank robbery, as well as the fingerprints and photograph of the person who was actually arrested in that case and discovered that it was, in fact, "Robert James Day", and;

34. That upon discovering that the 1984 bank robbery conviction was, in fact, that of Robert James Day, and not my own, I attempted to have Ms. Dickson address the matter in my direct appeal by having a fingerprint comparison performed, comparing my fingerprints ~~compared~~ to those submitted by the State in support of the Habitual Criminal allegation, and arguing that the State has failed to prove the Habitual Criminal allegation beyond a reasonable doubt because the fingerprints do not match those submitted by the State, and;

35. That Ms. Dickson failed to address the Habitual Criminal issue in my direct appeal, and advised me that she could not have a fingerprint comparison performed because her office would not

authorize the expenditure, and;

36. That I then sent a letter to Governor Guinn dated February 6, 2002, complaining, inter alia, that Ms. Dickson would not assist me in proving that my adjudication as an habitual criminal was unlawful, and sent a copy of that letter to the court as well as Ms. Dickson, and;

37. That I included in my letter to Governor Guinn a copy of a photograph of myself and one of Robert James Day for the Governor to compare in assessing my claim, and;

38. That subsequent to my letter to Governor Guinn, Ms. Dickson had a fingerprint comparison performed by the Las Vegas Metropolitan Police Department which concluded that my fingerprints do not match those submitted by the State in support of the habitual criminal allegation, and;

39. That subsequent to receiving the conclusions of the fingerprint comparison I prepared a pro per motion for a new trial, claiming prejudice from the use of the prior felony convictions during my trial, which Ms. Dickson adopted as her own and filed in my behalf, and;

40. That in response to my pro per motion for a new trial the State has argued that I made no objection or attempt to have the State bring me to trial under my true name, and;

41. That on November 8, 2002 and November 20, 2002, as well as several prior occasions, Ms. Dickson has indicated to me that she will be unwilling to admit that I told her, prior to trial, that I am not Robert James Day or that the prior convictions were not mine, and;

42. That oral arguments on my motion for a new trial are scheduled for December 4, 2002 and in order to rebut the State's

argument that I made no attempt to have the State bring me to trial under my true name, it will be necessary for Ms. Dickson to admit that I advised her of my true identity prior to trial but that she failed to bring this information to the attention of the court, and;

43. That based on Ms. Dickson's indication to me that she will be unwilling to admit, during oral arguments on my motion for a new trial that she failed to act on the information I provided her prior to trial concerning my true identity, I feel that a conflict of interest exists in this case and ask that she be withdrawn from my case and new counsel be appointed prior to oral arguments on December 4, 2002, and;

44. That I make this motion to withdraw counsel in good faith and not in attempt to delay this case, and;

45. Further affiant sayeth not.

I declare, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief. (NRS 171.102 and NRS 208.165).

Executed and dated this 22 day of November, 2002.

Robert James Day, #69140
a/k/a Gregory Scott Hermanski
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Motion to Dismiss Counsel and Appointment of Substitute Counsel" was sent via U.S. Mail to the following:

Dianne M. Dickson, Esq.
Deputy Public Defender
309 S. Third Street, Rm 226
Las Vegas, NV 89155-2610

Scott S. Mitchell, Esq.
Chief Deputy District Attorney
P.O. Box 552212
Las Vegas, NV 89155

this 27 day of November 2002.

Robert James Day, #69140
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

ORIGINAL

Robert James Day, #69140
/ In Propria Personam
Post Office Box 650 [HDSP]
Indian Springs, Nevada 89018

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ROBERT JAMES DAY,
Defendant.

Case No. C167783X
Dept No. IV
Docket C

NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE, that MOTION TO DISMISS COUNSEL AND APPOINTMENT OF SUBSTITUTE COUNSEL

will come on for hearing before the above-entitled Court on the ____ day of _____, 20___, at the hour of ____ o'clock ___. M. In Department ___, of said Court.

CC:FILE

DATED: this ____ day of _____, 20___.

BY: Robert J. Day
Robert James Day #69140
Defendant /In Propria Personam

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RESP
STEWART L. BELL
Clark County District Attorney
Nevada Bar #000477
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

CASE NO: C167783

DEPT NO: IV

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL

DATE OF HEARING: 12/4/02
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through SCOTT S. MITCHELL, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's State's Response To Defendant's Motion For New Trial.

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

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POINTS AND AUTHORITIES

MEMORANDUM

On or about April 22, 2000, Robert Day (Defendant) was arrested and charged with Robbery With Use of a Deadly Weapon and Burglary While in Possession of a Deadly Weapon. Prior to trial, the State filed an Amended Information alleging habitual criminal status. A Second Amended Information was filed subsequent to trial, again alleging habitual criminal status, but modifying the prior convictions alleged. Defendant went to trial in March 2001. On March 15, 2001, Defendant was found guilty by a jury on both counts.

On May 2, 2001, at Defendant's initial Sentencing Hearing, the Court noted Defendant refused to be interviewed for the Pre-Sentence Investigation Report (PSI) and the matter was continued in order to review a certified copy of a Judgment of Conviction. Defendant was sentenced on May 9, 2001, and over Defendant's objection, the Court ordered that he be treated as an habitual criminal. Defendant was sentenced to a maximum term of 300 months and a minimum of 120 months with 382 days credit for time served.

On or about July 23, 2002, Defendant, through counsel, filed a Motion For a New Trial on the grounds of alleged newly discovered evidence and a Motion to Vacate Sentence as an Habitual Criminal. The Hearing Date for these motions was October 2, 2002.

On October 2, 2002, in open court, Defendant, through counsel, filed another Motion For a New Trial on the grounds of alleged newly discovered evidence. At the hearing, an issue arose as to Defendant's true identity and all motions were continued sixty (60) days, to be heard on December 4, 2002. As it turns out, Defendant is really Gregory Scott Hermanski and not Robert J. Day.

Defendant Does Not Meet The Standard for a New Trial Pursuant to NRS 176.515

Defendant's Motion for a New Trial is based on an allegation that there is new evidence. Specifically, Defendant claims that a recently discovered witness -- Jones Beck -- allegedly remembers working with Defendant on April 22, 2000. Defendant argues that Beck can provide an alibi to Defendant for the time of the offense, can corroborate Defendant's

testimony that Defendant was working as a lumper for the unknown truck driver on the morning of April 22, 2000, and can allegedly confirm that Defendant was gambling shortly before the police officer appeared on the scene.

Defendant is mistaken in his belief that he warrants a new trial. The standard for the granting of a new trial under NRS 175.515 has been articulated by the Nevada State Supreme Court in Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279 (1991), in which the Court held that a district court may grant a new trial on the ground of newly discovered evidence which is such as to render a different result probable on retrial. NRS 176.515(1).

Motions for a new trial on the ground of newly discovered evidence are viewed with disfavor by the courts. Taylor v. Illinois, 484 U.S. 400, 414, 108 S. Ct. 646, 655 (1988). The movant bears a heavy burden of showing exactly how the newly discovered evidence rises to the level of meriting a new trial. Immigration and Naturalization Service v. Abudu, 485 U.S. 94, 109, 108 S. Ct. 904, 914 (1988). To establish a basis for a new trial on this ground, the evidence must be (1) newly discovered; (2) material to the defense; (3) such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; (4) non-cumulative; (5) such as to render a different result probable upon retrial; (6) not only an attempt to contradict, impeach or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and (7) the best evidence the case admits. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991). If any one of these criteria is absent, the defendant is not entitled to a new trial and the trial court should deny the motion for a new trial. McLemore v. State, 94 Nev. 237, 577 P.2d 871 (1978). See U.S. v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980).

Defendant has failed to show that this alleged new evidence would render a probable different result upon retrial. The evidence against Defendant was overwhelming in comparison to the alleged new evidence. In fact, this Court at Defendant's sentencing hearing commented,

"I listened to your testimony at trial, I listened to all the other witnesses. It was overwhelming evidence against you at trial. It wasn't even a close call."

(Recorder's Transcript Re: Sentencing, p. 15; May 19, 2001).

Further, the victim who had numerous contacts with Defendant prior to the incident on April 22, 2000 identified Defendant. The following excerpts are from the Direct Exam (by Ms. Luziach, Deputy District Attorney) and Cross Exam (by Ms. Dickson, Deputy Public Defender) of the victim, Ms. Jean Walker, at the Preliminary Hearing on December 4, 2000:

Direct Exam

Ms. Luziach: Prior to him walking around the counter on this date had you seen him before?

Ms. Walker: Yes, ma'am.

Ms. Luziach: How often had you seen him before, how many times?

Ms. Walker: I can't recall how many times. He would rent a room there once in a while or come in there and ask about somebody who had a room there.

Ms. Luziach: So, you had seen him on more than one occasion previously?

Ms. Walker: Yes.

***

Cross-Examination

Ms. Dickson: ... And you indicated that you had seen this gentleman before?

Ms. Walker: Yes, ma'am.

Ms. Dickson: About how many times?

Ms. Walker: Several times. I don't recall, maybe 10 times. He used to come in the motel quite often.

Finally, Defendant's credibility is seriously lacking. In addition to the fact that Defendant proceeded to trial and through sentencing using Robert J. Day's name, he has at least eleven prior felony convictions under his true identity, Gregory Scott Hermanski. Now, some two-and-a-half years after the incident, Defendant alleges that Beck can provide an alibi for him. Defendant claims he discovered the identity of Beck while he was in prison as a result of Beck having recognized Defendant as one of the men Beck had worked with on April, 22, 2000. It is incredible that Mr. Beck recognized Defendant two-and-a-half years

after the date of the incident. If the judicial system allows for this kind of "new evidence" it is inviting fraud on behalf of prisoners who find a prison inmate/buddy who says, "I was there, but didn't want to come forward." This "new evidence" is not some newly discovered DNA evidence, but rather some concocted story by one of Defendant's prison inmates in an effort to provide Defendant with an alibi. Again, the evidence was overwhelming by both the eyewitness identification provided by the victim and the money that was found on Defendant. Clearly, the strength and weight of the evidence provided at trial are overwhelming as compared to this "new evidence" Defendant purports to have discovered in his prison inmate, Beck. Because of this, Defendant fails to show that this new evidence would result in a different result probable on retrial.

CONCLUSION

For the foregoing reasons, Defendant's Motion For A New Trial should be denied.

DATED this 2nd day of December, 2002.

Respectfully submitted,

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

BY Scott Mitchell
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Response to Defendant's Motion for a New Trial, was made this 2nd day of December , 2002, by facsimile transmission to:

DIANNE M. DICKSON, Deputy Public Defender
455-5112

BY Aileen Collins Aileen Collins
Employee of the District Attorney's Office

SSM//ac

ORIGINAL

0001
MARCUS D. COOPER
PUBLIC DEFENDER
Nevada Bar No. 2290
309 South Third Street
Las Vegas, NV 89155
702-455-4685

FILED IN OPEN COURT
December 4, 2002
SHIRLEY B. PARRAGUIRRE, CLERK
BY Dorothy Kelly
DOROTHY KELLY DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff,
vs.
ROBERT JAMES DAY, Defendant.

CASE NO. C167783X
DEPT NO. IV
DOCKET C

OBJECTION

COMES NOW the defendant, Robert James Day, through his attorney, DIANNE M. DICKSON, Deputy Public Defender, and hereby submits his "Objection" to these proceedings.

DATED this 4th day of December, 2002.

MARCUS D. COOPER
CLARK COUNTY PUBLIC DEFENDER

By
Dianne M. Dickson, #5620
Deputy Public Defender

S18

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OBJECTION

Defendant objects to findings of guilt in this case on ground that conviction was obtained in violation of Defendant's right to effective assistance of counsel, secured under the 6th and 14th Amendment to the United States Constitution, when the State knew, or should have known, that the information it provided the Court and the defense, prior to trial, concerning Defendant's alleged criminal history, was false and/or incorrect.

The State's failure to provide the defense with "correct" information concerning any prior criminal history of defendant acted to prejudice defense counsel's ability to effectively object to the court's allowing the use of the prior felony convictions the state sought to introduce for impeachment purposes, and basing such objection on ground that defendant was not the person convicted in those prior felony cases, and supporting such objections with evidence contained in defendant's true criminal history which clearly demonstrates that defendant was incarcerated in federal prison at the time those prior felonies were committed elsewhere. Thus, the State's failure to provide the defense with record of defendant's true criminal history acted to circumvent and thereby dilute the protection afforded by the right to effective assistance of counsel.

Defendant further objects to any adjudication of defendant finding him to be an "Habitual Criminal" under Nevada Revised Statute 207.010, absent a determination by a jury that the State has proven each element of the "Habitual Criminal" allegation beyond a reasonable doubt.

Defendant bases said objection on ground that an allegation

under Nevada Revised Statute 207.010, constitutes a "legal offense," as opposed to merely a "status" permitting increased penalties, and as such, entitles defendant to jury trial guaranteed under the 5th, 6th, and 14th Amendments to the United States Constitution wherein each element constituting said legal offense must be submitted to a jury and proven beyond a reasonable doubt.

Respectfully Submitted,

Robert James Day, #69140
Defendant in Pro-per

NOTC
STEWART L. BELL
Clark County District Attorney
Nevada Bar #000477
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

FILED

DEC 26 3 34 PM '02

SHIRLEY B. PARAGINA
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI, aka Robert James Day, #1679345

Defendant.

Case No. C167783

Dept. No. IV

NOTICE OF INTENT TO SEEK PUNISHMENT AS A HABITUAL CRIMINAL

TO: GREGORY SCOTT HERMANSKI, aka Robert James Day, Defendant; and

TO: SHARON DICKINSON, Deputy Public Defender , Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that pursuant to NRS 207.012, the STATE OF NEVADA will seek punishment of Defendant GREGORY SCOTT HERMANSKI, aka Robert James Day, as an habitual criminal as said Defendant has been found guilty of ROBBERY WITH USE OF A DEADLY WEAPON (Felony – NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony – NRS 205.060, 193.165): in the above-entitled action.

That since the Defendant has been found guilty of ROBBERY WITH USE OF A DEADLY WEAPON (Felony – NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony – NRS 205.060, 193.165), the STATE

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NOTC
STEWART L. BELL
Clark County District Attorney
Nevada Bar #000477
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI, aka Robert James Day,
#1679345

Defendant.

Case No. C167783
Dept. No. IV

NOTICE OF INTENT TO SEEK PUNISHMENT AS A HABITUAL CRIMINAL

TO: GREGORY SCOTT HERMANSKI, aka Robert James Day, Defendant; and

TO: SHARON DICKINSON, Deputy Public Defender , Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that pursuant to NRS 207.012, the STATE OF NEVADA will seek punishment of Defendant GREGORY SCOTT HERMANSKI, aka Robert James Day, as an habitual criminal as said Defendant has been found guilty of ROBBERY WITH USE OF A DEADLY WEAPON (Felony – NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony – NRS 205.060, 193.165): in the above-entitled action.

That since the Defendant has been found guilty of ROBBERY WITH USE OF A DEADLY WEAPON and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON, the STATE OF NEVADA will ask the court to sentence the Defendant as an

Habitual Criminal based upon the following felony convictions, to-wit:

1. That in 1969, the Defendant was convicted in the State of Florida, for the crime of Attempt Larceny of Auto, in Case No. 69C-565.

2. That in 1971, the Defendant was convicted in the State of Florida, for the crime of Larceny of Motor Vehicle, in Case No. 71-3390.

3. That in 1971, the Defendant was convicted in the State of Florida, for the crime of Breaking and Entering, in Case No. 71-3828.

4. That in 1972, the Defendant was convicted in the State of Florida, for the crime of Burglary, in Case No. 71-3110.

5. That in 1977, the Defendant was convicted in the State of Florida, for the crime of Buying or Receiving Stolen Property, in Case No. 74-7116.

6. That in 1978, the Defendant was convicted in the State of Florida, for Probation Violation, Driving Under the Influence, Federal District Court, in Case No. 766-192.

7. That in 1981, the Defendant was convicted in the State of Florida, for the crimes of Possession of Cocaine and Carrying Concealed Firearm, in Case No. 79-2816CF.

8. That in 1984, the Defendant was convicted in the State of Florida, for the crime of Bank Robbery, in Case No. 81-6119-CR-JAG.

9. That in 1986, the Defendant was convicted in the State of Florida, for the crime of Aggravated Assault, in Case No. 85-784CF.

10. That in 1987, the Defendant was convicted in the State of Florida, for the crimes of Counts I and II, Bank Robbery with Use of a Firearm in the Commission of a Robbery, and Counts III and IV, Bank Robbery With Use of a Firearm in the commission of a Robbery, U.S. District Court, Southern District of Florida, in Case No. 85-662-CR-KING.

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11. That in 1998, the Defendant was convicted in the State of Florida, for the crime of Armed Burglary and Armed Robbery, in Case No. 94-24164C.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the State's NOTICE OF INTENT TO SEEK PUNISHMENT AS A HABITUAL CRIMINAL is hereby acknowledged this 26 day of December, 2002.

DIANE DICKSON, Deputy Public Defender
ATTORNEY FOR DEFENDANT
455-5112

BY _____
Justa Johnson
Secretary, District Attorney's Office

SSM/jj

OAC
PAUL E. WOMMER, ESQ.
625 South Sixth Street
Las Vegas, Nevada 89101
(702) 388-8817
Attorney for Defendant
ROBERT JAMES DAY

FILED
Dec 30 3 08 PM '02
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff,	)	CASE NO. C167783
vs.	)	DEPT NO. IV
ROBERT JAMES DAY, Defendant.	)	DOCKET

ORDER APPOINTING COUNSEL

THIS matter coming before the Court for confirmation of Appointment of Counsel, and the Court find Defendant to be indigent, and good cause appearing;

IT IS ORDERED that the Law Office of PAUL E. WOMMER is hereby appointed by this Court to represent Defendant in all proceedings;

. . .

. . .

. . .

. . .

. . .

. . .

PAUL E. WOMMER
A Professional Law Corporation
625 South Sixth Street • Las Vegas, Nevada 89101
Telephone: (702) 388-8817 & 388-8818 • Facsimile: (702) 388-8819

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IT IS FURTHER ORDERED that the fees shall be paid by the State of Nevada from the fund appropriated to the office Public Defender, pursuant to NRS 177.345(2).

DATED this 30th day of Dec., 2002.

District ~~Court~~ Judge

Submitted by:
LAW OFFICE PAUL E. WOMMER

PAUL E. WOMMER, ESQ.
Nevada Bar No. 000015
625 South Sixth Street
Las Vegas, Nevada 89101
(702) 388-8817
Attorney for Defendant
ROBERT JAMES DAY

PAUL E. WOMMER
A Professional Law Corporation
625 South Sixth Street • Las Vegas, Nevada 89101
Telephone: (702) 388-8817 & 388-8818 • Facsimile: (702) 388-8819

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Dept. 1

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IN THE JUSTICE COURT OF LAS VEGAS TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
ROBERT JAMES DAY,
Defendant.

PROCEEDINGS
Case No. 00F06978X

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE JUDGE DEBORAH J. LIPPIS, JUSTICE OF THE PEACE

Wednesday, April 26, 2000, 8:00 o'clock a.m.

APPEARANCES:

For the State: WILLIAM A. HEHN, ESQ.
Deputy District Attorney

For the Defendant: GEORGE E. FRANZEN, ESQ.
Deputy Public Defender

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Reported by: DONNA J. MCCORD, CCR No. 337

LAS VEGAS, CLARK COUNTY, NEVADA; WEDNESDAY, APRIL 26, 2000

P R O C E E D I N G S

THE COURT: Robert Day.

THE CLERK: Initial arraignment.

THE COURT: Sir, you have been charged with robbery with use -- can you stand up for me, sir? Thanks. Robbery with use of a deadly weapon, burglary while in possession of a deadly weapon. Do you understand the charges?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you able to hire your own lawyer, sir?

THE DEFENDANT: Not at the present.

THE COURT: Public Defender is appointed. Prelim set within 15 days.

THE CLERK: May 9th at 9:00 a.m.

THE DEFENDANT: Your Honor?

THE COURT: Sir.

THE DEFENDANT: These are very serious charges and I have a home and good job and if I were able to make bail I could hire my own attorney.

THE COURT: Unfortunately, sir, you have ten prior felony convictions.

THE DEFENDANT: It was a long time ago.

THE COURT: Well, '96 is not so long ago. '94 is not so long ago. Probably '88 would be considered

something remote, but I'm not releasing you, sir.

THE CLERK: May 9th, 9:00 a.m.

(Proceedings concluded.)

--oOo--

ATTEST: Full, true, and accurate transcript of proceedings.

DONNA J. MCCORD
CCR No. 337

EXPR
MARCUS D. COOPER, PUBLIC DEFENDER
NEVADA BAR No. 2290
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

FILED
JAN 24 1 09 PM '03
JUSTICE COURT
LAS VEGAS, NEVADA
BY AT
DEPUTY

JUSTICE COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

ROBERT JAMES DAY,

Defendant.

CASE NO. 00F06978X

DEPT. NO. ONE

EX PARTE ORDER FOR TRANSCRIPT

Upon the ex parte application of the above-named Defendant, by and through, Dianne M. Dickson, Clark County Public Defender, and good cause appearing therefore,

IT IS HEREBY ORDERED that the certified court reporter/recorder prepare and deliver to the Clark County Public Defender, at State expense, a copy of the transcript of the proceedings held on April 26, 2000, in Case No. 00F06978X, in Justice Court No. One.

DATED THIS ~~17th~~ 23 day of January, 2003.

JUSTICE OF THE PEACE

Submitted by:
MARCUS D. COOPER
CLARK COUNTY PUBLIC DEFENDER

By:
Dianne M. Dickson, #5620
Deputy Public Defender

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JAN 23 2003
JUSTICE COURT
#1 CHAMBERS

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JAN 23 2003
JUSTICE COURT

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OPI
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

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CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY, aka,
Gregory Scott Hermanski #1679345

Defendant.

CASE NO: C167783X
DEPT NO: IV

ORDER FOR PRODUCTION OF INMATE
ROBERT JAMES DAY, aka, Gregory Scott Hermanski, BAC #69140

DATE OF HEARING: 4/30/03
TIME OF HEARING: 9:00 A.M.

TO: JAMES J. SCHOMIG, Warden of the High Desert State Prison;

TO: Bill Young, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by DAVID ROGER, District Attorney, through SCOTT S. MITCHELL, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that JAMES J. SCHOMIG, Warden of the High Desert State Prison shall be, and is, hereby directed to produce ROBERT JAMES DAY, aka, Greogry Scott Hermanski, in Case No. C167783X, on a charge of ROBBERY WITH USE OF A DEADLY WEAPON (Felony) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony) wherein THE STATE OF NEVADA is the Plaintiff,

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inasmuch as the said ROBERT JAMES DAY, aka, Gregory Scott Hermanski, is currently incarcerated in the High Desert State Prison located in Indian Springs, Nevada and his presence will be required in Las Vegas, Nevada commencing on April 21, 2003, at the hour of 9:00 o'clock A.M. and continuing until completion of the prosecution's case against the said Defendant.

IT IS FURTHER ORDERED that Bill Young, Sheriff of Clark County, Nevada, shall accept and retain custody of the said ROBERT JAMES DAY, aka, Gregory Scott Hermanski, in the Clark County Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County, or until the further Order of this Court; or in the alternative shall make all arrangements for the transportation of the said ROBERT JAMES DAY, aka, Gregory Scott Hermanski to and from the Nevada State Prison facility which are necessary to insure the ROBERT JAMES DAY, aka, Gregory Scott Hermanski's appearance in Clark County pending completion of said matter, or until further Order of this Court.

DATED this 31st day of March, 2003.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

lks

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FILED

2003 MAY -7 PM 2:56

District Court

Clark, County, Nevada

CLERK

Case No. C167783

Department IV

THE STATE OF NEVADA,

Plaintiff,

vs.

GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY,

Defendant(s),

CASE APPEAL STATEMENT

1. Appellant(s): GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY
2. Judge: KATHY HARDCASTLE
3. All Parties, District Court:

Plaintiff, THE STATE OF NEVADA

Defendant(s), GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY

4. All Parties, Appeal:

Appellant(s), GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY

Respondent, THE STATE OF NEVADA

5. Appellate Counsel: Proper Person, GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY, #69140

PO BOX 650, INDIAN SPRINGS, NEVADA 89018, Appellant

/C167783

S10

THE STATE OF NEVADA, David Roger, District Attorney, 200 South Third Street, Las Vegas, Nevada 89155 (702) 455-4711, Counsel for Respondent

6. District Court, APPOINTED
7. On Appeal, N/A
8. Forma Pauperis: N/A
9. Date Commenced in District Court: 06/08/2000

DATED this 7 day of May, 2003.

SHIRLEY B. PARRAGUIRRE
CLARK COUNTY CLERK

By _____
ASTOR CHAM, DEPUTY CLERK
200 South Third Street
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 455-4409

/C167783

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Shirley B. Parraguirre
CLERK

NOA
Gregory Scott Hermanski #69140
A/K/A Robert James Day
(defendant, pro per)
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

Case No. C167783
Dept. No. IV
NOTICE OF APPEAL

GREGORY SCOTT HERMANSKI
A/K/A ROBERT JAMES DAY,
Defendant. /

TO: THE STATE OF NEVADA

DAVID ROGER, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and DEPARTMENT IV OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that GREGORY SCOTT HERMANSKI, A/K/A ROBERT JAMES DAY, presently incarcerated in the Nevada State Prison, appeals to the Supreme Court of the State of Nevada from the judgment entered against said defendant on the 30th day of April, 2003, whereby he was convicted of Count I , Robbery With Use of a Deadly Weapon and Count II, Burglary While in Possession of a Deadly Weapon, sentenced to a maximum term of **LIFE WITHOUT THE POSSIBILITY OF PAROLE, with no days credit for time served; pay $25 Administrative Assessment Fee and $250 DNA Analysis Fee; submit to a blood test and/or saliva test to determine genetic markers or secretor status; Defendant adjudged an habitual offender.**

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DATED this 2nd day of May, 2003.

Gregory S. Hermanski
a/k/a Robert J. Day

Gregory Scott Hermanski #69140
A/K/A Robert James Day
(defendant, pro per)
High Desert State Prison
P.O. Box 650
Indian Springs, Nv 89018

Robert James Day #69140
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

3762

HIGH DESERT STATE PRISON
MAY 02 2003
LAW LIBRARY

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Clerk of Court
Eighth Judicial District Court
Clark County Courthouse
P.O. Box 551601
200 South Third Street
Las Vegas, NV 89155-1601

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District Court

2003 MAY -8 PM 2:27

Clark, County, Nevada

CLERK

Case No. C167783

Department IV

THE STATE OF NEVADA,

Plaintiff,

vs.

GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY,

Defendant(s),

CASE APPEAL STATEMENT

1. Appellant(s): GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY

2. Judge: KATHY HARDCASTLE

3. All Parties, District Court:

Plaintiff, THE STATE OF NEVADA

Defendant(s), GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY

4. All Parties, Appeal:

Appellant(s), GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY

Respondent, THE STATE OF NEVADA

5. Appellate Counsel: Proper Person,

GREGORY SCOTT HERMANSKI aka ROBERT JAMES DAY #69140,

PO BOX 650 INDIAN SPRINGS NV 89018, Appellant

/C167783

S3

THE STATE OF NEVADA, David Roger, District Attorney, 200 South Third Street, Las Vegas, Nevada 89155 (702) 455-4711, Counsel for Respondent

6. District Court, APPOINTED

7. On Appeal, N/A

8. Forma Pauperis: N/A

9. Date Commenced in District Court: 06/08/2000

DATED this 8 day of May, 2003.

SHIRLEY B. PARRAGUIRRE
CLARK COUNTY CLERK

By

MANUEL RIVAS, DEPUTY CLERK
200 South Third Street
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 455-4409

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GREGORY SCOTT HERMANSKI
A/K/A ROBERT JAMES DAY
NDOC No. 69140
P.O. Box 650, HDSP
Indian Springs, Nevada 89018

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Shirley B. Parraguirre
CLERK

APPELLANT - IN PROPRIA PERSONA

DISTRICT COURT

CLARK COUNTY, NEVADA

--ooOoo--

GREGORY SCOTT HERMANSKI, A/K/A ROBERT JAMES DAY,
Appellant,

vs.

THE STATE OF NEVADA, et al.,
Respondent(s).

Case No. C167783
Dept No. IV
Docket

DESIGNATION OF RECORD ON APPEAL

TO: SHIRLEY PARRAGUIRRE, Clerk
Eighth Judicial District Court
Post Office Box 551601
200 South Third Street
Las Vegas, Nevada 89155-1601

The above-named Appellant hereby designates the entire record of the above-entitled case, to include all the papers, documents, pleadings, and transcripts thereof, as and for the Record on Appeal.

DATED this 6th day of May, 2003.

Respectfully Submitted By:

Gregory Scott Hermanski

GREGORY SCOTT HERMANSKI 61940
APPELLANT - IN PROPRIA PERSONA

//

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CERTFICATE OF SERVICE BY MAILING

I, GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY, hereby certify, pursuant to NRCP 5(b), that on this 6th day of May, 2003, I mailed a true and correct copy of the foregoing, "NOTICE OF APPEAL; and DESIGNATION OF RECORD ON APPEAL"

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

SHIRLEY B. PARRAGUIRRE
COUNTY CLERK
P.O. BOX 551601
200 S. THIRD ST
LAS VEGAS, NEVADA 89155-1601

CLARK COUNTY DISTRICT ATTORNEY
DAVID ROGER
200 S. THIRD ST
P.O. BOX 552212
LAS VEGAS, NEVADA 89155-2212

SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
201 S CARSON STREET, STE 201
CARSON CITY, NEVADA 89701-4702

CC:FILE

DATED: this 6th day of May, 2003.

Gregory Scott Hermanski

GREGORY SCOTT HERMANSKI #69140
Appellant /In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

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NOA
Gregory Scott Hermanski #69140
A/K/A Robert James Day
(defendant, pro per)
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

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Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

Case No. C167783
Dept. No. IV
NOTICE OF APPEAL

GREGORY SCOTT HERMANSKI
A/K/A ROBERT JAMES DAY,
Defendant. /

TO: THE STATE OF NEVADA

DAVID ROGER, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and DEPARTMENT IV OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that GREGORY SCOTT HERMANSKI, A/K/A ROBERT JAMES DAY, presently incarcerated in the Nevada State Prison, appeals to the Supreme Court of the State of Nevada from the judgment entered against said defendant on the 30th day of April, 2003, whereby he was convicted of Count I , Robbery With Use of a Deadly Weapon and Count II, Burglary While in Possession of a Deadly Weapon, sentenced to a maximum term of **LIFE WITHOUT THE POSSIBILITY OF PAROLE, with no days credit for time served; pay $25 Administrative Assessment Fee and $250 DNA Analysis Fee; submit to a blood test and/or saliva test to determine genetic markers or secretor status; Defendant adjudged an habitual offender.**

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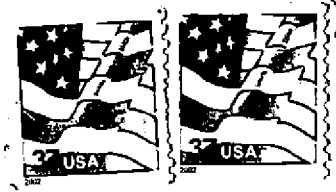
DATED this 6th day of May, 2003.

Gregory Scott Hermanski

Gregory Scott Hermanski #69140
A/K/A Robert James Day
(defendant, pro per)
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

Robert J. Day #69140
H.D.S.P.
P.O. Box 650
Indian Springs, NV
89018



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Clerk of Court
P.O. Box 551601
200 S. Third St.
Las Vegas, NV 89155-1601

HIGH DESERT STATE PRISON
MAY 06 2003
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JOCP
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,aka,
Gregory Scott Hermanski, #1679345

Defendant.

Case No: C167783

Dept No: IV

AMENDED

JUDGMENT OF CONVICTION

The Defendant previously appeared before the Court with counsel and having previously been found guilty by a jury to the crime(s) of **COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON (Felony)** and **COUNT II - BURGLARY (Felony)**, in violation of NRS 200.380, 193.165 and 205.060; thereafter, on the 11th day of May, 2001, the Defendant was present in Court for sentencing with counsel wherein the Jury found the Defendant guilty thereof by reason of the Juries Verdict.

THEREAFTER, on the 30th day of April, 2003, the Defendant appeared in court with his counsel, PAUL WOMMER, ESQUIRE, and pursuant to a hearing/proceeding, and good cause appearing to amend Judgment of Conviction; now therefor,

IT IS ORDERED THAT: Defendant ROBERT JAMES DAY, aka, Gregory Scott Hermanski, is sentenced as Habitual Violent Felon under NRS 207.012 on COUNT I and as Habitual Criminal under NRS 207.010(b) on COUNT II, and is sentenced in COUNT I to

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LIFE in the Nevada Department of Corrections WITHOUT the Possibility of Parole and in COUNT II to LIFE in the Nevada Department of Corrections WITHOUT the Possibility of Parole; Count II to run CONCURRENTLY with Count I with NO Credit for Time Served; Deft. to submit to a test to determine genetic markers. Court advised counsel he can file the appropriate motion as to credit for time served while Deft. serving Federal time.

The Court FURTHER ORDERED, that Defendant pay the $25.00 Administration Fee and $150.00 DNA Analysis Fee.

DATED this 15th day of May, 2003.

DISTRICT JUDGE
Kathy A. Hardcastle

lks

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District Court

Clark, County, Nevada

2003 MAY 20 PM 1:58

CLERK

Case No. C167783

Department IV

THE STATE OF NEVADA,

Plaintiff,

vs.

GREGORY SCOTT HERMANSKI,

Defendant(s),

CASE APPEAL STATEMENT

1. Appellant(s): GREGORY SCOTT HERMANSKI
2. Judge: KATHY HARDCASTLE
3. All Parties, District Court:

Plaintiff, THE STATE OF NEVADA

Defendant(s), GREGORY SCOTT HERMANSKI

4. All Parties, Appeal:

Appellant(s), GREGORY SCOTT HERMANSKI

Respondent, THE STATE OF NEVADA

5. Appellate Counsel: Proper Person, GREGORY SCOTT HERMANSKI,#69140
   PO BOX 650, INDIAN SPRINGS, NEVADA 89018, Appellant
   THE STATE OF NEVADA, David Roger, District Attorney, 200 South Third Street, Las Vegas, Nevada 89155 (702) 455-4711, Counsel for Respondent

/C167783

6. District Court, APPOINTED

7. On Appeal, N/A

8. Forma Pauperis: N/A

9. Date Commenced in District Court: 06/08/2000

DATED this 20 day of May, 2003.

SHIRLEY B. PARRAGUIRRE
CLARK COUNTY CLERK

By _____

ASTOR CHAM, DEPUTY CLERK
200 South Third Street
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 455-4409

/C167783

110

21

Gregory Scott Hermanski
A/K/A Robert James Day #69140

NDOC No. 69140
P.O. Box 650, HDSP
Indian Springs, Nevada 89018

APPELLANT - IN PROPRIA PERSONA

FILED

MAY 20 12 3. PM '03

Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

--ooOoo--

Gregory Scott Hermanski,

Appellant,

vs.

The State of Nevada,

Respondent(s).

Case No. C167783
Dept No. IV
Docket C

DESIGNATION OF RECORD ON APPEAL

TO: SHIRLEY PARRAGUIRRE, Clerk
Eighth Judicial District Court
Post Office Box 551601
200 South Third Street
Las Vegas, Nevada 89155-1601

The above-named Appellant hereby designates the entire record of the above-entitled case, to include all the papers, documents, pleadings, and transcripts thereof, as and for the Record on Appeal.

DATED this 14th day of May, 2003.

Respectfully Submitted By:

Gregory S. Hermanski

APPELLANT - IN PROPRIA PERSONA

//

/

SIS

CERTFICATE OF SERVICE BY MAILING

I, Gregory Scott Hermanski, hereby certify, pursuant to NRCP 5(b), that on this 16th day of May, 2003, I mailed a true and correct copy of the foregoing, "Notice of Appeal" and "Designation of Record on Appeal" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Shirley B. Parraguirre
Clerk of Court
P.O. Box 551601
200 S. Third Street
Las Vegas, NV 89155-1601

David Roger
Clark Co. District Attorney
200 S. Third Street
P.O. Box 552212
Las Vegas, NV 89155-2212

Supreme Court of Nevada
Office of the Clerk
201 S. Carson St. Ste. 201
Carson City, NV 89701-4702

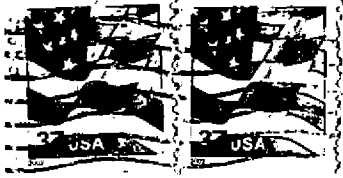
CC:FILE

DATED: this 16th day of May, 2003.

Gregory S. Hermanski
AKA Robert James Day #69140
Defendant /In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

Gregory Scott Hermanski
A/K/A Robert James Day # 69140
H.D.S.P.
P.O. Box 650
Indian Springs, NV 89018

LAS VEGAS NV 890
PM
19 MAY
2003



HIGH DESERT STATE PRISON
MAY 16 2003
LAW LIBRARY

Clerk of Court
P.O. Box 551601
200 S. Third St.
Las Vegas, NV
89155-1601

CONFIDENTIAL

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Gregory Scott Hermanski
Defendant/In Propria Persona
Post Office Box 650 [HDSP]
Indian Springs, Nevada. 89018

FILED

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Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

The State of Nevada,
Plaintiff,

vs.

Gregory Scott Hermanski,
Defendant.

Case No. C167783
Dept. No. IV
Docket C

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, That the Petitioner/Defendant, Gregory Scott Hermanski, in and through his proper person, hereby appeals to the Supreme Court of Nevada from the ORDER denying and/or dismissing the Defendant's Motions for New Trial

ruled on the 4th day of December, 2002.

Dated this 14th day of May, 2003.

Respectfully Submitted,

Gregory S. Hermanski

RECEIVED
MAY 20 2003
COUNTY CLERK

SIS

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NOT
PAUL E. WOMMER, ESQ.
Nevada Bar No. 000015
625 South Sixth Street
Las Vegas, Nevada 89101
(702) 388-8817
Attorney for Defendant
ROBERT JAMES DAY,
aka, GREGORY SCOTT HERMANSKI

FILED

MAY 22 4 07 PM '03

CLERK

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, aka, GREGORY SCOTT HERMANSKI, Defendant.	CASE NO. : C167783 DEPT NO. : IV

NOTICE OF APPEAL

TO: THE STATE OF NEVADA;

DAVID ROGER, DISTRICT ATTORNEY FOR CLARK COUNTY NEVADA; AND DEPARTMENT OF THE EIGHTH JUDICAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that ROBERT JAMES DAY, aka, GROEGORY SCOTT HERMANSKI, intends to appeal, and does hereby appeal to the Supreme Court of the State of Nevada from the Judgment of Conviction entered by this Court, on the 16th day of May, 2003.

PAUL E. WOMMER
A Professional Law Corporation
625 South Sixth Street • Las Vegas, Nevada 89101
Telephone: (702) 388-8817 & 388-8818 • Facsimile: (702) 388-8819

This appeal is taken from the whole judgment and every part thereof, and from questions of both law and fact.

DATED this 21st day of May, 2003.

Respectfully submitted,
LAW OFFICES OF PAUL E. WOMMER

By: _____
PAUL E. WOMMER, ESQ.
Attorney for ROBERT JAMES DAY,
aka GREGORY SCOTT HERMANSKI

PAUL E. WOMMER
A Professional Law Corporation
625 South Sixth Street • Las Vegas, Nevada 89101
Telephone: (702) 388-8817 & 388-8818 • Facsimile: (702) 386-8819

CERTIFICATE OF MAILING

The foregoing NOTICE OF APPEAL, was served on the following by mailing a copy thereof, in the United States mail, postage fully prepaid on this 21st day of May, 2003.

CLERK OF NEVADA SUPREME COURT
Capitol Complex
Carson City, Nevada 89710

ATTORNEY GENERAL OF NEVADA
Capitol Complex
Carson City, Nevada 89710

CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
200 South Third Street
7th Floor
Las Vegas, Nevada 89155

ROBERT JAMES DAY
Inmate No. 69140
High Desert State Prision
P.O. Box 650
Indian Springs, Nevada 89018

Employee of PAUL E. WOMMER, ESQ.

PAUL E. WOMMER
A Professional Law Corporation
625 South Sixth Street • Las Vegas, Nevada 89101
Telephone: (702) 388-8817 & 388-8818 • Facsimile: (702) 388-8819

ORIGINAL

IN THE ~~SUPREME~~ COURT OF THE STATE OF NEVADA

ROBERT JAMES DAY,
aka, GREGORY SCOTT HERMANSKI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 41406

MAY 30 8 07 AM '03

CLERK

167783

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement:

ROBERT JAMES DAY, aka, GREGORY SCOTT HERMANSKI;

2. Identify the judge issuing the decision, judgment, or order appealed from:

The Honorable KATHY A. HARDCASTLE;

3. Identify all parties to the proceedings in the district court:

The parties in the district court were The State of Nevada and ROBERT JAMES DAY, aka, GREGORY SCOTT HERMANSKI;

4. Identify all parties involved in this appeal:

The parties to this appeal are the State of Nevada and ROBERT JAMES DAY, aka, GREGORY SCOTT HERMANSKI;

5. Set forth the name, law firm, address, and telephone number of all counsel on appeal and identify the party or parties whom they represent:

Appellant is represented by Paul E. Wommer, Esq., 625 South Sixth Street, Las Vegas, Nevada 89101, (702) 388-8817; Respondent is represented by the Clark County District Attorney's Office, 200 South Third Street, 7th Floor, Las Vegas, Nevada 89155. (702) 455-4711;

6. Indicate whether appellant was represented by appointed or retained counsel at trial:

PAUL E. WOMMER
A Professional Law Corporation
625 South Sixth Street • Las Vegas, Nevada 89101
Telephone: (702) 388-8817 & 388-8818 • Facsimile: (702) 388-8819

Appellant was represented by appointed counsel, the Clark County Public Defender's Office;

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Mr. Wommer is Appellant's appointed counsel.

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

Mr. Wommer was appointed to represent Appellant on February 26, 2003.

9. Indicate the date the proceedings commenced in the district court:

Proceedings commenced in the district court on December 7, 2000 with the filing of the indictment.

DATED this 29th day of May, 2003.

PAUL E. WOMMER, ESQ.
Nevada Bar No. 000015
LAW OFFICE PAUL E. WOMMER
625 South Sixth Street
Las Vegas, Nevada 89101
(702) 388-8817

PAUL E. WOMMER
A Professional Law Corporation
625 South Sixth Street • Las Vegas, Nevada 89101
Telephone: (702) 388-8817 & 388-8818 • Facsimile: (702) 388-8819

PAUL E. WOMMER
A Professional Law Corporation
625 South Sixth Street • Las Vegas, Nevada 89101
Telephone: (702) 388-8817 & 388-8818 • Facsimile: (702) 388-8819

CERTIFICATE OF MAILING

The foregoing **CASE APPEAL STATEMENT**, was served on the following, by mailing a copy thereof, first class, postage prepaid on this 29th day of May, 2003.

FRANKIE SUE DEL PAPA
NEVADA ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701-4717

DAVID ROGER
DISTRICT ATTORNEY
Clark County Courthouse
Seventh Floor
200 South Third Street
Las Vegas, Nevada 89155

ROBERT JAMES DAY
Inmate No. 69140
HIGH DESERT CORRECTIONAL CENTER
P.O. Box 208
Indian Springs, Nevada 89018

Employee of PAUL E. WOMMER, ESQ.

TRAN

ORIGINAL

FILED
FEB 27 10 00 AM '04

CLARK COUNTY

DISTRICT COURT

THE STATE OF NEVADA, PLAINTIFF, VS. GREGORY SCOTT HERMANSKI, (TN), aka ROBERT JAMES DAY, DEFENDANT.	CASE NO. C167783 DEPT. NO. IV

BEFORE THE HONORABLE KATHY HARDCASTLE, DISTRICT JUDGE

WEDNESDAY, APRIL 30, 2003; 9:00 A.M.

RECORDER'S TRANSCRIPT RE:
SENTENCING

APPEARANCES:

FOR THE STATE:	MARTY HART, ESQ. Deputy District Attorney
	SCOTT MITCHELL, ESQ. Deputy District Attorney
FOR THE DEFENDANT:	PAUL WOMMER, ESQ.
	DIANNE DICKSON, ESQ. Deputy Public Defender
FOR THE DEPARTMENT OF PAROLE AND PROBATION:	B. LIZURA

RECORDED BY: CARRIE HANSEN, COURT RECORDER

RECEIVED
FEB 27 2004
COUNTY CLERK

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WEDNESDAY, APRIL 30, 2003; 9:00 A.M.

THE COURT: C167783, State of Nevada versus Gregory Scott Hermanski.

Mr. Hermanski is at the Nevada Department of Corrections. Was he not transported?

MR. WOMMER: He's present.

MR. HART: Your Honor, Mr. Mitchell from our office has this.

THE COURT: Okay. This is Mr. Day's -- he's present. Are we ready to go forward with sentencing?

MR. WOMMER: We are, your Honor.

THE COURT: All right. Mr. Hermanski, pursuant to jury verdict March 15, 2001, on the charge, Count I, robbery, felony, and Count II, burglary while in possession of deadly weapon, felony, you are hereby adjudicated guilty of those crimes. And State has previously submitted the certified copies of convictions. I'll hear argument before I make a determination on habitual offender.

MR. MITCHELL: Your Honor, the first and most important thing the State would say here is that under the law, if you have convictions of the nature of Mr. Hermanski's, which is certain predicate crimes that are considered violent crimes, the State of Nevada requires and does not even give discretion to the Court or the DA on whether to file or pursue this or in sentencing to sentence the defendant to anything but this. The State of Nevada requires a sentence of life in prison or, I believe, well, it's set forth in the pre-sentence report there. But the important thing to remember is that this is not discretionary. All I've got to prove here is that he has these predicate convictions, and he has more than the predicate convictions. He's

got not only two prior robbery convictions, he's got three prior separate robbery with use convictions. And he was convicted here of another robbery with use.

So, under the law, the maximum penalty that the Court -- the maximum penalty has to be imposed. It's not discretionary, and I think the pre-sentence report is misleading in that respect because it makes it seem as if it is discretionary. So, the habitual criminal penalty outlined on Page 7 of the pre-sentence report is what we're asking for. And I think that actually I think that this is a case where life in prison without the possibility of parole is justified.

This man has an unbelievable criminal record. I've got judgments of convictions going back to 1969 here. And it looks like he's got 11 prior felony convictions before he committed the crime that's before your Honor today, and the Court heard the facts in this case. He's also got numerous arrests for everything from murder to all sorts of thievery and drug offenses. But this is one man who is not retrievable. He cannot be reclaimed from a life of crime. He's shown for three decades plus that this is what he's dedicated to. And in fact, he committed perjury in front of this Court when he took the stand and claimed that his name was Robert James Day. And he just happened to pick another convicted felon who is also a dedicated criminal that he met somewhere back east while serving time. And he got sentenced under that name of that other criminal, but he was willing to do that to avoid the consequences of his actions because he didn't want the Court to know that as Gregory Hermanski he was much worse than Robert James Day.

I ask the Court to impose a sentence of life in prison without the possibility of parole. He has shown that if he's let out of custody he will go and he will rob somebody and he'll use a weapon and whether or not violence is used will

only depend on whether the victim resists. But there's no question what he will do if he's given a chance because for 33 years now he's been proving that fact conclusively. And I will say no more.

THE COURT: All right. Mr. Wommer?

MR. WOMMER: As the Court's aware, the case has a long and twisted history. The Court appointed me for post conviction relief purposes to determine whether or not Ms. Dickson was ineffective during her representation of him. After reviewing the matters, I determined it would be best if I substituted in for sentencing purposes.

Your Honor, in regard to the report itself, I call the Court's attention to Page 6 regarding the credit for time served. There's a mathematical error there. He's really entitled to 365 more days because the time period from 5/25/2001 to 2/26/2003 really should be on additional year. Moreover, on page 4, there is an error in one of the priors. That top charge relating to the date July 31, 1996, indicates that the crime occurred on that date. Well, if you look in conjunction with Page 3, the last entry where he was at the federal penitentiary at Atlanta, Georgia, the last line indicates that he wasn't released. His mandatory release date was September 30, 1996, but the crime in Dade County occurred on July 31, 1996. It couldn't have been him.

Moreover, in order to preserve all of his appellate remedies, including his remedies in the federal system, he's asked me to read a statement into the record, if I may.

THE COURT: You may.

MR. WOMMER: May it please the Court, in February and March 2001, the

State filed motions to amend the Information in this case to include a count under NRS 207.010 alleging the defendant to be a habitual criminal and listing his alleged prior felony convictions. The State now concedes that these prior felony convictions are not actually those of this defendant. The defendant was convicted after jury trial of the primary offenses and, thereafter, sentenced to 10 to 25 years as a habitual offender; however, due to deficiencies in the adjudication in sentence, the Supreme Court of Nevada remanded the case back to this Court for further proceedings.

Subsequent to remand, the State now seeks punishment of the defendant under yet another habitual statute alleging him at this time to be a habitual felon under NRS 207.012 and alleging yet another completely different set of alleged prior felony convictions. Pursuant to NRS 207.016, a court under NRS 207.012 may be separately filed after conviction of the primary offense but at least 15 days prior to sentencing. Thus, it is clear that the legislature intended that habitual criminal enhancement be charged prior to sentencing because it affects the sentencing stage of the proceeding. In the case of Crutcher versus Eighth Judicial District Court, 903 P.2d 823 Nev. 1995, defendant was improperly adjudicated a habitual criminal because the information filed by the State did not seek to impose habitual criminal enhancement and did not list Crutcher's prior felony convictions.

THE COURT: Put this in a motion. This is not a statement.

MR. WOMMER: I understand what the Court is saying, your Honor. I will file it in a written form.

THE COURT: Okay. I was just looking through the file. I don't have the certified copies for some reason in the file. I don't know if they were placed somewhere else. Do you have other copies?

MR. MITCHELL: Your Honor, yes. Let me give you everything I've got here, and I would note in response to one thing that Mr. Wommer started saying or talked about with respect to --

THE COURT: I'm not concerned about that. Do you have the certified copies there?

MR. MITCHELL: Yes. But with regard to credit for time served, he's not entitled to any because he was on federal parole for bank robbery when he committed this crime. When you commit a crime when you're on parole, you don't get credit for time served. And, Judge, in these felony convictions that I'm going to give you, the top three are the robbery convictions even though they're not in chronological order.

THE COURT: All right. And you've reviewed these Mr. Wommer?

MR. WOMMER: Yes.

THE COURT: All right.

MR. WOMMER: The statute does not enable the defense to challenge the validity of the convictions.

THE COURT: Anything else on behalf of Mr. Day?

MR. WOMMER: No. Submit it.

THE COURT: All right. Mr. Day, is there anything you wish to state -- Mr. Hermanski, is there anything you wish to state before I impose sentence?

THE DEFENDANT: Yes, ma'am. First of all, while the State lists a lot of prior convictions against me, I just don't believe that those are all of my prior convictions. I've looked at the pre-sentence report and there's a lot of charges in there that I've never seen before. For instance, the homicide, I have never in my life been ever

anywhere charged with a homicide. That one robbery/burglary that Mr. Wommer mentioned, I've never been charged with that. I was sitting in the United States Penitentiary Atlanta when that crime occurred.

THE COURT: I don't see a homicide in here.

THE DEFENDANT: Yes, ma'am. I don't know what page number it is, but it mentions a homicide. I've never been charged with a homicide. In as far as I know, none of those charges that the State are saying are my prior convictions are mine. I don't know. I don't believe they are. All I know is that they're alleging charges that I know I've never been charged with before.

MR. MITCHELL: Your Honor --

THE COURT: Anything else?

MR. MITCHELL: No. I said that that was an arrest, one of his many arrests. The convictions are --

THE COURT: All right. Anything else, Mr. Day?

THE DEFENDANT: No.

THE COURT: All right. Pursuant to statute then with the requisite certified copies of the prior convictions, one Count I, you are hereby adjudicated a habitual offender. On Count II, you are hereby adjudicated an habitual offender. And on each count, in addition to the $25 administrative assessment fee and the $150 DNA analysis fee, you are sentenced to a term of life without the possibility of parole, Count II to run concurrent to Count I. You shall submit to a test to determine genetic markers. And there'll be zero days credit for time served. You can file an appropriate motion regarding whether or not he would be entitled to credit for time served when he was on federal parole at the time.

THE DEFENDANT: Ma'am, I've been in jail for three years on this case.

THE COURT: All right.

MS. DICKSON: Your Honor, may I just make a record about one matter, and that is with respect to the motions for new trial.

THE COURT: No. You're not counsel of record anymore.

MS. DICKSON: I understand that, your Honor.

THE COURT: All right. Anything else?

MR. HERMANSKI: Your Honor, can I please --

THE COURT: Sit down, Mr. Hermanski.

(Whereupon, proceedings were concluded.)

* * * * * *

ATTEST: I do hereby certify that the foregoing is a true and accurate transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Janice R. Liston

JANICE R. LISTON
Court Recorder

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IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

2004 AUG -2 AM 11:38

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

CLERK

Supreme Court No. 41405

District Court Case No. C167783

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 1st day of July, 2004.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 27th day of July, 2004.

Janette M. Bloom, Supreme Court Clerk

By: J. Richards
Chief Deputy Clerk

JUL 2 0 2004
COUNTY CLERK

CE-02

AUG 04 2004

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 41405

District Court Case No. C167783

REMITTITUR

TO: Shirley Parraguirre, Clark County Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: July 27, 2004

Janette M. Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Paul E. Wommer

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on 1-29-04.

NORRETA CALDWELL
DEPUTY County Clerk

04-12374

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41405

FILED

JUL 0 1 2004

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

ORDER OF AFFIRMANCE

This is a direct appeal from an amended judgment of conviction. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellant was prosecuted, sentenced, and convicted under the name Robert James Day. However, appellant's real name is Gregory Scott Hermanski. On March 15, 2001, a jury convicted appellant of robbery with the use of a deadly weapon and burglary while in possession of a deadly weapon. The district court entered a judgment of conviction on May 18, 2001. Based on the prior convictions of the true Robert James Day, the district court adjudicated appellant a habitual offender and sentenced him to a maximum of 300 months and a minimum of 120 months in the Nevada State Prison.

On June 8, 2001, appellant filed a timely notice of appeal, and on November 15, 2001, this court affirmed the judgment of conviction in part and remanded in part. Although we affirmed the conviction, we remanded for corrections to the sentence and judgment of conviction.[1]

[1]Day v. State, Docket No. 38028 (Order of Affirmance in Part and Remand in Part, November 15, 2001).

RECEIVED
JUL 2 5 2004
CLERK OF THE SUPREME COURT

Subsequent to our order of remand, it was discovered that appellant was not Robert James Day, but rather Gregory Scott Hermanski. The district court vacated Hermanski's sentence and conducted another sentencing hearing. On December 26, 2002, the State filed a notice of intent to seek punishment of Hermanski as a habitual criminal pursuant to NRS 207.012(2), based on Hermanski's prior convictions. On April 30, 2003, the district court adjudicated Hermanski as a habitual offender and sentenced him to serve two concurrent life sentences in the Nevada Department of Corrections without the possibility of parole. The amended judgment of conviction was entered on May 16, 2003. Hermanski timely appeals from the amended judgment of conviction.

Hermanski raises two issues in his appeal. First, he claims that his due process rights were violated when the State allegedly permitted him to testify under a false name knowingly. However, Hermanski points to nothing in the record indicating that the State was aware at the time of trial or sentencing that Hermanski was not Robert James Day. In fact, Hermanski was responsible for introducing perjured testimony into his trial by testifying under oath that he was Robert James Day. Furthermore, during direct examination Hermanski perpetuated the fraud by admitting to offenses of which Day was convicted. Hermanski also argues that had the jury known his true identity, the jury would have concluded "Hermanski was not the same violent-type person as Day." Hermanski's assertion is ludicrous. Hermanski had more violent felony

convictions on his record than Robert James Day.[2] Obviously, Hermanski considered it in his best interest to portray himself as Robert James Day, a person whose criminal record was less extensive than his own. We conclude that Hermanski will not now be heard to complain that the jury convicted him under a false identity that he assumed.

Second, Hermanski claims that the State failed to file an information seeking to treat him as a habitual criminal under the name Gregory Scott Hermanski and thus, no notice was provided as required under NRS 207.012(2). Hermanski cites this court's decision in Crutcher v. District Court as support for his assertion.[3] Crutcher is inapplicable under the facts of this case. Here, once Hermanski's true identity became known, the district court vacated the sentence and ordered a new sentencing hearing. Prior to his new sentencing hearing, the State filed a notice of intent to seek punishment of Hermanski as a habitual criminal. In that notice, the State specifically stated that it intended to seek an adjudication of appellant Gregory Scott Hermanski as a habitual criminal pursuant to NRS. 207.012. Additionally, the State's notice listed Hermanski's prior 11 felonies in support of its allegation of habitual criminality. Unlike in Crutcher, because the district court vacated Hermanski's sentence after it learned that he had falsely portrayed himself as Robert James Day, Hermanski was not under a sentence of imprisonment at the time the State filed its notice that it would seek a

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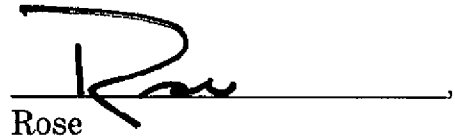
[2]Robert Day's criminal record reflects five prior felony convictions, one of which was violent in nature. Gregory Scott Hermanski's criminal record reflects 11 prior felony convictions, four of which involved violent offenses.

[3]111 Nev. 1286, 903 P.2d 823 (1995).

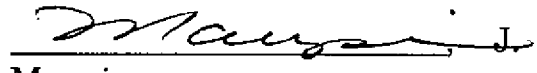
habitual criminal adjudication. Accordingly, we conclude this issue is without merit.

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

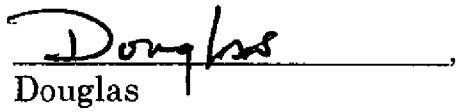
ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



_____, J.
Maupin



_____, J.
Douglas

cc: Hon. Kathy A. Hardcastle, District Judge
Paul E. Wommer
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

119

4

ORDR
PAUL E. WOMMER, ESQ.
Nevada Bar No. 000015
625 South Sixth Street
Las Vegas, Nevada 89101
(702)388-8817
Court Appointed Counsel for
ROBERT JAMES DAY

Shirley B Rawlings

AUG 26 9 02 AM '04

FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, a/k/a GREGORY SCOTT HERMANSKI, Defendant.	)	CASE NO. C167783 DEPT NO. DOCKET

ORDER FOR EXCESS FEES

DATE OF HEARING: N/A
TIME OF HEARING: N/A

This cause coming on regularly upon motion of the Defendant before the above-entitled court; the court being fully advised in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED; that a fee of SEVEN THOUSAND FOUR HUNDRED DOLLARS and 00/000 CENTS ($7,400.00), be paid to PAUL E. WOMMER, from the State fund for indigent defendants and that the aforementioned fee in excess of the

PAUL E. WOMMER
A Professional Law Corporation
625 South Sixth Street • Las Vegas, Nevada 89101
Telephone: (702) 388-8817 & 388-8818 • Facsimile: (702) 388-8819

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CLARK COUNTY

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statutory rate is reasonable and necessary.

DATED this 25 day of August, 2004.

KATHY A. HARDCASTLE
DISTRICT COURT JUDGE

Submitted by:
LAW OFFICE OF PAUL E. WOMMER

PAUL E. WOMMER, ESQ.
Nevada Bar No. 000015
625 South Sixth Street
Las Vegas, Nevada 89101
(702)388-8817
Attorney for Defendant
ROBERT JAMES DAY

PAUL E. WOMMER
A Professional Law Corporation
625 South Sixth Street • Las Vegas, Nevada 89101
Telephone: (702) 388-8817 & 388-8818 • Facsimile: (702) 388-8819

3

Gregory Scott Hermanski #69140
Defendant/In Propria Personam
Post Office Box 650 [HDSP]
Indian Springs, Nevada 89018

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JAN 14 10 38 AM '05
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

1-31-05

The State of Nevada,
Plaintiff,

vs.

Gregory Scott Hermanski
A/K/A Robert James Day,
Defendant,

Case No. C167783X

Dept. No. ~~IV~~ 9

Docket C

MOTION TO WITHDRAW COUNSEL

Date of Hearing: _____

Time of Hearing: _____

'ORAL ARGUMENT REQUESTED, Yes ____ No X"

COMES NOW, Defendant, Gregory Scott Hermanski, proceeding in proper person, moves this Honorable Court for an ORDER Granting him permission to withdraw his present counsel of record in the proceeding action, namely,

Paul E. Wommer, Esq., Las Vegas, NV

This Motion is made and based on all papers and pleadings on file with the Clerk of the Court which are hereby incorporated by this reference, the Points and Authorities herein, and attached Affidavit of Defendant.

DATED: this 4th day of January, 20 05.

BY: Gregory S Hermanski
~~Gregory Scott Hermanski #69140~~
Defendant/In Propria Personam

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COUNTY CLERK

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POINTS AND AUTHORITIES

NRS 7.055 states in pertinent part:

1. An attorney who has been discharged by his client shall upon demand and payment of the fee due from the client, immediately deliver to the client all papers, documents, pleadings and items of tangible personal property which belong to or were prepared for that client.

2. . . .If the court finds that an attorney has, without just cause, refused or neglected to obey its order given under this section, the court may, after notice and fine or imprison him until the contempt purged. If the court finds that the attorney has, without just cause, withheld the client's papers, documents, pleadings, or other property, the attorney is liable for costs and attorney's fees.

Counsel in the above-entitled case was court-appointed due to Defendant's indigence. Defendant does not owe counsel any fees.

WHEREFORE, Defendant prays this Honorable Court, Grant his Motion to Withdraw Counsel and that counsel deliver to Defendant all papers, documents, pleadings, discovery and any other tangible property which belong to or were prepared for the Defendant to allow Defendant the proper assistance that is needed to insure that justice is served.

DATED: this 4th day of January, 2005.

Respectfully submitted,

BY: Gregory S. Hermanski

~~Gregory Scott Hermanski #69140~~
Defendant/in Propria Personam
Post Office Box 650 [HDSP]
Indian Springs, Nevada 89018

NAME: Gregory Scott Hermanski, # 69140

HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89018

DATE: December 20, 2004

TO: Paul E. Wommer, Esq.
625 South Sixth Street
Las Vegas, NV

SUBJECT: TERMINATION OF COUNSEL/TRANSFER OF RECORDS

CASE NO.: C167783X

DEPT. NO.: IV

CASE NAME: STATE OF NEVADA V. GREGORY SCOTT HERMANSKI

Please be advised that from this date forward, your authority as Attorney of Record in the above-stated action is hereby terminated. All of the professional relations of Attorney and Client do hereby cease.

Please enter your withdrawal from this action with the Court immediately.

Pursuant to NRS 7.055, I respectfully request that you deliver to me, forthwith, all documents, papers, pleadings and tangible personal property that is in your possession that relates to the above-named action.

Your prompt attention to this request is genuinely appreciated.

Respectfully,

Gregory S. Hermanski

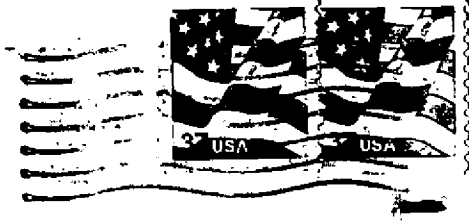
/ / / / /

/ / / / /

/ / / / /

Gregory Scott Hermanski
A/K/A Robert James Day #69140
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

Robert Day #69140
N.D.S.P.
P.O. Box 650
Indian Springs, NV
89018



Clerk of Court
Clark County Courthouse
200 S. Sixth Street
Las Vegas, NV
89101

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ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
GIANCARLO PESCI
Deputy District Attorney
Nevada Bar #007135
200 South Third Street
Las Vegas, NV 89155-2212
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY S. HERMANSKI, aka
Robert James Day,
#1679345

Defendant.

Case No. C167783
Dept No. IX

ORDER GRANTING DEFENDANT'S MOTION TO WITHDRAW COUNSEL

DATE OF HEARING: 1/31/05
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 13th day of January, 2005, the Defendant not being present, represented by PAUL WOMMER, ESQ., the Plaintiff being represented by DAVID ROGER, District Attorney, through GIANCARLO PESCI, Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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IT IS HEREBY ORDERED that the Defendant's Motion to Withdraw Counsel, shall be, and it is granted.

DATED this 7th day of February, 2005.

Jennifer P. Togliatti
DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

GIANCARLO PESCI
Deputy District Attorney
Nevada Bar #007135

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CLERK

ORIGINAL

Gregory Scott Hermanski,
A/K/A Robert James Day, #69140
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

DISTRICT COURT

CLARK COUNTY, NEVADA

Gregory Scott Hermanski,
Petitioner,

v.

D.W. Neven, Warden,
High Desert State Prison,
Respondent. /

Case No. C167783

Dept. 9

PETITION FOR WRIT OF HABEAS CORPUS

NOW COMES, the Petitioner, Gregory Scott Hermanski, and in proper person respectfully submits the attached "Petition for Writ of Habeas Corpus"which is based upon the issues contained therein and any/all papers, pleadings, documents on file in this case.

Furthermore, petitioner asks this Honorable Court to issue an Order to the Warden (Reppomdent) of High Desert State Prison located at 22010 Cold Creek Rd., Indian Springs, Nevada, where petitioner is incarcerated, to have Petitioner transported to this Court to have an evidenciary hearing concerning the issues presented in petitioner's Petition for Writ of Habeas Corpus.

Dated this 7th day of July, 2005.

Gregory S. Hermanski
Gregory Scott Hermanski
petitioner, in pro per

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COUNTY CLERK

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Gregory Scott Hermanski
A/K/A Robert James Day #69140
Petitioner/In Propria Personam
Post Office Box 650 [HDSP]
Indian Springs, Nevada 89018

DISTRICT COURT

CLARK COUNTY, NEVADA

Gregory Scott Hermanski,

Petitioner,

vs.

D.W. Neven, Warden,
High Desert State Prison
Indian Springs, Nevada,

Respondent(s).

Case No. C167783

Dept. No. IV

Docket C

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

Failure to raise all grounds I this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) If your petition challenges the validity of your conviction or sentence, the original and one copy must be filed with the clerk of the district court for the county in which the conviction occurred. Petitions raising any other claim must be filed with the clerk of the district court for the county in which you are incarcerated. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and who you are presently restrained of your liberty: High Desert State Prison, Clark County, Nevada.

2. Name the location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, Las Vegas, Nevada.

3. Date of judgment of conviction: May 16, 2003

4. Case number: C167783

5. (a) Length of sentence: ~~Life without possibility of parole~~

(b) If sentence is death, state any date upon which execution is scheduled: _____

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

Yes ____ No _x_ If "Yes", list crime, case number and sentence being served at this time: ____

_____

7. Nature of offense involved in conviction being challenged: NRS 200.380, 193.165, 205.060, 207.010, 207.012

_____

_____

8. What was your plea? (Check one)

(a) Not guilty __x__

(b) Guilty _____

(c) Nolo contendere ____

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

N/A

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

(a) Jury __x__

(b) Judge without a jury ____

11. Did you testify at trial? Yes __x__ No ____

12. Did you appeal from the judgment of conviction?

Yes __x__ No ____

13. If you did appeal, answer the following:

(a) Name of court: Supreme Court of Nevada

(b) Case number or citation: 38028, 41405

(c) Result: Affirmed

(d) Date of appeal: July 1, 2004

(Attach copy of order or decision, if available).

14.) If you did not appeal, explain briefly why you did not: N/A

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

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

(a) (1) Name of court: N / A

(2) Nature of proceedings: N / A

(3) Grounds raised : N / A

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

Yes ____ No ____ N / A

(5) Result: N / A

(6) Date of result: N / A

(7) If known, citations of any written opinion or date of orders entered pursuant to each result: N / A

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

(1) Name of Court: N / A

(2) Nature of proceeding: N / A

(3) Grounds raised: N / A

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

Yes ____ No ____ N / A

(5) Result: N / A

(6) Date of result: N / A

(7) If known, citations or any written opinion or date of orders entered pursuant to each result: N / A

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

N / A

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

(1) First petition, application or motion? N/A

Yes ____ No ____

Citation or date of decision: _____

(2) Second petition, application or motion? N/A

Yes ____ No ____

Citation or date of decision: _____

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

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion or application or any other post-conviction proceeding? If so, identify: N/A (Grounds included in this petition have not been previously presented in any court.

(a) Which of the grounds is the same: _____

(b) The proceedings in which these grounds were raised: N/A

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). N/A

18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). Petitioner raises ineffective assistance of counsel issues pursuant to sixth amendment

19. Are you filing this petition more than one (1) year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). No. Remittur issued July 27, 2004

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ____ No X

If "Yes", state what court and the case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Dianne M. Dickson, Paul E. Wommer

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

Yes X No ____ If "Yes", specify where and when it is to be served, if you know: federal sentence of 20 years to be completed upon federal parole revocation.

Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

23. (a) GROUND ONE: Petitioner asserts that his right to effective assistance of counsel, secured under the sixth and fourteenth amendments of the United States Constitution was violated.

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): See, attached, "facts in support of petition, Ground I.

FACTS IN SUPPORT OF PETITION

GROUND I

PETITIONER, Gregory Scott Hermanski, A/K/A/: Robert James Day, (hereinafter, "petitioner"), was arrested on or about April 22, 2000, and charged by way of Information with Count I, Robbery w/use of a deadly weapon". NRS 200.380, 193.165 and Count II, "Burglary while in possession of a deadly weapon". NRS 205.060. SEE, District Court Index no. 0003.

Petitioner was subsequently "Booked" into the Clark County Detention Center under the alias name "Robert James Day". SEE, "Temporary Custody Record", attached as Exhibit "A".

Upon being "Booked" into the Clark County Detention Center, petitioner provided Las Vegas Metropolitan Police Department (hereinafter "LVMPD"), with a sample of his fingerprints. SEE, copy of petitioner's fingerprint card dated April 22, 2000, attached as Exhibit "B".

Petitioner submits that LVMPD thereafter, on April 22, 2000, submitted petitioner's fingerprints to the United States Department of Justice, Federal Bureau of Investigation, (hereinafter "F.B.I."), for identification purposes. SEE, "F.B.I. Identification Record", attached as Exhibit "C").

Petitioner further submits that Exhibit "C" clearly demonstrates that LVMPD ran a fingerprint check to determine petitioner's identity and criminal history. Petitioner asserts that the "footnote" contained in Exhibit "C" clearly indicates that the record of petitioner's arrest by LVMPD on April 22, 2000, was entered into petitioner's F.B.I. Identification Record on "Fingerprint Comparisons". SEE, footnote, Exhibit "C".

Thus, petitioner asserts that the State was aware of petitioner's true identity since the outset of this case! However, petitioner was tried by jury and convicted under the alias name "Robert James Day". During trial the prior felony convictions of the true Robert James Day were permitted to be introduced

for impeachment purposes and petitioner was sentenced as an habitual criminal based on the prior felony convictions of the true Robert James Day! SEE, "Order of Affirmance". Supreme Court case no. 41405, attached as Exhibit "D".

At the outset of this case petitioner was remanded to the custody of the Administrator of the Mental Hygeine and Mental Retardation Division of the Department of Human Resources for detention and treatment, and petitioner was thereafter adjudicated "competent". SEE, District Court Index no. 0010.

Petitioner was initially represented in this case by Dianne M. Dickson (hereinafter, Ms. Dickson), of the Clark County Public Defender's Office. At the outset of this case, petitioner advised Ms. Dickson that the name "Robert James Day", was an alias name and that his true name is "Gregory Scott Hermanski". Ms. Dickson's reaction to this information was to advise petitioner that the State was aware of petitoner's true identity by virtue of having a fingerprint comparison performed by the F.B.I.. SEE, "Affidavit of Defendant", attached to and in support of "Motion to Dismiss Counsel and Appointment of Substitute Counsel", District Court Index no. 0086.

Petitioner thereafter proceeded to trial under the alias name "Robert James Day". During the trial, the State sought and was granted leave, to introduce the prior felony convictions of the true Robert James Day for impeachment purposes, if petitioner testified. The Court granted the State's request but directed that the State must be able to produce certified copies of the judgements of conviction if it did so. SEE, Trial transcript, Vol. II, pg. 99.

At that time, petitioner attempted to advise the court, in proper person, that the prior felony convictions sought to be introduced by the State were not that of this petitioner! However, the court interrupted petitioner and directed that petitioner address the matter with Ms. Dickson. SEE, Trial Transcript, Vol. II, pg. 99-101. (See also, "Affidavit of Defendant",

attached to and in support of "Motion to Dismiss Counsel and Appointment of Substitute Counsel",, District Court Index No. 0086.

Petitioner thereafter, advised Ms. Dickson that the prior felony convictions sought to be introduced by the State for impeachment purposes were not that of this petitioner. However, Ms. Dickson advised petitioner that he must testify to rebut the State's evidence related to "Flight", and that he must admit to the prior felony convictions because, if he did not, the State would impeach petitioner's testimony by introducing the certified judgments of conviction. See, copy of letter from Ms. Dickson to Paul E. Wommer dated December 26, 2002, wherein Ms. Dickson states at page 4:

> "When I discussed those convictions with Mr. Day, he told me that he did not remember them. I told him that the district attorney had proof of the convictions and that he was going to have to admit to them, which he did. Of course, as it turns out, he did not remember them because they were not his convictions, 'I made him admit to somehing he had not done." (Emphasis added). Attached as Exhibit "H".

During trial, petitioner waived his right to remain silent, and based on the information petitioner was provided by Ms. Dickson to the effect that "the district attorney had proof of the prior convictions", See, Exhibit "H", petitioner testified that he was Robert James Day and the had prior felony convictions. See, Trial Transcripts, Vol. II, pg. 36-37, 78.

Petitioner asserts that his right to effective assistance of counsel secured under the Sixth and Fourteenth Amendments of the United States Constitution was violated when Ms. Dickson knew or should have know petitioner's true identity and failed

to advise the court of petitioner's true identity.

Petitioner further asserts that, as a direct result of such failure, the jury's decision to convict was based, at least in part, on the untrue testimony of petitioner concerning the prior felony convictions which, petitioner asserts, had an adverse impact on the jury's decisional process.

Petitioner further asserts that except for his untrue testimony concerning prior felony convictions, i.e., "Bank Robbery", which is similar in nature to the charges on which petitioner was before the jury, the State could not have met its burden of proof beyond a reasonable doubt and the jury would not have convicted petitioner.

Petitioner further asserts that Ms. Dickson's failure to have petitioner tried under his true name and true criminal history resulted in petitioner waiving his right to remain silent during trial and that except for Ms. Dickson's failure to have petitioner tried under his true name and criminal history, petitioner would not have waived his right to remain silent during trial.

Petitioner further asserts that Ms. Dickson's advice that petitioner admit to the prior felony convictions resulted in petitioner also testifying that he was "Robert James Day" since he could not logically admit to the priors but deny being Robert James Day.

Thus, petitioner submits that except for the advice of Ms. Dickson that petitioner admit to the prior felony convictions, petitioner would have testified that he is, in fact "Gregory Scott Hermanski", and would have denied being Robert James Day

and would have denied the prior felony convictions.

Thus, petitioner submits that his right to effective assistance of counsel secured under the Sixth and Fourteenth Amendments of the United States Constitution was violated when Ms. Dickson knew or should have known petitioner's true identity and failed to have petitioner tried under his true name and when she advised petitioner to admit during his testimony to the prior felony convictions which she knew or should have known were not that of this petitioner.

23. (b) GROUND TWO: Petitioner asserts that his right to effective assistance of counsel secured under the sixth and fourteenth amendments of the United States Constitution was violated.

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): See, attached, "facts in support of petition", Ground II.

FACTS IN SUPPORT OF PETITION

GROUND II

PETITIONER, Gregory Scott Hermanski, is currently serving a sentence of "Life Without Possibility of Parole" after being adjudicated an "Habitual Criminal", pursuant to N.R.S. 207.010(B), based on prior felony convictions which are not that of this petitioner; and defense counsel, Paul E. Wommer, failed to object in the district court and failed to address the matter on direct appeal in violation of petitioner's right to effective assistance of counsel secured under the sixth and fourteenth Amendments of the United States Constitution. In support thereof, petitioner would submit as follows:

Petitioner was arrested and booked into the Clark County Detention Center under the alias name "Robert James Day", SEE, "Temporary Custody Record", attached as Exhibit "A".

Subsequent to trial in this case, the State filed a "Second Amended Information", which included a count pursuant to Nevada's "habitual criminal" statute, NRS 207.010, based on the listed prior felony convictions of "Robert James Day". SEE, District Court Index No. 0044.

Petitioner was adjudicated an "Habitual Offender" pursuant to the "Habitual Criminal" allegation contained in the "Second Amended Information" and petitioner was sentenced to 10-25 years. SEE, "Judgment of Conviction", District Court Index No. 0050.

Petitioner timely appealed to the Supreme Court of Nevada in case No. 38028, who in turn, remanded the case back to the district court to address sentencing deficiencies. SEE, "Order Affirming in Part and Remanding In Part", District Court Index

No. 0066.

Subsequent to remand petitioner filed several motions in the district court asserting that he was not "Robert James Day", and that the prior felony convictions relied upon by the State in support of the habitual criminal allegation were not those of this petitioner. SEE, Motion to Vacate Sentence as an habitual criminal". District Court Index No. 0070; "Motion to Dismiss Count pursuant to Habitual Criminal statute, NRS 207.010", District Court Index No. 0079.

In response to petitioner's claim that the prior felony convictions relied upon by the State in support of the Habitual Criminal allegation were not those of this petitioner, the State conceded that petitioner is "not the person he was sentenced under", and requested that petitioner be resentenced. SEE, "Criminal Court Minutes", page 014.

On December 4, 2002, the court granted petitioner's "Motion to Vacate Sentence as an Habitual Criminal", and ordered a new pre-sentence report. SEE, "Criminal Court Minutes", page 15.

On December 26, 2002, the State filed "Notice of Intent to Seek Punishment as an Habitual Criminal", which listed petitioner's alleged true prior felony convictions and reflected that the State was seeking such punishment pursuant to the provisions of NRS 207.012. SEE, "Notice of Intent to Seek Punishment as an Habitual Criminal", District Court Index No. 0093.

At sentencing, the court stated as follows:

"'Pursuant to statute' then with therequisite

> certified copies of the prior convictions, on Count I, you are hereby adjudicated a 'habitual offender'. On Count II, you are hereby adjudicated an 'habitual offender'". (Emphasis added).

SEE, Sentencing Transcript, April 30 2003, at page 7, District Court Index No. 0096.

Petitioner asserts that while the court adjudicated petitioner an "Habitual Offended" as to both counts and indicated that such adjudication was "pursuant to statute", the court failed to identify any specific statute.

However, the amended judgment of conviction reflects that petitioner was adjudicated as a "Habitual Violent Felon", under NRS 207.012, on Count I, and, as a "Habitual Criminal" under "NRS 207.010(B)", on Count II, SEE, "Amended Judgment of Conviction", attached as Exhibit "I".

However, petitioner asserts that the State proceeded and sought punishment of petitioner pursuant solely to the provisions of "NRS 207.012", SEE, "Notice Of Intent to seek Punishment as an Habitual Criminal", District Court Index No. 0093.

In fact, during sentencing the State made repeated references to the "non-discretionary" status of the sentencing procedure. The State asserted as follows:

> "Your Honor, the first and most important thing the State would say here is that under the law, if you have convictions of the nature of Mr. Hermanski, 'which is certain predicate crimes that are considered violent crimes, the State of Nevada requires and does not even give discretion to the Court or the DA on whether to file or pursue this or in sentencing the defendant to anything but this'." (Emphasis added).

SEE, "Sentencing Transcript", April 30, 2003, at page 2.

Thus, petitioner would submit that it should be obvious to any rational trier of fact that it was the State's intent to proceed soley pursuant to the provisions of NRS 207.012.

Thus, it appears, and petitioner asserts, that the court has once again punished petitioner based on the prior felony convictions of the true "Robert James Day", since the only prior felony convictions ever used by the State in support of any habitual criminal allegation pursuant to NRS 207.010 were those of the true Robert James Day, which are solely reflected in the "Amended Information" and "Second Amended Information". SEE, "Amended Information", District Court Index No. 0022; see also, "Second Amended Information", District Court Index No. 0044.

However, the punishment imposed by the court as to Count II reflected in the "Amended Judgment of Conviction" was imposed pursuant to the provisions of NRS 207.010(B) which was only sought by the State in the Amended Information and Second Amended Information, as noted above, and based on the prior felony convictions of the true Robert James Day which were listed therein!

During the pendency of petitioner's direct appeal to the Supreme Court of Nevada in Case No. 41405, petitioner wrote a letter to Mr. Wommer requesting that Mr. Wommer address the matter in petitioner's appeal. SEE, copy of letter from petitioner to Mr. Wommer dated March 13, 2004, at page 2, attached as Exhibit "F". However, mr. Wommer failed to do so. SEE, "Appellant's Opening brief", Supreme Court Case No. 41405.

Thus, petitioner asserts that his right to effective assistance of counsel secured under the sixth and fourteenth

Amendments of the united States Constitution was violated when Mr. Wommer failed to object in the District Court to petitioner being sentenced as an habitual criminal based on the prior felony convictions of Robert James Day, and/or, to petitioner being sentenced and adjudicated under NRS 207.010(B), when the State did not seek punishment pursuant to that statute, and/or, when Mr. Wommer failed to object to petitioner being adjudicated and sentenced under both NRS 207.010 and 207.012, and, when Mr. Wommer failed to address these matters on direct appeal. As the result of such failures, petitioner was deprived of a full and fair review of his case by the Supreme Court of Nevada which is petitioner's right secured under the fifth and fourteenth Amendments of the United States Constitution.

23. (c) GROUND THREE: Petitioner asserts that his right to effective assistance of counsel secured under the sixth and fourteenth amendments of the United States Constitution was violated.

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law): See, Attached, "facts in support of petition", Ground III.

FACTS IN SUPPORT OF PETITION

GROUND III

Subsequent to trial in this case the State filed a "Second Amended information" which included a count pursuant to NRS 207.010, alleging that petitioner was an habitual criminal, and in support thereof, listed prior felony convictions which petitioner asserts were not his true prior felony conviction. SEE, "Oder Of Affirmance", Supreme Court Case No. 41405, attached as Exhibit "D".

On May 9, 2001, petitioner was sentenced to a term of 10-25 years in Nevada State Prison. Timely Notice of Appeal was filed and the case proceeded to the Supreme Court of Nevada in Case No. 38028.

On November 15, 2001, the Supreme Court affirmed petitioner's conviction but remanded the case back to the district court to address sentencing deficiencies. SEE, Order Affirming In Part and Remanding In Part, District Court index No. 0066.

Subsequent to "Remand" petitioner filed several motions in the district court which eventually led to the court's determination that petitioner was not "Robert James Day", but is, in fact, "Gregory Scott Hermanski", and the court ordered that a new pre-sentence report be prepared. SEE, Criminal Court Minutes, 10-2-02 and 12-4-02, respectively.

On December 4, 2002, the court granted petitioner's "Motion to Vacate Sentence as an Habitual Criminal" and vacated petitioner's sentence. SEE, Criminal Court Minutes, 12-4-02, page 15.

On December 26, 2002, the State filed "Notice of Intent to Seek Punishment as a Habitual Criminal" under petitioner's

true name, "Gregory Scott Hermanski" and listing petitioner's alleged prior felony convictions. SEE, "Notice", attached as Exhibit "L".

On April 30, 2003, petitioner appeared once again for sentencing. At that time the State argued that:

> "Your Honor, the first and most important thing the State would say here is that, under the law, if you have the convictions of the nature of Mr. Hermanski's, which is certain predicate crimes, that are considered violent crimes, the State of Nevada does not give discretion to the Court or the DA on whether to file or pursue this or in sentencing to sentence the defendant to anything but this,..." and, "...all I've got to prove here is that he has these predicate convictions, and he has more than the predicate convictions..." and, "...So, under the law, the maximum penalty for the Court... ...the maximum penalty has to be imposed." "...it's not discretionary."

SEE, Sentencing Transcript, April 30, 2003, page 2-3.

The State then talked about petitioner's alleged criminal history and stated:

> "I ask the Court to impose a sentence of life in prison without the possibility of parole."

SEE, Sentencing Transcript, April 30, 2003, at page 3.

In response to the State's argument concerning the habitual offender allegation, Mr. Wommer offered nothing except to state:

> "The statute does not enable the defense to challenge the validity of the convictions."

SEE, Sentencing Transcript, April 30, 2003, at page 6.

Petitioner asserts that Mr. Wommer's statement noted above clearly indicates and/or demonstrates Mr. Wommer's lack of understanding of the proceedings. It appears that Mr. Wommer

believed that he could not object or offer anything in petitioner's defense to the habitual offender allegation once the requisite number of certified judgments of convictions were presented by the State!

When the Court permitted petitioner to speak in his own behalf, petitioner asserted that the prior felony convictions were not that of this petitioner. SEE; Sentencing Transcript, April 30, 2003, at page 6-7.

Pursuant to the statute, NRS 207.012, there were only 3 possible sentences petitioner could have received:

1. "10-25 years."
2. "10 years to life;" and,
3. "Life without possibility of parole."

Petitioner asserts that while the State sought the maximum sentence as noted above, Mr. Wommer failed to argue for the lesser of the 3 possible sentences! In fact, Mr. Wommer failed to offer anything in opposition to the State's request for "Life Without Possibility Of Parole", such as the fact that petitioner has an extensive history of mental illness, as noted in the pre-sentence report (see, presentence report dated February 20, 2003, at page 6), or the fact that petitioner is 51 years old, and terminally ill with hepatitis "C", and, is in need of a liver transplant, which he cannot receive in prison due to cost to taxpayers, or even to receive treatment for the disease (see, attached Exhibit "M"), or, the fact that petitioner has maintained his innocence since the outset of this case.

Petitioner was subsequently adjudicated an "Habitual Violent Felon" and "Habitual Criminal" and sentenced to 2 concurrent life terms without the possibility of parole. SEE, "Amended

Judgment of Conviction", attached as Exhibit "I".

Thus, petitioner asserts that his right to effective assistance of counsel secured under the sixth and fourteenth Amendments of the United States Constitution was violated when Mr. Wommer failed to act as petitioner's advocate at sentencing when he failed to offer anything in opposition to the State's request that petitioner be sentenced to the maximum punishment prescribed by law.

23. (d) GROUND FOUR: Petitioner asserts that his right to effective assistance of counsel secured under the sixth and fourteenth amendments of the United States Constitution was violated.

23. (d) SUPPORTING FACTS (Tell your story briefly without citing cases or law): See, attached, "facts in support of petition", Ground IV.

FACTS IN SUPPORT OF PETITION

GROUND IV

Petitioner was prosecuted, sentenced and convicted under the name Robert James Day. However, petitioner's true name is Gregory Scott Hermanski. On March 15, 2001, a jury convicted petitioner of robbery with the use of a deadly weapon and burglary while in possession of a deadly weapon. The district court entered a judgment of conviction on May 18, 2001. Based on the prior convictions of the true Robert James Day, the district court adjudicated petitioner a habitual offender and sentenced him to a maximum of 300 months and a minimum of 120 months in the Nevada State Prison. SEE, "Order of Affirmance", attached as Exhibit "D".

On June 8, 2001, petitioner filed a timely notice of appeal, and on November 15, 2001, the Supreme Court of Nevada affirmed the judgment of conviction in part and remanded in part. Although the Supreme Court affirmed the conviction, the case was remanded for corrections to the sentence and judgment of conviction. SEE, Day v. State, Docket No. 38028 (Order of Affirmance in part and Remanded in part. November 15, 2001).

Subsequent to the remand petitioner filed a "Motion For New Trial", based on an allegation that the introduction of prior felony convictions of the true Robert James Day during trial acted to deprive petitioner of a fair trial. SEE. District Court Index No. 0077.

In response to petitioner's motion for a new trial, the State argued that petitioner:

> "...made no attempt to have the State bring him to trial under his alleged real name, Gregory Scott Hermanski."

SEE, "State's Response to Defendant's Motion for New Trial", at page 4, District Court Index No. 0087.

Subsequent to receiving a copy of said "State's Response", petitioner ascertained that counsel, Dianne M. Dickson was unwilling to admit to the court at any oral argument on said "Motion for New Trial", that petitioner advised her as to his true identity prior to trial.

Petitioner thereafter filed a "Motion to Dismiss Counsel and Appointment of Substitute Counsel", based on a claim of "conflict of interest". SEE, District Court Index No. 0086. Attached to and in support of said motion is an "Affidavit of Defendant", wherein, petitioner asserted that:

> "...based on Ms. Dickson's indication to me that she will be unwilling to admit, during oral arguments on my motion for new trial that she failed to act on the information I provided her prior to trial concerning my true identity, I feel that a conflict of interest exists in this case and new counsel be appointed prior to oral arguments on December 4, 2002."

SEE, "Affidavit of Defendant", page 8, attached to and in support of "Motion to Dismiss Counsel and Appointment of Substitute Counsel". District Court Index No.0086.

On November 27, 2002, petitioner served the State and Ms. Dickson with copies of petitioner's "Motion to dismiss counsel". SEE, Certificate of Service attached to Motion to Dismiss Counsel and Appointment of Substitute Counsel, District Court Index No. 0086.

On December 4, 2002, a hearing was held on petitioner's Motion for new trial and, although the State and Ms. Dickson had been served with petitioner's motion to dismiss counsel,

neither the State nor Ms. Dickson advised the court that a claim of alleged conflict of interest was on calendar. Ms. Dickson offered no rebuttal to the State's claim that petitioner made no attempt to be tried under his true name as asserted in the "State's Response" to Defendant's "Motion for New Trial". The Court denied petitioner's motion and indicated it's disapproval that petitioner had "misrepresented" his identity. SEE, "Criminal Court Minutes", 12-4-02, page 15.

On December 16, 2002, Ms. Dickson advised the court that petitioner no longer desired her representation in this case due to "confusion regarding factual allegations of the defendant's identity". The court granted petitioner's motion to dismiss counsel and ordered that "independent counsel is appointed to review the ineffective assistance of counsel claim". SEE, "Criminal Court Minutes", 12-16-02, page 16.

Paul E. Wommer was thereafter appointed and confirmed as counsel of record. SEE, Criminal Court Minutes, 12-23-02, page 17.

On April 30, 2003, petitioner was adjudicated an "Habitual Offended" as to both counts and petitioner was sentenced to Life without possibility of parole. SEE, Sentencing Transcript, April 30, 2003.

On May 16, 2003, the district court entered the "Amended Judgment of Conviction", and on May 20, 2003, petitioner filed his "Notice of Appeal", in proper person, to the Supreme Court of Nevada from the Order denying petitioner's "Motion(s) for New Trial" which were denied on December 4, 2002. See attached, "Notice of Appeal", Exhibit "J",

The case thereafter proceeded to the Supreme Court of Nevada in Case No. 41405. Petitioner's proper person "notice of appeal" was docketed in the Supreme Court on May 13, 2003, and May 27, 2003. SEE, "Nevada Supreme Court Docket Sheet", attached as Exhibit "K".

However, though petitioner specifically preserved his right to appeal the denial of his motions for new trial by filing his "Notice of Appeal" in a timely manner, Mr. Wommer failed to assert on direct appeal that the district court had abused it's discretion in denying petitioner's motion(s) for new trial. SEE, Appellant's Opening Brief, Case No. 41405.

Thus, petitioner asserts that his right to effective assistance of counsel secured under the sixth and fourteenth Amendments to the United States Constitution was violated when Mr. Wommer failed to address the denial of petitioner's motion(s) for new trial on direct appeal and, as result, petitioner was deprived of his right under the fifth and fourteenth Amendments to the united States Constitution to a full and fair hearing in the Supreme Court of Nevada.

GROUND V
"facts in support of petition"

Petitioner asserts that his right to effective assistance of counsel secured under the sixth and fourteenth amendments of the United States Constitution was violated. For facts in support thereof, See attached, "facts in support of petition, GROUND V.

FACTS IN SUPPORT OF PETITION

GROUND V

On direct appeal to the Supreme Court of Nevada, petitioner claimed that his "Constitutional Right to due process was violated when the State knowingly permitted him to testify under a false name". SEE, "Appellant's Opening Brief" (hereinafter, "AOB"), at page 12, Supreme Court Case No. 41405.

In it's "Response" the State provided:

> "The State did violate defendant's due process rights". (Emphasis added).

SEE, "Respondent's Answering Brief", (hereinafter, "RAB"), at "Table of Contents" and at page 4.

However, the State further provided:

> "The defendant claims that the State knew from the beginning that he was not really Robert James Day because it ran a fingerprint check through the F.B.I. database. He offers no support for this assertion".

SEE. "RAB", at page 4.

Apparently, and petitioner asserts, the State conceeded Petitioner's claim but somehow felt that petitioner's alleged failure to offer support for his assertion acted to negate his claim, even in the face of the State's admission.

Indeed, the Supreme Court of Nevada, in affirming petitioner's conviction concluded that:

> "Hermanski points to nothing in the record that the State was aware at the time of trial or sentencing that Hermanski was not Robert James Day".

SEE, "Order of Affirmance", at page 2, attached as Exhibit "D",

However, it is inconceivable that the Supreme Court could conclude that no Constitutional deprivation occurred in the face

of the State's admission that such Constitutional deprivation had, in fact, occurred.

Petitioner asserts that the State's admission that it violated petitioner's right to due process is, in effect, an admission that it was aware of petitioner's true name at the time of trial because the basis for petitioner's due process claim was petitioner's assertion that the State knew petitioner testified falsely as to his identity and permitted him to do so!

Thus, petitioner would submit that it was irrational for the Supreme Court to reject petitioner's claim based on the assertion by the State that petitioner offered no proof that the State was aware of petitioner's true identity, when the State, through it's admission that it had violated petitioner's due process right, also admitted that it was aware of petitioner's true identity at trial.

Thus, petitioner asserts that appellate counsel, Paul E. Wommer, should have filed a reply brief and presented argument to the court that the State's admission that it had, in fact, violated petitioner's right to due process was, in effect, an admission that the State was aware of petitioner's true identity during trial and permitted petitioner to testify falsely.

Petitioner speculates that the reason the State admitted to violating petitioner's right to due process, and thereby, in effect, admitting to having been aware of petitioner's true identity during trial, was because a "denial" of having violated petitioner's due process right was, in effect, a denial that the State was aware of petitioner's true identity.

However, the State could not deny knowledge of petitioner's

true identity because a record exists of the State's fingerprint submission on April 22, 2000, to the Federal Bureau of Investigation which may indicate that the State was aware of petitioner's identity since the outset of this case and possibly has perpetrated a fraud upon the courts.

Petitioner submits that throughout the history of this case, the State has never made an outright denial of having ran petitioner's fingerprints through the F.B.I. database.

Subsequent to the Supreme Court's decision in this case, petitioner submitted a request to the Federal Bureau of Investigation dated October 18, 2004, to be provided with a copy of petitioner's "F.B.I. Identification record". SEE attached, Exhibit "E", In response to petitioner's request, petitioner was provided a copy of same. SEE attached, "F.B.I. Identification Record", Exhibit "C".

Petitioner asserts that the information reflected in "Exhibit C" is based on "fingerprint comparison", (see, footnote, Exhibit "C") and was entered into petitioner's record by submission of petitioner's fingerprints by the Las Vegas Metropolitan Police Department on April 22, 2000. While Exhibit "C" does not reflect what information was provided the State of Nevada as a result of any such fingerprint submission, it is inconceivable that the State was not advised by the U.S. Department of Justice as to the true identity of the subject whose fingerprints were submitted.

Petitioner asserts that the outcome of petitioner's appeal in the Supreme Court Case No. 41405 would have been different if the information reflected in Exhibit "C" had been available

to the court, since Exhibit "C" supports petitioner's assertion contained in his "Appellant's Opening Brief" that the State "had to have/should have known Day's true name was Gregory Scott Hermanski". SEE, AOB at 14. The court based it's decision as to the due process claim on the determination that petitioner failed to offer evidenceeto indicate that the State was aware of petitioner's true identity at the time of trial or sentencing.

While petitioner's appeal was pending, petitioner wrote letters to Mr. Wommer (SEE, Exhibits "F" and "G"), dated March 13, and 18, 2004, requesting that he obtain records from the U.S. Department of Justice to support petitioner's assertion that the State was aware of petitioner's true identity during trial and to address the matter in a "Reply Brief". However, Mr. Wommer failed to obtain such records and failed to present any "Reply Brief", and as the result of such failure petitioner was deprived of a full and fair hearing in his appeal to the Supreme Court of Nevada.

Petitioner submits that his right to effective assistance of counsel secured under the sixth and fourteenth Amendments of the United States Constitution was also violated when Mr. Wommerfailed to present argument to the Court in petitioner's appeal that the State's admission that it had violated petitioner's Constitutional right to due process warranted a reversal of his conviction.

Petitioner further asserts that his right to effective assistance of counsel secured under the sixth and fourteenth Amendments was violated when Mr. Wommer failed to present evidence in support of petitioner's assertion that the State was aware

of petitioner's true identity at the time of trial and, as the result of such failure, petitioner was deprived of a full and fair hearing in his appeal to the Supreme Court of Nevada.

WHEREFORE, petitioner, prays that the court grant any/all relief ti which he may be entitled in this proceeding.

EXECUTED at High Desert State Prison on the 7th day of July, 2005.

Gregory S. Hermanski
Signature of Petitioner

VERIFICATION

Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true and correct of his own personal knowledge, except as to those matters based on information and belief, and to those matters, he believes them to be true.

Gregory S. Hermanski
Signature of Petitioner
in proper person

Attorney for Petitioner

CERTFICATE OF SERVICE BY MAILING

I, Gregory Scott Hermanski, hereby certify, pursuant to NRCP 5(b), that on this 7th day of July, 2005, I mailed a true and correct copy of the foregoing, "Petition for writ of habeas corpus" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clerk of Court
Clark County Courthouse
300 South Third Street
Las Vegas, Nevada 89101

CC:FILE

DATED: this 7th day of July, 2005.

Gregory S. Hermanski
Gregory Scott Hermanski # 69140
Petitioner /In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

NEW

Page 1 of 1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
TEMPORARY CUSTODY RECORD

I.D. #: 1679345 Event #: 000422-1105

DATE OF ARREST: 4/22/00 TIME OF ARREST: 1320 I.D. ESTAB. BY:

INTAKE NAME (AKA, ALIAS, ETC.) Last	First	Middle	TRUE NAME Last	First	Middle
DAY	ROBERT	JAMES			

ADDRESS NUMBER & STREET	BLDG./APT. #	CITY	STATE	ZIP
TRANSIENT				

DATE OF BIRTH	RACE	SEX	HEIGHT	WEIGHT	HAIR	EYES	SOCIAL SECURITY #	Speak English?	PLACE OF BIRTH
2-6-54	W	M	5'11	180	GRY	BRO	498-62-9076	☒ Yes ☐ No	KANSAS

LOCATION OF CRIME (# - Street - City - State - Zip)	Citizen Arrest	LOCATION OF ARREST	PCN #
5201 S. INDUSTRIAL LV NV 89118 (AJ ☒ CC ☐ LV)	Y (N)	3535 W TROPICANA LV NV	

BKG. CODE	CHARGE ORD / NRS #	M	GM	F	ARR TYPE*	EVENT NUMBER	WARR / NCIC NUMBER	COURT LV	COURT JC	COURT DC	COURT OTHER
5039	ROBBERY/W/W 200.380	☐	☐	☒	PC	000422-1105		☐	☒	☐	☐
5068	BURG W/WEAPON 205.060	☐	☐	☒	PC	"	"	☐	☒	☐	☐
5517	PSP 205.275	☐	☐	☒	PC	"	"	☐	☒	☐	☐
		☐	☐	☐				☐	☐	☐	☐
		☐	☐	☐				☐	☐	☐	☐
		☐	☐	☐				☐	☐	☐	☐

ARREST TYPE: PC – PROBABLE CAUSE BS – BONDSMAN SURRENDER BW – BENCH WARRANT WA – WARRANT RM – REMAND GJI – GRAND JURY IND.

OTHER COURT:

Arresting Officer's Signature D. [illegible] 3359 LVMPD
(Print Name) P # Agency

Transporting Officer's Signature (Print Name) P # Agency

OFFICER MUST SIGN SECOND PAGE WITH ORIGINAL SIGNATURE.

APPROVAL CONTROL # FOR ADDITIONAL CHARGES:

Time Stamp at BOOKING

☐ FOR PROBABLE CAUSE/NCIC HIT ARREST SEE PAGE TWO FOR DETAILS.

☐ BENCH WARRANT SERVED ON _____.

☐ WARRANT SERVED ON _____.

☐ GRAND JURY INDICTMENT SERVED ON _____.

TYPE OF I.D. FOR VERIFICATION _____.

(V. 7-98) (1) CENTRAL RECORDS • ORIGINAL

Exhibit "A" Case 1 of 1

LAS VEGAS NEVADA
RINGER CARD

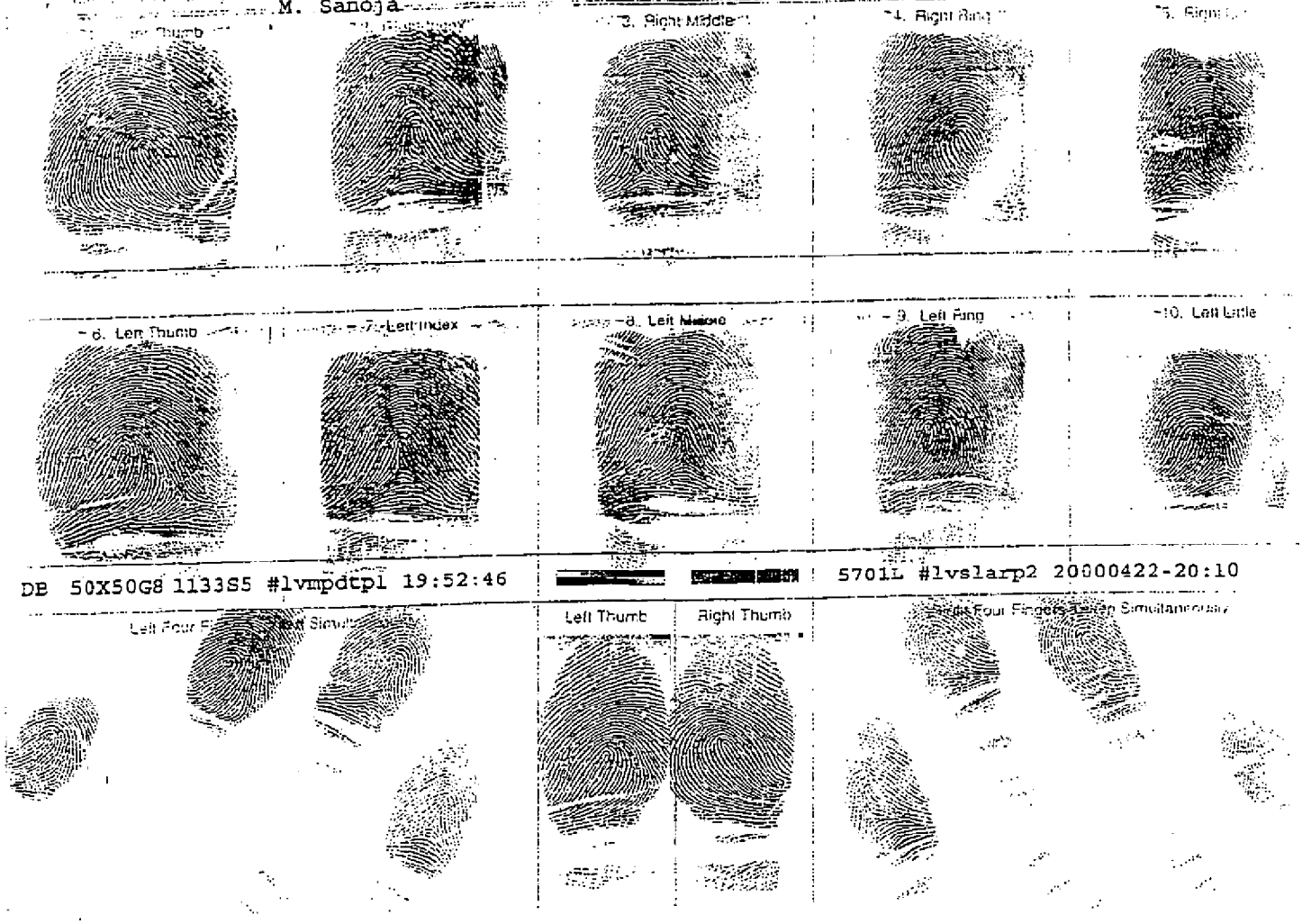
DAY, ROBERT JAMES 01679345

W M 02061954 511 180 GRY BRO

04/22/00

6297

M. Sanoja



This is to certify that the document is a true and accurate copy of the original document now in the possession of the Las Vegas Metropolitan Police Department

2-25-02 C. Stubblefield 4960
Date Signature & P#

Exhibit "B"
Page 1 of 1

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION
CLARKSBURG, WV 26306

DC000000Z ICN ISIS0003000019470327
PART 5

- FBI IDENTIFICATION RECORD - FBI NO-888420G

14-ARRESTED OR RECEIVED 1996/01/10
AGENCY-US PEN-RECORDS OFF ATLANTA (GA060017C)
AGENCY CASE-00766192 NAME USED-HERMANSKI,GREGORY
CHARGE 1-BANK ROBBERY & PROB VIOL

COURT-
CHARGE-BANK ROBBERY & PROB VIOL
SENTENCE-
1-10-96 TRF FRM MVA/10 YRS,MR

SUPERVISION OR CUSTODY-
AGENCY-US PROBATION MIAMI (FL013017G)
1996/09/30 STATUS--MANDATORY RELEASE

15-ARRESTED OR RECEIVED 1997/12/02W (PRT REC)
AGENCY-FED CORR COMPLEX-MED COLEMAN (FL060027C)
AGENCY CASE-00766192
CHARGE 1-USE OF F/ARM DURING CRIME OF VIOL-PV

COURT-
CHARGE-USE OF F/ARM DURING CRIME OF VIOL-PV
SENTENCE-
ORIGINAL 10 YRS 954 DAYS REMAINING

16-ARRESTED OR RECEIVED 2000/04/22 SID- NV04030188
AGENCY-METRO POLICE DEPT LAS VEGAS (NV0020100)
AGENCY CASE-01679345 NAME USED-DAY,ROBERT JAMES
CHARGE 1-00118F ROBBERY WITH A DEADLY WEAPON
CHARGE 2-00301F BURGLARY WITH USE OF DEADLY WEAPON
CHARGE 3-00349F POSSESSION OF STOLEN PROPERTY

RECORD UPDATED 2005/01/03

ALL ARREST ENTRIES CONTAINED IN THIS FBI RECORD ARE BASED ON FINGERPRINT COMPARISONS AND PERTAIN TO THE SAME INDIVIDUAL.

THE USE OF THIS RECORD IS REGULATED BY LAW. IT IS PROVIDED FOR OFFICIAL USE ONLY AND MAY BE USED ONLY FOR THE PURPOSE REQUESTED.

Exhibit "C"
Page 1 of 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41405

FILED

JUL 0 1 2004

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

ORDER OF AFFIRMANCE

This is a direct appeal from an amended judgment of conviction. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellant was prosecuted, sentenced, and convicted under the name Robert James Day. However, appellant's real name is Gregory Scott Hermanski. On March 15, 2001, a jury convicted appellant of robbery with the use of a deadly weapon and burglary while in possession of a deadly weapon. The district court entered a judgment of conviction on May 18, 2001. Based on the prior convictions of the true Robert James Day, the district court adjudicated appellant a habitual offender and sentenced him to a maximum of 300 months and a minimum of 120 months in the Nevada State Prison.

On June 8, 2001, appellant filed a timely notice of appeal, and on November 15, 2001, this court affirmed the judgment of conviction in part and remanded in part. Although we affirmed the conviction, we remanded for corrections to the sentence and judgment of conviction.[1]

[1]Day v. State, Docket No. 38028 (Order of Affirmance in Part and Remand in Part, November 15, 2001).

Exhibit "D"
Page 1 of 4

04-12083

Subsequent to our order of remand, it was discovered that appellant was not Robert James Day, but rather Gregory Scott Hermanski. The district court vacated Hermanski's sentence and conducted another sentencing hearing. On December 26, 2002, the State filed a notice of intent to seek punishment of Hermanski as a habitual criminal pursuant to NRS 207.012(2), based on Hermanski's prior convictions. On April 30, 2003, the district court adjudicated Hermanski as a habitual offender and sentenced him to serve two concurrent life sentences in the Nevada Department of Corrections without the possibility of parole. The amended judgment of conviction was entered on May 16, 2003. Hermanski timely appeals from the amended judgment of conviction.

Hermanski raises two issues in his appeal. First, he claims that his due process rights were violated when the State allegedly permitted him to testify under a false name knowingly. However, Hermanski points to nothing in the record indicating that the State was aware at the time of trial or sentencing that Hermanski was not Robert James Day. In fact, Hermanski was responsible for introducing perjured testimony into his trial by testifying under oath that he was Robert James Day. Furthermore, during direct examination Hermanski perpetuated the fraud by admitting to offenses of which Day was convicted. Hermanski also argues that had the jury known his true identity, the jury would have concluded "Hermanski was not the same violent-type person as Day." Hermanski's assertion is ludicrous. Hermanski had more violent felony

Exhibit "D"
page 2 of 4

convictions on his record than Robert James Day.[2] Obviously, Hermanski considered it in his best interest to portray himself as Robert James Day, a person whose criminal record was less extensive than his own. We conclude that Hermanski will not now be heard to complain that the jury convicted him under a false identity that he assumed.

Second, Hermanski claims that the State failed to file an information seeking to treat him as a habitual criminal under the name Gregory Scott Hermanski and thus, no notice was provided as required under NRS 207.012(2). Hermanski cites this court's decision in Crutcher v. District Court as support for his assertion.[3] Crutcher is inapplicable under the facts of this case. Here, once Hermanski's true identity became known, the district court vacated the sentence and ordered a new sentencing hearing. Prior to his new sentencing hearing, the State filed a notice of intent to seek punishment of Hermanski as a habitual criminal. In that notice, the State specifically stated that it intended to seek an adjudication of appellant Gregory Scott Hermanski as a habitual criminal pursuant to NRS. 207.012. Additionally, the State's notice listed Hermanski's prior 11 felonies in support of its allegation of habitual criminality. Unlike in Crutcher, because the district court vacated Hermanski's sentence after it learned that he had falsely portrayed himself as Robert James Day, Hermanski was not under a sentence of imprisonment at the time the State filed its notice that it would seek a

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[2]Robert Day's criminal record reflects five prior felony convictions, one of which was violent in nature. Gregory Scott Hermanski's criminal record reflects 11 prior felony convictions, four of which involved violent offenses.

[3]111 Nev. 1286, 903 P.2d 823 (1995).

Exhibit "D"
page 3 of 4

habitual criminal adjudication. Accordingly, we conclude this issue is without merit.

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

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Douglas

cc: Hon. Kathy A. Hardcastle, District Judge
Paul E. Wommer
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

Exhibit "D"
page 4 of 4

October 18, 2004

Federal Bureau of Investigation
CJIS Division
Attn: SCU, Mod. D-2
1000 Custer Hollow Road
Clarksburg, WV 26306

Re: Identification Record Request

Dear Sir,

Please accept this as my request for a copy of my identification record pursuant to the provisions of Title 28, CFR Part 16.32.

I am presently serving a sentence in the Nevada Department of Corrections under the alias name "Robert James Day". My true name is "Gregory Scott Hermanski", DOB 11/26/53, POB Miami, Florida, SS# 262-08-4363, FBI No. 888 420 G.

Attached, please find my fingerprint card and my request for a waiver of fee and Financial Certificate prepared by prison officials.

Thank you for your assistance in this matter.

Submitted by,
Gregory S. Hermanski

Gregory Scott Hermanski
A/K/A Robert James Day #69140
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

cc: File

Exhibit "E"
Page 1 of 1

March 13, 2004

Paul E. Wommer, Esq.
Attorney at Law
625 South Sixth Street
Las Vegas, NV 89101

Re: Gregory Scott Hermanski v. State of Nevada

Dear Mr. Wommer,

Thank you for providing me with a copy of the State's Answer, though I doubt there is time to file a reply brief. Still, the following consists of information I would like for you to bring to the attention of the court.

First, as I've previously discussed with both you and Ms. Dickson, we can prove that the State had knowledge of my true identity by securring a copy of whatever documentation P&P used in preparing the original presentence report. The State's claim that the presence of my true name in the original presentence report is irrelevant to whether the State knew my true identity is misleading. The question is not what the presence of my true name would mean to a prosecutor, but rather, "how did my true name find it's way into the criminal record of Robert Day?

]f the State had merely ran a record search without submitting my fingerprints, using the name Robert Day, his DOB and vital statistics, my name could only have been discovered in the criminal history of Robert Day if he had ever been arrested and used my name as an alias or if I had ever used his name before. I have never used his name before and he has never used mine.

As we've previously discussed, there is only 2 ways the State could have discovered my true name. First, I told Ms. Dickson my true name and though she denies it, she may have told the State. Second, the State did, in fact, conduct a record search using the fingerprints taken from me on the day I was arrested, and there are ways to prove it.

First, because my true name is contained in the original presentence report, whatever documentation used by P&P in preparing the presentence report will show where that information came from. Additionally, fingerprint records of LVMPD will show what was done with the prints, whether a fingerprint search was conducted. Moreover, a record search through the U.S. Department of Justice will reveal each and every time my prints were submitted to NCIC, the identity of the requesting agency, the date, and what information was provided that agency in response to such request.

Mr. Wommer, since the Supreme Court will probably not give you time to get these records, I hope that you will at least ask the court for an extension of time to secure them.

Exhibit "F"
page 1 of 2

Next, the State's argument that it could have offered the same deal if it had proceeded against me under my true name is in contradiction with what the State argued at my sentencing. (See Respondent's Supplemental Appendix, p. 2). The State argued that it was "MANDATORY" that the State charge me under the big habitual because the State of Nevada requires it! As such, if the State proceeded against me under my true name it could not have offered me a deal of 3-10 years. (See also, NRS 207.012).

The State further argues that it's "Notice of Intent to Seek Punishment as an Habitual Criminal" was sufficient to satisfy notice. However, the State's "Notice" was vague and ambiguous, and, as such, does not satisfy the notice requirements of the fifth amendment..

As I've previously discussed with you, the habitual statutes consists of 3 separate habitual offenders. NRS 207.010 relates to "Habitual Criminals"; 207.012 is "Habitual Felons"; 207.014 is "Habitually Fraudulent Felons". In the State's "Notice" the State cites to NRS 207.012, (habitual felon). However, in both the title of said "Notice" as well as the text, the State repeatedly makes reference to "Habitual Criminal"! Thus, it was unclear as to which habitual statute the State was prosecuting me under.

Furthermore, even if the State's "Notice" could be seen to satisfy the notice requirements of the fifth amendment (which it does not), under the decision in Crutcher, the State has failed to meet such requirements by failing to seek leave of the court to amend the Information. Under Crutcher, the charging document must contain a list of the prior felony convictions. The Information in my case still contains a list of Robert Day's convictions. The State has never even sought leave of the court to amend it!

Additionally, the Information filed under Robert Day ad listing his priors seeks punishment under 207.010. The State's "Notice" under Hermanski seeks punishment under 207.012. However, in adjudicating me, Judge Hardcastle adjudicated me under both statutes. Apparently, Hardcastle has adjudicated me under 207.010 for Day's priors, and under.012 for my own alleged priors. That is the only logical conclusion since the State's "Notice" does not seek punishment under 207.010, but specifically references 207.012.

Anyway, I would appreciate it if you would file a reply brief based on the foregoing. Thank you for your assistance in this matter.

Sincerely,

Gregory S. Hermanski

Gregory Hermanski

cc: file

Exhibit "F" Page 2 of 2

GREGORY SCOTT HERMANSKI, #69140
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV 89018

March 18, 2004

Paul E. Wommer, Esq.
Attorney at Law
625 South Sixth Street
Las Vegas, NV 89101

Re: Hermanski v. State

Mr. Wommer,

In the State's Response, the State mentions a "Tactical Advantage." In your Opening Brief, while you argue that the State impeached me with Robert Day's priors, the true "tactical advantage" sought to be gained by the State is not adequately addressed.

Under the "Habitual Criminal" statute, NRS 207.010, the State has "discretion" as to whether or not it will proceed against a defendant under that statute. When a criminal defendant in Nevada is eligible to be charged under this statute, prosecutors routinely threaten to use it if the defendant refuses to plead guilty.

However, under the "Habitual Felon" statute, NRS 207.012, when a criminal defendant has the requisite number and types of prior felony convictions he is considered a "violent habitual offender" and it is statutorily mandated that he be charged under this statute, and also mandatory that the judge impose sentence pursuant to this statute.

As such, under 207.012 the State's ability to induce a guilty plea is limited. The lightest sentence the State can lawfully offer is 25 years!

Thus, if the State proceeded against me under my true name and criminal history, it was "mandatory" that the State proceed against me under the Habitual Felon statute (207.012), and the minimum sentence the State could offer was 25 years. At my age (50), and with my prior experience with the system, there is little difference between 25 years and Life Without, and the State knew there was little chance I would, therefore, plead

Exhibit "G"
page 1 of 4

guilty.

However, because I was allegedly pretending to be Robert Day, and under Day's criminal history, I was eligible for prosecution under 207.010 (which permits the State's discretion in its use), the State opted to permit me to pretend to be Day so that it could offer me a deal of 3-10 years or prosecution under 207.010 if I refused.

Mr. Wommer, nothing in the proposed plea agreement would have prevented the State from filing Habitual Felon proceedings against me once my plea was entered and accepted. I knew the State was aware of my true identity and that with my criminal history I was eligible. I believed then, and I believe now, that the State intended to "miraculously discover" my true identity through a presentence investigation following my guilty plea and charge me under Habitual Felon once my guilty plea was entered and accepted.

The State attempted to gain tactical advantage by allowing me to pretend to be Robert Day so that it could obtain a guilty plea and thus avoid jury trial by threatening prosecution under 207.010, and intended to file under 207.012 once my plea was accepted and my true identity discovered through presentence investigation.

However, the State's plan backfired when I, at the last minute, declined the State's offer and proceeded to trial the following day. When I declinedthe State's offer, the State could not halt the proceedings at that point to rectify the identity problem without revealing that it had been aware of my true identity from the outset of this case. The fact that the State had already filed habitual criminal charges against me using Day's name and criminal history precluded the State from this course of action. At the time I declined the State's offer, the State had already "knowingly" perpetrated a fraud against the Court when it "knowingly" accused me of Day's prior convictions.

At that point, the State had no choice but to proceed against me as Day. If I had plead guilty the State could have pretended to discover my true identity from the presentence investigation. When I refused to bite, the State opted to keep quiet, realizing

Exhibit "G"
page 2 of 4

that a guilty verdict at trial would result in an habitual sentence regardless.

Mr. Wommer, I admit that all this is mere speculation. However, several facts which support this theory can be proven. First, we can prove the State obtained my fingerprints when I was arrested, submitted them to NCIC,and received my true identity and criminal history as the result of such. In th State's Response, while the State argues that the "Stubblefield" fingerprint comparison was done "after" the remand, the State does not deny that my prints were ran through NCIC at the time of my arrest nor claims that they had not!

Next, the presence of my true name in the original presentence report proves that P&P discovered it somewhere. If a record search was performed using name and date of birth, etc., without fingerprints, NCIC would have responded with the criminal record of Robert Day. However, the name "Gregory Scott Hermanski" would only be found in that record if Robert Day had ever been arrested using Hermanski's identification, or as Hermanski as an alias. He has not! The only place my name could be found is in my criminal record! And, if a fingerprint search was done with my prints and the name "Robert Day" was revealed, NCIC would have responded that "Day" was an alias and that my true name is Gregory Scott Hermanski. A record search through NCIC will reveal that my prints were submitted for record search upon my arrest by LVMPD or P&P prior to my sentencing, and what information was supplied to those agencies as a result. Thus, either Ms. Dickson provided the State or P&P with my true name, or my true name was discovered in my criminal record due to a fingerprint search.

Next, at my initial appearance before Judge Lippis, in response to my request for bail reduction, Judge Lippis commented that I had 10 or 11 prior felony convictions. Apparently, this comment was based on a notation contained in the Criminal Complaint in this case which advised Judge Lippis of this fact. The notation was placed there by "George Franzen", an employee of the Public Defender's office. (SEE attached). Since the criminal history of "Robert Day" shows only about 4 prior felony convictions and my own shows 11 prior felony convictions, it is apparent that

Exhibit "G"
page 3 of 4

the prior felony convictions noted by Franzen at the outset of this case were my own and not those of Robert Day!

Mr. Wommer, I sincerely hope and pray that this letter helps you to understand my case and to effectively argue it in your Reply Brief. Moreover, not withstanding, the above, the bottom line is that I was prejudiced as the result of the jury basing it's decision, in part, on perjured testimony concerning the prior felony convictions of Robert Day. If the State had proceeded against me properly, under my own name and true criminal history, my entire trial strategy would have been different. I would have never testified at trial.

Thank you for your time and assistance in this matter.

Sincerely,

Gregory S. Hermanski

GREGORY SCOTT HERMANSKI, #69140

/ / / / /

/ / / / /

/ / / / /

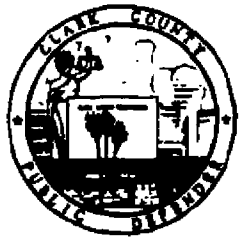
cc: file

4

exhibit "6"
page 4 of 4

Public Defender
MARCUS D. COOPER

Assistant Public Defender
RALPH E. BAKER



PUBLIC DEFENDER MAIN OFFICE
THIRD STREET BUILDING
309 S THIRD ST RM 226
PO BOX 552610
LAS VEGAS NV 89155-2610
LONG DISTANCE TELEPHONE: 455-4011
LOCAL TELEPHONE: 455-4685
FAX #: 455-5112
TT/TDD: 326-6868

December 26, 2002

Paul E. Wommer, Esq.
625 South Sixth Street
Las Vegas, NV 89101

RE: State of Nevada v. Robert James Day
Case No. C167783X

Dear Mr. Wommer:

You have been chosen to represent Mr. Day on the limited questions of whether or not he and I have a conflict of interest which would require me being replaced at this time and/or whether or not I was ineffective in representing him. Mr. Day, himself, is concerned about raising the ineffectiveness claim now because he does not want to preclude being able to raise that in a post-conviction proceeding or on a habeas somewhere down the road.

Mr. Day is presently incarcerated at High Desert State Prison with his inmate ID being number 69140. He is a very articulate and intelligent man who spends a lot of his time reading law books and, apparently, understanding a lot of what he reads.

Mr. Day is actually Gregory Scott Hermanski. However, as I have always known him as Robert Day and as it is in that name that all of the case papers have been filed, that is the name I continue to use.

I will try to give you a synopsis of what has happened in this case to the best of my knowledge. Obviously, matters which have been related to me by Mr. Day are being related to you under the continuing coverage of attorney client privilege.

Our office was originally appointed to represent Mr. Day on April 26, 2000. He was subsequently examined by two psychologists or psychiatrists who found that he was not competent to face trial and he was sent to Lakes Crossing. I was not involved in his case until the preliminary hearing which was held on December 4, 2000. For what it's worth, I have never had any question about Mr. Day's

Exhibit "H"
page 1 of 5

RE: State of Nevada v. Robert James Day
Case No. C167783X

competence.

The substance of the charges in a nutshell is that, on April 22, 2000, Karen Walker, the clerk at the Parkway Inn, at 5201 South Industrial, Las Vegas, was robbed at knifepoint of an amount which has never been specifically determined, but which was in the neighborhood of $1,000.00. The robbery occurred shortly before 1:00 p.m. A short time thereafter, Sergeant Flaherty happened to be in the area of East Tropicana where there is a truckstop by the Wild Wild West Casino where he saw Mr. Day, whom he believed answered the description which had been broadcast. The officer attempted to question Mr. Day who, after a brief conversation, took off running across Tropicana. He was taken into custody while he was inside another truck tractor, allegedly trying to start the engine. Mr. Day had $1,018.00 rolled up in a ball in his pockets. Ms. Walker was taken to the location where she identified him as the person who had committed the robbery.

One of the issues dealt with the identification of Mr. Day. Ms. Walker indicated that the person she had seen did not have any tatoos or marks on his arms while Mr. Day's arms are covered in tatoos. For that reason, I made sure that he was wearing a long sleeve shirt at the preliminary hearing so Ms. Walker could not see his arms. Also, relative to the identification, during the trial we learned for the first time that Ms. Walker had been provided with a picture of Mr. Day by one of the police officers and that she had had that picture during the entire time the case was pending. This revelation took me by surprise at trial and I did not make an adequate record or preserve this issue further for appeal.

A major issue which we attempted to deal with pretrial dealt with the failure of the police officer to preserve the identity of a witness. When Sergeant Flaherty came upon Mr. Day, Mr. Day was speaking to a truck driver whom Mr. Day said he had been working for that day. He said that the source of the money he had in his pocket, was, in large part, from working for that truck driver that day and also as a result of shooting craps in the back of the truck while he was waiting to be paid. Though the officer spoke to the truck driver, he never got his name or identity and, because Mr. Day did not know it, we were never able to locate the truck driver to confirm the fact that Mr. Day had been employed and had been earning money on the day in question, instead of robbing the Parkway Inn.

Exhibit "H"
page 2 of 5

RE: State of Nevada v. Robert James Day
Case No. C167783X

We filed motions to dismiss the case because of the prosecution's failure to preserve this vital evidence, but those motions were denied.

During trial, in alleged rebuttal and over objection from me, the State was allowed to introduce a statement through Sergeant Flaherty that this unknown truck driver had said that Mr. Day offered him $100.00 to drive him to New Orleans. This statement was not contained in any of the police reports and was extremely damaging to Mr. Day's case.

When I first spoke to Mr. Day in November of 2000, he told me that he had a reason for running from the police officer, but refused to tell me what it was at that point. Later, he told me that he had a parole violation from his bank robbery conviction because he had left a halfway house early and that he ran because he believed that he would be arrested on that violation. The district attorney scoffed at this explanation during the trial and we had no factual support of that parole violation.

Subsequently, when Mr. Day was in Nevada State Prison, a detainer was served upon him because of this parole detainer. I have filed a motion for a new trial based on this recently discovered evidence.

The matter went up to the Nevada Supreme Court on direct appeal. While they affirmed the conviction, they did remand for resentencing based on the fact that Judge Hardcastle had sentenced Mr. Day as an habitual criminal only on one count when he should have been sentenced on both counts. We are scheduled for resentencing on January 22, 2003.

The main area of conflict between Mr. Day and myself deals with his identity. At some point after his conviction, though I don't remember whether this was before or after sentencing, Mr. Day called me from the jail and said, "What if I am not Robert Day?" My response, as I recall was "I don't know." Shortly thereafter, and it may even have been in the same phone call, Mr. Day assured me that's who he was, Robert Day.

After Mr. Day was sentenced and sent to NSP, he brought up the subject again and told me he was not Robert Day. He had requested that I provide him with copies of the records which had been used to habitualize him. I had never gotten an actual copy of them, but I got a copy from the court clerk. (The DA changed the alleged priors several times throughout this case.) Included in the

Exhibit "H"
page 3 of 5

RE: State of Nevada v. Robert James Day
Case No. C167783X

records was a copy of a photograph, and fingerprints. Even I could tell in comparing the fingerprints of my Robert Day taken at the time of his arrest here with those of the Robert Day supplied in the certified records that the prints did not match. We contacted Metro and their fingerprint person ran the prints again and she determined that my Robert Day was in fact Gregory Scott Hermanski and not the Robert Day whose records were used to habitualize my client.

Because I was concerned about opening a can of worms at that point, I made sure that Mr. Day wanted me to raise as an issue the fact that he was not the Robert Day whose records were used to habitualize him. He assured me that was, in fact, what he wanted me to do. As it turns out, Mr. Hermanski has a record which is much worse then that of Mr. Day and he is subject to the mandatory big bitch. So far, no one has filed any paperwork to seek that punishment, though Scott Mitchell has indicated that he will be doing so.

Mr. Day and I have both filed several motions post-remand. Among them is a motion for a new trial because the jury was prejudiced by the introduction of a record at trial which was not that of Mr. Day. This is another area in which he and I have had a conflict. I recall speaking to Mr. Day either during the trial before his testimony or before we even started trial and telling him that he would have to admit, if he took the stand, that he had prior convictions. I told him that it would be better for him to admit to those convictions on direct exam rather then waiting for the district attorney to bring them up on cross. One of the convictions was for Bank Robbery. He had no problem with that prior conviction as, apparently, both Mr. Day and Mr. Hermanski had Bank Robbery convictions. The records I had obtained from the district attorney in discovery indicated that he had two North Carolina convictions from 1985 for Embezzlement and Obtaining Money Under False Pretenses. When I discussed those convictions with Mr. Day, he told me that he did not remember them. I told him that the district attorney had proof of the convictions and that he was going to have to admit them, which he did. Of course, as it turns out, he did not remember them because they were not his convictions. Because I didn't know that they weren't his convictions, I made him admit to something he had not done.

We have filed various post-trial motions, all of which are enclosed. As far as I know, Judge Hardcastle has denied them all, though I presume we may get the chance to try again at the time of

Exhibit "H"
page 4 of 5

RE: State of Nevada v. Robert James Day
Case No. C167783X

sentencing.

Mr. Day is convinced that this whole identity issue involves a conspiracy in the district attorney's office; he is convinced that the district attorney has known all along that he was Mr. Hermanski and that they wanted him to plead guilty as Robert James Day so they would not have to pursue the big bitch, knowing that he would never plead to that. I am equally convinced that the district attorney had no idea that Mr. Day was not Mr. Day prior to my showing them the proof. I agree that they should have known he was not Robert Day by doing a simple comparison of fingerprints.

I am enclosing everything from my file which I think may be of benefit to you. If there are any additional materials you need, please let me know. I also welcome you to browse through my file to see if there is anything else that you would like.

Sincerely,

CLARK COUNTY PUBLIC DEFENDER

Dianne M. Dickson
Deputy Public Defender

DMD/ss

cc: Robert James Day, #69140
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

Enc.

Exhibit "H"
page 5 of 5

ORIGINAL

1

JOCP
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

FILED
MAY 16 11 34 AM '03
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,aka,
Gregory Scott Hermanski, #1679345

Defendant.

Case No: C167783

Dept No: IV

AMENDED

JUDGMENT OF CONVICTION

The Defendant previously appeared before the Court with counsel and having previously been found guilty by a jury to the crime(s) of **COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON (Felony) and COUNT II - BURGLARY (Felony)**, in violation of NRS 200.380, 193.165 and 205.060; thereafter, on the 11th day of May, 2001, the Defendant was present in Court for sentencing with counsel wherein the Jury found the Defendant guilty thereof by reason of the Juries Verdict.

THEREAFTER, on the 30th day of April, 2003, the Defendant appeared in court with his counsel, PAUL WOMMER, ESQUIRE, and pursuant to a hearing/proceeding, and good cause appearing to amend Judgment of Conviction; now therefor,

IT IS ORDERED THAT: Defendant ROBERT JAMES DAY, aka, Gregory Scott Hermanski, is sentenced as Habitual Violent Felon under NRS 207.012 on COUNT I and as Habitual Criminal under NRS 207.010(b) on COUNT II, and is sentenced in COUNT I to

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MAY 13 2003
COUNTY CLERK

Exhibit "I"
page 1 of 2

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CK

LIFE in the Nevada Department of Corrections WITHOUT the Possibility of Parole and in COUNT II to LIFE in the Nevada Department of Corrections WITHOUT the Possibility of Parole; Count II to run CONCURRENTLY with Count I with NO Credit for Time Served; Deft. to submit to a test to determine genetic markers. Court advised counsel he can file the appropriate motion as to credit for time served while Deft. serving Federal time.

The Court FURTHER ORDERED, that Defendant pay the $25.00 Administration Fee and $150.00 DNA Analysis Fee.

DATED this 15th day of May, 2003.

DISTRICT JUDGE
Kathy A. Hardcastle

lks

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Exhibit "I"
page 2 of 2

FILED

MAY 20 12 3 PM '03

Shirley B. Parraguirre
CLERK

Gregory Scott Hermanski
Defendant/In Propria Persona
Post Office Box 650 [HDSP]
Indian Springs, Nevada. 89018

DISTRICT COURT

CLARK COUNTY, NEVADA

The State of Nevada,
Plaintiff,

vs.

Gregory Scott Hermanski,
Defendant.

Case No. C167783
Dept. No. IV
Docket C

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, That the Petitioner/Defendant, Gregory Scott Hermanski, in and through his proper person, hereby appeals to the Supreme Court of Nevada from the ORDER denying and/or dismissing the Defendant's Motions for New Trial

ruled on the 4th day of December, 2002.

Dated this 14th day of May, 2003.

Respectfully Submitted,

Gregory S. Hermanski

Exhibit "J"
page 1 of 3

Gregory Scott Hermanski
A/K/A Robert James Day #69140

NDOC No. 69140
P.O. Box 650, HDSP
Indian Springs, Nevada 89018

APPELLANT - IN PROPRIA PERSONA

FILED
MAY 20 12 3: PM '03
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

--ooOoo--

Gregory Scott Hermanski,

Appellant,

vs.

The State of Nevada,

Respondent(s).

Case No. C167783
Dept No. IV
Docket C

DESIGNATION OF RECORD ON APPEAL

TO: SHIRLEY PARRAGUIRRE, Clerk
Eighth Judicial District Court
Post Office Box 551601
200 South Third Street
Las Vegas, Nevada 89155-1601

The above-named Appellant hereby designates the entire record of the above-entitled case, to include all the papers, documents, pleadings, and transcripts thereof, as and for the Record on Appeal.

DATED this 14th day of May, 2003.

Respectfully Submitted By:

Gregory S. Hermanski

APPELLANT - IN PROPRIA PERSONA

//

/

Exhibit "J."
page 2 of 3

CERTFICATE OF SERVICE BY MAILING

I, Gregory Scott Hermanski, hereby certify, pursuant to NRCP 5(b), that on this 16th day of May, 2003, I mailed a true and correct copy of the foregoing, "Notice of Appeal" and "Designation of Record on Appeal" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Shirley B. Parraguirre
Clerk of Court
P.O. Box 551601
200 S. Third Street
Las Vegas, NV 89155-1601

David Roger
Clark Co. District Attorney
200 S. Third Street
P.O. Box 552212
Las Vegas, NV 89155-2212

Supreme Court of Nevada
Office of the Clerk
201 S. Carson St. Ste. 201
Carson City, NV 89701-4702

CC:FILE

DATED: this 16th day of May, 2003.

Gregory S. Hermanski
AKA Robert James Day # 69140
Defendant /In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

Exhibit "5"
page 3 of 3

Nevada Supreme Court Docket Sheet

Docket: 41405 HERMANSKI (GREGORY) VS. STATE

GREGORY SCOTT HERMANSKI A/K/A ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 41405
Consolidated with:

Counsel

Paul E. Wommer, Las Vegas, NV, as counsel for Appellant

Attorney General Brian Sandoval/Carson City, Carson City, NV, as counsel for Respondent

Clark County District Attorney David J. Roger, Las Vegas, NV \ James Tufteland, Chief Deputy District Attorney, as counsel for Respondent

Case Information

Panel: SNP04D **Panel Members:** Rose/Maupin/Douglas
Disqualifications:
Case Status: Closed **Category:** Criminal Appeal **Type:** Direct/Life
Submitted: On Briefs **Date Submitted:** 06/24/04
Oral Argument:
Sett. Notice Issued: **Sett. Judge:** **Sett. Status:**
Related Supreme Court Cases: 38028

District Court Case Information

Case Number: C167783
Case Title: STATE VS. DAY
Judicial District: Eighth **Division:** **County:** Clark Co.
Sitting Judge: Kathy A. Hardcastle
Replaced By:

Notice of Appeal Filed: 05/07/03 Appeal
05/08/03 Appeal
05/20/03 Appeal
05/22/03 Appeal

Judgment Appealed From Filed: 05/16/03

Docket Entries

Date	Docket Entries	
05/13/03	Filing Fee Waived: Criminal.	
05/13/03	Filed Certified Copy of proper person Notice of Appeal. Appeal docketed in the Supreme Court this day.	03-08113
05/13/03	Filed Certified Copy of proper person Notice of Appeal. .	03-08159
05/21/03	Issued Notice to Transmit Required Document. 5/6/03 Amended Judgment of Conviction. Due Date: 10 days	
05/27/03	Filed Certified Copy of proper person Notice of Appeal.	03-08877
05/27/03	Filed Certified Copy of Notice of Appeal. (Docketing statement mailed to counsel for appellant.)	03-08878

Exhibit "K"
Page 1 of 1

Monday, December 20, 2004 02:49 PM

NOTC
STEWART L. BELL
Clark County District Attorney
Nevada Bar #000477
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

FILED

DEC 26 3 34 PM '02

Shirley B. Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI, aka Robert James Day,
#1679345

Defendant.

Case No. C167783
Dept. No. IV

NOTICE OF INTENT TO SEEK PUNISHMENT AS A HABITUAL CRIMINAL

TO: GREGORY SCOTT HERMANSKI, aka Robert James Day, Defendant; and

TO: SHARON DICKINSON, Deputy Public Defender , Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that pursuant to NRS 207.012, the STATE OF NEVADA will seek punishment of Defendant GREGORY SCOTT HERMANSKI, aka Robert James Day, as an habitual criminal as said Defendant has been found guilty of ROBBERY WITH USE OF A DEADLY WEAPON (Felony – NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony – NRS 205.060, 193.165): in the above-entitled action.

That since the Defendant has been found guilty of ROBBERY WITH USE OF A DEADLY WEAPON (Felony – NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony – NRS 205.060, 193.165), the STATE

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DEC 26 2002
COUNTY CLERK

Exhibit "L"
Page 1 OF 4

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NOTC
STEWART L. BELL
Clark County District Attorney
Nevada Bar #000477
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI, aka Robert James Day, #1679345

Defendant.

Case No. C167783
Dept. No. IV

NOTICE OF INTENT TO SEEK PUNISHMENT AS A HABITUAL CRIMINAL

TO: GREGORY SCOTT HERMANSKI, aka Robert James Day, Defendant; and

TO: SHARON DICKINSON, Deputy Public Defender , Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that pursuant to NRS 207.012, the STATE OF NEVADA will seek punishment of Defendant GREGORY SCOTT HERMANSKI, aka Robert James Day, as an habitual criminal as said Defendant has been found guilty of ROBBERY WITH USE OF A DEADLY WEAPON (Felony – NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony – NRS 205.060, 193.165): in the above-entitled action.

That since the Defendant has been found guilty of ROBBERY WITH USE OF A DEADLY WEAPON and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON, the STATE OF NEVADA will ask the court to sentence the Defendant as an

Exhibit "L"
page 2 of 4

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Habitual Criminal based upon the following felony convictions, to-wit:

1. That in 1969, the Defendant was convicted in the State of Florida, for the crime of Attempt Larceny of Auto, in Case No. 69C-565.

2. That in 1971, the Defendant was convicted in the State of Florida, for the crime of Larceny of Motor Vehicle, in Case No. 71-3390.

3. That in 1971, the Defendant was convicted in the State of Florida, for the crime of Breaking and Entering, in Case No. 71-3828.

4. That in 1972, the Defendant was convicted in the State of Florida, for the crime of Burglary, in Case No. 71-3110.

5. That in 1977, the Defendant was convicted in the State of Florida, for the crime of Buying or Receiving Stolen Property, in Case No. 74-7116.

6. That in 1978, the Defendant was convicted in the State of Florida, for Probation Violation, Driving Under the Influence, Federal District Court, in Case No. 766-192.

7. That in 1981, the Defendant was convicted in the State of Florida, for the crimes of Possession of Cocaine and Carrying Concealed Firearm, in Case No. 79-2816CF.

8. That in 1984, the Defendant was convicted in the State of Florida, for the crime of Bank Robbery, in Case No. 81-6119-CR-JAG.

9. That in 1986, the Defendant was convicted in the State of Florida, for the crime of Aggravated Assault, in Case No. 85-784CF.

10. That in 1987, the Defendant was convicted in the State of Florida, for the crimes of Counts I and II, Bank Robbery with Use of a Firearm in the Commission of a Robbery, and Counts III and IV, Bank Robbery With Use of a Firearm in the commission of a Robbery, U.S. District Court, Southern District of Florida, in Case No. 85-662-CR-KING.

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Exhibit "L"
page 3 of 4

11. That in 1998, the Defendant was convicted in the State of Florida, for the crime of Armed Burglary and Armed Robbery, in Case No. 94-24164C.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the State's NOTICE OF INTENT TO SEEK PUNISHMENT AS A HABITUAL CRIMINAL is hereby acknowledged this 26 day of December, 2002.

DIANE DICKSON, Deputy Public Defender
ATTORNEY FOR DEFENDANT
455-5112

BY _____
Justa Johnson
Secretary, District Attorney's Office

SSM/jj

Exhibit "L"
page 4 of 4

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Log Number 2004-26-4529

NEVADA DEPARTMENT OF CORRECTIONS
INFORMAL GRIEVANCE

NAME: Robert Day I.D. NUMBER: 69140

INSTITUTION: H.D.S.P UNIT: 8-D-6

GRIEVANT'S STATEMENT: I am dying from ~~Hepatitis~~ Hepatitis "C". At present, my liver is rock hard and severely enlarged. (Cirrhosis). The medical department has repeatedly refused treatment for my condition, claiming that such treatment is "cost prohibitive". I am in need of treatment. All my requests and grievances have thus far been ignored.

SWORN DECLARATION UNDER PENALTY OF PERJURY

INMATE SIGNATURE: R. Day DATE: 8-24-04 TIME: 12:50 pm

GRIEVANCE COORDINATOR SIGNATURE: X _____ DATE: _____ TIME: _____

GRIEVANCE RESPONSE: Currently Inmate is not a candidate for treatment. Inmate needs to Kite Dr Murford to discuss treatment Inmate's last Kite was May 9, 2004 on his condition.

CASEWORKER SIGNATURE: Moore DATE: 10/14/04

___ GRIEVANCE UPHELD X GRIEVANCE DENIED ___ ISSUE NOT GRIEVABLE PER AR 740

GRIEVANCE COORDINATOR APPROVAL: X _____ DATE: _____

___ INMATE AGREES ✓ INMATE DISAGREES

INMATE SIGNATURE: X Robert Day DATE: 10-27-04

FAILURE TO SIGN CONSTITUTES ABANDONMENT OF THE CLAIM. A FIRST LEVEL GRIEVANCE MAY BE PURSUED IN THE EVENT THE INMATE DISAGREES.

Original:	To inmate when complete, or attached to formal grievance
Canary:	To Grievance Coordinator
Pink:	Inmate's receipt when formal grievance filed
Gold:	Inmate's initial receipt

Exhibit "M"
page 1 of 2

DOC 3091 (12 / 01)

Grievance Printout
Case: GR-2004-26-4529

Inmate	Back#	Emr	Issue	Date Entered
DAY, ROBERT	69140	No	Medical	9/27/2004 2:38:25 PM

Level	Date Rcvd	Date Rtrnd	Finding	Assigned To
Informal	9/27/2004		Denied	Moore #, Robert

Hendrickson

Inmate wants treatment for Hepatitis "C". Inmate claims that medical refuses to help him.

10-20-2004 Currently this innate is not a candidate for treatment. The inmate needs to send a medical request to Dr. Mumford requesting treatment.

X _____ ↑ _____

Grievance responder Administrator

Produced by NDOC Grievance Tracking System

Thursday, October 21, 2004

Exhibit "M"
page 2 of 2

Page 1 of 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

GREGORY SCOTT HERMANSKI,

Petitioner,

vs.

D.W. NEVEN, WARDEN,

Respondent,

Case No: C167783
Dept No: 9

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on July 13, 2005. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

CMC

Calendar on the 21 day of September, 200 5, at the hour of

9 o'clock ___ a.m./pomp. for further proceedings.

7/15/05

District Court Judge For JENNIFER P. TOGLIATTI

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JUL 13 2005
COUNTY CLERK

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09/20/2005 08:49:15 AM

CLERK

OPPS

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411
200 South Third Street
Las Vegas, Nevada 89155-2212
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- GREGORY SCOTT HERMANSKI a/k/a Robert James Day, #167783 Defendant.	CASE NO: C167783 DEPT NO: IX

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

DATE OF HEARING: 9/21/05
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through H. LEON SIMON, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction).

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include the additional count charging Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with 382 days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction based on the discovery that Defendant's true birth name was in fact Gregory Scott Hermanski.

On December 26, 2002, the State filed a notice of intent to seek punishment of Defendant as a habitual criminal pursuant to NRS 207.012(2). On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

Defendant filed a timely appeal from the Amended Judgment of Conviction, case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in case No. 41405,

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[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

affirming Defendant's conviction. Remittitur was issued on July 27, 2004.

Defendant filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's opposition is as follows.

ARGUMENT

I. DEFENDANT'S COUNSEL PROVIDED EFFECTIVE ASSISTANCE THROUGHOUT THE PROCEEDINGS

A. Standard of Review

In order to assert a claim for ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the Defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary

circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not the defendant has demonstrated by "strong and convincing proof" that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). 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).

This 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, 94 Nev. at 675, 584 P.2d at 711. In essence, 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.

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been

different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing Strickland, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., citing Strickland, 466 U.S. at 687-89, 694.

B. Standard of review for appellate counsel

There is a strong presumption that appellate 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. The federal courts have held that a claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; 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). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

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). In Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983), the Supreme Court recognized that part of professional diligence and competence involves "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. The Court also held that, "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.

It seems that Defendant's claims of ineffective assistance of trial counsel are based on the fact that he had represented himself to be Robert James Day and that he admitted to Mr.

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Day's prior felonies based on his counsel advice (he alleges she knew Robert Day was an alias). However, it is the State's position that since Defendant lied about his identity and since he now admits that he lied (committed perjury) when he admitted to the prior felony convictions of his alias, Defendant is now estopped from complaining of the negative effects he suffered since he was the one who caused this error. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002).

Furthermore, to the extent that Defendant is alleging that the Court and the State violated Defendant's due process rights when they "allowed" him to perjure himself by testifying under a false identity, the Nevada Supreme Court in its Order of Affirmance of Defendant's conviction (Supreme Court No. 41405) already rejected this argument when it stated:

> Hermanski was responsible for introducing perjured testimony into his trial by testifying under oath that he was Robert James Day. Furthermore, during direct examination Hermanski perpetuated the fraud by admitting to offenses of which Day was convicted. Hermanski also argues that had the jury known his true identity, the jury would have concluded "Hermanski was not the same violent-type person as Day." Hermanski's assertion is ludicrous. Hermanski had more violent felony convictions on his record than Robert James Day. [Footnote omitted.] Obviously, Hermanski considered it in his best interest to portray himself as Robert James Day, a person whose criminal record was less extensive than his own. We conclude that Hermanski will not now be heard to complain that the jury convicted him under a false identity that he assumed.

Order of Affirmance, No. 41405, p. 2-3. Therefore, it is the State's position that the Law of the Case applies in this instance. Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001); see McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); see also Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). Contrary to Defendant's argument, the State, as argued in its Answering Brief to the Nevada Supreme Court, was only made aware of Defendant's true identity after he was remanded by the District Court for resentencing under his true name. Defendant's claims are wholly without merit.

III. DEFENDANT HAS NOT ESTABLISHED SUFFICIENT GROUNDS TO JUSTIFY AN ORDER TO PRODUCE THE PRISONER

A defendant must be present at those hearings in which the Court deems it necessary to expand the record. See Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002). In the instant matter, Defendant has not shown, nor is there is any need, for the court to receive evidence or take testimony from any party before ruling on Defendant's motion. There is no need to consider facts outside of the record, therefore, Defendant need not be present and his motion to produce should be denied.

IV. DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING IS PREMATURE

A defendant is entitled to an evidentiary hearing if his Petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). "The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required." NRS 34.770(1). However, "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984); (*citing* Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981)).

Furthermore, NRS 34.770 reads in pertinent part:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.

Accordingly, the court is to determine whether a hearing is required when it considers Defendant's Petition and the State's Opposition on September 21, 2005. Defendant's instant request for an evidentiary hearing is, therefore, premature and must be denied.

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///

CONCLUSION

Based on the arguments as set forth above, Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) should be DENIED.

DATED this 20th day of September, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Scott S. Mitchell for
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 20th day of September, 2005, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY S. HERMANSKI, AKA
ROBERT JAMES DAY #69140
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89018

BY J. Robertson
Secretary for the District Attorney's Office

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FILED

OCT 5 8 38 PM '05

Shirley B. Parraguirre
CLERK

Gregory Scott Hermanski
a/k/a Robert Day #69140
PO Box 650 [HDSP]
Indian Springs, NV 89018

Petitioner in proper person

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. GREGORY SCOTT HERMANSKI, a/k/a Robert James Day, Defendant.	Case No. C167783 Dept No. IX

MOTION FOR PRISONER TRANSPORTATION ORDER

DATE OF HEARING: 10-24-05

TIME OF HEARING: _____

"ORAL ARGUMENT REQUESTED"

COMES NOW, DEFENDANT, Gregory Scott Hermanski proceeding in proper person in the above entitled action and moves this Court for a Prisoner Transportation Order for hearing on Petitioner's pro per Petition for Writ of Habeas Corpus on the 24th day of October, 2005 before this Court.

This motion is made and based upon all papers, pleadings on file with the Clerk of this Court, the attached points and authorities and affidavit of Defendant in support of.

///

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RECEIVED
OCT 05 2005
COUNTY CLERK

POINTS AND AUTHORITIES

Defendant seeks an Order directing the Warden of High Desert State Prison to transport Defendant before this Court on the 24th day Of October, 2005 for hearing on Defendant's proper person Petition for Writ of Habeas Corpus at 9:00 AM.

NRS 209.274(1) states;"...when an offender is required or requested to appear before a court in this state, N.D.O.C. shall transport the offender to and from court on the day scheduled for his appearance."

Defendant contends that this Court will hear and recieve evidence at said hearing. In lieu of Defendant's presence a manifest of injust would create preventing Defendant from refuting or otherwise disputing any evidence or expansion of said record. Gerber v. State, 50 P.3d 1092 (2002)

NRS 50.215 permits the prisoner to be present upon a NOTICE, duly served upon the warden of the institution where he is confined. Defendant asserts his presence is necessary to direct, answer and compose the record for appeal if necessary.

NRS 50.215 also imposes an affirmative duty upon the defendant to present an Affidavit demonstrating his need to be present at said hearing. That Affidavit is attached hereto.

CONCLUSION

To prevent a manifest of injustice and to secure Defendant's rights. This Court is urged to grant the instant motion and issue an Order to the Warden of High Desert State Prison to transport Defendant before this Court on the 24th day of October, 2005 at 9:00 AM. for hearing on Defendant's

proper person Petition for Writ of Habeas Corpus.

Respectfully submitted,

Dated this 3 day of October, 2005.

Gregory Scott Hermanski
a/k/a Robert James Day #69140

CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of October, 2005, that I served the foregoing Motion for Prisoner Transportation Order, by placing said in the US Mail postage fully pre-paid addressed as follows:

DAVID ROGERS
D.A. CLARK COUNTY
200 SOUTH THIRD STREET
LAS VEGAS, NV 89155

Gregory Scott Hermanski
a/k/a Robert James Day #69140
PO Box 650 [HDSP]
Indian Springs, NV 89018

AFFIDAVIT OF GREGORY SCOTT HERMANSKI

STATE OF NEVADA)
)ss
COUNTY OF CLARK)

I, Gregory Scott Hermanski (a/k/a Robert James Day), under penalty of perjury, swear and state that;

1) I am the Defendant in the previous entitled action;

2) In said action I am proceeding in proper person;

3) On the 24th day of October, 2005 I have hearing before this Court on said petition;

4) Absent my presence at said hearing I would suffer a manifest of injustice as evidence would be heard and recieved preventing me from refuting or otherwise disputing that evidence;

5) H.D.S.P. has regular daily transportation to and from this Court.

AFFIANT SAYS NAUGHT:

Gregory S. Hermanski
Gregory Scott Hermanski
a/k/a Robert James Day #69140

VERIFICATION

I verify under penalty of perjury, pursuant to NRS 208.165 that I am a prisoner confined within N.D.O.C.; that I am the person named in the foregoing Affidavit; that I have read same and know the contents thereof; that statements made therein are true and correct.

EXECUTED THIS 3rd DAY OF OCTOBER, 2005 AT HDSP.

Gregory S. Hermanski
Gregory Scott Hermanski
a/k/a Robert James Day #69140

FILED

OCT 5 8 38 PM '05

Shirley B. Parraguirre
CLERK

Gregory Scott Hermanski
a/k/a Robert James Day #69140
PO Box 650 [HDSP]
Indian Springs, NV 89018

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs

GREGORY SCOTT HERMANSKI,
a/k/a Robert James Day,

Defendant.

Case No. C167783

Dept No. IX

10-24-05

NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE, that Gregory Scott Hermanski (a/k/a Robert James day), will come for hearing before the above-entitled court on the _____day of _____,2005 at the hour of_____0'clock _____,M. in Department_____, of said court.

Dated this 3rd day of october, 2005.

Gregory S. Hermanski
Gregory Scott Hermanski
a/k/a Robert James Day #69140

RECEIVED
OCT 05 2005
COUNTY CLERK

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ORIGINAL

FILED IN OPEN COURT
OCT 2 4 2005
SHIRLEY B. PARRAGUIRRE, CLERK
BY Judy McFadden
JUDY McFADDEN DEPUTY

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI, aka
Robert James Day,
#167783

Defendant.

CASE NO: C167783

DEPT NO: IX

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR PRISONER TRANSPORTATION

DATE OF HEARING: 10/24/05
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through SCOTT S. MITCHELL, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion For Prisoner Transportation.

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

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COUNTY CLERK

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include the additional count charging Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with 382 days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate that Defendant's adjudication as a habitual criminal was pursuant to NRS 176.015(1)(c), and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering this the district court vacated Defendant's sentence and conducted another sentencing hearing.

---

[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

In response the State also filed a notice of intent to seek punishment of defendant as a habitual criminal pursuant to NRS.012(2) on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated defendant a violent habitual criminal and sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

Defendant filed a timely appeal from the Amended Judgment of Conviction, case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in case No. 41405, affirming defendant's conviction. Remittitur was issued on July 27, 2004.

Defendant filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. Defendant filed his instant motion on October 5, 2005. The State's response is as follows.

ARGUMENT

DEFENDANT HAS NOT ESTABLISHED SUFFICIENT GROUNDS TO JUSTIFY AN ORDER TO PRODUCE THE PRISONER.

A defendant must be present at those hearings in which the Court deems it necessary to expand the record. See Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002). In the instant matter, defendant has not shown, nor is there is any need, for the court to receive evidence or take testimony from any party before ruling on defendant's petition. There is no need to consider facts outside of the record, therefore, defendant need not be present and his motion to produce should be denied.

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CONCLUSION

Based on the foregoing arguments, the State respectfully requests that Defendant's Motion for Prisoner Transportation be denied.

DATED this 21st day of October, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 21st day of October, 2005, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY SCOTT HERMANSKI, aka
Robert Day #69140
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89018

BY _____
Secretary for the District Attorney's Office

AS/HLS/jr

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OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI, aka

Robert James Day,
#167783

Defendant.

CASE NO: C167783

DEPT NO: IX

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR PRISONER TRANSPORTATION

DATE OF HEARING: 10/24/05
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through SCOTT S. MITCHELL, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion For Prisoner Transportation.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include the additional count charging Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with 382 days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate that Defendant's adjudication as a habitual criminal was pursuant to NRS 176.015(1)(c), and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

Subsequent to the Nevada Supreme Court's Remand Order of November 15, 2001, it was discovered that Defendant's birth name was Gregory Hermanski. Upon discovering this the district court vacated Defendant's sentence and conducted another sentencing hearing.

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[1] During the pendency of this case Defendant had gone by the alias "Robert James Day." After Defendant's first appeal to the Nevada Supreme Court, case No. 38028, Defendant's name was amended to reflect his birth name of Gregory Scott Hermanski.

In response the State also filed a notice of intent to seek punishment of defendant as a habitual criminal pursuant to NRS.012(2) on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated defendant a violent habitual criminal and sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

Defendant filed a timely appeal from the Amended Judgment of Conviction, case No. 41405. On July 1, 2004, the Supreme Court filed its Order of Affirmance in case No. 41405, affirming defendant's conviction. Remittitur was issued on July 27, 2004.

Defendant filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. Defendant filed his instant motion on October 5, 2005. The State's response is as follows.

ARGUMENT

DEFENDANT HAS NOT ESTABLISHED SUFFICIENT GROUNDS TO JUSTIFY AN ORDER TO PRODUCE THE PRISONER.

A defendant must be present at those hearings in which the Court deems it necessary to expand the record. See Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002). In the instant matter, defendant has not shown, nor is there is any need, for the court to receive evidence or take testimony from any party before ruling on defendant's petition. There is no need to consider facts outside of the record, therefore, defendant need not be present and his motion to produce should be denied.

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CONCLUSION

Based on the foregoing arguments, the State respectfully requests that Defendant's Motion for Prisoner Transportation be denied.

DATED this 24th day of October, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Scott S. Mitchell
SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 24th day of October, 2005, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY SCOTT HERMANSKI, aka
Robert Day #69140
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89018

BY J. Robertson
Secretary for the District Attorney's Office

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OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
H. LEON SIMON
0411Deputy District Attorney
Nevada Bar #000346
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GREGORY SCOTT HERMANSKI

a/k/a Robert James Day,
#167783

Defendant.

CASE NO: C167783

DEPT NO: IX

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

DATE OF HEARING: 12/21/05
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through H. LEON SIMON, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction).

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 7, 2000, an Information was filed charging Gregory Scott Hermanski[1], hereinafter "Defendant," with one count of Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165) and one count of Burglary while in Possession of a Deadly Weapon (NRS – Felony 205.060). On February 21, 2001, the State filed an Order to Amend Information to include the additional count charging Defendant as a Habitual Criminal (NRS 207.010). On March 13, 2001, Defendant's trial before a jury commenced. On March 15, 2001, the jury returned a verdict of guilty as to both counts. Defendant was sentenced on May 9, 2001, to the following: as to both counts Defendant was sentenced as a habitual criminal to a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months incarceration with 382 days credit for time served. A Judgment of Conviction was filed on May 18, 2001.

Defendant filed a timely direct appeal to the Nevada Supreme Court, case No. 38028. On November 15, 2001, the Supreme Court affirmed Defendant's conviction. However, the Supreme Court remanded Defendant's case for corrections to the sentence and judgment of conviction (1) to correct the Judgment of Conviction so that it reflects that Defendant was convicted pursuant to jury verdict and not a plea of guilty, (2) for the district court to specifically indicate that Defendant's adjudication as a habitual criminal was pursuant to NRS 176.015(1)(c), and (3) for the district court to specify a sentence for each of Defendant's two convictions as the Judgment of Conviction only sets forth one definite term for one offense.

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In response the State also filed a notice of intent to seek punishment of Defendant as a habitual criminal pursuant to NRS 207.012 on December 26, 2002. On April 30, 2003, this Court heard argument, adjudicated Defendant a violent habitual criminal and sentenced him to two concurrent life sentences without the possibility of parole with no credit for time served. An Amended Judgment of Conviction was filed on May 16, 2003.

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Defendant filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) on July 18, 2005. The State's Opposition was filed on September 20, 2005. Defendant filed a Motion for Prisoner Transport on October 5, 2005. The State's response was filed on October 24, 2005. On October 24, 2005, the Court heard argument and denied Defendant's Motion for Prisoner Transport. The Court also ordered a supplemental response from the State regarding Defendant's Ground 3 of his Petition which alleges ineffective assistance of counsel at his resentencing under his true name. The State's supplemental response regarding Defendant's Ground 3 is as follows.

ARGUMENT

I. DEFENDANT'S COUNSEL PROVIDED EFFECTIVE ASSISTANCE THROUGHOUT THE PROCEEDINGS

A. Standard of Review

In order to assert a claim for ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the Defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432,

683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

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

Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not the defendant has demonstrated by "strong and convincing proof" that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). 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).

This 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, 94 Nev. at 675, 584 P.2d at 711. In essence, 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.

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing Strickland, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., citing Strickland, 466 U.S. at 687-89, 694.

B. Assertion that Defendant's counsel failed to make mitigation argument at Defendant's sentencing

In his Ground Three Defendant specifically complains that his counsel was ineffective for failing to make any argument in mitigation to counter the State's request that Defendant be sentenced to the maximum amount of jail time permissible under NRS 207.012(1) which was life without the possibility of parole: "Mr. Wommer failed to argue for the lesser of the 3 possible sentences." Defendant's Petition, p. 9C. On April 30, 2003, the date of Defendant's sentencing, Defendant states that his counsel "*offered nothing except to state*: '[t]he statute does not enable the defense to challenge the validity of the convictions.'" [Emphasis added.] Defendant's Petition, p. 9B, quoting Reporter's Transcript 4-30-03, p. 6. It is the State's position, however, that Defendant's argument is belied by the record and without merit.

The Nevada Supreme Court has held that use of a criminal defendant's prior conviction to enhance his sentence is permissible as long as the State satisfies its initial burden of production by presenting prima facie evidence that the prior conviction existed. Dressler v. State, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96 (1991). A certified copy of the conviction constitutes prima facie evidence of the existence of the prior conviction and a Judgment of Conviction is presumed to be constitutionally sound on its face. Id. at 693, 697. The Supreme Court has also held that a criminal defendant can challenge or rebut the 'presumption of regularity' of a prior judgment of conviction by establishing by a preponderance of the evidence that the prior conviction is 'constitutionally infirm.' Id. at 698. In the present case, read by itself Defendant's counsel's statement gives the impression that he believed he could not challenge the 'validity' of Defendant's prior convictions, and Defendant's argument implies that but for this one statement his counsel stood mute during his sentencing. However, the record is clear that his counsel did in fact argue on Defendant's behalf regarding the question of his habitual offender status.

During Defendant's sentencing the Court permitted each side to argue their positions regarding Defendant's status as a habitual offender. At that time Defendant's counsel argued the following on his behalf:

> Your Honor, in regard to the [pre-sentence] report itself . . . on page 4, there is an error in one of the priors. That top charge relating to the date July 31, 1996, indicates that the crime occurred on that date. Well, if you look in conjunction with Page 3, the last entry where he was at the federal penitentiary at Atlanta, Georgia, the last line indicates that he wasn't released. His mandatory release date was September 30, 1996, but the crime in Dade County occurred on July 31, 1996. It couldn't have been him.

Reporter's Transcript (RT) 4-30-03, p. 4. Notwithstanding counsel's argument on Defendant's behalf the Court reasoned that Defendant's prior convictions as presented to the court in the form of certified copies of his convictions were in essence constitutionally sound and adjudicated Defendant accordingly: "[a]ll right. *Pursuant to statute then with the requisite certified copies of the prior convictions*, one [sic] count I, you are hereby adjudicated a habitual offender. On Count II, you are hereby adjudicated a habitual

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offender. . . . " [Emphasis added.] RT 4-30-03, p. 7. Since there is no indication from the record that the Court believed, notwithstanding Defendant's counsel's statement, that the certified copies of Defendant's prior convictions were constitutionally infirm on their face, the implication is that they were in fact constitutionally sound. There was not much more that Defendant's counsel could say on his behalf.

Further, Defendant subsequently denied on the record that any of the convictions listed in the pre-sentence report were his, however, such a denial does not constitute proof by a preponderance of the evidence that any of the certified judgments of conviction were constitutionally infirm, particularly since all the felony convictions in question were attributed to Defendant based on his fingerprints and other identifying factors via local and federal (FBI) records. Means v. State, 103 P.3d 25 (2004).

Finally, Defendant has not shown that but for his counsel's alleged failure to advise the court of Defendant's medical status or his alleged psychological problems that there is a reasonable probability that the court would have sentenced him to less time. With regard to Defendant's mental problems as mentioned in the pre-sentence report, the Court also had the same pre-sentence report at its disposal at the time of sentencing so it is of no consequence that Defendant's counsel did not offer it as mitigation because the Court was already aware of it. See Pre-Sentence Report, 2-20-03, p. 6. Further, the Court was well aware of the three sentencing options at its disposal notwithstanding the State's request for the maximum penalty of life without the possibility of parole. Defendant's reliance on his alleged mental illness and physical problems do not take away from the fact that he was convicted by a jury after trial. Nor do these points lessen the impact of the certified judgments of conviction regarding Defendant's prior convictions as presented by the State to warrant adjudicating Defendant as a habitual criminal pursuant to NRS 207.012. Given the quantity of Defendant's previous felony convictions as presented to the Court by the State in the form of certified judgments of conviction coupled with the gravity of Defendant's most recent conviction the sentence of life without the possibility of parole was most certainly warranted and justified. Defendant has failed to show that his counsel's representation fell below an

objective standard of reasonableness or that had he advised the court of Defendant's health status or alleged prior mental problems that it would have sentenced him to less time as permitted by NRS 207.012.

CONCLUSION

Based on the arguments as set forth above and in the State's Opposition to Defendant's Petition filed on September 20, 2005, Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) should be DENIED.

DATED this 7th day of December, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Scott S. Mitchell for
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 8th day of December, 2005, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GREGORY SCOTT HERMANSKI, aka
ROBERT JAMES DAY #69140
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89018

BY J. Robertson
Secretary for the District Attorney's Office

HLS/SA/jr

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
August 12, 2011 2:47 p.m.
Tracie K. Lindeman

GREGORY S. HERMANSKI,
Appellant(s),
vs.
STATE OF NEVADA,
Respondent(s),

Case No: 00C167783
SC No: 58688

RECORD ON APPEAL
VOLUME
2

ATTORNEY FOR APPELLANT
GREGORY S. HERMANSKI # 69140
PROPER PERSON
P.O. BOX 7000
CARSON CITY, NV 89702

ATTORNEY FOR RESPONDENT
DAVID ROGER, ESQ.
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NEVADA 89101

Docket 58688 Document 2011-24627

00C167783 STATE OF NEVADA VS. GREGORY S. HERMANSKI

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A Between buildings.
Q Between buildings?
A Um-hum.
Q You're familiar with this area, is that correct?
A Yes.
Q You drive there every day for a year or so, right?
A Um-hum.
Q And how did you drive when you drove there?
A I went down Ali Baba.
Q From where?
MR. FATTIG: Objection, relevance.
THE COURT: Overruled. Go ahead.
THE WITNESS: I come from Tropicana and then I went down Valley View, I think, and then up Ali Baba to work.
BY MS. DICKSON:
Q So, you wouldn't go down Industrial, you would, I guess, take the back way, Valley View to Ali Baba?
A Right.
Q Are you familiar with the fact – well, I'm pretty sure that there's an industrial area there, but are you familiar with the fact that there's a lot of chain link fences around most of those properties?
A No.
Q You're not familiar with that?
A No.

Q Have you ever walked from the Parkway Inn to Tropicana?
A No – well, yes, I have.
Q Okay, how many times?
A Industrial Road.
Q I'm sorry?
A On Industrial Road, I have.
Q You would walk up Industrial to get to Tropicana?
A I have.
Q You have. How many times have you done that?
A Once.
Q Do you know how long it took you?
A No.
Q Where did you go when you went onto Tropicana?
A To the Wild Wild West.
Q The person who robbed the Parkway Inn took no change, is that correct, only paper money?
A Yes.
Q Now, you said there was some money – I'm sorry, did you say there was some money on the floor?
A There was.
Q There was some money on the floor. Do you know how much?
A Not exactly. Actually, it was picked up by one of the workers that came in.

Q Did you see that or they just told you that?
A No, I saw that.
Q Okay, you saw one of the workers pick it up?
A I saw it. It was there when he was putting the money in his pocket. He had dropped it. I seen that when I left.
Q And at some point did you see somebody picking it up?
A I seen – Julio walked in and picked it up.
Q And you saw Julio pick the money off the floor?
A Yeah.
Q Do you know how much there was?
A No.
Q What did he do with that money?
A He just brought it back behind the desk and put it on the counter. Anyway, I guess he gave it to the boss, I don't know.
Q Now, when you and your boss did the accounting later on, were you counting that money as money that was stolen or as money that you still had there?
A We didn't count the change. All we did when we counted was the money that was in the computer and what was there.
Q And what was there includes the money that Julio had found on the floor and given back, is that correct?
A The only thing that he left was the change, ma'am, and what was on the floor.
Q That's what I'm asking about, the money that's on the floor.

A Right.

Q At some later time, you and your boss sat down and figured out that there was something over a thousand dollars, though you don't remember the exact amount.

A Yeah.

Q When you counted and figured out that there was over a thousand dollars missing, were you taking into account the fact that Julio found fifty dollars or a hundred dollars, or whatever he found on the floor?

A I'm not sure.

Q Okay. Do you ever wear glasses?

A Excuse me?

Q Do you ever wear glasses?

A All the time.

Q Are you wearing contacts now?

A No, I have them right here.

Q Are they for reading or for distance?

A For reading.

Q Now, I want to take you back to April of 2000 and I want you, as best as you can, to tell me what the description was that you gave the police of the person that had robbed the Parkway Inn.

A He had salt and pepper gray hair, with a mustache. He had blue Levi's on, a blue and white T-shirt on.

Q When you say Levi's ma'am, do you mean the actual brand name Levi's, or do you just mean jeans?

A Jeans, I don't know what brand they were, I didn't see them.
Q Do you remember whether you gave the police any other description?
A Not that I recall.
Q Did you give any age description?
A Well, I might have, I'm not sure.
Q Did you give any height description?
A He was about my size, my age.
Q So, you told the police he was about your size and age – I mean, your height, height and age?
A Yes.
Q And how tall are you, ma'am?
A 5'5."
Q And, I'm sorry, your age?
A 52.
Q Was there anything else you gave them in terms of a description?
A No, not that I recall.
Q Did you observe – strike that – let me go back. When you got back from going around to the front or wherever – I'm sorry, I don't know where the directions are – going around and seeing this person go off in the industrial area, you said when you came back the police were there?
A Yes.
Q Were these uniformed patrolmen?

A Yes.

Q They were in uniform. And they at that time asked you for a description, is that right?

A Yes.

Q And you gave them a description?

A I did.

Q Do you know whether they were filling out forms as you were giving them this description?

A I don't recall them filling out forms.

Q Did they ask you specific questions about, you know, height, weight, age, or did they just ask you to describe the man?

A I don't recall.

Q Did they ask you if you knew the man?

A Yes, I think they did. They asked me if I'd seen him before.

Q Did you tell them yes or no?

A Actually, I think I volunteered that information.

Q Did you tell them that, yes, you had seen him or no, that you had not?

A Yes.

Q You told them, yes, you had seen him before?

A Yes.

Q Did they ask you if he had any scars or marks or tattoos, or anything like that distinguishing him?

A They probably did.

Q And you told them, no, he did not?

A I didn't remember seeing any.

Q Okay. You don't remember seeing – as you sit here today, you don't remember seeing any scars, marks, tattoos, nothing of that nature, is that right?

A That's correct. Actually, I didn't pay attention.

Q Well, you were looking at the guy's hand, right?

A His hand?

Q The one with the knife in it. Looking at his hands as they're in the money drawer.

A Um-hum.

Q And as he's putting the money in his pockets, right?

A Right.

Q Now, shortly after that, after you talked to these police officers, did they stay on the scene or did they go somewhere then?

A They left.

Q They left. And you said maybe 20 minutes or so later they took you somewhere?

A Yes, there was a couple of them that was there with me, though.

Q That stayed the whole time?

A Well, I don't recall if they stayed the whole time. I know they came and had me fill out, start filling out a report.

Q Okay, asking you to write a statement?

A Right.

Q And that was before you were taken to identify anybody, is that correct?

A Yes.

Q You started it before and then you finished it after you'd actually done the identification, is that correct?

A Yes.

Q Now, you were taken by some police officers. Do you remember who those police officers were?

A I don't remember his name.

Q Do you remember whether he was in uniform or not?

A He was in uniform.

Q So, a uniformed police officer took you over – where did he take you?

A He took me over to the Harley Davidson shop next to McDonald's, in the parking lot.

Q Okay, there's a motorcycle shop next to the McDonald's, is that right?

A That's correct.

Q And they told you that they thought they had the person who had done the robbery, is that right?

A That's right.

Q Now, you were in a police vehicle, was that right?

A Yes.

Q Were you sitting in the front or the back seat?
A I was sitting in the front seat.
Q The front seat. And you never got out of the vehicle to do this identification, is that right?
A No.
Q I'm sorry. No, you never got out, or no, I'm not right?
A No, I never got out.
Q You never got out. So, the police say, we think we have the person who did the robbery, come with us, they put you in the police car, they take you over to the motorcycle shop and you see Mr. Day in handcuffs, is that right?
A Right.
Q Standing in front of a police vehicle?
A Right.
Q With police all around?
A Right.
Q He was over in the McDonald's parking lot, is that correct?
A That's correct.
Q And how far away was he from you?
A Maybe from here to the back wall.
MS. DICKSON: Do we know what that is, Your Honor?
THE COURT: It's approximately 40 feet.
BY MS. DICKSON:
Q Okay, so he was about 40 feet away?

A Yeah, I'd say, probably.

THE COURT: From the back wall to – from this wall to the back wall is 39 feet and 3 inches.

MS. DICKSON: Close enough.

BY MS. DICKSON:

Q So, you're sitting in the car, he's about 40 feet away over in the McDonald's lot in handcuffs with police around him and they say, we think this is the person that robbed you, is he the guy, and you said, yes, right?

A Right.

Q Now, Mr. Day was not wearing a shirt, is that correct?

A That's correct.

Q Now, you also saw Mr. Day at the preliminary hearing a few months ago, is that right, in the Justice Court here?

A That's correct.

Q Have you been shown his picture on any other occasions?

A Yes.

Q When?

A Actually, they brought a picture to me after it had happened, a little photo.

Q Before you were brought over to do the identification?

A No, it was later.

Q Later?

A After it was already over.

Q They brought a picture of Mr. Day to you?
A Are you talking about before I identified him?
Q Okay, let's start again, because I'm not clear.
A Okay, me either.
Q At some point, the police brought you a picture of Mr. Day, correct?
A Yeah, right.
Q Do you know who that police officer was?
A Yeah, I do.
Q Who was it?
A I don't know his name, I just know what he looks like.
Q Okay, did you see him in the hall today?
A Yeah.
Q Is he in uniform or not?
A Yes.
Q He's in uniform today?
A Yes.
Q He showed you a photograph, and what was the purpose for him showing you this photograph?
A I asked for the photograph so that we could all, everybody that worked there, would see him in case he came back, even though he was in jail.
Q Okay, so you asked just so everybody else could see the person that you said had robbed the place, is that right?

A Right.

Q And when did he give that to you, in relation to when you did the identification?

A I'm not sure.

Q Before or after, or you're not sure?

A It was later on.

Q It was afterwards, is that what you're saying?

A It was afterwards, yes.

Q Do you know what happened to that picture?

A It was at the office.

Q So, that's where you left it?

A Yeah.

Q How much does a room cost at the Parkway Inn, or did it cost back in April of 2000?

A I think it was twenty-nine something or thirty-three something.

Q So, less than fifty dollars, is that correct?

A Right.

Q Do you have any recollection of the kinds of bills that you got in that day, whether you had 50's, 100's?

A I don't remember, ma'am.

MS. DICKSON: Court's indulgence, just for a moment.

I have no other questions, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. FATTIG:

Q Do you know whether or not there was a surveillance camera inside that office that day?

A There was but it was not working.

Q When you saw the defendant with a knife at his side, what was going through your head?

MS. DICKSON: Objection, Your Honor, that's not relevant.

THE COURT: Overruled.

BY MR. FATTIG:

Q What were you feeling?

A Scared.

Q The money that fell on the floor in the office, how much money was that?

A I think it was just a couple of dollars, but I'm not really sure. I don't know. It wasn't very much.

Q It wasn't very much?

A No.

Q When the police took you to the McDonald's, what exactly did they say about the person they had?

A They said they thought they might have the person that might have robbed me, but they weren't sure, and asked me if I would come and identify him if I could, and I went and it was Mr. Day.

Q How positive are you that the person that the police had at

the McDonald's, the defendant, is the person that robbed you at knife point that day?

A Absolute. I'm absolutely sure it was Mr. Day.

MR. FATTIG: Nothing further, Your Honor.

RECROSS EXAMINATION

BY MS. DICKSON:

Q Ma'am, you keep referring to Mr. Day –

A Uh-huh.

Q When did you learn Mr. Day's name?

MR. FATTIG: Objection, outside the scope.

THE COURT: Overruled.

THE WITNESS: After he was arrested.

BY MS. DICKSON:

Q So, when you're talking about all these incidents that happened and you said Mr. Day did this and Mr. Day did that, you didn't know Mr. Day at that time, correct?

A I didn't know his name, no.

Q And it's the police who gave you the name of the person they arrested as Mr. Day, is that right?

A Right.

Q Now, you said that you think there was only a couple of dollars on the floor, and you're not sure exactly how much, but would you say less than ten?

A I'm not sure.

MS. DICKSON: I have no other questions.

MR. FATTIG: Nothing further.

THE COURT: All right. Thank you, you may step down.

MR. FATTIG: Douglas Huffmaster?

Can we approach, Your Honor?

THE COURT: You may.

(Whereupon a bench conference was held)

THE COURT: Please come all the way forward and remain standing.

DOUGLAS HUFFMASTER

Having been called as a witness and being first duly sworn testified as follows:

Q Sir, how are you employed?

A Sir, I'm employed with the Las Vegas Metropolitan Police Department as a patrol officer.

Q For how long?

A Almost three years, sir.

Q Back on April 22nd of 2000, were you on duty?

A Yes, sir.

Q And what part of town were you patrolling that day?

A I was patrolling Southwest Area Command, ocean area.

Q Is that near Tropicana and Industrial, does that encompass that area?

A Yes, sir.

Q Did you receive a call sometime near one o'clock regarding a

robbery in the area?

A Yes, sir.

Q What did you do after you received the call?

A I put myself en route and proceeded from where I was located to the actual location of the robbery.

Q Was that – did you proceed to 5201 South Industrial?

A Yes, sir.

Q How long did it take you to get there?

A No more than three to five minutes, sir.

Q When you arrived on the scene, what did you do?

A The first thing I did is I met the PR – person reporting – which was the clerk at the Parkway.

Q Is that the person that just left the courtroom before you?

A Yes, sir.

Q When you met her, what did you do?

A The first thing I asked her is what had happened and she stated what had happened, and after that I asked her for a description, just basically the same thing we always do.

Q Did you obtain a direction of travel?

A Yes, sir.

Q And do you remember what she told you?

A Yes, sir. The subject ran northbound.

Q The information that she gave you in terms of a description, what did you do with that?

A I immediately put it out over the radio.

Q Were you accurate in conveying that information?

A As accurate as she told me. I went by exactly what she had told me.

Q Did you also convey information on where the person was last seen going towards?

A Yes, sir.

MR. FATTIG: I have nothing further, Your Honor.

CROSS EXAMINATION

BY MS. DICKSON:

Q Officer Huffmaster, do you remember what that description was?

A Ma'am, if I'm not mistaken it was late 40's, gray hair, blue shirt and jeans.

Q Anything else in this description?

A No, ma'am, not that I remember.

Q Officer, are you responsible at all for filling out, in this case, any of the paperwork with respect to description and all the little forms that the police have to fill out for every incident?

A Yes, ma'am.

Q What forms did you fill out?

A I filled out the Incident Report, along with Officer Mullins.

Q Would that be this one?

A Yes, ma'am.

Q And did you do that when you first arrived at the scene?

A Not immediately, ma'am. The immediate concern was to, if we could apprehend the subject, apprehend the subject.

Q So, you got this description and broadcast that and then you did the paperwork?

A Yes, ma'am.

Q So, it was within minutes of getting there, is that right?

A Yes, ma'am, it wasn't more than thirty minutes at the most.

Q Okay. And there are police forms that you fill out in every case, right?

A Yes, ma'am.

Q Lots of paperwork. And some standardized forms that you ask a victim of a crime specific facts to get a better description, is that right?

A Yes, ma'am.

Q Like you ask the build, whether they're left or right handed, what their hair length is, their hair style, on and on and on, lots of questions, right?

A Yes, ma'am.

Q And you asked Ms. Walker, the lady that just left the courtroom, those questions in this case, is that correct?

A Yes, ma'am.

Q And did you ask her whether he had any scars, marks, tattoos, or injuries?

A Yes, ma'am, we did.

Q And what did she say?

A If I'm not mistaken, at that time she didn't –

Q Do you need to see your report?

A That would be nice.

MS. DICKSON: Okay. May I approach, Your Honor?

THE COURT: You may.

BY MS. DICKSON:

Q Does that help refresh your recollection?

A Yes, ma'am.

Q And that's the report that you filled out at the scene while she's telling you these things, is that right?

A Yes, ma'am.

Q And what did she say about marks, scars, tattoos?

A According to this she said there was none, none observed.

Q None observed?

A None observed.

Q Now, there's also a question whether she's had any pre-incident contact, is that right? Meaning, does she know this person from before?

A Yes, ma'am. Actually, I don't know if it means pre-incident contact meaning that day or –

Q Or ever?

A Well, the same thing here it says pre-incident contact, 2, 3, 4. It's like gambling, making an arrest, opening or closing a business. I don't

know if it means forever or pre-incident that day.

Q I must be looking at the wrong thing.

A No, it says none, number one says none.

Q Oh, okay.

A That's what it has on there, but –

Q So, she was asked if there was any pre-incident contact and she said no.

A Like, for example, sometimes people come in to case an area before they actually do rob it.

Q Okay, I've heard of that. And she said no, that that hasn't happened in this case?

A Not that day, no.

Q Or that she hadn't – did you get any other information from her at that time?

A Ma'am, just basically what's in the report there.

Q Okay. Did you get a dollar amount of how much was missing?

A Not at the initial contact, and at that time I don't remember putting an actual dollar amount down. I think Officer Mullins did when they counted – I don't know if they counted out the drawer at that time or not.

Q Were you involved in that at all?

A No, ma'am.

Q Were you there when it happened?

A I'm not sure, ma'am.

MS. DICKSON: May I approach the witness again, Your Honor?

BY MS. DICKSON:

Q Officer, I'm going to show you your Incident Report again.

A Yes, ma'am.

Q Is that your writing?

A I believe it is Officer Mullins' writing, ma'am.

Q That's Officer Mullins that has the -- various denominations and the amount?

A Yeah, various denominations, a thousand fifty-one.

Q So, you didn't write that, but would you have been there when she related that to Officer Mullins?

A Yes and no, ma'am. The reason why I say that is --

Q Explain that one.

A Okay, the reason why I say that is is because I don't know exactly who did the count out of the drawer, whether it was the manager or her.

Q Okay.

A Okay, and there were other things involved with her that I did.

Q So, would it be fair to say you don't recall at this point any information about the amount that was supposed to be taken?

A Other than what's on that report, ma'am.

Q But you didn't write what's on this one, with respect to that amount, correct?

A No, we did that together.

Q So, when you look at this report, does it refresh your

recollection of how much you were told was taken?

A Yes, ma'am.

Q Okay, and how much was taken? How much were you told was taken?

A According to that, it says one thousand fifty-one dollars, ma'am.

Q And you and Officer Mullins wouldn't have written that down if that isn't what you were told, is that right?

A Yes, ma'am.

Q Did you have – strike that – let's go back. How long were you there at the Parkway Inn?

A I would say probably, usually when I take a report 60 minutes.

Q Is that about what it would have been in this case?

A That would – that's a best guess.

Q I assume you've done a whole lot of calls since this one almost a year ago, is that right?

A That's my job, handle calls.

Q We keep you busy in Las Vegas, I am sure. So, you've had probably hundreds of incidents you've responded to since this day, is that right?

A Yes, ma'am.

Q And some of the clarity gets lost of some of the details of all of these incidents, is that correct?

A Yeah, none of us are perfect.

Q That's why you need the police reports so you can look at them and rely on what you were told back then, is that right?

A Yes, ma'am.

Q So, normally you would be there about an hour and you don't know of anything to think you may have stayed some different amount of time in this case, anything unusual going on?

A Not really unusual, we – the only other thing was the actual apprehension of the suspect.

Q Now, were you involved in that at all?

A I wasn't involved in the apprehension, ma'am. My job was to call it out and get other units to that location.

Q Which is what you did?

A Yes.

Q Did you – were you involved at all in taking Ms. Walker over to identify someone?

A Yes, ma'am.

Q And what was your role in that?

A My job was the officer to take her to the location of the suspect that was in custody at that time, to identify the person.

Q Did you do that alone or was there someone else?

A I did it by myself, ma'am.

Q So, she was in your police vehicle?

A Yes, ma'am.

Q And do you remember where you went when you took her

there?

A Yes, ma'am.

Q Where?

A We went to the – basically the parking lot of the Honda dealership, which is adjacent to the McDonald's.

Q And you parked your vehicle there?

A Yes, ma'am.

Q And Mr. Day was in custody over at the McDonald's lot, is that correct?

A Yes, ma'am.

Q In handcuffs?

A Yes, ma'am.

Q There was no one else around that was a suspect, is that correct?

A There was no one else in custody, ma'am.

Q He was the only person she was asked to identify, is that correct?

A Yes, ma'am.

Q And how far away was he from the police vehicle?

A From my vehicle, ma'am?

Q Yes.

A Probably no more than 10 yards.

Q 30 feet? That would be 10 yards, right? Okay. Did you see any money at that time when you were –

A Not when I was in the vehicle with the person that was identifying.

Q Did you get out of the vehicle at some point?

A Not when we did the identification, ma'am.

Q You're making it sound like at some point you saw the money. Did you see the money at some point?

A Yes, ma'am.

Q When was that?

A When we saw the money was after the report was taken, she was taken back, of course, prior to that. After the report was taken, we cleared the Parkway and then went to the location where the subject was at.

Q And you had some further involvement in the case at that point?

A The only further involvement I had was to ask if anybody else needed any help?

Q But, Ms. Walker was not with you at that time?

A No, ma'am.

Q By the way, was the manager with you when you did this identification?

A No, ma'am.

Q Were you involved in turning the money that was taken from Mr. Day over to the manager?

A No, ma'am.

Q Were you involved in counting the money at any point?

A No, ma'am.

Q Do you remember what denominations of bills you saw?

A No, ma'am, I really don't.

MS. DICKSON: Okay. I have no other questions.

MR. FATTIG: Nothing further.

THE COURT: All right. Thank you, Officer, you may step down.

MR. FATTIG: Billy Ramirez?

BILLY RAMIREZ

Having been called as a witness and being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. FATTIG:

Q Sir, how are you employed? What's your job?

A I'm the general manager.

Q Are you the general manager of the Parkway Inn at 5201 South Industrial?

A Yes, sir.

Q On April 22nd of last year, did something unusual happen at the Parkway Inn?

A Yes, sir.

Q What was the first thing that happened – how were you notified?

A I was notified by my desk clerk and I was in my room. She said to me that she was being robbed.

Q Was that Karen Walker?
A Yeah, her name is Karen Walker.
Q After she told you that, what did you do?
A I called 9-1-1.
Q Did the police come on the scene?
A Yes, sir.
Q Did you find out whether any money was taken from the Parkway Inn?
A Yes, after that they checked her drawer and the cash we received that day, and they counted it.
Q How did you go about checking how much money was supposed to be in the cash drawer?
A Basing on our computer cash report.
Q And, you have a normal way of keeping track of the money that is supposed to be in the register?
A Yes, it's –
Q It's right there on the computer?
A Right in the computer.
Q And did you look that day, in terms of in the computer in the records you normally rely on, did you look and determine how much money was supposed to be in that register?
A Supposedly, we have originally five hundred dollars bank for change –
Q That's the bank, okay.

A – and the money including that five hundred is a little over a thousand.

Q Do you know – can you get any more accurate in terms of a little over a thousand? Do you remember how much?

A I do not recall, but I know it's a little over a thousand.

Q Did the police bring you some money back?

A Yes, they did.

Q Was that later that day?

A The same day after a couple of hours, maybe.

Q How much money did they bring back?

A They bring back over a thousand. It's only missing by twelve dollars.

Q So, the amount of money they gave you back was missing by twelve dollars –

A By twelve dollars.

Q – in comparison to how much had been taken?

A I'm sorry?

Q The amount of money that was taken from the drawer, minus the amount of money that the police gave you back, was that twelve dollars?

A Yes, twelve dollars.

Q Twelve dollars less?

A Yes. Yes, sir.

Q Was there a surveillance camera in the Parkway Inn that day?

A During that time we do not.

Q You didn't have one?

A I don't recall, but we do not have during that time.

MR. FATTIG: Nothing further, Your Honor.

CROSS EXAMINATION

BY MS. DICKSON:

Q Mr. Ramirez, how long have you been the manager there?

A I've been the manager since November of 1999; November 12, to be exact.

Q So, in April of 2000 when this occurred, you had been the manager for five, six months, something like that?

A Five, six months.

Q Had you worked there before that or were you new to the Parkway Inn in November?

A I was very new here.

Q New in Las Vegas?

A In Vegas.

Q And you're still employed there, is that right?

A Correct.

Q Now, Karen Walker came back and said something about, we're being robbed, and you called 9-1-1. Did she give you any kind of description about the person who had done the robbery?

A I didn't even ask because she was so very nervous –

Q Upset?

A – upset.

Q Had you ever seen her that upset before?
A No, no. Scared, too.
Q Upset and scared. So, at that point you figured that there wasn't even much point in trying to question or talk to her because she was just so upset?
A She's just upset, running around, nervous.
Q You called 9-1-1?
A Yes, I did.
Q And the police responded, is that correct?
A Responded.
Q They came out there. Did you go outside and see if you could see the person who had done the robbery at all?
A I never had chances to go out because Karen wasn't behind the desk during that time, and I don't want to leave the desk if there is nobody in the front desk.
Q Were you made aware of the fact that there was some money that was on the floor?
A I saw, but I don't know how much.
Q At some point in time was that money returned to you?
A Yes, they did return – by one of my employees.
Q One of your employees gave you back the money that was on the floor. Did you count it at that time?
A I never had chances to do that because –
Q Now, at some point in time you did a count, checked your

computer to see how much money was missing, is that right?

A That's correct.

Q And you told the police how much you had determined was missing, is that correct?

A That's correct.

Q And as you sit here today, you don't remember what that amount was?

A I know it's a little over one thousand, but I don't exactly remember the exact figure.

Q Did you keep any records of this?

A Not at this point, I don't have with me.

Q You don't have them with you or you don't have records at all?

A I don't have it with me.

Q Did the police ask you to keep the records of how much was missing?

A He didn't say that. As long as the money is okay, this is how he says, thank you very much.

Q So, if the police report reflects that you told them it was one thousand fifty-one dollars that was missing, does that sound like the correct amount?

A I don't exactly recall but I know it's a little over one thousand.

Q When did you do the count?

A Right after the police gave me the money.

Q After they gave you the money back – gave you money?
A Yeah, in front of them I counted.
Q I'm sorry, I guess I wasn't clear. When did you do the count of the computer and the drawers?
A Right at the same –
Q At the same time?
A – at the same time.
Q So, after the police gave you one thousand eighteen dollars and fifty-five cents from Mr. Day, that's when you counted up how much was missing?
A No, I counted it earlier. I did not count it physically, but I looked in the computer.
Q In the computer?
A How much is the cash we received that day and the amount of money we had in the bank.
Q So, before you got the money from Mr. Day from the police, you had figured out how much was missing, is that right? And you told the police that?
A Yeah.
Q And then at some point the police gave you money that they had gotten from Mr. Day, is that right?
A Yes.
Q And you counted that money then?
A I counted in front of the police officers.

Q Do you remember that it was one thousand eighteen dollars and fifty-five cents?

A I know it's a little over one thousand.

Q Do you remember what the denominations were of those bills?

A That I cannot -- I don't even remember.

Q Do you remember whether there were any hundred dollar bills in there?

A I know there was a lot of singles and twenties and tens, but I don't recall how many – what are the denominations.

Q Let me go back, I meant to ask you this but I forgot. When you were figuring out how much money was missing, when you were looking at the computer and you figured out some amount which you told the police, you had also had money that your employee found on the floor and returned to you, is that right?

A That's correct.

Q Now, when you figured in how much money was missing from the drawer, based on what the computer said, were you counting back in that money that had been found on the floor?

A I did not count it, because like I told you before, we were being panicked. I just put it in the drawer and wanted to be aware because of the incident.

Q Do you know – I understand that you don't remember, but let's assume for the moment that what you told the police was that there

was one thousand fifty-one dollars missing, based on your computer check, right?

A Right.

Q Did you look in the drawer to see if there was any money in the drawer at that time?

A Yes, if I remember, there are some change, like quarters, dimes, nickels, and pennies.

Q And how about the money that was picked up off the floor?

A It's a couple of dollars, I think. I'm not too sure about it.

Q When you figured out that you should have, hypothetically, one thousand fifty-one dollars in the drawer, did you then go in the drawer and say, well, here I've got a ten dollar role of quarters and here's a couple of ones, so that we're only missing one thousand forty dollars?

A A little over a thousand, yeah.

Q That wasn't my question. Did you count back the money that was in the drawer when you were doing that calculation?

A To begin with, I told you I don't remember. I just base on the computer the amount of cash and the bank, I know it's five hundred dollars.

Q And did you check in that drawer to see – is part of that five hundred dollars change or is that all bills?

A Bills and coins.

Q There's also coins in that five hundred dollar drawer?

A That's correct.

Q So, figuring that five hundred dollars was taken, there was

also change in that drawer, so there wasn't five hundred dollars taken, is that right?

A In the drawer?

Q Right.

A I saw a lot of, a few coins there, but when the police returned the money, it's a little over a thousand.

Q Let me try again. The police want to know how much money is missing, correct?

A That's correct.

Q You look in your computer to figure out how much money you should have in your drawers, correct?

A Correct.

Q And you can tell that because you know you start off with five hundred dollars in one drawer, two hundred dollars in the other drawer –

A No, one hundred and four hundred.

Q I'm sorry?

A On the other drawer there is always four hundred, that is the change. And the other drawer there is always one hundred, that is the bank. A total of five hundred.

Q Oh, it totals five hundred, it doesn't total seven hundred, the bank?

A In excess of that is the money that we receive from any clients, from any guests.

Q So, one drawer has four hundred dollars –

A It's always four hundred.

Q Not five hundred?

A The other drawer with one hundred is in the change. We have two drawers.

Q I understand that.

A Okay.

Q How much is in the bank drawer?

A Four hundred and one hundred.

Q Okay, so there's four hundred in bills and one hundred in change, is that what you're saying?

A No, all of them are either way, either bills, either singles, either coins, either quarters.

Q And that's in one drawer or two drawers?

A Two drawers.

Q So, there's four hundred in one drawer and one hundred in the other drawer is what you're saying?

A Correct.

Q And some of it's bills and some of it's change in both drawers?

A Correct.

Q So, anything over five hundred dollars that was in those drawers at the time of the robbery is what was taken in that day, is that correct?

A Correct.

Q Now, when the police asked you to determine how much money was missing and you looked on your computer and you came up with an amount, correct, which you don't remember today, but you came up with some amount, right?

A Correct. It is the – hold on. It is not me, it is my desk clerk, who is Karen Walker.

Q So, you're not the one who did this?

A Karen Walker is the one in charge. I was the one who was talking to the police officer and the detectives, whoever was there.

Q Do I understand that you're not the one who did this counting, Karen is the one who did the counting?

A I count the money when they return it back, in front of Karen.

Q But not – I'm sorry, I didn't mean to cut you off. You didn't do the count to determine how much money was missing?

A When they return it to me.

Q I understand you counted the money that they gave you from Mr. Day. Did you – are you the person who determined how much money was missing?

A It says in the computer.

Q Are you the person who told the police what it said in the computer?

A It was Karen Walker who is –

Q Karen was the one who did that?

THE COURT: Please let him finish his answer before you cut him off.

MS. DICKSON: I'm sorry, Your Honor.

THE COURT: You're contributing to the confusion here.

THE WITNESS: I am very confused about your question. It's very simple. We have five hundred bank. In excess of that is the money we received from guests. Asking me about the denominations – I cannot even remember that because we were so confused, we were so panicked about, and plus we have a lot of guests in there and I'm afraid, I'm embarrassed for the guests because of the incident.

BY MS. DICKSON:

Q That's not my question. Who told the police how much money was missing, you or Karen?

A Karen.

Q So, Karen is the one who checked on the computer to see how much that was?

A She was the one on duty.

Q Okay.

A I'm a manager. I don't participate in the money counting behind the desk, in the cash position behind the desk.

MS. DICKSON: I have no other questions.

MR. FATTIG: Just one, Your Honor.

REDIRECT EXAMINATION

BY MR. FATTIG:

Q Did you ever look in the computer to find out how much money was missing?

A Yes, we did look. Like I said, it's a little over a thousand. I don't exactly remember the figure. After two hours the police gave it back to us, the money; he returned it to us, the money.

Q Did Karen look in the computer to see how much money was missing?

A Yes, she did.

Q Did you count the money that was returned to you by the police?

A Like I said before, a little over a thousand.

Q And there was a difference of twelve dollars?

A Twelve dollars.

MR. FATTIG: Nothing further.

RECROSS EXAMINATION

BY MS. DICKSON:

Q Mr. Ramirez, how do you know it was twelve dollars if you don't know what there was to start with?

A Because Karen told me, give me all the info. It's in her report, in her computer report that the twelve dollars is missing after we count the money.

MS. DICKSON: Your Honor, I'd ask that that be stricken as hearsay. That's not what she testified.

THE COURT: Overruled.

BY MS. DICKSON:

Q Did you at any point that day count how much money was

actually in the drawers after the robbery?

A I just counted it once in front of the police officer.

Q That's the money that was given to you by the police?

A Correct.

Q No, that wasn't my question. Did you at any time after the robbery count how much money was in those drawers?

A I never counted after that. Like I told you, I was too very busy. I am not dealing with the robbery, I'm dealing with my guests.

MS. DICKSON: I have no other questions.

MR. FATTIG: Nothing further.

THE COURT: All right. Thank you, you may step down.

MR. FATTIG: Jorge Cruz?

THE COURT: All right. I just want to inquire of the jury. It's been almost an hour and a half since our last break. It's 4:25, would you like a short ten minute break, or are you ready to go through until five o'clock? Short break? All right. I try and break at least every hour and a half. All right, let's take a short ten minute break and then we'll come right back.

We're going to take a short ten minute break. Before you go out, let me remind you once again you're not to discuss this case among yourselves or with anyone else, nor are you to read, watch, or listen to any commentary or reports on this case or anyone connected to it, nor are you to form or express any opinion about this case until it has been submitted to you.

(Whereupon a brief recess was taken at 4:25 p.m.)

(Whereupon the following proceedings were held in the presence of the jury)

THE COURT: All right. The record can reflect we're back in the presence of the jury, all members of the jury panel are present, counsel for both sides are present, as is Mr. Day. You may call your next witness.

MR. FATTIG: Jorge Cruz?

JORGE CRUZ

Having been called as a witness and being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. FATTIG:

Q Sir, how are you employed? What's your job?

A I'm a truck driver myself.

Q Back on April 22nd of 2000, did you happen to be at the McDonald's on Tropicana?

A Yes.

Q Did you have your truck with you that day?

A Yeah.

Q Where was it at?

A The parking lot of the McDonald's.

Q Is that the McDonald's – where on Tropicana, is it close to I-15?

A It's on Tropicana, probably about 300 feet from I-15; three, four hundred feet.

Q What kind of truck were you driving that day?
A It's a twenty-footer, refer.
Q When you say refer, does that mean refrigerator?
A Yes.
Q Was the refrigerator unit running that day?
A Yes.
Q Did you go into McDonald's at some point?
A Yes, I went to order something to eat for me and my son.
Q You had your son with you?
A Yes.
Q Did you see anything unusual?
A I look at my truck and I seen a person inside my truck.
Q Did you know who that person was?
A Yes.
Q Had you ever seen him before?
A No.
Q Did he have permission to be in your truck?
A No.
Q What did you do?
A Well, I came out running to get him out of my truck and when I opened the door of the McDonald's, the police was already outside waiting for him.
Q Did you see the police get him out of your truck?
A Yes.

Q Was your truck running?
A The refer, it was running, not the truck.
Q The refrigerator unit on the truck?
A Yes.
Q Does it sound like the engine is running when the refrigerator is running?
A Yes.
Q It does?
A Yes.
Q Did you go back into the cab of your truck?
A After they pulled him out of my truck I did.
Q Did you notice anything different?
A Yeah, the wires in the bottom, they were pulled down.
Q The person that was inside your truck, do you recognize if anyone here in court today is that same person?
A Yes.
Q Could you please point to that person and identify a piece of clothing they're wearing today?
A Well, it looked like him.
Q And I see you looking, your eyes. What kind of clothing is he wearing?
A White shirt.
MR. FATTIG: May the record reflect the identification of the defendant?

THE COURT: It may.

MR. FATTIG: Thank you.

BY MR. FATTIG:

Q Had you ever seen that defendant before that day?

A No.

MR. FATTIG: Nothing further.

CROSS EXAMINATION

BY MS. DICKSON:

Q Mr. Cruz, have you been shown any pictures of this gentleman?

A No.

Q And you said he looks like the person that was in your truck, is that right?

A Yes.

Q And this is almost a year ago, is that right?

A Yeah.

Q So, you're not absolutely certain that it is him, he just looks similar?

A Well, it was dirty and filthy at that time.

Q What was dirty and filthy?

A Dirty.

Q The person was?

A Yeah.

Q Okay. Do you know what a lumper is?

A Yes.
Q What's a lumper?
A Well, a person who unloads trucks.
Q Do you ever use lumpers?
A Yeah.
Q And do you know that there are lumpers who sort of hang out by the Wild Wild West there looking for work?
A Yeah.
Q You've seen them there?
A Yeah.
Q Have you ever hired any of them?
A No.
Q You said your son was with you, does he help you?
A No, my son, he's two years old.
Q Oh, okay. You haven't hired any of the lumpers that are out at the Wild Wild West?
A No.
Q Do you – are you based here, sir, or were you just traveling through?
A Well, I live here in town.
MS. DICKSON: Thank you. I have no other questions.
MR. FATTIG: Nothing further.
THE COURT: All right. Thank you, you may step down. Yes, you're excused.

MR. FATTIG: Daniel Flaherty?

DANIEL FLAHERTY

Having been called as a witness and being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. FATTIG:

Q Sir, how are you employed?

A I'm a sergeant with Las Vegas Metro Police.

Q And back on April 22nd of 2000, what was your assignment?

A I was working the problem-solving unit at Southwest Area Command.

Q Were you, in fact, in charge of that unit?

A Yes.

Q And when you say Southwest Area Command, what does that encompass?

A That's south of Charleston, west of I-15.

Q How long have you been with Metro?

A Fourteen years; going on fourteen years.

Q On April 22nd of 2000, did you hear a call regarding a robbery at a Parkway Inn?

A Yes.

Q And about what time of day did you hear that call?

A It was after noon, before one in the afternoon.

Q In that call, did you get a general area of where the crime

occurred?

A Yes.

Q Did you also get a description of the subject?

A Yes, sir.

Q And that came over the radio?

A Yes, channel 3, which is Southwest Area Command channel.

Q Do you remember who was talking in the radio?

A Dispatch.

Q Based on that, did you proceed to the area of Industrial and Tropicana?

A Yes, sir.

Q When you got to the area, what did you do?

A Well, I was in a plain car. I was in a plain patrol vehicle.

Q Why were you in a plain patrol vehicle?

A Because my particular assignments – the problem-solving unit is a plain clothes unit of the substations.

Q Were you in uniform?

A No, I was not.

Q Describe what kind of clothing you were wearing.

A I had on blue jeans, a T-shirt underneath, a button-down shirt, and I had a Sam Brown undercover holster, my Metro badge, handcuffs, a collapsible baton, and I believe I was carrying capstun.

Q And those various items, were they on your belt or –

A On my belt.

Q You were in your plain clothes. How did you approach the area, where were you coming –

A I exited – I was coming southbound on I-15, exited the Tropicana exit and went westbound on Tropicana from I-15.

Q When you got on westbound Tropicana, what did you do?

A Well, I was going to the last known location or direction of travel where the suspect was last seen, which was north, so I headed northbound.

Q Did you see anything that struck your attention?

A Yes.

Q Where were you at when you first saw it?

A I was on Tropicana Boulevard, or Tropicana Avenue.

Q What did you see that struck your attention?

A I saw a subject fitting the description of the suspect north of Tropicana.

Q That subject that you saw, is that person here in court today?

A Yes, he is.

Q Could you please point to him and identify a piece of clothing he's wearing today?

A White male sitting at the defendant's table wearing the long-sleeved white button-down shirt.

MR. FATTIG: May the record reflect the identification of the defendant?

THE COURT: It may.

BY MR. FATTIG:

Q Where was the defendant when you first saw him?

A He was walking in between trucks in the location of the Wild Wild West Truck Stop.

Q And that's on the north side of Tropicana?

A Yes.

Q What did you do after you saw him?

A Well, I went around a side street there and creeped into the parking lot, started driving in between trucks and then I saw the subject again.

Q Did the defendant seem to match the description you received over the radio well?

A Yes.

Q Were there any differences that you noted?

A He wasn't wearing a shirt.

Q When you pulled around – and I take it you approached the defendant?

A Yes, I did.

Q What did you see the defendant doing?

A He was standing on the floorboard or running board of a large truck talking to a white male.

Q Did the guy he appeared to be talking to, was he inside the truck?

A Yes.

Q Perhaps was a truck driver?
A Yes.
Q Was he doing that the first time you saw him?
A The first time I saw him he was just walking through the – walking in between trucks.
Q When you pulled around, you got out of your car I take it?
A Yes.
Q What happened?
A I pulled up – I pulled my vehicle up at a 45 degree angle, my vehicle was facing east, and I asked the defendant to step in front of my vehicle, I needed to speak with him, I was a police officer.
Q So, you identified yourself as a police officer?
A Yes, I did.
Q And where was your badge at at that time?
A My badge was hanging on the right side of my hip attached to my belt.
Q What was the defendant's response to that?
A He wanted to know why I was stopping him.
Q Did you inform him or give him any information at that time?
A Not right away.
Q Was there additional conversation between you and the defendant at that time?
A Yes, he asked – I asked him what he was doing in the parking lot and he told me that he was a truck driver.

Q Did he indicate whether or not he had a truck there in the parking lot?

A He indicated he had a truck, but he couldn't point the truck out.

Q Did he do any pointing at all?

A Yes.

Q What did he do?

A He pointed to a row of trucks that were east on the parking lot and was point– he kept stating that truck over there, and he couldn't point out the specific truck, and the person kept getting closer to me, so I kept telling him to keep his distance.

Q When you say the person, the defendant was approaching you?

A Yes, the defendant.

Q He was approaching you?

A Oh, yes.

Q How close was he getting?

A A couple times he tried to get within arm's reach of me.

Q Did you feel threatened by that?

MS. DICKSON: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: I didn't specifically feel threatened by Mr. Day, but my training, being a police officer, I know that hands hurt people, hands kill people, and I don't want somebody to get within arm's reach of me.

BY MR. FATTIG:

Q Were you instructing him to stay away from you?

A Yes.

Q Was he following that instruction?

A Haphazardly.

Q What was his demeanor like during this conversation?

A He was more inquisitive of why I was stopping him.

Q Did you have any additional conversation with the defendant at that point?

A Within a couple minutes in the conversation, I finally told him I was stopping him because I believed that he fit the description of a suspect that just committed a robbery.

Q Did you ever have a discussion with the person, the truck driver that the defendant was talking to?

A Yes.

Q And did you have that discussion before you talked to the defendant about the specifics of why you were talking to him?

A Yes.

Q Was that the first time you mentioned the word robbery?

A Yes.

Q What happened after you said that?

A He took off running.

Q Where did he go?

A He ran southbound across Tropicana in the McDonald's

parking lot.

Q Describe the scene that day, was it, this was early afternoon?

A Yes.

Q Approximately – let me go back – approximately what time was it when you got to the area of the Wild Wild West Truck Stop there, originally?

A Probably five after one at the most; maybe 1:10. I really wasn't looking at the clock, I wasn't looking at my watch. I just basically instinctively responded.

Q Could you go back now and describe what the area was like at 1:05, 1:10, or I guess by this time maybe it was 1:15 or so?

A Yeah.

Q Is that fair?

A Yes, sir, that's fair.

Q By the time he took off?

A Yes.

Q Describe, basically, the area. Was there a lot of commotion or was it pretty empty or what?

A The parking lot where the trucks park, many trucks parked in the parking lot. There wasn't a lot of activity, not a lot of trucks driving through the parking lot, one or two persons walking through the parking lot. However, Tropicana had pretty thick traffic, east and westbound traffic.

Q And, did the defendant – how did the defendant get across Tropicana?

A He ran across the street.
Q It was busy at that time?
A Yes.
Q Were you chasing him?
A Yes, I was.
Q Did you manage to get across the street as well?
A Yes, I did.
Q How did you do that?
A I ran out in traffic.
Q Did cars have to slow down or stop?
A Yes, thank- yeah.
Q Did you use your badge?
A I just had my hands out and had my shirt open with my badge out, had my firearm in my hand.
Q So, your firearm was out at that point?
A Yes.
Q During the chase?
A Yes.
Q Where did you see the defendant run to?
A He ran to a van, like a cooler van.
Q What did he do with the van?
A Got into the van, got behind the driver's wheel.
Q When you say a cooler, what do you mean?
A It was like a refrigerator van.

Q What did you see the defendant do once he got behind the driver's wheel?

A He attempted to put the vehicle into gear.

Q Did it seem to you that the vehicle may have been running?

A Yes, it did.

Q Why was that?

A The refrigerator on top, I don't know what type of motor, I'm not a mechanic, but it sounded like a diesel running and it sounded like the truck was running, but it ended up being the refrigerator motor on the truck.

Q Had you called out for backup?

A Yes, I did.

Q When did you that?

A Right when Mr. Day started running.

Q Did backup arrive?

A Yes.

Q When?

A Mr. Day entered the vehicle, I put myself in front of the vehicle. Again, I thought the vehicle was running. I told him not to put it into gear. I was yelling commands at him to exit the vehicle; he refused. At one point I went around to the driver's side. As I was coming around the driver's side, I realized that the vehicle wasn't running or he didn't know how to put it in gear, one of the two, but I didn't want to let him get behind the wheel of the vehicle. Two patrol officers pulled up. I then got the driver's side door open of the van. I told Mr. Day to exit the van, he started

yelling at me.

Q What was he saying?

A At one point he told me to shoot him, just to shoot him.

Q Did he get out of the car or the truck on his own?

A He struggled for a minute. I managed to get a wrist lock on his left arm. I managed to snake my left arm around his head in kind of a modified, what we call lateral vascular neck restraint, and I was able to peel him out of the vehicle. He reached over, he grabbed the passenger side of the vehicle. I don't think he was attempting to flee, he was just holding on to it. I was able to pull him out, I took him out of the car, and I told him to quit resisting. I told the two patrol – there was a male and female police officer in uniform, they really didn't know what was going on at that point. I told them that I was going to take him down on the ground and we were going to handcuff him, and we did so and there was no further incident.

Q So, the two of you fell, actually fell on the ground on the parking lot?

A Yes.

Q Where was your gun during this struggle?

A Re-holstered.

Q Had you actually had it out and pointed at him when he was inside the vehicle?

A Yes, I did.

Q And he still didn't comply?

A No.

Q Did you handcuff him once you were out on the ground?
A Yes.
Q And did you search the defendant incident to arrest?
A Yes, I did.
Q What did you find on the defendant?
A He had approximately a thousand dollars in his pocket, and he had a small silver pocket knife.
Q Could you describe what clothing the defendant was wearing at that time?
A He was wearing kind of an acid-wash set of jeans, cowboy boots, and I believe he had like a cowboy belt or like a Western-type belt on and no shirt.
Q Could you describe how the money was placed on his body?
A It was just in a large ball, actually. The majority of it, I believe, to the best of my recollection, was in his front right pocket and there may have been some more in his left pocket.
Q And when you say a ball, was it folded nicely or –
A It was just – no, it was just crumbled up, shoved together, stuck in the front pockets.
Q And you recovered a knife as well –
A Yes.
Q – from his pants pocket?
A Um-hum.
Q And you remember it being something over a thousand dollars?

A Yes.

Q Was it all in currency, paper money or was there change?

A American currency.

Q Was it all in paper money or was there some change, or do you remember?

A I think there was a couple quarters, maybe a couple nickels. I don't really recall.

Q Did other officers arrive at the scene at that point?

A Yes.

MR. FATTIG: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. FATTIG:

Q Do you know if someone was called out and took a few photographs at the scene that day?

A Yes.

Q And having shown defense counsel, I'll show you what has been marked as Proposed No. 1, do you recognize that photograph?

A Yes, sir.

Q And what is that photograph?

A That's the McDonald's.

Q Where this incident occurred?

A Yes, sir.

Q On West Tropicana?

A Yes.

Q How about Proposed No. 2, do you recognize that photograph?
A Yes.
Q And what does that show?
A That's Mr. Day handcuffed, this is the back portion of him. This is his front right pocket, and I do believe those are my handcuffs.
Q In his front right pocket, is anything shown in the photograph?
A Yes.
Q Is that the cash balled up?
A It appears to be cash, American currency.
Q Is that a fair and accurate description of how it was balled up and kept in his pocket that day?
A Yes.
Q And how about Proposed No. 3, do you recognize that photograph?
A Yes.
Q And what does that show?
A That's me holding the money after it was extracted out of his pocket.
Q Is that – you didn't crumple it up more, I take it?
A No, no sir.
Q That's how it was when you took it out?
A Exactly how it was removed from his pocket.
Q And showing – No. 1 and No. 3, are those fair and accurate representations of the various descriptions that you described?

A Yes, sir.

MR. FATTIG: I'd move for admission of 1, 2, and 3, Your Honor.

MS. DICKSON: No objection.

THE COURT: Be admitted. Did you want to publish to the jury?

MR. FATTIG: Yes, if I may.

May I approach again, Your Honor?

THE COURT: You may.

BY MR. FATTIG:

Q Sergeant, you testified that during that time period you were in charge of a problem-solving unit in a specific area of town?

A Yes.

Q And that was the southwest area of town?

A Yes, sir.

Q Showing you what has been previously marked as State's Proposed No. 4, do you recognize what's depicted in that?

A Yes, I do.

Q What is depicted in No. 4?

A Well, you have the Parkway Inn at 5201 South Industrial highlighted in red or squared off in red.

MS. DICKSON: Your Honor, I have no objection if he wants to show the jury this at this time, so that the jury makes some sense of what he's testifying.

THE COURT: Do you want to stipulate to it being admitted?

MS. DICKSON: Sure.

THE COURT: All right. Exhibit No. 4?

MR. FATTIG: No. 4.

THE COURT: Will be admitted.

MR. FATTIG: Thank you.

BY MR. FATTIG:

Q Officer Flaherty, would you mind –

A Sure.

MR. FATTIG: Your Honor, may I have him step around?

THE COURT: You may.

BY MR. FATTIG:

Q And just describe what we're seeing on No. 4.

A The location of –

THE COURT: Okay, I think you're standing in the way of some of the jurors, so if you could stand to the side.

THE WITNESS: Oh, I'm sorry. I'm sorry about that.

MR. FATTIG: Was there a pointer over there?

THE WITNESS: I can point it out from here.

THE COURT: There's a pointer on the back of the easel there.

THE WITNESS: (Points out locations on photo) The location of the robbery, the location of me seeing the subject, stopping the subject, location of arrest.

BY MR. FATTIG:

Q And, we're looking at I-15 and Tropicana, and this would be westbound –

A Yes, sir.
Q On Tropicana?
A Um-hum.
Q Is it fair to say that this represents the Wild Wild West Truck Stop?
A Yes.
Q That's when you originally saw him?
A Yes.
Q Could you again point the direction of travel that you saw him during the pursuit?
(The witness points out the direction on the photo)
Q And that would be southbound across Tropicana to the McDonald's area?
A Yes, sir.
MR. FATTIG: Nothing further at this time with regards to this.
THE COURT: All right. Would this be a convenient stopping point for the day?
MR. FATTIG: Yes.
THE COURT: All right. It's now just slightly after five o'clock, so we're going to recess for the day. Before I release the jury, I'll remind you once again it's your duty not to discuss this case among yourselves or with anyone else, nor are you to read, watch, or listen to any reports or commentary on this case or anyone connected to it, and that includes without limitation radio, television or newspaper, nor are you to form or

express any opinion about this case until it has been finally submitted to you.

With that, we'll be in recess until 10:30 tomorrow morning. I'm not sure which courtroom we're going to be in. Since I have one of the larger courtrooms, quite often my courtroom gets used for some of the bigger cases and I've had a request for tomorrow, so I'm sure the bailiff will meet you over – which jury room? Just meet there in the morning and the bailiff will come and get you and then bring you to – we may start out in this courtroom and then end upstairs in another courtroom to finish the case, but the bailiff will come and get you and take you to the right courtroom.

So, with that, we'll see the jury tomorrow morning. We still have a couple housekeeping matters. So, I'll see – let's wait until the jury leaves and then take care of a couple housekeeping matters. You can go ahead and leave, thank you.

(Whereupon the jury was excused at the hour of 5:05 p.m. and the following proceedings were held outside the presence of the jury)

THE COURT: All right. How many more witnesses are you going to have tomorrow?

MR. FATTIG: This is the last witness.

THE COURT: All right. So, we'll finish with him in the morning.

Let me go through the advisement, then, on the defendant. All right, Mr. Day, under the Constitution of the United States and under the Constitution of the State of Nevada, you cannot be compelled to testify in

this case, do you understand that?

THE DEFENDANT: (inaudible)

THE COURT: Okay, I need for you to answer out loud.

THE DEFENDANT: Yes, ma'am.

THE COURT: You may at your own request give up this right and take the witness stand and testify. If you do, you will be subject to cross-examination by the District Attorney, and anything you may say, be it on direct or cross-examination will be the subject of fair comment when the District Attorney speaks to the jury in his final argument. Do you understand that?

MS. DICKSON: He has some hearing problem.

THE COURT: All right. You may at your own request give up this right and take the witness stand and testify. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: If you do so, you will be subject to cross-examination by the District Attorney –

THE DEFENDANT: Yes, ma'am.

THE COURT: Anything that you may say, be it on direct or cross-examination, the District Attorney will be able to comment on in his closing arguments. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you choose not to testify, the Court will not permit the District Attorney to make any comments to the jury because you have not testified.

THE DEFENDANT: Yes, ma'am.

THE COURT: If you would like not to testify, the Court will instruct the jury, if your attorney specifically requests, the law does not compel a defendant in a criminal case to take the stand and testify and no presumption may be raised and no inference of any kind may be drawn from the failure of a defendant to testify. Do you have any questions?

THE DEFENDANT: No, ma'am.

THE COURT: Since you have a felony conviction that we've already ruled on, were you able to get the other certified copies?

MR. FATTIG: I have not received them as of yet, Your Honor. I was in contact with a person in my office in charge of that. She informed me this morning that the jurisdiction in North Carolina was faxing a certified copy to our office and attempting to overnight the certified copies, which theoretically could be in the mail and arrive tomorrow morning.

THE COURT: All right. If he receives the certified copies, as well as the conviction he already has a certified copy of, if you take the stand, the District Attorney in the presence of the jury will be allowed to ask you if you've been convicted of a felony, what was the felony, and when did it happen. No other details will be gone into, however. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Then, Ms. Dickson, have you gone through the jury instructions?

MS. DICKSON: No.

THE DEFENDANT: I have just one question, Your Honor. Do you mean by any felony, are you talking about the ones that he shows that he's claiming that he's going to question me about, the bank robbery –

THE COURT: He's – yes.

THE DEFENDANT: And the other two –

THE COURT: The two out of North Carolina, yes.

THE DEFENDANT: Okay, those are the ones he's going to ask me about?

THE COURT: That's the ones he's going to have the certified copies of. All right.

MR. FATTIG: As of right now, I only have the bank robbery one.

THE COURT: Right.

MS. DICKSON: I think Mr. Day is perhaps concerned there is a fourth one that's listed in the amended information that comes from, I think, 1982, and I think we've already agreed that that's not part of what's coming in, correct?

MR. FATTIG: That's correct.

THE COURT: Right.

MR. FATTIG: Yes.

THE COURT: All right. Mr. Day – I'm sorry, Ms. Dickson, you'll have a chance to go through these tonight –

MS. DICKSON: Yes.

THE COURT: – and we can settle jury instructions tomorrow over the lunch hour?

THE DEFENDANT: Your Honor, my problem with those two –

THE COURT: Mr. Day, you need to talk to your attorney about that.

All right, we'll be in recess.

(Whereupon the evening recess was taken at the hour of 5:10 p.m.)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording in the above-entitled case.

Elizabeth Garcia

ELIZABETH GARCIA
Court Transcriber

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DISTRICT COURT

STATE OF NEVADA,
Plaintiff,
vs.
ROBERT JAMES DAY,
Defendant.

CASE NO. C167783
DEPT. NO. IV

BEFORE THE HONORABLE KATHY A. HARDCASTLE, DISTRICT JUDGE
WEDNESDAY, MARCH 14, 2001

RECORDER'S TRANSCRIPT RE:
TRIAL BY JURY
VOLUME II - DAY 2

APPEARANCES:

For the State: TIM FATTIG, ESQ.
Deputy District Attorney

For the Defendant: DIANNE DICKSON, ESQ.
Deputy Public Defender

RECORDED BY: Liz Garcia, Court Recorder/Transcriber

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LAS VEGAS, NEVADA; WEDNESDAY, MARCH 14, 2001; 10:30 A.M.

(Whereupon the following proceedings were held outside the presence of the jury)

THE COURT: All right, let's look through the jury instructions just real fast. You received a copy of the proposed instructions by the State, did you have any objection to any of the proposed instructions?

MS. DICKSON: Yes, Your Honor. There's an instruction: You are here to determine the guilt or innocence of the defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the defendant, you should so find even though you believe one or more persons are also guilty. I recognize that that's valid law, I just don't think it's applicable here. There's no indication that there is –

THE COURT: Yeah, I don't find that that's applicable.

MR. FATTIG: That's fine with me.

THE COURT: All right.

MS. DICKSON: Also, the expert witness instruction I don't think is applicable here. We haven't had any expert witnesses.

MR. FATTIG: Yes, I'd agree.

THE COURT: All right, that will come out.

MS. DICKSON: The instruction regarding the definition of deadly weapon. I guess my concern is that I've always had some questions in my

own mind about what some of these things are, that the statute talks about dirks and daggers and things of that nature which I don't think are something that people know what they are exactly, without some further definition. I would have no problem with the instruction: Deadly weapon means any instrument which if used in the ordinary manner contemplated by it's design and construction will or is likely to cause substantial bodily harm or death. Any weapon, device, instrument, material or substance which under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing substantial bodily harm or death.

And I think that's where the instruction should stop, since it goes to mention specific kinds of weapons that are considered deadly weapons, none of which is applicable here, and I think to throw in all these other deadly weapons just confuses the issue, because none of those are what we're arguing about is the weapon involved here.

MR. FATTIG: I think it's important to give the jurors a context and an accurate context of what our legislature is talking about when they're defining what a deadly weapon is, and this is exactly the standard instruction given as to the definition of a deadly weapon. The statute directly refers to all of these items, and I believe that including all of them gives the jurors a context of what the legislature had in mind when they went about defining a deadly weapon.

MS. DICKSON: I agree with Mr. Fattig that that's what the statute says, but I don't think most people know what a dirk is. I don't know if they

know what the legal definition of a dagger is or a nunchuck or a trefoil, or a lot of these other things, and I think they might be left thinking, well, this little pocket knife that we're talking about here might be one of these particular deadly weapons, when it's not. I think you can explain to them what a deadly weapon is, that it's something that causes substantial bodily harm or death, and I think we don't need to go into the specific, itemized deadly weapons because none of those is at issue here.

THE COURT: All right. I agree with the defense. We'll change the instruction on that one and we'll delete after substantial bodily harm or death, we'll delete the remainder of that paragraph.

MS. DICKSON: And I guess, finally, Your Honor, there's also an instruction about the Constitutional right of the defendant not to testify.

THE COURT: You're not requesting that?

MS. DICKSON: I'm not – well, he is going to testify, so it really doesn't apply anyway.

THE COURT: Well, then it's not coming in.

All right. Also, the one instruction on read-backs of testimony are time consuming, not encouraged, I don't give that unless both sides really want it.

MR. FATTIG: Fine with the State.

THE COURT: I've never had a jury hesitate to ask for read-back when they want one, so that will come out.

All right. I've got the three instructions that the defense has proposed. Has the State had a chance to look at those?

MR. FATTIG: I've just looked at them just briefly this morning, Your Honor.

THE COURT: All right. The first one on: During the trial you've heard evidence concerning felony convict– prior felony convictions of the defendant. I've got no problem with giving that one.

MR. FATTIG: I have no objection, either.

THE COURT: The next one: The evidence in this case is subject to two constructions or interpretations. That is not an instruction that is given in this State, and hasn't been approved by the Supreme Court, so I will not give it.

And the next one is: You have heard evidence that the prosecution has failed to obtain or preserve the identity of the truck driver. You've already had your ruling on that one. It wasn't a failure to preserve evidence, there's no legal basis for the giving of that instruction, so therefore, I will not give that instruction.

We will make the two instructions from the Defense that I have indicated I will not give, we'll have those marked by the Court and made part of the record.

All right. Did you have any other proposed instructions to give by either side?

MR. FATTIG: No.

MS. DICKSON: No, Your Honor.

THE COURT: All right. You've seen the verdict form? Either side have any objection to the verdict form?

MS. DICKSON: I don't believe so.

MR. FATTIG: No.

THE COURT: All right. What we will do is after close of testimony then, we'll put the jury instructions in final order and number them and the instructions that we have currently are the ones that will be given.

We just have completion of testimony by the one individual, by the detective –

MR. FATTIG: Yes.

THE COURT: – and then you have Mr. Day. Do you have any other witnesses?

MS. DICKSON: I do have one other – actually, I probably have two other witnesses, Your Honor. I have one other witness I've notified the State about who is coming here at 1:30. He's a lumper and he's pretty much of a street person and I did speak to him yesterday. The other person I have not endorsed is my investigator, Ruben Aquino, and I'm not certain at this point whether I'm going to call him or not, it depends on what some of the evidence is that comes from the officer.

THE COURT: All right.

MR. FATTIG: I am, Your Honor, concerned and I was going to bring this up, regarding the failure to fully notice this one witness that they actually did attempt to notice. What they did was they listed his name and they listed a cellular phone number. They listed that approximately a week to ten days ago. I've been in contact with Ms. Dickson in an effort to obtain a better – the statute requires an address. And my investigator called the

cell number, it's been out of order. This particular witness isn't even registered to this particular cell number, and so my investigator has not been able to contact this particular individual. In my conversations with Ms. Dickson, it appears that the individual is a vagrant type of individual with no address.

THE COURT: The lumper?

MS. DICKSON: He's a lumper, yes. And I –

THE COURT: You're just going to have him testify regarding what a lumper is?

MS. DICKSON: Pretty much, yes, and the fact that he knows that Mr. Day is a lumper because he's seen him there working.

THE COURT: That's fine. I don't have a problem with that.

MR. FATTIG: And I don't have a problem with it in that Mr. Fleming is my investigator, he's going to be out in the hallway because Ms. Dickson told me the lumper was going to be there at 1:30. I'm just going to have Mr. Fleming ask him a few questions.

THE COURT: That's fine.

MS. DICKSON: I gave him all the information I had, Your Honor, and I actually saw him yesterday by physically going out where the lumpers hang out and talking to him.

THE COURT: All right. Then, we'll take a short recess while the bailiff brings in the jury.

MS. DICKSON: My request, Your Honor, is I'm not sure how much longer we're going to be with Officer Flaherty. I know the State has some

more and I have some extensive cross-examination. If we don't – if we're finished before noon, my request would be to break at that time, because as I said, my next witness is this gentleman who's coming in at 1:30.

THE COURT: You can start with Mr. Day.

MS. DICKSON: Or I can perhaps bring Mr. Aquino in if I need to.

THE COURT: Or Mr. Aquino, either one.

THE BAILIFF: We won't be here after one o'clock, Cherry is coming in at one.

THE COURT: Yes, this afternoon we'll be up in Judge Cherry's department.

THE BAILIFF: Seventeen.

THE COURT: Um-hum.

(Whereupon the jury returned to the courtroom and the following proceedings were held in the presence of the jury)

THE COURT: All right. The record can reflect we're back in the presence of the jury, all members of the jury panel are present, counsel for both sides are present and Mr. Day is present. Is the listening device working, Mr. Dentino?

(Short pause while checking the listening device for the alternate juror)

THE COURT: All right. Thank you. You may continue with your direct examination.

MR. FATTIG: Thank you, Your Honor.

DANIEL FLAHERTY

Having been recalled as a witness and being previously sworn testified as follows:

BY MR. FATTIG:

Q Sergeant Flaherty, I just have a few more questions for you. If you could clarify for me, from the time you first got the call over the radio regarding the robbery and the description of the suspect to the time you got to Tropicana Boulevard off of I-15, about how much time elapsed?

A Approximately 20 minutes, I believe. I can't be exact.

Q You weren't timing it?

A No, I was not.

Q It could be a few minutes less?

A Yes.

Q It could be a few minutes more?

A Correct.

Q When you got to the area of West Tropicana by the Wild Wild West, did you see any other people that fit the description you had besides the defendant?

A No.

Q Could you describe – are you familiar, basically, with that area of town?

A Yes.

Q Could you describe the area between the Parkway Inn and the Wild Wild West Casino? I'm showing you State's Exhibit No. 4, which is the

map, if this would help you. Generally, what type of area is that?

A It's kind of, it's an industrial area. They've got several –

THE COURT: Counsel, I think it'd be better if you got the easel out and then set it so the jury can see it. The bailiff's getting it out over here. Hopefully, in the new courthouse everything will work.

BY MR. FATTIG:

Q Officer, could you describe the area generally between the Parkway Inn and the Wild Wild West Truck Stop?

A It's an industrial area.

Q By industrial, what type of things, what type of businesses are in this area?

A There's several storage units or storage businesses which they also run businesses out of those storage units. There's several weekly-daily motels on Industrial. As you go to the area of Tropicana on the east, on the southeast corner of Tropicana and Industrial –

Q Right here?

A Um-hum. Well, I'm saying the southeast corner, actually, I'm just giving you a description of the area, there's a restaurant, it's a pancake house. On the west side, southwest corner there, there's a Chevron, I believe, there's a Hampton's that is just on the south side of the Chevron. When you start working your way west, there are several little fast-food places, I believe there's a Jack-in-the-Box, a Wendy's, and then the McDonald's.

Q And those would be located –

A On the south side, south side.

Q About in this area.

A And as you cross over onto the north side where I saw the defendant, Mr. Day, there's a couple of other little restaurants, there's a, I believe an Eat-a-Burger or one of those California places, I can't think of – In and Out Burger, I'm sorry. There's also a lot of construction going on. I haven't been in the area for awhile, but at the time of the incident there was some road construction on Industrial. There's always – it's just a very busy intersection.

Q How about the – could you estimate the distance between the Parkway Inn and the truck stop?

A I would say, if I was a bird flying, it would be about maybe three to four hundred yards, and that's just my guestimation.

Q From your experience in the area?

A Yes.

Q Now, you testified about the defendant in terms of what he told you. He mentioned something to the effect of, shoot me. Did he also at that point in time talk about how he had nothing to lose?

A Yes.

Q That was in combination with when he said, just shoot me?

A Yes.

Q When you got him out of the truck, you searched him incident to arrest, correct?

A Yes.

Q And you found the money?
A Yes, sir.
Q What else did you find?
A He had a small silver pocket knife in his right pocket, pants pocket.
Q What did you do with that knife?
A I impounded it.
Q Could you explain the process of how you impound a piece of evidence?
A There's some documents that need to be filled out, it's called an Evidence Impound Report. We fill that out in conjunction with a packet that's filled out. The knife is put into the packet, the packet is sealed with what we call an evidence sticker, it's a red or orange evidence sticker. That package is sealed with tape, sealed with a small string, then we put our initials over the red evidence sticker. Sometimes we put additional tape on it, sometimes we don't. That packet is then, by end of shift per LVMPD policy, by end of shift that evidence is taken either directly to the evidence vault or it's dropped in what we call an evidence chute. We have evidence custodians that on a 24-hour basis respond to the chutes. They take the evidence out of the chutes and then they take it down to the evidence vault, at which point it's stored by – I don't work down there, but at last – it's stored by event number.
Q So, there is a particular event number that corresponds to this incident only, is that fair to say?

A Yes.

Q And that's put on the bag?

A Yes, sir. It's supposed to be.

Q Were you subpoenaed to bring anything to court with you yesterday when you first came?

A Yes.

Q And did you bring anything to court with you?

A Yes.

MR. FATTIG: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. FATTIG:

Q Showing you what has been marked as Proposed No. 5, which appears to be a sealed envelope, could you describe what that is?

A This is the packet that I impounded the knife in on the 22nd, 2000, of April.

Q Does the packet appear to be in a sealed condition to you?

A Yes.

Q And does it appear to be in substantially the same condition as when you impounded it?

A Yes.

Q If we open up this envelope, what would we expect to find in there?

A There's going to be a small knife in there, a small pocket knife, I believe it's silver in color.

Q Does it appear that the envelope has been opened since you impounded that knife?

A Has not. Those are my initials on there.

Q Sergeant, I'm going to ask you to open up State's –

MR. FATTIG: Actually, I'm going to move to admit No. 5 at this point, Your Honor.

MS. DICKSON: No objection.

THE COURT: Be admitted.

BY MR. FATTIG:

Q I'm going to ask you to open that up on an unsealed portion of the envelope, and as you do that, could you describe what, if anything, is inside it?

A Sure. A small folding-blade pocket knife.

Q And you've extended the blade. Approximately how long is that blade to you?

A About two inches.

Q Is there only one blade in the knife?

A Yes, there is.

Q Put it back. Does that knife appear to be the same knife that was in the front pocket of the defendant's jeans?

A Yes, it is, absolutely.

THE COURT: For the record, we'll have the knife marked 5-A when it's admitted.

MR. FATTIG: I would move to admit the knife at this point, 5-A.

MS. DICKSON: No objection.

THE COURT: Be admitted.

BY MR. FATTIG:

Q After the defendant was arrested, did you pose any questions to him?

A Did I pose any questions to him?

Q Yes.

A After he was arrested?

Q Yes.

A No.

Q Why didn't you do that?

A I didn't feel I needed to.

Q And could you go into that – why didn't you feel you needed to?

MS. DICKSON: I'm going to object to this, Your Honor, I don't think it's –

THE COURT: Sustained.

BY MR. FATTIG:

Q Did the defendant volunteer any statements to you?

A He made several spontaneous statements or remarks.

Q What did the defendant say to you?

A Just, aside from shoot me, do me a favor shoot me, words to that effect. At one point he asked me what – on the way to county jail, he asked me what I was arresting him for, and I told him I was arresting him for

armed robbery, and he blurted out, that wasn't an armed robbery or words to that effect, this was no armed robbery.

Q Did he mention, talk about tennis shoes at all?

A Yes.

Q What did he say about that?

A Well, he was wearing cowboy boots and he said that if he was wearing his tennis shoes there was no way I would have caught him.

MR. FATTIG: Nothing further at this time.

THE WITNESS: And he also said I was slow.

BY MR. FATTIG:

Q He said you were slow?

A Yeah.

Q Did he poke fun at you about that?

A Oh, yeah, sure.

MR. FATTIG: Nothing further, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MS. DICKSON:

Q Sir, you are familiar with this area, is that correct?

A Somewhat, I was in – I worked that area for six months prior to this.

Q Okay, that was my question. Six months prior to this incident, you were in that command, the Southwest Command?

A Yes. I'm sorry, about five months.

Q About five months?
A Yes.
Q Are you still in that command?
A No, I'm not.
Q Do you still go into that area or not?
A Once in awhile. I'm a detective sergeant now, so I'm all over town.
Q But that's not your particular assignment?
A That's not my area.
Q But you are, nevertheless, still familiar with the area, at least to some extent?
A Somewhat.
Q Let's talk about the area. (Sets up photo on easel)
THE COURT: You might need to angle it a little more so that the jury can see it a little more clearly.
BY MS. DICKSON:
Q Can you see that, officer?
A Yes, ma'am.
Q This is the Parkway Inn down here, is that correct?
A Yes.
Q Now, did you go to that location on that day?
A No, ma'am.
Q But you are familiar with the Parkway Inn?
A I've been there a few times over the years.

Q And are you familiar with the fact that there's sort of an archway here in the center that you actually drive into?

A I couldn't swear to that; I remember that, right.

Q Okay, if you don't know, you don't know.

A Okay.

Q And you've indicated that this is an industrial area, is that correct?

A Yes.

Q There are warehouses and industrial buildings of all different kinds?

A Right.

Q There are also chainlink fences around most of these properties, is that correct?

A Yes.

Q And some of them have like a type of razor wire on the top of them?

A I'm not sure about that.

Q Are you also familiar with the fact that there are some fairly high brick or cement walls in that area around those properties?

A Yes, there's some.

Q So, this is not an area that you can just walk through, is that correct, because of the fences and the walls?

A You could walk – I mean, you could get through that area.

Q Have you ever?

A I haven't had to.

Q Are you also familiar, I think you said, with the fact that there is a, like a Budget Suites that's right in this area?

A The Budget Suites is further west.

Q Well, it's actually rather – west is this way?

A Yes, ma'am.

Q It actually goes all the way around, doesn't it?

A I'm trying to see where McDonald's is –

Q Can you see? If you need to come down to see, that's fine.

A No, I'm fine, I'm fine. Yes, that's Budget Suites there.

Q Okay, it goes actually behind the McDonald's and sort of almost curves around behind it?

A Yes.

Q And there's fencing around the Budget Suites, correct?

A Last I saw, there was a wall, a brick wall, with openings.

Q A wall. Now, let's see. Where this – actually, here at the corner of Tropicana and Polaris is actually the Wild West Casino, correct?

A Yes, ma'am.

Q And over here is the Wild Wild West Truck Stop, in this area?

A Yes.

Q This photo was not taken on April 22nd of last year, correct?

A I don't know when the photo was taken.

Q So, we're not looking at something that actually depicts the vehicles that were there on that day?

A Probably not.
Q Now, when you saw Mr. Day, he was in this area, is that correct?
A Yes.
Q In what looks like almost a dirt area here?
A Yeah.
Q A little bit north of that, where these trucks are parked now?
A Yes, ma'am.
Q And when you saw him you said that – well, before we get to that point, let's do a little more orientation. You mentioned the In-and-Out Burger, that would be right here, is that right?
A I believe so.
Q And this is the McDonald's here that's marked?
A Yes.
Q And this is a Honda motorcycle shop, correct?
A For some reason I thought it was a Harley shop, but I think you are correct.
Q Okay, it's a motorcycle shop of some sort?
A Yes.
Q Are you familiar with the lumpers?
A The lumpers?
Q The lumpers who sit in this area, the men who do day labor for truckers?
A I've never had any contact with them, but I know there are

some day laborers down there.

Q Who basically hang out, I believe, in this area along Polaris?

A Quite possibly.

Q There's also a truck wash in this area along Polaris, is that correct?

A I'm not sure about that.

Q Now, you told us that as the birds fly, you would estimate this distance to be, what did you say, three to four hundred yards?

A Yes.

Q Have you ever measured it?

A No, I have not.

Q You can't go as the bird flies, is that correct?

A Oh, yes.

Q But you've never done it, have you?

A No.

Q And you are aware that there's a lot of fences and walls in this whole area here, correct?

A Yes, um-hum.

Q Have you ever measured the distance if you went up Industrial to Tropicana?

A No, I have not.

Q Would you agree with me that it's probably half a mile or more?

A Yeah, that would be a fair estimation.

Q Actually, over nine hundred yards.
A Okay.
Q Now, you received or heard the dispatch over the radio, correct, about this robbery?
A Yes.
Q And a description was given of the suspect, is that correct?
A Yes, ma'am.
Q Do you remember what that description was that was given?
A Yes, a white male, mid-40's, blue jeans and a white and blue, I believe, striped shirt, with a mus–
Q Nothing about boots, correct?
A I don't believe so. I don't remember that.
Q White and blue striped shirt, did you say?
A Striped shirt, yes.
Q Now, you hadn't talked to Ms. Walker, is that correct?
A No, I have not talked to her ever.
Q Ever?
A Well, I ran into her –
Q Here in the courthouse?
A Yes.
Q But in terms of the investigation, you had no part of that?
A No, ma'am.
Q So, you don't know that she had indicated the gentleman was approximately her age, and 52 is her age?

A No.

Q Now, when you saw Mr. Day he was walking in the truck stop, is that correct?

A Yes.

Q There were other people in the area, is that correct?

A Yes.

Q Other truck drivers?

A One that I saw for sure.

Q Other people working around the trucks?

A I didn't notice.

Q Any of them wearing jeans?

A They could have been; probably, actually.

Q Any of them have gray hair?

A Not that I noticed.

Q How many people did you notice?

A Two people.

Q Now, there wasn't any information that you had been given that the robber was located in that area, is that correct?

A Just that he ran northbound and that was north.

Q North from Industrial or from the location down on Industrial?

A Yes, ma'am.

Q And there wasn't any indication of whether the person had gotten into a vehicle at some point, was there?

A No.

Q Mr. Day wasn't hiding or running or doing anything of that nature when you saw him, was he?

A When I first saw him?

Q Yeah.

A No.

Q And you said he seemed to match the description because he was wearing jeans and he had gray hair?

A He had long gray hair.

Q Was long gray hair part of the description?

A I believe so. And the mustache, sorry.

Q Mr. Day's hair was the same length then as it is now, is that correct?

A I can't see the back of his hair right now. To the best of my recollection, it was a little bit longer but probably pretty close to what it is now.

Q I'm going to show you what's been marked as Defense Proposed Exhibit A. Do you recognize that?

A Yes, ma'am.

Q Is that a picture of Mr. Day that was taken at the time of his arrest?

A Yes, it is.

Q And that's at the scene at the McDonald's?

A Yes, ma'am.

Q And he's in handcuffs without a shirt?

A Yes, that's him.

Q And that fairly and accurately depicts what he looked like on that day?

A Yes, ma'am.

Q Now, you said you first saw Mr. Day just sort of walking around in that area, and then when you next saw him you said something about you were creeping through the area, I guess trying not to be seen.

A Yes, that may have been the wrong term to use, but I was surreptitiously driving my car through the parking lot.

Q That's what I understood you meant by creeping.

A Okay.

Q Then you saw him talking to a truck driver, is that correct?

A Yes.

Q Was he actually like, standing up on the running board talking to that driver?

A Yes, he was.

Q And that's when you approached him?

A Yes.

Q Was he standing on the driver's side of the vehicle or the passenger side?

A Driver's side.

Q And you parked your vehicle in front of that truck, is that correct?

A Not directly in front, just to the west of the truck.

Q And you said something about a 45 degree angle?
A Yes.
Q Do you know whether or not that truck could move when your vehicle parked where it was?
A It probably could have.
Q Have you ever driven a truck?
A In the Army, I did.
Q A big 18-wheeler?
A Not an 18-wheeler, no.
Q Did you ever get the name of that truck driver?
A No, I did not.
Q And you asked that truck driver to actually watch your police vehicle when you took off running after Mr. Day?
A Yes.
Q At some point you went back to your vehicle, is that correct?
A Yes.
Q You never got the name of that truck driver, is that correct?
A No, ma'am.
Q Mr. Day told you that he had been driving trucks all over the country that week, is that correct?
A Yes, ma'am.
Q Now, you told us yesterday that I guess you were getting a little bit nervous because Mr. Day was walking towards you –
A Yes.

Q – and you were telling him to stay away?

A I was just telling him to stay in front of the car. We have a procedure.

Q Did you mention any of that in your police report?

A I don't recall.

Q Do you have a copy of it?

A I did, but I don't have it with me.

(Copy of report is shown to the witness)

THE WITNESS: Can you repeat your question, ma'am?

BY MS. DICKSON:

Q Probably not, but the gist of it was did you mention in your report any of this information that you told us yesterday about Mr. Day approaching you and making you nervous and telling him to stand in front of the car and him keep coming towards you?

A I did mention that I asked him twice to stand in front of the car in the report.

Q But nothing about the rest of that –

A No.

Q – about him making you nervous and coming towards you and moving –

A If I used the term nervous, I didn't mean it that way.

Q But you didn't mention anything in the report about him coming within arm's reach of you?

A No, I don't see that anywhere.

Q Now, you weren't keeping track of the time when you went there –

A No, ma'am.

Q – in relation to the call, but you thought it was about twenty minutes later?

A You could say that, I mean, that's just an estimate that I have. It could have been anywhere from twenty minutes to a half hour.

Q But it was probably at least twenty minutes?

A I would say so.

Q Had you been told the amount of money that had been taken in the robbery?

A I don't think it was mentioned over the radio.

Q Had you been told at some point about the amount of money?

A Yes.

Q And what were you told was the amount of money that was taken?

A I believe I was told a thousand fifty-four or some, a thousand fifty.

Q Would it help you to refresh your recollection to look at your report?

A Sure.

Q Would you do so?

A Yeah, I'm sure I got this out of the crime report.

Q One thousand fifty-one?

A One thousand fifty-one, yes, ma'am.

Q You have no way of knowing if that's the accurate amount, that's just the amount you were told had been taken in the robbery?

A Yes, ma'am.

Q And when you arrested Mr. Day and you emptied out his pockets, you counted the money that was in them, is that correct?

A Yes.

Q And there was one thousand eighteen dollars and fifty-five cents, correct?

A I believe so.

Q Again, would it help you to refresh your recollection to look at your report, or somebody's report. I don't think it's in the one you have there.

A You know, it might be in the Impound Report, ma'am. Yes, one thousand eighteen dollars and fifty-five cents.

Q Had you been told there were no coins taken?

A I wasn't told that.

Q Did you learn that at some point or not?

A No.

Q And you're the person who counted the money, correct?

A I counted it with another officer present. Actually, there were many officers present at that point.

Q Do you remember if there were any one hundred dollar bills in that?

A I do not remember that.

Q And then are you the person who made the decision to give this money to the manager of the motel?

A Yes.

Q Were you the senior officer on this case?

A I was one of the supervisors.

Q Did you actually release the money or did someone else do that?

A I would have to look at that report to see who signed it, ma'am. Looks like it was released by Officer Montoya; yes, Mark Montoya.

Q Do you recall whether you were present when that happened?

A I don't recall.

Q Do you remember saying something to Mr. Day about, you know, you're lucky this wasn't twenty years ago, I would have just put a cap in you?

A I never said that to Mr. Day. That's a ridiculous statement.

Q Anything about, you would have blown him away?

A Absolutely not. If he tried to run me over, I was going to.

Q And you did have your gun drawn when you were chasing him, is that correct?

A Yes.

Q And there was some struggle to get Mr. Day out of the truck, is that correct?

A A brief struggle.

Q Were other officers helping you or were you the only one who was involved in that?

A It was a small cab, so I just went in and got him.

Q And you said something about you had to pull him out and he was grabbing on to the things to hold on?

A Yes.

Q Did you ever find a shirt belonging to Mr. Day?

A No, I did not.

Q Did you ever look?

A Yes, I did.

Q Did you look in the back of the truck that he was talking to the trucker of?

A No, I did not.

Q Where did you look?

A I looked – actually, after I made the arrest, I came back into the area, I looked around the truck stop and I checked some garbage cans. That was a couple of hours later. They never found it.

Q So, you looked like around, in the garbage cans, that kind of thing?

A Yes.

Q Do you know whether anybody took any fingerprints from the location where the robbery took place?

A I don't know about that.

Q Would that not have been any part of your assignment here?

A No, that would have been a robbery detective.
Q Do you know if there was a robbery detective called out in this?
A No.
Q So, there was no robbery detective?
A Not to my knowledge.
Q If there was no robbery detective, does that put you in charge of the investigation?
A No, it goes up to the robbery detectives.
Q Even if they're not called out?
A Right.
Q Do you know whether any other kind of investigation was done at all?
A Do you mean a follow-up investigation?
Q Anything.
A Not to my knowledge.
MS. DICKSON: Court's indulgence for a moment.
BY MS. DICKSON:
Q When you saw Mr. Day, did he have anything in his hands?
A No.
Q He wasn't carrying anything?
A No.
Q Did you notice any other items, property belonging to him that he had at the time?

A No.

Q And the only things that he had in his pockets are the money and the knife?

A I can't remember if he had a wallet or not. I don't recall.

Q Nothing that he would have –

A Carried in his hand?

Q – recently purchased?

A No.

MS. DICKSON: I have no other questions.

MR. FATTIG: Can we approach, Your Honor, briefly?

THE COURT: You may.

(Whereupon a bench conference was held)

REDIRECT EXAMINATION

BY MR. FATTIG:

Q Officer, on cross-examination, you testified that you didn't essentially investigate that trucker the defendant was talking to?

A No.

Q Did you have a conversation with that trucker?

A Yes, I did.

Q When, in context, did you have that conversation?

A When I got Mr. Day in front of the vehicle. In all fairness, I want to make sure this is him. I went over to the trucker and I asked him a question.

Q And what did you ask the trucker?

A I asked him what they were talking about.

Q What did the trucker tell you?

MS. DICKSON: Objection, Your Honor.

THE COURT: Objection overruled. Proceed.

THE WITNESS: The truck driver stated to me that Mr. Day offered him a hundred dollars to drive him to New Orleans.

BY MR. FATTIG:

Q And after that – after you heard that, what did you do based on that?

A That's when I walked back over to Mr. Day, and Mr. Day again was adamant about why am I detaining him, and a tactical error I made mention, I said, well, there was a robbery down the street.

Q And at that point he took off?

A Yes.

Q When you came back from the McDonald's, obviously your car was on the north side of the street, is that correct?

A Yes.

Q Was the trucker anywhere around?

A He wasn't around and I don't – like I said, there was several trucks parked next to each other and he wasn't in the truck where he was sitting. I was very happy that my car was there, it was still running, the door was open, I had a bunch of equipment in the car, and I got in my vehicle and went back over to the scene.

MR. FATTIG: Nothing further, Your Honor.

RECROSS EXAMINATION

BY MS. DICKSON:

Q Do I understand, sir, that the truck was there but the trucker wasn't?

A I'm not sure if that was the truck, ma'am.

Q Okay. Well, there was a truck parked where the truck had been parked?

A I believe so.

MS. DICKSON: Nothing further.

MR. FATTIG: Nothing further.

THE COURT: All right. Thank you, you may step down.

The State may call the next witness.

MR. FATTIG: The State would rest at this point in time. I believe all the exhibits, 1 through 5A, have been admitted.

THE COURT: Yes.

THE COURT: All right. Defense? Ms. Dickson, you may call your first witness.

MS. DICKSON: Yes, Your Honor. May I have the Court's indulgence for just a moment.

Call Robert Day.

ROBERT DAY

Having been called as a witness and being first duly sworn testified as follows:

. . . . .

DIRECT EXAMINATION

BY MS. DICKSON:

Q Mr. Day, could you tell the ladies and gentlemen of the jury your name, please?

A My name is Robert Jamie Day.

Q And what are you known by?

A Jamie.

Q How old are you, Mr. Day?

A I'm 47 years old.

Q Back in April of 2000, you would have been 46?

A 46, right.

Q Where are you from originally, Mr. Day?

A I'm from Kansas, Leavenworth, Kansas. I was born in Leavenworth, Kansas.

MS. DICKSON: Now, I'm having a little trouble hearing you –

THE WITNESS: I was born in Leavenworth, Kansas.

MS. DICKSON: – so, I want you to keep your voice up and move that closer to your mouth. Thank you.

BY MS. DICKSON:

Q Mr. Day, you've had some trouble in your life, is that correct?

A Yes, ma'am.

Q And as a result of that, you've been convicted of some crimes, is that correct?

A Yes, ma'am.

Q Back in 1984, were you convicted of a bank robbery?
A Yes, ma'am.
Q And in 1994, were you convicted of two charges involving some stolen credit cards?
A Yes, ma'am.
Q And as a result of those convictions, did you serve a sentence?
A Yes, ma'am.
Q I want to take you back to approximately – well, to exactly the year 2000.
A Okay.
Q April of 2000. Had you finished your sentence for the bank robbery?
A Not – April, 2000?
Q April, 2000.
A Yes, ma'am, it was completed but I didn't realize that it was completed. I thought that I had – well, it's a long story.
Q I know it's a long story, let's try to make it a little bit shorter. Did you think that there was a warrant out for you because of that bank robbery conviction?
A Yes, ma'am.
Q And why did you think there was a warrant for you?
A Because when I got out of prison, in the halfway house I met a girl and we fell in love, you know, and we wanted to get together. And

I got out before she did and I went down and had some blood drawn and everything. I was waiting for her to get out, and I found out that I had some – I brought some things home with me that I didn't go to prison with.

Q You're talking diseases?

A Yes, ma'am.

Q Would you tell the ladies and gentlemen what the disease is?

MR. FATTIG: Objection, relevance.

THE COURT: Relevance, counsel?

MS. DICKSON: The relevance is to his state of mind, Your Honor, and it explains some of the remarks that he made to the police officer.

THE COURT: Objection overruled.

THE WITNESS: Anyhow, I found out that I had Tuberculosis and Hepatitis. And when she – excuse me, I'm sorry, I'm very nervous. It's been going on for a long time.

THE COURT: There's no question pending in front of you. Please keep your remarks to yourself.

BY MS. DICKSON:

Q You found out you had Tuberculosis and Hepatitis –

A Hepatitis C.

Q Hepatitis C, is that a fatal disease?

A Yes, ma'am.

Q Is there any cure for Hepatitis C?

A From what I understand, the only thing they can do is give you a liver transplant.

Q Now, did you tell your girlfriend about this?

A Yes, ma'am.

Q And what happened as a result of that?

A Well, we tried to act like it didn't matter, but it did. So, I packed a bag and there was a truck stop not too far from the house, and I walked down to the truck stop and found me a driver and went out on the road.

Q Was that something that you were supposed to do or not?

A No, I wasn't.

Q Why?

A Because I was on parole.

Q So, you ran away from your parole?

A But I only had like a little bit – I only had a little bit left.

Q How much time did you have left?

A Less than 60 days, and apparently what had happened was that they had just let it expire. But I didn't know that, I thought there was a warrant out for me for parole violation.

Q So, in April of 2000, you thought you had a warrant out for your arrest, is that correct?

A Yes, ma'am.

Q Let's go back to that – well, let's go back even before that. When did you come to Las Vegas?

A February.

Q February of 2000?

A Right.

Q So, had you been here a year before April of 2000?

A No, ma'am.

Q And how did you come to Las Vegas?

A I came with a truck.

Q What do you do for a living?

A Well, I'm a lumper, but, you know, a lot of the lumpers are – I do a little more than lump. I don't just, you know, just carry the stuff to and from the truck. I go out on the road with the drivers. I pack, load, carry and drive, I do it all. If a driver will let me drive out on the road, I don't have a CDL, but I can drive. I've been around trucks ever since I was a kid. My dad was a diesel mechanic, truck driver, race car driver, all that stuff, and I've been around that stuff all my life.

Q Let me – a lumper is someone who normally just loads and unloads a truck, is that correct?

A Yes, ma'am. I got sidetracked there for a second. But, generally, I stay out on the road, but sometimes, like when I'm running with a driver that has to go home – you know, he's been out for a couple of months or a few weeks and his wife's complaining, wants him to come home, he'll go home and he'll drop me off at a truck stop and I'll find somebody else to run with. Sometimes, maybe I'll stay there at the truck stop for awhile and work out of the truck stop catching different trucks by the day, different trucks every day. As the trucks are pulling in, you know, coming through town, they'll come in with a load and they'll need their help.

They'll pull over to the truck stop and say, you, you, you know, do we got a loader, I need two men, or whatever. We jump on the truck and we go do the job.

Q So, when you said that you came to Las Vegas in February, were you in Las Vegas between February and April of 2000, for that entire time?

A No, ma'am, I left out of town a couple times.

Q When you're working as a lumper, tell us what kind of money you can make?

A Well, it depends. It varies, okay. Let's say a driver has – generally what they go by, now this is generally speaking, they go by a hundred weights. And it's like, I'm not good with math, I think it's a dollar a hundred weight. In other words, if you've got 12,000 pounds, that's 120 dollars, so what is that, a dollar a hundred weight, something like that. So, if you're a loader, though, they'll pay you more because the loader is the guy that the driver pays to make sure that your stuff is loaded on that truck where it won't get broke, it won't be broke when it gets to wherever you're going to. And so, he makes a little bit – a little better. You know, I can make between a hundred, two hundred dollars a day.

Sometimes, though, there's another thing that I do, a little hustle that I got going here in Las Vegas. They have the conventions and I met this gal that's a lumper and she's got this little pick-up truck with a CB radio in it, and sometimes she'll work with me –

THE COURT: Counsel, bring it back to some relevance.

Q Okay, you would do jobs working at the conventions as well, is that correct?

A Yes, ma'am. Sometimes those pay even better. Those are pad-wrapping the display cases, the displays from the conventions.

Q So, how much could you earn working the conventions?

A Say, two hundred, two hundred fifty dollars for four hours work.

Q Now, how about if you're going out on the road with the trucker and actually traveling across with him across the country?

A I make a hundred bucks a day, plus expenses.

Q And back in April of 2000, that's the kind of money you were making?

A Yes, ma'am.

Q Did you have a place to live at that time or were you pretty much an itinerant?

A No, ma'am, not really. There was a – if I didn't have – if I wasn't out on the road, there was a couple people I'd go stay with them, you know, for a couple days until I found somebody else, somewhere else to go.

Q Let's talk about April 22nd of the year 2000. Do you remember where you were on that day?

A Yes, ma'am.

Q Where were you?

A Okay, you mean, when this happened?

Q No, let's start – what did you do that day? Were you working that day?

A Yes, ma'am.

Q Where were you working?

A All right. I just got in town the night before from Georgia.

Q How long had you been out of town?

A Seven days. I made a seven-day run from Atlanta to Victorville, California and back here.

Q And that was with another truck driver?

A Yes, ma'am.

Q And you got paid for that?

A Yes, ma'am.

Q How much did you get paid for that?

A Five hundred and sixty bucks. Seven hundred dollars for – you see, what I do, I draw twenty bucks a day and he holds the rest until – that's what I do with the driver. I'll draw twenty dollars a day for my beer, cigarettes, candy, whatever. The driver pays for all my meals and all that stuff. And we got back into town that night and I went into the casino, I ate, took a shower, come back out, got me a pack of one dollar bills, played some slots for awhile, went out and went to sleep in the truck. And I met – no, before I went out to sleep in the truck, I met the driver of the truck where Mr. Flaherty, where Sergeant Flaherty saw me.

Q Do you know that gentleman's name?

A No, ma'am.

Q Now, as a lumper, do you normally know the names of the people you work for?

A Well, if we're out on the road I do, yes, ma'am. Sometimes I'll even go home with them and stay with their families for, you know, a week until they're ready to go back out on the road. But, generally on day labor, we get together – man, it's let's get it done and over with. We'll get to the shipper's house and we'll all introduce ourselves to the shipper and half the time we don't even know each other.

Q So, I guess I should have asked you this, the lumpers in the area of the Wild Wild West, do they have a particular location where they congregate?

A If I could show you on that thing.

Q Do you want to step down here? Here's the pointer.

A Okay. Let me see where we're at.

THE COURT: You're going to need to move the microphone so that we can pick him up on the mike.

THE WITNESS: (Pointing to photo) All right, generally this right in here is where we all hang out at, from this corner right here –

BY MS. DICKSON:

Q Which is the corner of Tropicana and Polaris?

A Right. From this corner right here, all the way back here these guys will be on the sidewalks, on the corners, and all the way back here to the trucks, waiting for the trucks to come off of the I-15 into the truck stop or coming out of the truck stop and picking guys up. We're not

supposed to be on the property.

Q Says who?

A Says the Wild West.

Q And have you ever had any problems with the Wild Wild West?

A Yes, ma'am, they run us off all the time.

Q They don't like the lumpers hanging out there?

A No, ma'am.

Q So, the lumpers hang out along Polaris, alongside the truck stop?

A Yes, ma'am.

Q How does a trucker hire a lumper if he wants to?

A Well, with most of them, what they do is they just stand there on the sidewalk and when the trucks come in they, you know, point at a guy or two guys or whatever, they'll call one over or they'll ask them if they're working, or they'll just stop and the guys will run up and jump on the side of the truck. And me, I'm a little more aggressive than that, I go into the truck stop, I go into the lot. And what I do is, I pass myself off, I look like a driver. I wear company clothes, I've got uniforms for every company, Allied, United, North American. I'm always clean, I'm always presentable, and I try to keep the Wild West from bothering me, and half the time they don't even know I'm not a lumper.

Q Not a lumper or not a trucker?

A Not a truck driver.

Q Okay, so you started to tell us you had been working for about a week or so before the 22nd, you got back the night before, and then you met up with this truck driver?

A Yes, ma'am, in the Wild West that night, talked to him for a couple minutes. He had 12,000 pounds going out in the morning, unloading over – I'm not that familiar with the streets out here, but it was like Craig Road and somewhere, I think it was like a military shipment, some kind of military shipment. Somebody in the military, the military pays for the move and the guy was in the military.

Q So, did you help with this move?

A Yeah, I got two – I had two guys waiting at 6:30 in the morning, we met with the driver.

Q Two other lumpers?

A Yes, ma'am. He gave us $20 to go across the street to the McDonald's to get something to eat and he went inside to get something to eat, he went inside the Wild West to get something to eat, and then we all met back out and he come out and we jumped on the truck, took off and went and did the 12,000, and –

Q About how long did that take? About what hours were you working this job?

A It was a four hour mini. We was done with it – we started maybe about 7:30 and was done by 11:30.

Q And then what happened?

A We got back to the truck stop and the driver went inside to

cash a comp check. A comp check is the way that drivers do their financial transactions. In the truck stops they just go in and just fill out the papers. I mean, I don't know, I've never cashed a comp check, I just know that it's real easy. They just fill out a little check and give it to the people, and they give them cash for it. So, he went in to cash a comp check to pay us and play some slots or eat or whatever he was going to do, and we got together – well, first we made a beer run. And we got back up in the trailer, we've got to fold up all the pads and clean the trailer up and everything. The trailer is empty and we've got to get it ready for him, he's leaving to go load somewhere else, and there that's when I was talking with him, when I was standing on the side of the truck, I was talking about going with him.

Q Now, let me go back a little bit. When you are paid, are you paid in cash or check?

A No, we're paid in cash.

Q Always?

A Always.

Q And you were waiting for the trucker to come back and pay you?

A Yes, ma'am.

Q And in the meantime it was a part of your responsibility to clean up in the trailer –

A Clean the trailer, yeah.

Q – fold up the pads and things?

A Yes, ma'am.

Q So, that's what you were doing, correct?
A Yes, ma'am.
Q And then what were you doing?
A We started bumping dice.
Q What do you mean by bumping dice?
A Shooting dice.
Q Now, who's we?
A Me and the two lumpers, and then another two came up, so there was like five of us back there shooting dice and drinking beer.
Q Do you know any of the names of any of those people?
A No, ma'am. We're just, you know, we just bump into each other now and then and I never know their names. I don't hang out with them or anything.
Q So, you were shooting dice in the back of the truck?
A Yes, ma'am.
Q What were you wearing?
A A pair of blue jeans and my boots.
Q How about a shirt?
A It was – it was hung up or laying around back there somewhere.
Q In the back of the truck?
A Yes, ma'am.
Q Why did you take it off?
A Because it was hot and dirty back there.

Q What kind of a shirt were you wearing?
A A t-shirt.
Q What color?
A Gray. It was a gray Allied Van Lines t-shirt.
Q At some point in time did the trucker come back to the truck?
A Yes, ma'am.
Q Do you know what time that was at all?
A It wasn't too long before Officer Flaherty showed up, I know that. I don't know what time it was.
Q And did you have some discussions with the truck driver?
A Yes, ma'am.
Q Did you get paid?
A Yes, ma'am.
Q How much did you get paid?
A One hundred and twenty dollars.
Q Had you spent all of the money that you'd received the day before from your earnings?
A No, ma'am.
Q You still had that?
A Yeah, I hadn't spent hardly none.
Q Where do you keep your money?
A In my pocket.
Q Do you have a bank account?
A No, ma'am.

Q Now, you said you were shooting dice in the back of the truck?

A Yes, ma'am.

Q Did you win or lose at that?

A I won.

Q Do you know how much you won?

A I had about five hundred bucks going in and I come out with a grand.

Q So, you won about five hundred?

A Yes, ma'am.

Q Now, we've seen the pictures of how the money was all like, crumpled up?

A Yes, ma'am.

Q Why was that money all crumpled up?

A Because when I hit my – when it come my turn for the dice, I made a few small bets with the other guys, fading them. When it come my turn to shoot, I bet it all and I hit my point. It took me about eight or nine throws to hit my point, and when you got it all bet and you hit your point, you snatch your money and go, because if you don't, they're going to keep you there and they're going to get it all back from you. I grabbed it up, jammed it in my pocket and jumped down out of the trailer, went back around to the front and I was standing there talking with the driver about trying to talk him into, hey, man, you know, running my spiel on him to go out on the road with him. I didn't ask him to go to New Orleans. I didn't

offer to pay him a hundred dollars to take me to New Orleans, that's ridiculous.

Q Why is that ridiculous?

A Because it's just ridiculous.

Q Would a truck driver take you to New Orleans for a hundred dollars?

A No, ma'am.

Q Why?

A Well, number one –

Q How much would it cost him to go to New Orleans?

A In fuel?

Q Yes.

A From here?

Q Yes.

A Man, that's clear across the country. That's 2,000 miles, at least. New Orleans is almost all the way to Atlanta.

Q So, would it cost more or less than a hundred dollars of fuel just to go to New Orleans?

A It would cost a whole lot more.

Q So, you didn't offer the trucker a hundred dollars to take you to New Orleans?

A No, ma'am. If I offer somebody or ask somebody to go with him, it's going with him for work, it ain't paying him to take me somewhere.

Q Do you remember when Officer Flaherty came up to the truck?

A Yes, ma'am.

Q Did you know who he was?

A Well, I thought he was – the first thing that I thought was that he was security from Wild West, because the way he – what he done was he pulled in like he was blocking the truck from getting out, and he got out of his vehicle, okay. And it was like one of the kind of cars that the – not the security for the Wild West, the guys that wear the uniforms, but the security supervisors from the Wild West. I don't know what kind of car, it's got tinted windows and it don't look like a police car.

Q And we've heard that it was not a marked police vehicle, right?

A Right.

Q So, you thought he was the security from Wild Wild West?

A Yes, ma'am.

Q And did that cause you some concern?

A Yeah, I wasn't supposed to be there.

Q What happened next?

A He got out of his car and he was real scared or real – scared is the wrong word, he was intense. And I was half drunk, we'd been back there shooting dice and drinking beer, and I'd already drank about – this is maybe an hour and a half, maybe two hours after we got back, I'd already drank maybe a six-pack already. I mean, I'm not an alcoholic, furniture movers, that's –

THE COURT: Counsel, would you put a question to him? He's

starting to ramble.

MS. DICKSON: Thank you, Your Honor.

BY MS. DICKSON:

Q Just try and answer my questions, okay?

A Okay.

Q I know there's a whole lot more.

A Okay.

Q But, what happened after the officer got there? You said you were half lit –

A Okay, he was standing – he got out of his car and he was standing where I couldn't really see him. I mean, I could see his top, all right, and he's talking to me but he's doing like this, like he's looking around like – it spooked me, it was like, it felt like we were surrounded and somebody was coming, the cops were coming was my first idea, because –

Q Why was that a concern?

A Because I'm a parole violator.

Q So, you were concerned that you were about to be arrested?

A Yes, ma'am.

Q Did you –

A Well, no, I was concerned maybe he had already called the cops, and I just broke and ran.

Q Did you hear him say anything about he was investigating a robbery?

A No, ma'am.

Q You don't remember him saying that?

A No, ma'am.

Q And you ran?

A Yeah.

Q And where did you run?

A I ran straight over to the McDonald's and there was a truck parked there and the refer was running. I know the difference between a refer running and the motor running, I've been around trucks all my life. And I jumped up in it and laid down, trying to hide. And the next thing I know –

Q In the cab?

A Yeah. And the next thing I know the guy's out there beating, and I look and he's got his gun pointed at me. And then I seen his badge on his thing and I'm like, oh, man, not again.

Q And did you struggle when he was trying to pull you out of the truck?

A Well, I didn't like the way he grabbed me and started jerking on me. Yeah, I guess I –

Q And you're grabbing on to things in the truck like you say?

A Yeah.

Q Now, did you have some conversation with that officer, and he told us it was something like – when he said he was arresting you for armed robbery, you said something about, that wasn't an armed robbery. Do you remember that conversation with him?

A I don't remember exactly what was said, but what it was

was I was letting him know I didn't run because I'm sweating an armed robbery, I ran because I'm sweating something else, which is the parole violation. I didn't run because of no robbery. I knew I didn't have nothing to sweat on that.

Q The officer also said you said something like: do me a favor and shoot me.

A I didn't say nothing like – well, he told me, he said, if this was twenty years ago, I'd have just blown you away. And I said, pal, you'd have done me a favor. It went down just like that, because I knew I was going back to prison for parole violation. It didn't have nothing to do with no robbery.

Q Did you rob the Parkway Inn?

A No, ma'am, I did not.

Q Have you ever been to the Parkway Inn?

A No, ma'am. I've gone past there but I've never been in there.

Q And as far as you know, you've never stayed there, is that right?

A No, ma'am.

Q When you're working with truck drivers, do you stay at motels on occasion?

A Yes, ma'am.

Q Do you know what – do you have to have an I.D. to stay at motels?

A Generally speaking, yeah.

Q Do you have an I.D.?
A No, ma'am.
Q So, how do you stay at a motel without an I.D.?
A Stay with somebody else, I guess –
Q So, someone else rents the room?
A – with the driver, yeah.
Q You also had a knife in your pocket?
A Yes, ma'am.
Q This knife? (Shows knife to witness)
A Can I have my glasses? Yeah, that's it, that's it, that's my knife. I can see it.
Q Can you see it okay?
A Yeah, that's it.
Q How long have you carried this pocket knife?
A Man, I've had that pocket knife a long time.
Q Are we talking years?
A That's my work knife. You got to have – yes, ma'am, I've had it for years. You got to have a knife like that on the job to cut boxes open, to cut tape, to cut string. Every lumper carries them.
Q How about truck drivers, do they carry knives?
A Yes, ma'am.
MS. DICKSON: Court's indulgence for a moment.
BY MS. DICKSON:
Q Mr. Day, do you have any tattoos on you?

A I'm covered with them.

Q Would you stand up? I want you take off your shirt.

A Both of them or just –

Q Just the dress shirt.

MR. FATTIG: Your Honor, I would ask that the photograph that was earlier marked that shows the tattoos be admitted, rather than this exhibition.

MS. DICKSON: Well, I think the jury is entitled to see first-hand what the tattoos look like.

THE COURT: I'll allow it.

BY MS. DICKSON:

Q You have tattoos which cover pretty much your forearms, is that correct, and above as well?

A Yes.

Q But, your forearms on both sides of the fronts and backs of your arms have tattoos on them, is that correct?

A Yes, ma'am.

Q And you had those back in April of 2000, is that correct?

A Yes, ma'am.

MS. DICKSON: Thank you, sir.

I have no other questions.

THE COURT: Actually, it's a few minutes before twelve, this might be a good time to break, rather than break in the middle of your cross-examination.

I'll remind the jury that it's your duty not to discuss this case among yourselves or with anyone else, nor are you to read, watch, or listen to any reports or commentary on this case, and that includes without limitation radio, television, or newspapers, nor are you to form or express any opinion about this case until it's been finally submitted to you.

With that, we'll be in recess until 1:30. We will be in a different courtroom this afternoon.

(Whereupon the lunch recess was taken at the hour of 11:55 a.m.)

* * * * *

WEDNESDAY, MARCH 14, 2001; 1:35 P.M.

(Whereupon the following proceedings were held in the presence of the jury)

THE COURT: All right, we'll be back on the record. Back in the presence of the jury panel, all members of the panel are present, counsel for both sides are present, Mr. Day is present.

Counsel, you may start your cross-examination.

MR. FATTIG: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. FATTIG:

Q Sir, are you familiar with the Parkway Inn there on South Industrial?

A Yes, sir, I know where it's at.

Q Have you been there before?

A No.

Q Never stayed there?

A No.

Q When you were arrested you had a thousand eighteen dollars on you, and fifty-five –

A Yes, sir, that's what they say. I don't know exactly how much it was, but that's what the police report indicated.

Q Does that sound about right to you?

A It was more than I started out with, I know that.

Q You didn't have that in a wallet, right?
A No, sir.
Q In fact, you don't even own a wallet?
A Yeah, I did.
Q Where did you have your wallet at?
A My back pocket.
Q So, you had a wallet on you?
A Yes, sir.
Q Where did you live as of April 22nd, 2000? Were you just a vagabond on the road all the time, or did you have a residence? It seems like a simple question.
A I wasn't a vagabond. You know, I was comfortable with what I was doing. If I wasn't on the road with a trucker and if I was in a truck stop, generally you can get a trailer to sleep in, a driver will let you sleep in his trailer.
Q So, you didn't have a home?
A No, sir.
Q In the traditional sense?
A No, sir.
Q No apartment?
A No, sir.
Q Is it fair to say that the possessions you had were the possessions you had on you, other than the t-shirt in the back of the truck? You had your jeans, right?

A Yes, sir.
Q Boots?
A Yes, sir.
Q A knife?
A Yes, sir.
Q And that was in your pocket?
A Yes, sir.
Q And you had a thousand and some dollars, correct?
A Yes, sir.
Q And you had your boots?
A Yes, sir.
Q And that was it?
A Yes, sir.
Q Fair to say?
A Yes, sir.
Q All the money that was in your pockets, that was all crumpled up, right?
A No, sir.
Q Okay. What wasn't crumpled up?
A The money in my left pocket.
Q You work with these lumpers a lot, right?
A Yes, sir.
Q And they're generally pretty friendly guys?
A Give or take.

Q Get along with them?

A Sometimes yes, sometimes no; sometimes you gotta fight for turf.

Q You told Sergeant Flaherty that you could have gotten away if you had tennis shoes on, right?

A I was being silly.

Q Did you say that?

A Yes, sir.

Q Okay.

A No, I didn't say I could have gotten away, I said – what I said was, I could have outrun him because he was slow.

Q If you had tennis shoes?

A Yes, sir.

Q And you kidded him about being younger than you and –

A About being young – yes, sir, because I was in good shape back then.

Q And when you ran across Tropicana Boulevard, it was very busy, right?

A Yes, sir.

Q In fact, you almost got hit by a car?

A I don't know, I was drunk, sir.

Q You don't have any memory of that?

A Yeah, I remember, but I don't know if I almost got hit by a car.

Q Okay, well, you remember getting in the truck, right?
A Yes, sir.
Q And when you got in the truck, you hid, right?
A Yes, sir.
Q And that's all you did, right, you laid down and you hid?
A Yes.
Q That's it?
A Yep.
Q And then Sergeant Flaherty came and he pulled you out of the truck, right?
A Well, he started beating on the side of the truck and hollering at me to get out and pointing his gun at me, and –
Q And eventually he got you out?
A Yes, sir.
Q And during that time period you told him you had nothing to lose, right? Did you say that?
A Yes.
Q And you told him, go ahead and shoot me?
A No, I didn't tell him go ahead and shoot me.
Q Did you ever say that?
A No, sir.
Q Now, after you were arrested, you asked Sergeant Flaherty why you were being arrested, right?
A Yes, sir.

Q And Flaherty told you it was because of an armed robbery, right?

A Yes, sir.

Q And then you said something like, what I did was no robbery?

A Okay, again I'm gonna tell exactly what that was, was that –

Q Did you say that?

A No, sir.

Q Okay, what did you say?

A Exactly what I said is – I can't remember, but I know what I meant. What I meant was –

Q What did you think?

A – the reason I ran was because of the parole – I got another reason why I ran, it ain't got nothing to do with the robbery. I don't remember exactly what I said. But I didn't want to tell him it was a parole violation, either, because maybe it won't show up and it didn't because it was already expired.

Q A few minutes before Flaherty shows up, you were playing craps, correct?

A Yes, sir.

Q And you were also working before Flaherty showed up, right?

A Yes, sir.

Q In fact, you were getting the trucker's truck ready for another load, right?

A Yes, sir.

Q To take off on yet another trip?
A Yes, sir.
Q Who was around when you were doing that, getting the truck ready to load?
A The two lumpers that I worked with that day and two others that came up while we was back there folding pads.
Q So, four different lumpers and you?
A Yes, sir.
Q And you're back there folding pads –
A Yes, sir.
Q – all of you?
A Yes – no, just me and the two guys that worked that day. The other two just come and hung out and drinking beer.
Q And was the trucker around at that time?
A No, he went inside.
Q Essentially, you were on the premises of the Wild Wild West Truck Stop all morning that day, right?
A No, sir.
Q Where were you?
A We was on the job.
Q Okay, you mentioned you were loading up –
A Unloading.
Q – unloading 12,000 pounds?
A Yes, sir, if my – I'm pretty sure that's what it was, 12,000.

Q That was from 7:30 to 11:30 that morning?
A Around about that.
Q And that was some place else, not at the truck stop?
A No, sir, that was at a residence.
Q What residence was that?
A I don't know exactly where it was.
Q Where at?
A Like Craig, out by – I haven't been in this area in quite awhile, in about a year now. The other truck stop over there, The Flying J, Craig Road I think it is.
Q It was a house up there?
A Yes, sir.
Q You were with the lumpers when you did that, right?
A Yes, sir.
Q And the trucker was there?
A Yes, sir.
Q And then you were – after that, you were still with the lumpers, right? When you came back to the Wild Wild West?
A Yes, sir.
Q You came back there after 11:30, right?
A No, it was before. We got back before that.
Q So, it took less than – how long did it take you to unload all that stuff at the residence?
A We got at the residence probably about seven, got back to

the truck stop about eleven.

Q Not 7:30 to 11:30?

A No, sir. Somewhere around there, it could have been 7:30 to 11:30, I'm not sure.

Q Okay, you weren't keeping track of time?

A No, sir. I just, you know, it was basic.

Q When you got back to the truck stop –

A Generally when a trucker wants to go out, I don't remember –

MR. FATTIG: There isn't a question posed.

THE COURT: All right.

BY MR. FATTIG:

Q When you got back to the truck stop, were you hanging out with the lumpers at that point?

A Yes, sir.

Q In fact, you testified on direct that you, as in we, made a beer run. You went with the lumpers to make a beer run, right?

A Well, one guy would make a beer run, another guy would make a beer run, you know.

Q There were several beer runs?

A Right.

Q And you were hanging around –

A By we – can I answer?

Q Yes.

A By we, meaning one of us.

MS. DICKSON: Excuse me, may I have the Court's indulgence for a moment. I think this is my witness.

THE COURT: You may.

(Person enters the back of the courtroom)

MS. DICKSON: I'm sorry, never mind.

THE COURT: All right.

BY MR. FATTIG:

Q While you were making the beer runs, you were drinking beer and you were still working, right?

A Yes, sir.

Q By getting that truck ready, right?

A Yes, sir.

Q And then you have the craps game with the other lumpers, there was four of them, right?

A Yes, sir. Well, can I answer that?

Q Yes.

A While me and the other two guys that are working on the truck are folding pads, two other guys come up, they started throwing dice while we're folding pads and drinking beer. After we got done folding the pads, then we got in the game too, one at a time, kind of like.

Q Then you played craps?

A Right.

Q You play craps and you make a bunch of money, right?

A Well, yeah.

Q And then you go around and you talk to the trucker, right?
A Right.
Q And then Flaherty shows up?
A Right.
Q You didn't know the name of that trucker, right?
A No, sir.
Q You don't know the name of any of those lumpers, either?
A No sir.
Q Nothing?
A No, sir. I didn't associate with them.
Q Didn't associate with them. It's common to hitch rides at a truck stop, right?
A Hitch rides, yeah.
Q In fact, you get jobs with truckers occasionally?
A Yes, sir.
Q Or you can hitch a ride and go to a different part of the country, because the trucks are interstate trucks, right?
A I guess if one wanted to leave town and was ready to, yeah, I guess he could.
Q Those lumpers, they pretty much hang out there at the Wild Wild West all day, don't they, the truck stop? That's where the work is?
A It was a Saturday.
Q Do lumpers keep normal businessman-type hours like bankers' hours?

A Generally, Monday through Friday they're there like 6:30 in the morning and they'll stay there all day because a truck will come in at three o'clock in the afternoon, gonna load in the morning, and he'll line his help up right then and the guy will just meet him back there the next morning.

Q But Saturdays they don't stick around?

A Sometimes we'll show up on a Saturday, but a lot of times on Saturdays we'll just hang out and drink beer.

Q After you were arrested, you never asked to get any possessions from anywhere, right?

A Yes, sir, I did.

Q You did? Who did you ask? Was it a police officer or was it someone else?

A I had somebody in the jail contact or try to contact somebody that might have had my clothing, and I never heard –

Q By clothing, what were you referring to, the t-shirt?

A No, sir, my bags that were at somebody's house.

Q You just testified earlier that – with regards to all of the possessions you had?

A Yes, sir.

Q You didn't mention any bags or anything.

A My bags, all my belongings were at somebody's house. I was in jail and I didn't want to lose my things, and I lost them.

Q Whose house, another lumper?

A No, it was a guy that has a concrete business, one of the people who I would stay at his house occasionally. He hired me out of the Wild Wild West to go move – his mother-in-law died and he hired me to come take all her stuff out of her house and put it in storage. And we got to knowing each other a little bit after working together that day, and I just started, every once in awhile, coming over to his house.

Q What is his name?

A Bob Mortenson.

Q Where is his house at?

A It's on Upland Drive, Upland Place, something like that. It's right off of Charleston.

Q In Las Vegas?

A Yes, sir.

Q After you were arrested, or in fact at any point that day, you never told anyone about the truck driver and the lumpers that you had been with all day, right?

A Pardon me?

Q At any point that day, you never told anyone about the trucker who you were working for that day and about the lumpers who you had been with all day, right?

A I don't remember, sir.

Q You usually carry change with you, right?

A If I have it.

Q You did that day, though, right?

A Fifty-five cents.

Q Yeah. In April of 2000, you still thought you were on parole, right?

A Yes, sir.

Q But you knew it was almost over, right?

A I knew when I left that it was almost over. I'd been gone for over a year.

Q You knew about a year before or over a year before that it was almost over?

A Yes, sir.

Q In fact, didn't you mention something about 60 days being left on your parole? You thought there was 60 days left?

A Somewhere around there.

Q When you left?

A Yes, sir.

Q And that was over a year before, in April of '99, before then?

A At the time I left, I had close to about 60 days left, and from the time I left until the time I was arrested, maybe a little over a year had passed.

Q Isn't it a fact that if you would have been violated on parole, you would have done another 60 days or thereabout?

MS. DICKSON: Objection, Your Honor, that's not the law, not with a parole violation.

THE COURT: Overruled.

BY MR. FATTIG:

Q You're a gambler, right?

A Occasionally.

Q You bet all the money you had in the world on that one roll of dice?

A No, sir.

Q You didn't?

A No, sir.

Q You don't have any bank accounts, right?

A No, sir.

Q But you got lucky and you doubled your money?

A Not really, not quite doubled it.

Q You didn't quite double it?

A No, sir.

Q You almost doubled it, is that fair, or less?

A I don't know how much I had bet. All I know is that I had maybe between – the night before I had about five hundred bucks. But I don't know, I was drinking and I don't know how much I went through the night before.

Q So, you had less than five hundred at some point?

A Around there somewhere.

Q And you ended up with more than a thousand, right?

A Yes, sir, plus the hundred and twenty that the driver paid me.

Q Plus that?

A Yes, sir.
Q When did you get paid?
A Just before Flaherty pulled up. I just stuck it in my pocket. That was the folded money in this pocket.
Q Other than the craps game, fair to say you were pretty much working all day?
A Yes, sir.
Q You didn't play craps for very long, did you?
A No, they played for a little while.
Q The question was you.
A Okay, I'm sorry.
Q Are you a trucker, a lumper, or a loader?
A I'm a lumper and a loader.
Q Do you drive trucks, too?
A Yes, sir.
Q And you're driving trucks around this time period?
A I can.
Q You can, and you did?
A Yes, sir.
Q A pretty good life, isn't it?
A It's wonderful.
Q Make a lot of dough?
A Not a lot. For me, it's good.
Q A hundred dollars a day when you're on the road?

A Yes, sir, and expenses.

Q Plus expenses?

A Yes, sir.

Q A dollar per a hundred weight?

A When I'm on the road it's just straight hundred dollars a day, plus expenses.

Q And then when you're loading, it's a dollar per hundred weight, is that fair?

A Well, it depends. It depends if it's an independent operator or if it's a company driver. Independent operators make two hundred, two hundred fifty thousand dollars a year, he'll pay a good loader extra money if the loader appears to – can present himself as a competent loader.

Q Sometimes it's more?

A Yes, sir.

Q You pretty much lived out of a suitcase, though?

A Yes, sir, exactly; two bags.

Q You don't have an I.D., right?

A No, sir.

Q You're able to do – hustle occasionally, as you said on direct examination, right?

A Yes, sir.

Q And, in fact, you're able to pose as pretty much any driver you want for these various companies, right?

A Well, not – yeah, I mix, I mingle in so they don't run me out

of the truck stop.

Q Exactly. You mingle in as a trucker in these various uniforms?

A Yes, sir.

Q In order so the security doesn't run you off?

A Exactly.

Q The security runs off these lumpers all the time, right?

A Yes, sir.

Q Lumpers are pretty important to truckers, aren't they?

A Yes, sir, they are.

Q In fact, they're essential, aren't they?

A Yes, sir.

Q They do a lot of good work and they're necessary –

A Yes, sir.

Q – to the whole industry?

A Yes, sir.

Q The night before you had somewhere around five hundred dollars?

A Somewhere around there, yes, sir.

Q And you slept out in the truck?

A Yes, sir.

Q And you slept with the trucker that you were with that day?

A Yes, sir – no, sir. I slept with the trucker that I came into town with.

Q And that was out of Atlanta?

A Yes, sir. I didn't sleep with him, I slept in his trailer.
Q You slept in his trailer?
A Yes, sir.
Q Would that be the cab?
A The trailer, these are tractor trailer semi's we're talking about.
Q So up, right behind where the driver sits?
A No, sir, back in the trailer.
Q No, back? Back in the –
A You take the folding pads, the furniture pads, lay them out about six of them on the floor and you've got a mattress about like that, sleep like a baby.
Q Sleep in the back of the truck?
A Yes, sir.
Q Was it empty back there?
A Yes, sir.
Q You were getting paid a hundred dollars a day?
A Yes, sir.
Q On that trip from Atlanta to Las Vegas?
A Yes, sir.
Q Getting paid to drive an empty truck across country, right?
A No, sir, we off-loaded in Victorville, California.
Q You told Officer Flaherty that you had a truck, didn't you?
A Yes, sir.
Q In fact, you pointed to a truck there in the truck stop, a

different one than where the trucker was at?

A No, I told him it's back over in the other lot.

Q You pointed in a direction?

A If you want me to show you on the thing, I'll show you where I was talking about.

Q What kind of truck was it?

A Allied Van Lines.

Q And this was your truck?

A Not my truck, that was the truck I came in on.

Q You came in on it, but you weren't with that driver anymore, right?

A No, sir, he wasn't going nowhere.

Q Earlier when you had the shirt on, you have it on now and you took it off, fair to say all the tattoos are covered up on your arms?

A Yes, sir.

Q No tattoos anywhere visible?

A Not now.

Q The robbery there at the Parkway Inn, that's not the first robbery you've ever committed, is it?

A I didn't commit that robbery, sir.

Q You didn't commit the robberies from before?

A I didn't commit the robbery at the Parkway Inn, no, sir.

Q In 1984, you were convicted of robbery in Missouri, correct?

A Yes, sir, an unarmed bank robbery with a note. It's a whole

lot different than cowboy style running in with a gun or knife, taking something from somebody.

Q A man named Price Beasley, do you know him?

A I've heard the name, the name sounds familiar, but –

Q What context does the name sound familiar? Could he be a lumper?

A It's possible. Is it Bryce Beasley or Price Beasley?

MR. FATTIG: Court's indulgence.

THE WITNESS: As I said, sir, I don't associate with them guys too much. I work with them and –

THE COURT: There's no question pending.

BY MR. FATTIG:

Q Price Beasley, that's the name. Strike a bell?

A I'm not sure, sir.

Q Not sure?

A No, sir.

Q An individual who – you don't have any contact with a person named Price Beasley?

A It sounds familiar.

Q Are you good friends with any lumpers?

A No, sir.

Q Do you know any lumpers for any period of time at all?

A Not really, it's real competitive and you've got to stand your ground and kind of, you know, make sure that somebody don't try to run

you off or – you got to be a man around the truck stop, otherwise they'll gang up on you and run you off.

Q You're paid in cash exclusively on these jobs, right?

A Yes, sir. Well, every once in awhile a driver will – let me clarify that. I had one driver sent me a comp check. I said earlier that I'd never had anything to do with comp checks. I had one driver who was in another part of the country and I was in another part of the country and I was broke, and he sent a comp check to this truck stop and I went and picked up fifty dollars cash and went and –

Q Besides that one check for fifty dollars –

A That was it.

Q – you've always been paid in cash?

A Cash, yes, sir.

Q What kind of companies are these that are paying you in cash?

A These are generally the only ones that I ever run with an independent operator is that, the way it is –

Q Are they the drivers or are they the companies?

A The drivers lease their trucks to the companies. United, Allied, North American, Mayflower, they own their own rigs and they – if you look on the side of the rig a lot of times you'll see, owned and operated by so and so, but you'll see a big Mayflower sign on the side of it.

Q So, the truckers are leasing the vehicles from Mayflower and North American, is that correct?

A No, the driver most – a lot of times the driver owns the truck himself and he leases it to Mayflower. He leases it to an agent for Mayflower is how they work it.

Q Okay. And he gets his business through that negotiation with the company?

A Through that agent, yes sir. That agent does all his booking for him and –

Q So, this trucker is basically the independent contractor?

A Yes, sir.

Q He's his own man?

A Yes, sir.

Q And he's paying you in cash every single time?

A Yes, sir.

Q Besides that one check.

A Besides that one I forgot about that one time. It wasn't nothing, it was just fifty bucks I needed.

MR. FATTIG: Nothing further.

REDIRECT EXAMINATION

BY MS. DICKSON:

Q Just a few questions. Mr. Day, Mr. Fattig was asking you about the property that you owned back in April of 2000?

A Yes, ma'am.

Q And we went through the things you had actually on your physical body. Did you have other property that belonged to you at that

time, other clothing, other personal items?

A That belonged to me?

Q Did you have other clothing than the clothing you were wearing that day? Did you own other clothing?

A I had my t-shirt in the truck, that's it.

Q How about other clothing?

A No, no other clothing.

Q You told us, maybe I'm confusing you. You told us that you had a lot of different outfits for the different companies –

A In my bags over at Bob's house.

Q So, there was, there were other things that belonged to you that were not with you on that day?

A Yes, ma'am.

Q Okay, and they were over at Bob's house?

A Yes, ma'am.

Q And since that time, they've disappeared?

A Disappeared. I can't get him – can I answer?

Q Well, you were arrested after – well, we know you were arrested on April 22nd, correct, and you were taken to jail?

A Right.

Q And during that period of time, you were not able to contact any of the witnesses or to get in touch with the people about your property?

THE COURT: Counsel, you're leading.

MS. DICKSON: That's true, I'm sorry, Your Honor.

THE WITNESS: Can I answer why?

BY MS. DICKSON:

Q Why?

A Because he has a cell phone and in the jail you can't get out to a cell phone. I don't even know if he still lives there anymore.

Q Mr. Fattig also asked you about this robbery you did back in 1984?

A Yes, ma'am.

Q And you told the ladies and gentlemen that you did a bank robbery?

A Yep.

Q Was there any weapon used in that offense?

A No.

Q Was there any threat in that offense?

A No.

Q Was it just – what did you do?

A I gave them a note, told them –

THE COURT: Counsel, you're not to get into the prior and what happened on the prior, it's not relevant to this proceeding.

MS. DICKSON: Okay, Your Honor, Mr. Fattig brought it up on his cross-examination, that's why I was going into it.

THE COURT: He asked a question. I think your client is the one who went into the details.

THE WITNESS: I didn't threaten anybody or hurt anybody.

THE COURT: There's no question pending.

MS. DICKSON: You have to wait until I ask you a question.

BY MS. DICKSON:

Q Now, Officer Flaherty – I'm sorry, you told Officer Flaherty something about you had nothing to lose, go ahead and shoot, or you wish he had shot you, something like that. What exactly do you remember saying?

A We were on the way to jail and he said something about busting a cap in me, and I was, and I'm going to jail. And I'm thinking – I was being facetious, you know, maybe it would have been better off if you'd have shot me. I was depressed, I was, oh, man, I'm going to jail, I'm like, man, wow, and it didn't mean nothing. I wasn't suicidal or anything like that, just, I didn't want to go back to jail, that's all.

Q When Mr. Fattig was asking you about the times when you worked on this particular day, 7:00 to 11:00, 7:30 to 11:30 – when you're working for a truck driver as a lumper loading and unloading, are you paid by the hour, by the time, or are you paid by the weight?

A It differs.

Q Okay.

A It differs. Sometimes – for instance, on the day this particular job where we were – on the day this happened, on April 22nd, I got paid a flat rate, and the reason I got paid a flat rate was because I lined up the help on a Saturday. The crew, the other two guys, got a mini four, all right. I paid them or told them, you know, it don't come out of my pocket, it comes out of the boss' pocket, forty dollars, ten dollars an hour.

Q So, they were paid by the hour?

A It cost him two hundred dollars to get his trailer unloaded.

Q Now is that – does somebody keep track of the time, is somebody watching?

A No.

Q Or do they figure that based on the weight it takes four hours?

A No, we know we got there at seven o'clock in the morning, we left there at eleven o'clock, or usually what they do is, like let's say we get to the residence at seven o'clock in the morning, we're done at ten and it takes us twelve to get back to the truck stop where we picked the help up, they get paid all the way back to the truck stop, back to wherever we pick them up at.

Q Do you know exactly how much money you had on April 22nd?

A No, ma'am.

Q Were you keeping track –

A All I know is what the police report said, that I know the night before I had around five hundred bucks, and after I come to jail and I got the police report it said I had a thousand eighteen dollars. That's all I know.

Q You went out drinking and gambling the night before, is that correct?

A Yes, ma'am.

Q Were you keeping track of whether you won or lost at that time?

A I wasn't winning or losing. It was, I'm not a big – when I'm playing slot machines, it's just, you know, what I'm doing is, I'm drinking for free. I'm putting a few dollars in the nickel machines and the girls are bringing me beers and I'm tipping them a dollar each beer they bring me, and to me that's, you know, I enjoy that. And as far as getting in a crap game like that, I kind of got suckered into it, but once everything gets, betting gets going, you know, you get suckered into it. And that's why when I hit my point, I snatched up my money, stuck it in my pocket, and got out, told them guys, see ya.

Q And do you know how much you won?

A No, ma'am.

Q Now, you said that the name Price Beasley is familiar, but you don't know whether you know the gentleman or not?

A No, ma'am.

Q Now, if he comes into court today, is it possible he's somebody you recognize but didn't know his name?

A Well, I haven't been around there for a year, so I don't know if, you know, it depends. If it's somebody that I worked with a few times, maybe I'll remember him. If it's just somebody that – I don't know. Like I told the gentleman, the name kind of rings a bell, I don't know why, but I don't know why you're asking me about him, because he's not – I don't understand, basically.

MS. DICKSON: Okay, I have no other questions.

MR. FATTIG: May we approach briefly, Your Honor?

THE COURT: You may.

(Whereupon a bench conference was held)

MR. FATTIG: Nothing further.

THE COURT: All right. Mr. Day, you may step down.

You may call your next witness.

MS. DICKSON: I need to check the hallway, Your Honor.

(Short pause in the proceedings)

THE COURT: Mr. Day, keep your comments to yourself, you're no longer on the stand.

PRICE BEASLEY

Having been called as a witness and being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MS. DICKSON:

Q Mr. Beasley, you told us your name, can you tell us what you do for a living?

A I'm a lumper, a furniture lumper. I'm an experienced furniture lumper. I work for different agents like United, Bekins, Ellis, Mayflower, all the different moving companies.

Q I'm having a little bit of trouble understanding you because you talk real fast.

A All different moving companies, like Ellis, United, Bekins, all different names. I do furniture, a furniture lumper. I load, unload, pack, all that.

Q How long have you been lumping?
A For about nine years now.
Q As a lumper, how do you get your jobs?
A Well, through agents, then through different drivers contact you on your beeper, give you a job, got a job for you, like that.
Q And is there also a place where the lumpers hang out?
A Yeah, there's lots of different truck stops.
Q How about at the Wild Wild West, do they –
A That's where lumpers – a lot of lumpers will be there at the Wild Wild West.
Q I'm going to ask you to look at Robert Day over here.
A Yeah, I worked with him several times.
Q Do you remember him from being a lumper?
A Yes.
Q Now, I'm going to also ask you, about how much does a lumper make?
A Well, it always varies. If you get lucky loading, you make $1.25 a hundred. For 10,000, you get $125. You get a 20,000 load, you get $250. If you're packing, they pay like $30 an hour or $31 an hour.
Q I'm sorry, if you're packing they pay –
A If you're packing you're making $31 an hour or $30 dollars an hour, packing.
Q So, you make more packing than unloading?
A Yeah, packing you make more. Most pays cash, less cash.

Q You're paid in cash?

A Yes.

Q Would you tell us what your average weekly income is?

A Well, somewhere running from a thousand – from eight hundred to a thousand to – you make more than a thousand a week sometimes, fourteen, sixteen hundred. It depends on what kind of job you're working, if you're packing.

Q A range somewhere between eight hundred and sixteen hundred dollars, something like that?

A Yeah, a week, yes; it all depends.

Q A week?

A Yes.

Q And that's in cash?

A That's cash.

MS. DICKSON: Thank you, I have no other questions.

CROSS EXAMINATION

BY MR. FATTIG:

Q Sir, do you always get paid in cash?

A Yeah, the shipper, they come in and they want to give you a personal check and we have to go to the bank and get it. I asked them to make it out in a cashier's check. So, we ask for a cashier's check and they can cash it and pay us off in cash.

Q How did you find out you were going to testify on behalf of the defendant?

A Oh, I ain't knowing I'm testifying, just coming and showing – one of the investigators come down and I was up there waiting on a driver to show up. And he come up and showed us a picture and I said, yeah, I worked with this guy, he's a lumper.

Q How long ago was that?

A What, I talked to the investigator?

Q Yes, the first time?

A About three or four weeks ago; about two or three weeks ago.

Q What kind of clothes do you normally wear when you're loading?

A Well, when you're a lumper you gotta wear the – what agent you're looking for, you got a Mayflower shirt and blue jeans. You gotta wear blue jeans and a t-shirt with the name of the company you're working for.

Q And you'd wear gloves to load and unload?

A Yes, you need some. Yes, that's one thing, you need gloves, you can wear gloves. Sometimes you don't to move, I mean, you're loading, you don't need no gloves to move because you can't hold the furniture and stuff like that. You can wear gloves, though, some wear gloves.

Q How long does it take to unload 12,000 pounds?

A Well, 12,000 to unload, takes me about five hours, five and a half hours.

Q Lumpers are a pretty important job, isn't it?

A Oh, yes. They train you, they buy you work for you, how to move furniture, how to pad furniture.

Q It's a pretty important job to the truckers, right?

A Yes, you gotta know how to do it.

MR. FATTIG: Nothing further.

MS. DICKSON: Thank you, I have no questions.

You may leave, Mr. Beasley, thank you.

THE COURT: All right. Your next witness, Ms. Dickson?

MS. DICKSON: We have no other witnesses, Your Honor, we rest.

MR. FATTIG: No rebuttal, Your Honor.

THE COURT: All right, then that concludes the evidentiary portion of the trial.

Counsel approach?

(Whereupon a bench conference was held)

THE COURT: All right. Ladies and gentlemen, I'm now going to read to you the jury instructions. I'd like to be able just to orally state them to you, but some of them are quite involved, and it is important that I read them to you word by word. If, as I read them, some of them sound a little confusing or a little involved, don't be overly concerned about it, you will have a copy of the jury instructions to take with you to the jury deliberation room where you can read them for yourselves and go over them and discuss them.

(Whereupon the Court reads

the jury instructions aloud to the jury)

THE COURT: Counsel, you may make your closing argument.

MR. FATTIG: Thank you.

CLOSING ARGUMENT

BY MR. FATTIG:

May it please the Court, counsel, ladies and gentlemen of the jury. The job you have at hand is the same job any jury is going to have at this point in the case. You have to sift through the evidence you've heard, and that evidence has been by witnesses from the witness stand and by any exhibits that have been admitted. That's the only evidence in the case. You've got to sift through that and you've got to answer two main questions, and they're the same questions any jury has to ask: what crimes were committed, if any, and who committed them.

Now, with this particular case, I would submit that the first question, the first question of what crimes were committed is not going to be in dispute as much as the second question. Clearly from the evidence presented in this case that you heard, whoever walked into the Parkway Inn on April 22nd of 2000, committed robbery with use of a deadly weapon and burglary while in possession of a deadly weapon. However, despite that, I would be derelict in my duties as a District Attorney if I did not address the law and explain how it might fit the particular facts that you have heard.

Before I talk about the instructions relating to the law, I want to point your attention to Instruction No. 23, which is normally called the common sense instruction. Instruction No. 23, I'm focusing in a little bit, because this is one of the instructions that really sort of tells you how you

can go about doing your job. One of the reasons the jury system in this country is such a revered institution is the fact that it brings together twelve people of diverse backgrounds. And it brings you together, it puts you as one unit to work together, and the law understands that you're not going to come in here as clear slates. You're going to bring with you common sense and everyday experiences that we all know. And it's important for you to use that common sense when you go through the evidence, and it's important for you to ask important questions like what is reasonable, what makes sense to me. Now, what is reasonable? Oftentimes I would submit that the truth lies in good old common sense and asking yourself what makes sense to you, based on what you know about how the world works.

What crimes were committed that day? The evidence has shown us that the crime of burglary while in possession of a deadly weapon was committed that day. Now, most people when they think about the crime of burglary have a certain expectation in their head, and I think the common stereotype is when you think about a burglary, you think about perhaps a cat burglar breaking into houses at night, maybe dressed in black, with a knapsack. Well, when you think about that type of stereotype, it's not inaccurate, that is burglary, as long as he's entering various houses, he or she, with a certain intent, and that intent is to steal.

The reason I bring that up isn't that that stereotype is wrong, it's just that it tends to create a notion that the crime of burglary is a bit more narrow or more narrow than the law recognizes. And the law is much more expansive, and specifically the law provides that the structure for

which the burglar can go into doesn't necessarily have to be a home, it can be any building. And that's what the law in this particular case specifically instructs you. And Instruction No. 8 is the instruction on burglary, and it reads, quote, "Every person who by day or night enters any building with the intent to commit larceny and/or a felony therein is guilty of burglary," unquote. Now, certainly the front desk area, as you heard the evidence, at the Parkway Inn is a building, and under the law that can be burglarized.

The most – oftentimes, the most difficult aspect of the particular crime of burglary is the second aspect, and that's the aspect of the mental state. You need to have the physical act of entering into a structure and you need to do it with a specific mental state. In this case, there needs to be proof that the defendant entered the Parkway Inn with the intent to steal, that he steal something from inside, or with the intent to steal something by force, which is essentially the crime of robbery, but I'll talk a little bit more specifically about that in a minute.

Now, on the face of it, this might seem fairly difficult. How do you look inside the mind of someone when they go inside a particular building, because that's what this requires, it requires you to look inside and think about what makes sense, what was he thinking about. Well, how is that possible? Use the law that Judge Hardcastle just read to you, and you'll be given a copy of those instructions when you go back, and use your common sense. And again, the law recognizes that the old axiom, actions speak louder than words, really applies in this situation. And specifically, I'll point you to Instruction No. 12, which tells you that the intention with which

an entry is made is a question of fact, which may be inferred from the defendant's conduct and all of the circumstances disclosed by the evidence. Again, this is not rocket science with this particular count.

The instant the defendant entered that building, his intent was clear. When Karen Walker first noticed him, he was already behind the gate where customers are not allowed. The defendant had the knife in his hand and he immediately told Karen Walker, open up those drawers, referring to the cash register. He was told that they were open by Ms. Walker and he immediately started grabbing the money. So, the answer to what was going on inside the defendant's head when he entered is pretty clear cut. He obviously did not go into that building to get a room, to use the restroom. He went in there to steal, and by force, if necessary, because he had that weapon.

And what about the deadly weapon aspect of this case? There are two instructions that I would submit to you you need to read in tandem when deciding whether or not State's Exhibit No. 5-A, which is that knife, constitutes a deadly weapon in this case. Instruction No. 21 is going to define what a deadly weapon for you is, and it's a bit convoluted, perhaps a bit complicated. Instruction No. 19 is the substantial bodily harm instruction, and I would submit, read those together. That knife that the defendant used is clearly a deadly weapon under the law. Read those instructions.

Obviously, it may not be the most effective deadly weapon there is. The officer opened it up, you saw the blade, not real long.

However, that's not the standard under the law. The knife the defendant used that day is considered a deadly weapon under the law because it is readily capable of causing substantial bodily harm or death.

Now, this is where the substantial bodily harm instruction comes in, and it tells you what substantial bodily harm, that catch phrase means. And if you look at it and look at the facts and consider that knife, the knife is clearly a deadly weapon because it can cause another person to suffer serious permanent disfigurement or loss of a bodily function or an organ. Or, certainly, it can cause someone to suffer for a long physical pain. If Karen Walker would have been stabbed that day, she would have -- could have suffered severe injuries. She could have been cut in the face, causing permanent scarring. It could have punctured a lung, perhaps a kidney, depending on where it was used, and certainly it could cause prolonged pain when entered into the human body in any number of areas.

Now, did a robbery occur that day? I would submit to you that, yes, it clearly did. Instruction No. 17 is the instruction dealing with robbery. And there's some pretty basic elements with this particular crime. Initially, it takes the unlawful taking of property. And, was there an unlawful taking, of course, there was no evidence that the defendant had any right to take the money at the Parkway Inn. It was also taken in the presence of another. Karen Walker, as the testimony showed, was just a few feet away at the time. Against Karen Walker's will, of course, again, that's another easy one. She testified that she was scared, she testified that she at one point attempted to stop the defendant by moving towards the phone, her

intention was to call 9-1-1. By means of force or violence or fear of injury to person or property, again, using your common sense, pretty elementary, that was met in this case. In fact, there was an overt threat by the defendant when he had the knife, to Karen Walker, don't make me hurt you, she testified he said.

Now, the robbery instruction also provides at the very bottom here that the degree of force used by the defendant is immaterial, if it is used to compel acquiescence to the taking of or the escaping with the property. And essentially, this aspect is speaking to the fact that the law recognizes that there is no burden on the victim to actively resist the robber. The crime of robbery occurs despite the apparent cooperation to the taking by the victim. Karen Walker had no duty to stop Robert Day that day. The defendant had a knife, he threatened to use it to hurt Karen Walker, and he used it in order to ensure that he obtained personal property of the Parkway Inn, money that he had no right to. And obviously, that is a robbery with use of a deadly weapon.

Now that I have covered the law as it applies to those two crimes that you are considering in this case, I'm going to go on to the second question, that being who, who committed these crimes? Who walked into the Parkway Inn a few minutes before 1:00, April 22nd, 2000? Remember Karen Walker, she testified that she was absolutely positive that the defendant was the person that robbed her that day. And when you remember Karen Walker, it's important to remember that Karen Walker is not just a witness that saw the defendant for just a minute or two on April 22nd

while he was holding a knife and under the stress of the moment. She was a person that also saw him later that day at the McDonald's, and more importantly, she is someone that, although she didn't know the defendant's name before this happened, she had seen the defendant on numerous occasions before. So, it's a situation where she testified she had seen the defendant approximately ten times before at the Parkway Inn, and this was over a period of months. And she recognized him on the 22nd as the same guy she had seen before. She has also never wavered on that identification. She is positive beyond any doubt that the defendant was the person that robbed her.

Now, what corroborates her identification? How do we know beyond a doubt that it's reasonable, which is the burden in this case, that she's right? The most obvious one is the defendant's appearance. Within minutes of the robbery, the testimony was that Karen Walker told the police the description of the robber. She told it to them while it was fresh in her mind. You also heard testimony from Officer Huffmaster, who was the first on the scene, and he testified that he accurately conveyed that information from Karen Walker over the radio. Sergeant Flaherty told you that he heard that information over the radio and he heard a description and the area of travel, that being northbound towards Tropicana. And when he got to the area of Tropicana, he testified there was only one person in the area that fit that description, and that was the defendant. And the defendant was the one that had the gray hair, the defendant was the one with the mustache, the defendant was the one with the blue jeans, just like the robber.

The defendant didn't have a shirt on, the robber did, what about that? Well, what is a reasonable explanation for that? Is it reasonable to not wear your shirt while you're working inside of a truck? Well, maybe. As you consider that question, think about what was going through the perpetrator's mind and if it was the defendant as all the evidence points to. He just committed a violent crime, he knows Karen Walker saw, got a good look at him, he knows she was going to call 9-1-1, she tried to do that earlier. He knew the police were going to get a description of the robber. He's also on foot, and he's wearing blue jeans and a blue and white shirt. Now, what is the easiest way to change your appearance in that situation? Do you take your jeans off, walk in your underwear? Do you take your boots off, or do you take your shirt off? What would someone in that position do, what would draw the least attention, yet be the most effective? Obviously, the easiest thing to do was remove the shirt.

Now, also notice the area of the Parkway Inn. There was no easy way in that short period of time in that area for the defendant to change his appearance. You heard testimony and you can see on the map, No. 4, that that particular area of town between the hotel and the truck stop is an industrial area. Also note that it's important that the defendant – the testimony wasn't that the defendant was wearing a purple shirt and that Karen Walker said, the robber had a yellow shirt. If something like that happened, perhaps there would be reasonable doubt, but that wasn't the occasion here. It was a shirt and then no shirt.

In addition to the clothing matching, the hair color being the

same, the mustache, the age being approximately the same, and you heard the defendant testify he was 46 at the time, Karen Walker testified he appeared – the robber appeared somewhere around her age, and I believe she testified that she was 52, and perhaps last year when this occurred she was 51.

Now, in addition to all those, what about the location and the timing of where the defendant was at? Karen Walker testified that the robbery occurred a few minutes before one o'clock in the afternoon. Sergeant Flaherty testified that when he heard the call of the robbery, he heard the description, he started going towards the area, and he heard that call sometime before 1:00. Karen Walker testified that the last time she saw the defendant, he was headed northbound out of the Parkway, and she testified that he was heading across Ali Baba towards Tropicana. She told you that when she last saw the defendant, he was moving rather quickly, something between a walk and a run.

Sergeant Flaherty testified that he got in the area about twenty minutes after the call came out. And again, he wasn't exactly sure, but he testified it was around 1:10 or so in the afternoon when he came down I-15, exited, and got off onto West Tropicana, seeing the defendant in this generally area initially. Is it reasonable that the perpetrator would have been in that area at about that time? Well, again, use your common sense. The testimony and the evidence has shown that the robber was on foot. If he did not have a car, how would he get away? Would you go somewhere where people might know you, somewhere where people might help you

out, somewhere you can hitch a ride, somewhere where there are trucks and they're headed to all aspects of the country, all corners?

Not only does the defendant's clothing, his physical description, and the location and timing of where he was found corroborate Karen Walker's testimony, the defendant's actions do as well. Sergeant Flaherty approaches the defendant because he matches the description. He asks him to step in front of his car and keep a reasonable distance away from him, and the defendant does not comply. The defendant says he's a truck driver, he says he's in a hurry, wants to know why he's being questioned. What does he do when he immediately – when he hears why he's being questioned? The testimony from Sergeant Flaherty was, the first time he used the word robbery and let the defendant know he was a suspect, the defendant bolted. He immediately took off, he immediately headed southbound across the truck stop, across a very busy Tropicana Boulevard to the McDonald's. Sergeant Flaherty pulled out his weapon and chased him, managed to stop traffic, and managed to stay in hot pursuit and see that when the defendant got to the McDonald's in the parking lot, he got into a vehicle.

Now, the defendant ran as if he was guilty, and there's an instruction, it's called a flight instruction, and it's important to read that. You can consider that evidence as evidence of consciousness of guilt. Why would he run? Remember what was going on in his head at the time. He knew Karen Walker got a good look at him and could I.D. him. He knew that his appearance had only slightly been altered by that point by removing the

t-shirt. He knew that he had all that money balled up in his pockets. He knew that he had the weapon used in the crime. The defendant ran away as if he had a lot to lose, as if he had done something gravely serious. He risked his life, nearly getting struck by cars out there on Tropicana Boulevard, he ran in an effort to flee.

Now, the defendant got into Jorge Cruz' truck and he thought it was – perhaps he thought it was running. The testimony was it sounded like it was running. Mr. Cruz said the refrigerator unit on the top of that truck was on. The defendant attempted to hot wire that vehicle. Jorge Cruz testified when he came in that when he got back to his cab, wires beneath the steering wheel had been messed with, they weren't like that before. You heard the defendant's version of that event. The defendant told you he was just laying down and hiding, he didn't touch anything. Which version do you believe?

There is an instruction specifically talking about the credibility of a witness, his mannerisms upon the stand. You remember back when Jorge Cruz was testifying, and I asked him to identify the defendant and to point, Mr. Cruz didn't point, he looked. Mr. Cruz didn't want to be there. Mr. Cruz didn't want to finger the defendant, he was a trucker. What motive did Mr. Cruz have to lie?

Now, when the defendant knew he was trapped because Officer Flaherty had the gun, he resisted and he told Officer Flaherty, I have nothing to lose, just shoot me. He acted as if a person who had been virtually caught red-handed would act. Did he act like a person that possibly

violated a parole for a crime occurring in 1984, a crime that he admitted to on the stand, over a year before he thought his parole was almost over? What about what he had to say after being handcuffed? Sergeant Flaherty – the testimony was the defendant asked Sergeant Flaherty what he was being arrested for and he said something to the effect of, what I did was no robbery, after Sergeant Flaherty responded to the robbery. I would submit to you that the defendant implicated himself verbally, just as he did with his physical actions by fleeing that day.

Does it make sense that the defendant thought Flaherty was arresting him for a parole violation from a case in 1984, or does it make sense that the defendant knew he had participated in a crime earlier that day and he was implicating himself in that, although his untrained legal mind perhaps didn't understand exactly what he had done, or maybe didn't want to admit it fully to the officer?

What about the other corroborating evidence? When searched incident to arrest, we have the defendant having the two items you would expect the robber to have. He had the money and he had the weapon. Let's talk about how the condition of the money was found. Was it found as if it was legitimate property of the defendant? Was it found in a wallet or perhaps one of those money clips some of the gamblers around town use? Well, the money was found exactly in the way you would expect it to be found. State's Exhibit No. 2 shows the money in that pocket, stuffed in there all balled up, the same condition it was, consistent with what Karen Walker described. Clearly, the perpetrator didn't have time to carefully fold

and collect that money. He had to stuff it in and run. Now, he also didn't have time to stop once he left the Parkway Inn. He had to keep moving to get away from the Parkway Inn as quickly as possible, and he had to get out of the public eye. It's not something you can do in public, take out the money and count it out – it's suspicious – and organize and collect it in a way you would expect to find it. The knife, of course, also corroborates Karen Walker's identification, the same type of knife that she identified. She didn't see the handle, but she testified about that blade that was a small blade. You can look at that knife yourself.

After you consider all that evidence, the conclusion to reach, a reasonable conclusion to reach, is that Karen Walker was right, that the defendant is guilty of robbery with use of a deadly weapon and burglary while in possession of a deadly weapon.

Thank you.

THE COURT: All right, before we hear closing arguments from Ms. Dickson, I think we'll take a short recess.

So, I'll admonish the jury once again it is your duty not to discuss this case among yourselves or with anyone else, nor are you to read, watch, or listen to any reports or commentary on this case or anyone connected to it, nor are you to form or express any opinion about this case until it's been finally submitted to you.

With that, we'll be in recess until 3:15.

(Whereupon a brief recess was taken)

. . . . .

(Whereupon the following proceedings were held in the presence of the jury)

THE COURT: All right. The record can reflect we're back in the presence of the jury, all members of the jury panel are present, counsel for both sides are present, as is Mr. Day.

Counsel, you may make your closing argument.

MS. DICKSON: Thank you, Your Honor.

CLOSING ARGUMENT

BY MS. DICKSON:

May it please the Court, Mr. Fattig, Mr. Day, ladies and gentlemen. As I told you yesterday, this is a case about mistaken identity. Karen Walker is wrong about saying that Mr. Day is the person who robbed her on April 22nd, 2000. The District Attorney has his favorite instructions that are included in the packet which you will be given, and I have mine. My favorite instruction is Instruction No. 5, which deals with reasonable doubt. And the reason this is a favorite instruction is because this is something that's pretty much the basis of our whole system of justice. Reasonable doubt and the presumption of innocence are what protect every single one of us from false accusations. If anyone is accused of a crime, they have a right to demand that the prosecution prove the charges against them beyond a reasonable doubt.

And a reasonable doubt is a doubt that – in order to have a reasonable doubt, you have to be – or not to have a reasonable doubt, you have to be convinced beyond an abiding conviction. That's what the

instruction says, an abiding conviction of guilt. In the most important decisions in your own life, in decisions whether to get married, whether to change jobs, whether to move to a different location, important decisions in your own lives, would you have an abiding conviction of the rightness of what you were doing before proceeding. And there are extremes, there's the extreme where you're absolutely sure, 100 percent this person is guilty. And the other extreme, 100 percent this person is innocent. And in-between there's a whole lot of gray area. And in the middle where you're just not sure, that's a reasonable doubt. In order to find guilty beyond a reasonable doubt, it isn't just that maybe he did it, it isn't just that possibly he did it, it isn't just that probably he did it, it's that he did for sure beyond a reasonable doubt to an abiding conviction.

There's another part of the reasonable doubt argument that is often explained that in a situation in which you have a bunch of facts – the evidence in this case which you've heard over the last day and a half – that evidence you have to consider. And if you interpret that evidence and there's a reasonable, legal explanation for all of the evidence, and there's another reasonable explanation which shows that guilt is the outcome, when you're deciding between those two, you have to pick the one that says, not guilty. Two reasonable explanations, one indicating guilt, one indicating not guilty, you have to pick the not guilty one. That is what proof beyond a reasonable doubt is.

You heard from Karen Walker, who of course is the main witness in this case. Karen Walker is the person who saw the robber of the

Parkway Inn. And Mr. Fattig is right, there's not a whole lot of dispute about the charges here, whether a robbery occurred, whether a burglary occurred. What is at dispute is who did those things and our argument is is that Mr. Day did not.

Karen Walker said two very important things that I would ask you to focus on. The first of those things is that when she was asked to give a description of the person who had robbed her, she said that that person had no distinguishing scars, marks, or tattoos. No tattoos. This is Karen Walker, as she told you, is looking at that knife in the person's hand, focusing on his hand, seeing his arms, seeing his hands reach in the cash drawer and pull out the money, seeing him put the money into his pockets with his hands. That person had no tattoos. Mr. Day has tattoos that you cannot miss. If you're looking at Mr. Day and you're looking at his hands and you're seeing his arms, you cannot miss those tattoos. Karen Walker saw no tattoos. That's important point number one of what she said.

Important point number two of what she said is that when I asked her if she had seen a picture of Mr. Day after the arrest, after she did the identification when she said, well, yes, as a matter of fact, I asked the police officer to give me a picture of Mr. Day so I could take it back to the motel and I could show the other people in case he came in again, out of some sort of fear. She has had a picture of Mr. Day for a year to look at. By this point in time, she has no independent recollection of what the person looked like who actually robbed her, because all she has seen for a year is a picture of Mr. Day.

Mr. Fattig made some reference to the fact that this isn't just a question of, well, she said it was a purple shirt and he was really wearing a yellow shirt, so we can dispute it in that way, but you can change shirts. You can't change tattoos. This isn't a difference between a purple shirt and a yellow shirt. This is a difference between a person with no tattoos and a person whose tattoos cannot be missed.

What do we know happened on that day? We know that there was a very brief period of time in which this robbery occurred. Karen Walker obviously wasn't keeping track of the time and she doesn't know exactly how much time elapsed, and I think she said it was about a minute. She's in the Parkway, she's on the phone, her back is apparently turned towards the door, she doesn't see anyone come in, she puts down the phone, turns around, there's the robber, hand over the – open the drawers, the drawers are open, he opens the drawers, don't make me hurt you, I've got this knife, takes the money out, puts it in his pockets and he's gone. A very, very quick period of time. And she, naturally, was very upset, and you heard her manager say that she was very upset, that I guess there was some trouble getting everything organized because of how upset that she was. She's not in the best position to be a good observer. She's traumatized by this incident. But, she does give a description of the person that she's seen. And what does she say? She says she saw a man in blue jeans, a blue and white shirt, gray hair, approximately 5'5," she said he was approximately her height, and that's something that's fairly easy to tell because you're looking at eye level. She said he was about 5'5" and he was about her age, which

is 52 or 51 perhaps last year.

Officer Flaherty says that he sees Mr. Day walking around in the area of the Wild West Truck Stop, and he says that he matches that description. Well, he was wearing blue jeans and he has gray hair. He wasn't wearing a blue and white shirt, he isn't 5'5" and he isn't 52. So, the description isn't all that accurate as to whether or not Mr. Day meets – matches the description that was given by Karen Walker.

Bear in mind that he's also approximately a half a mile or more away, and there was some discussion with Officer Flaherty about whether you can actually go from the Parkway Inn through this industrial area the way a crow flies up to the truck stop. And Officer Flaherty said, well, I think you can; I've never done it, however. And he did testify that he knows that around most of these lots around here, and some of them you can actually see, there are walls, there are chainlink fences. This is an industrial area which is not generally open to the public, it's kept private so that people can't walk through that area. I would suggest to you that you cannot go as the crow flies from that point to that point. You have to go up Industrial Road, up to Tropicana and across. And Officer Flaherty told you that's at least a half a mile.

And he saw Mr. Day a half mile away walking around in the truck stop about twenty minutes later, maybe as much as thirty minutes later. Mr. Day wasn't doing anything unusual at that time, he wasn't trying to hide, he wasn't running anywhere, he was just walking around in the truck stop, talking to the trucker. It also seems to be assumed by the

prosecution in this case that the robber didn't have a car, that he was on foot. Well, we know that he was on foot when he walked into the motor inn, but we don't know whether he had a car in the area or not. Karen Walker saw him crossing Ali Baba Street right next to the motel and going towards the industrial area, but she doesn't know if he went up the street to one of the other places that Officer Flaherty told you that are there, and got in his vehicle that he had parked there and drove away. That would be probably the logical way to get from this area. If you're going to choose a fairly remote location to rob like the Parkway Inn, you need transportation to get away from there, and most likely the robber drove away in the car that he drove there and that he had parked at a site from the motel.

Mr. Day told you that he ran, and we know he ran, everybody knows he ran. But he told you why he ran. You heard about this prior record. He's been convicted of felonies in the past, particularly a bank robbery back in 1984, and he went to prison for that and he was on parole, and because of some personal problems in his life he ran away from his parole. Even though he only had 60 days left on his parole, he ran away. You haven't heard any evidence about what the consequences of that would be, so you can't assume that well, there wouldn't be anything, because we don't know what the consequences would have been from running away from that parole. It could have been considerably more than the 60 days that were left on the parole. He ran because he thought that there were warrants out for him, and it's true that he was probably wrong about that, because apparently they decided not to go after him for the 60 days that

were left. But that was what he was concerned about at the time. And he told you he doesn't remember exactly what the officer was saying, doesn't remember him saying anything about a robbery, but he saw the officer, like looking around, he was kind of fidgeting with his gun and his belt, and Mr. Day thought that, you know, he's looking at the people that are surrounding me, that are coming in around me, and that's what Mr. Day is focusing on, why is the officer looking around in this fashion, and he took off because he thought that he was about to be arrested for that parole violation.

And he runs and he tries to hide in a truck. Now, Mr. Cruz, Jorge Cruz said that some of the wires were pulled from his truck, and that may very well be. You heard how Mr. Day said he was trying to hide in the truck, trying not to be seen by the officer, and you heard the officer say that when he was trying to pull him out, he had to pull him out and Mr. Day is grabbing on to things, holding on to things, trying not to be pulled from the truck, and maybe that's when the wires got torn, we just don't know.

And then what happens? The police come to Karen Walker and they say, we think we have the person who did the robbery. We think we have the person who frightened you, who terrorized you. We want you to come and identify him, and she does. She's taken in the police car, she stays in that police car, she's parked actually in the next lot to McDonald's and she said it was about forty feet away – or, actually what she said was it was the distance of the courtroom, which the judge was kind enough to tell us was just under forty feet. Forty feet away, she's asked – sitting in the vehicle, she's asked to identify Mr. Day. Mr. Day at that time is standing

there, he's in handcuffs, he's got police surrounding him, he's the only person there.

Now, we've all seen a lot of television and movies with police line-ups where a person is asked to pick out somebody from a line-up. Do you see the person who did your robbery among this group of people? And that's how you pick someone out. And that's a more appropriate way to do it because then you have a choice, and then you really have to test your identification, your memory of who the person was that you saw. Karen Walker didn't have that choice. She had one guy in handcuffs that the police told her they thought was the robber. Is that him, from forty feet away, and she said, yes. Based on having seen him for just a few moments earlier, having to see him from a distance. But what happened after that? She gets a picture of Mr. Day, of the person she has identified, and she's been looking at that picture ever since.

I would suggest to you, also, ladies and gentlemen, that the police were perhaps a little bit too sure of themselves in this case. They find Mr. Day, they think he fits the description, they arrest him, he runs, making himself look guilty, he's got money in his pockets, the police didn't look anywhere else. They don't look for any other suspects. They don't look to see if there's any other gray-haired men anywhere in this area wearing jeans and a t-shirt. I would suggest to you, ladies and gentlemen, if they'd really looked for anyone else, they could have found a lot of people in that area of the truck stop, of the casino, of all of the fast food places, of all the places in that general area who were wearing jeans, who had gray hair, who would

have fit the general description given by Karen Day (sic). But, they didn't look – I'm sorry, Karen Walker. They didn't look for anybody else after they had Mr. Day. They didn't go back again over evidence. They didn't get fingerprints to see if they could match the fingerprints on the drawer that the robber had opened with those of Mr. Day.

They didn't get the name of the truck driver, the truck driver that Mr. Day was talking to, the truck driver that could have come into court and testified about exactly what was said then. He could have testified as to whether or not Mr. Day was working for him that day, whether he had paid him money, which would explain some of the money in his pocket. The police never bothered to even get the name of that truck driver, though they certainly got the name of the other truck driver who had just as much involvement in this case. They were sure that they had the right person, but they were wrong, and they didn't look anywhere else.

Karen Walker says that she thinks that she has seen Mr. Day in the motel about ten times over a period of a year. Now, you heard that Mr. Day was only in town since February, he'd only been there for two or three months, he hadn't been there for a year, and he's never stayed at the Parkway Inn. We don't have any other evidence on that point. That's something you have to determine the credibility of. Do you believe that he has never stayed there or do you believe Karen Walker that she thinks he's been there? If Mr. Day had stayed at that motel, he would have had to produce I.D. Karen Walker told you you're required to have I.D. to rent a motel room. Somebody could have looked through the registers to see if

Robert James Day was listed in the registers. Nobody bothered to look. Mr. Day has never stayed at that motor inn.

How about the money? Well, it certainly looks somewhat incriminating when they say that there's a little over a thousand dollars stolen from the Parkway Inn and Mr. Day has over a thousand dollars in his pockets and it's crumpled up. That looks pretty bad. How much money was taken? Did you ever hear a clear amount of how much was taken? Ms. Walker said that, well, her boss was the one who was responsible for counting the money. He said she was the one responsible for counting the money. The police officers did tell you that somebody told them on that day that one thousand fifty-one dollars was taken. When they came into court and testified, nobody could pin that amount down, but that's what they were told on April 22nd last year. One thousand fifty-one dollars was taken.

Twenty minutes later, Mr. Day has one thousand eighteen dollars and fifty-five cents. We probably disregard the fifty-five cents, because we know from Karen Walker that no change was taken. So, assuming that the one thousand eighteen dollars was what was taken from the robbery, what happened to the other thirty-three dollars? Where did that go? Where did Mr. Day spend thirty-three dollars in the twenty minutes between the time of the robbery and when he was seen at the truck stop walking around talking to truckers? And I asked the police officer, did he have anything with him, did he look like he had just bought something? He didn't have any food, didn't have any other items? No, he had nothing on him that he had just purchased. What happened to the thirty-three dollars?

The witnesses about the money were pretty unclear. We had the manager saying, well, in one drawer there's four hundred, in the other drawer there's one hundred. Karen Walker said in one drawer there's five hundred, in the other drawer there's two hundred. They couldn't agree on how much was even supposed to be in the drawer, let alone how much actually was.

Motive. What would be the motive for robbing the Parkway Inn? Well, money. And it's true that the prosecution doesn't have to prove a motive, but the obvious motive for a robbery is you want the money. Mr. Day didn't need the money. He's making a couple hundred dollars a day, usually, working as a lumper. And we brought in Mr. Beasley, as a lumper, just to say he knows that Mr. Day is a lumper because he's seen him out there with the other guys lumping, and as a lumper he can make up to sixteen hundred dollars a week. You don't need to steal a thousand dollars in a robbery from the Parkway Inn if you're making that kind of money. So, motive goes against the prosecution in this case.

Mr. Day's knife, the deadly weapon that's charged here. And while, as I said it's true that we don't have much dispute about the evidence, I do want to touch on this one because one of the things the State is required to prove is that this is a deadly weapon. Now, it's our position that this isn't the weapon that was even used. Karen Walker said the knife that she saw had a blade of about two and a half to three inches, and the officer said that this was about two inches, and I don't think anybody's actually measured it, but it does appear to be about two inches. Is this a

deadly weapon? Is this an instrument, which if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death? I would suggest to you that this is not a deadly weapon. A deadly weapon isn't really an issue here. All truckers have knives. Mr. Day told you he needs a pocket knife for the work that he does, he cuts opens boxes, he has to slice different things when he's working, he needs a pocket knife.

Some of you have, I believe, been victims of crimes before, and unfortunately the statistics are that probably at some time in your lifetime most of you will be the victim of a crime. If you're lucky, it won't be a crime directed against you physically, it won't be a crime of violence in which your safety is endangered. But, if you're ever in that kind of a situation, or for anybody in that kind of a situation, I would suggest to you that it's a very terrifying experience. It makes you very frightened. And Karen Walker told you she was frightened. And when you're frightened, you want to know that you're safe. And when you've been the victim of a personal assault of this nature, how do you know you're safe? You know you're safe if the person who did that to you is locked up and in jail. Karen Walker wants to believe that Robert Day is the person who robbed her, because then she can feel safe. And she got that picture of Mr. Day so that she can look at it and make sure that the people who come in aren't Mr. Day. She's been looking at that picture, because she wants to feel safe and to be assured that she doesn't have to fear from him.

Karen Walker isn't deliberately misleading you, she's not lying

to you. I would suggest that she honestly believes that Mr. Day is the person who robbed her, but she's wrong. And we know that she's wrong because of the tattoos. Because of the tattoos that you can't possibly miss and because of the fact that she's had Mr. Day's picture in front of her for almost a year now, she can't possibly tell you what the real robber looked like.

Karen Day (sic) was mistaken in her identification. Every time she looks at the picture, she compounds that mistake. I'm going to ask you not to compound that mistake further. When you go back in the jury deliberation room, find Mr. Day not guilty.

Thank you.

REBUTTAL ARGUMENT

BY MR. FATTIG:

Because the State has the burden of proof in this case and the State readily accepts it, I get to speak twice. I promise I will be shorter than the last time.

The defense indicates that, suggests that the defendant had no motive to steal because he had plenty of money, plenty of possessions. You heard the testimony about his life. Does that make sense? Use your common sense. It didn't sound like to me he was living the high life.

Now, when we look at the State's Exhibit No. 4, the map, Ms. Dickson talks about, suggests maybe it's impossible to go as the crow flies between the Parkway and the truck stop up here because of various fences and walls. Well, ask yourself, do you need to go as the crow flies? In this

particular case was there time? The evidence was that there was plenty of time for the defendant to walk, perhaps through some buildings, cut over, go up Industrial and over. We heard testimony from everyone in this case that suggested that it was sometime before 1:00 when the robbery happened. And then Karen Walker called the police, they were there within a couple minutes, Officer Huffmaster phoned dispatch, called in a description. When that happened, Sergeant Flaherty heard the description, the direction of travel, and he testified it took twenty minutes, approximately, he wasn't sure, it could have been thirty, for him to get in the area. And that's when he saw the defendant. Is that enough time for the defendant to get where he was at? Of course it is.

Now, the Defense often times puts the police on trial in a criminal case and it's pretty common, but is it justified in this particular case? I would submit to you that the police didn't need to look for anyone else once they had Robert Day in custody. Not only did they have a middle-aged mid-40's man with jeans, gray hair, mustache, that fit the description, but they also had a man with over a thousand dollars in cash all balled up and stuffed in his pockets, and a man that had the same type of weapon that had been described.

What about the truck driver? Well, the testimony from Sergeant Flaherty was he didn't have time when he came back after pursuing the defendant across that busy road and taking him by force out of that truck. And by the time he arrested him and searched him and went back to where his car was across the street, that trucker was gone. They also didn't

have to get other people, and didn't have the time to get other people when they did that line-up with Karen Walker, that looked like the defendant. The defendant was the only one in the line-up, and that's common in that type of situation and it's allowed under the law.

What about these inconsistencies? There's always inconsistencies in every single case. Why is that? Well, you can't prove, I would submit, virtually anything beyond any doubt, beyond the shadow of a doubt. That's why the law doesn't require that burden upon the State. It is proof beyond a doubt which is reasonable. These are events that naturally are very stressful. They are events that occurred, the testimony was the police were out there for an hour, maybe even less. The robbery happens within a minute or two, she runs for help, the police are called, they arrive within a couple minutes. Within twenty minutes or so, someone is caught, they take her, she I.D.'s him as the man, not wavering at all that he was the man; not possibly the man, not maybe. There's never been any wavering on behalf of Karen Walker in this case. Is it possible people make little mistakes when it comes to counting money and remembering how much money is around? Of course it is. People are human beings. Everyone knows human beings are not computers, people can make mistakes. Is it enough to cause reasonable doubt? Well, the Defense is harping on the fact –

MS. DICKSON: I object to the term, harping, Your Honor.

THE COURT: Sustained. Use a different term.

MR. FATTIG: The Defense argued in their closing argument that Karen Walker testified that the person who robbed her did not have any

tattoos. What I say and what Ms. Dickson says is not evidence, and part of the reason we have twelve jurors and part of the reason our system is considered the best in the world is because of a collective remembrance by twelve jurors. And my memory of Karen Walker's testimony was, she didn't remember whether the person that robbed her had any tattoos. Now, my memory doesn't count and Ms. Dickson's memory doesn't count, your collective memory does. But use it.

The defendant's testimony. Keep in mind that when the defendant testified, he was able to conform his testimony to all the evidence against him. Ask yourself, when he did that, was it reasonable? Did his story make sense?

Coincidences. The Defense would have you believe that this is really a strange and crazy series of coincidences, extremely dumb luck. Was it, or was this the product of a description by an eye witness who had an opportunity to observe her offender, not only on that day but on previous occasions, who had the forthrightness to come forward and contact the police right away despite her admission that she was scared, who informed the police within minutes of the observation, of the description, who gave the police that description. That description was accurately transcribed over the radio and that description matched a particular suspect. Was it the product of good police work and a brave victim, or was it a series of horribly strange and bizarre coincidences? Ask yourself, what are the chances of someone with jeans, blue jeans, with gray hair, a mustache, and who looks around 51 or thereabouts, who happens to be in an area walking distance from the

scene of the crime approximately twenty minutes or so, twenty-five or thirty minutes after the crime, and who happens to have nearly the same amount of money taken in that crime and it's all balled up and stuffed in his pants pockets. And he has the weapon, the same type of weapon the victim described. Merely coincidences? Use your common sense.

During voir dire, I asked all of you whether or not if you were selected as a juror you would be able to do your duty, and your duty as a juror is to do equal and exact justice between the people of Nevada and the defendant. If the State proves all the essential elements beyond a reasonable doubt, it is your duty to return verdicts of guilty. Now, keep in mind with regards to the burden of proof, it is no higher nor lower than any other case here in Nevada. Juries every single day in this State decide cases beyond a reasonable doubt and use that instruction.

It is perhaps impossible to prove anything beyond all doubt. I ask you to not hold the State to an impossible burden. This case has been proved beyond any doubt which is reasonable. Go back into that deliberating room, go through the evidence, do your job, and when you come back into this room, tell the defendant something he already knows, that he is guilty of robbery with use of a deadly weapon and burglary while in possession of a deadly weapon. Thank you.

(Whereupon the officers were sworn to take
charge of the jury deliberations
and the jury retired to commence deliberations
at the hour of 3:50 p.m.)

(Whereupon the following proceedings were held outside the presence of the jury)

THE COURT: All right. Anything else before we recess?

MS. DICKSON: Yes, Your Honor. You had indicated earlier that we would make a record and then I completely forgot about the point.

Mr. Fattig was allowed to introduce over my objection testimony from the police officers, the hearsay statements from this truck driver who said that – or Sergeant Flaherty said that the trucker said that Mr. Day offered him a hundred dollars to take him to New Orleans. I think that's impermissible hearsay and I object to its introduction.

THE COURT: Okay, we're making a record.

MR. FATTIG: Your Honor, the statement was not offered for the truth of the matter asserted. The Defense, during their cross-examination, cross-examined the officer regarding his failures to investigate the truck driver. Failure to get his identification, failure to get the t-shirt or look for the t-shirt in the back of the truck that allegedly belonged to the defendant. Such statements opened up to the fact that the statement made by the truck driver was offered to explain why the police officer did not follow up on that investigation with regards to the trucker. When the police officer originally approached the trucker, it was after he initially made contact with the defendant. He approached the trucker because he saw the defendant talking to the trucker when he first came on the scene. He then went up to the trucker, he heard the statement, and therefore, based on that, it's effect on the hearer, that being Sergeant Flaherty, he returned, focused his

investigation more on the defendant, mentioned the word robbery, and that's when the defendant fled. When the defendant fled, he followed, and the trucker, when he came back, was gone. So, the statement was not offered for the truth of the matter asserted, it was offered merely to show its effect on the hearer, that being the witness, Officer Flaherty.

MS. DICKSON: I don't think that's why it was offered at all, Your Honor, I think it was offered for the truth that Mr. Day had offered a hundred dollars to be driven to New Orleans and to attempt an escape. The police officer – and the Court is aware of how we have pursued this motion – the police officer never got the identification of this truck driver. He didn't have any problem getting the identification of the other truck driver, whose involvement I would suggest is even –

THE COURT: Counsel, we've already argued that portion of it. You don't need to re-argue that.

MS. DICKSON: They did manage to get the identity of the other truck driver, Your Honor, they did not get this identity. The statement was introduced for its truth, there was no other argument to be made about it. I asked the officer why – or if he had gotten the identity of the trucker. He didn't get that identity, and I think, I'm not sure exactly what I said on it, but I think that's pretty much as far as it went, just asking him if he had gotten the identity of the truck driver. And I don't think that opened the door to statements the truck driver made.

THE COURT: You have continually raised the issue regarding the police failure to obtain information that you think would be favorable to the

Defense. You even argued it on closing argument. The State did not seek to admit the hearsay statement on their case in chief. It was only after you had opened the door and started questioning regarding his failure, the police officer's failure to take certain steps to get certain information, and specifically the name of the truck driver, or any follow-up investigation with the truck driver. So, based upon that, the door had been opened, the State did seek to admit the statement for a non-hearsay purpose, and for that reason the State was allowed to go into that line of inquiry.

So your objection is noted for the record, but it was overruled.

MS. DICKSON: It perhaps is a little late at this point, Your Honor, I wasn't aware that that's why it was being introduced. I thought it was being introduced for the truth. I think the jury should have a precautionary instruction, then.

THE COURT: Now, in the conference at the bench, the State specifically stated why they were seeking to admit it and for a non-hearsay purpose, to explain the state of mind of the officer regarding that.

So your objection is overruled.

(Whereupon the evening recess was taken at the hour of 4:00 p.m.)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording in the above-entitled case.

Elizabeth Garcia
ELIZABETH GARCIA
Court Transcriber

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ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

ROBERT JAMES DAY,

Defendant.

CASE NO. C167783

DEPT. NO. IV

BEFORE THE HONORABLE KATHY A. HARDCASTLE, DISTRICT JUDGE

WEDNESDAY, MAY 9, 2001

RECORDER'S TRANSCRIPT RE:
SENTENCING

APPEARANCES:

For the State: TIM FATTIG, ESQ.
Deputy District Attorney

For the Defendant: DIANNE DICKSON, ESQ.
Deputy Public Defender

RECORDED BY: Tina Smith, Court Recorder

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LAS VEGAS, NEVADA; WEDNESDAY, MAY 9, 2001; 9:00 A.M.

THE COURT: C167783, State of Nevada versus Robert James Day. All right, did you have a chance to review the judgments of convictions?

MS. DICKSON: Yes, Your Honor, I have. My biggest concern at this point is the Pre-Sentence Report. Did Your Honor get a copy of the Amended Pre-Sentence Report that was supplied yesterday?

MR. FATTIG: I didn't get a copy of that.

MS. DICKSON: Okay. It doesn't matter, it's still wrong.

THE COURT: Yeah, the corrected PSI, yes.

MS. DICKSON: Yes, Your Honor. The reason for this is I spoke to Officer Wheaton, who did the original Pre-Sentence Report. With respect to page 3, it indicates in 1995 a conviction for Escape. And I spoke to Officer Wheaton about that, that I didn't believe that that was a valid conviction, particularly in light of the fact that Mr. Day would not have received a 10-year consecutive sentence in 1997 and be out of custody from the Federal system by now. Officer Wheaton went back, looked at his records, and decided he was wrong on the time, that it was actually a 16-month sentence. But I think the State would agree with me, and I did talk to the Pre-Sentence Officer who is here today, because she has the supporting paperwork, this is not a conviction for Escape. Mr. Day was charged as a parole violation with escape from a halfway house that he had been sent to, and he was given a parole violation and a new parole hit of 16 months. It is not a subsequent felony conviction or even charge for Escape.

Because of the nature of that charge and because I know what will happen when the prison system sees this report and sees that Mr. Day has an escape charge and conviction on his sentence, and that's going to interfere seriously with any kind of programming or placement or anything like that, I would like the Pre-Sentence – the Probation Department to go back and correct this Pre-Sentence Report again, to eliminate that Escape charge. It is not a proper conviction or charge. And I do have the paperwork, which actually has been provided to me by the District Attorney, showing that this was a parole violation for which he was given a 16-month hit.

THE COURT: Well, we can make the paperwork part of the record.

MS. DICKSON: The problem, Your Honor, is that NSP looks at the Pre-Sentence Report, they don't care about any other paperwork. This is what they're going to go by and this is wrong.

THE COURT: You've got your paperwork there, I'm not going to pass this another two weeks for them just to take that off. They can make the record, make sure that the prison is aware of the correction on the PSI.

MS. DICKSON: Is the Court directing them to actually correct this Pre-Sentence Report that will go up with him?

THE COURT: They can send a letter along with the PSI, pointing out that it's not a conviction, the Escape charge.

MR. FATTIG: There is one other amendment, Your Honor, that inures to the benefit of the State. Also on page 3, in 1984 it lays out that the defendant was convicted for Obtaining Property by False Pretenses. That is

correct, he was also along with that, and I have the certified Judgment of Conviction, which I filed this morning, convicted for the felony crime of Embezzlement, which was actually a separate crime. So, I would agree that he has five felony convictions. I would agree that the Embezzlement is an accurate conviction, the Escape is not.

THE COURT: All right.

MS. DICKSON: And for the record, I would agree that Mr. Day was convicted of Embezzlement also in that case, but they were treated together and for purposes of habitual criminal stature, I think that's one offense. For the Pre-Sentence Report it may be considered as five prior felonies, but for habitual criminal purposes, pursuant –

THE COURT: He still has four prior felony convictions.

MS. DICKSON: He still has four prior –

MR. FATTIG: And I would take exception to that, because clearly on the Judgment of Conviction there are separate dates of offenses when it comes to the two crimes, and he received separate sentences on them. So, he qualifies under four or five, so it's sort of –

THE COURT: So, I don't have to decide the issue. He qualifies under the four.

MS. DICKSON: Correct, Your Honor.

THE COURT: All right.

MR. FATTIG: Are you ready to hear argument?

THE COURT: I'll hear argument. Well, first of all, let me adjudicate him.

Mr. Day, pursuant to your jury convictions entered March 15th, 2001, Count I – Robbery With Use of a Deadly Weapon, felony; and Count II – Burglary While in Possession of a Deadly Weapon, felony, you are hereby adjudicated guilty of those crimes.

State?

MR. FATTIG: Your Honor, the first exhibit that I have marked is a Judgment of Conviction from Missouri and it lays out that the defendant pled guilty in 1975 for Sale of a Controlled Substance, which was a felony in Missouri. He received a sentence of 5 years in that case, plus a 5-year period of what they called special parole. He ended up doing 13 months on that particular case. He was paroled in August of 1976.

He then made it down to North Carolina, and Exhibit No. 3 which has been marked is a certified copy of Judgment of Conviction from crimes he committed in North Carolina in 1982. He ended up being convicted in 1985 after he picked up the bank robbery and went to prison. He ended up being convicted for Embezzlement and Obtaining Property by False Pretenses, two more felonies that occurred in 1982. And the Judgments of Conviction reveal that in that particular case he used a credit card that had been fraudulently obtained to obtain various goods and services from small businesses in Wake County, North Carolina.

He then, after picking up those charges, he was a fugitive when he went to Missouri in 1984, and Exhibit No. 2 is a Judgment of Conviction from the Federal Court, the Western District of Missouri, along with the PSI and an extensive report about his background back in 1984.

In that particular case, the PSI reveals that in 1984 he walked into a bank in Springfield, Missouri at 2:00 in the afternoon and he handed a note to the teller. The note read: You have 30 seconds, 10,000 in a deposit bag. Move, no alarm. I don't get caught, no one gets hurt, understand? I'll be beside you. He showed this to a couple different clerks, he ended up getting 3,000 dollars in cash. Later that day, because of a report that a person matching the description got into a cab by the bank and got on an airplane, he was picked up in St. Louis across the State getting off of an airplane and was arrested. At the time he did the crime, not only had he absconded from North Carolina because of the credit card charges, but he was also considered an absconder from his parole from the State of Missouri for that earlier Sale of a Controlled Substance charge.

Then after he got sentenced on the bank robbery charge in Federal Court, North Carolina ended up adjudicating him and giving him a break on those 1982 charges. He got concurrent time to that North Carolina case. He received two 10-year sentences concurrent to the Federal case. Upon being paroled on the bank robbery case and upon being paroled from the North Carolina cases, he picked up various violations, and that Judgment of Conviction and the PSI lay it all out. He failed to go to drug and alcohol counseling, he was given numerous problems (sic) – numerous chances to address his problems, he didn't take advantage. He picked up an Escape violation, which has already been mentioned. He also picked up a DUI arrest in 1996, where while drunk he ran into another vehicle, a truck that was stopped at an intersection.

In 1994 is the fourth document, and that was a new felony conviction that he picked up while on Federal parole, another felony in North Carolina, and that one is Financial Transaction, Card Theft. He received a light sentence in that case, two years. He's on parole until recently up until this particular case in Nevada. He comes out here, and Your Honor is well aware of the facts in this particular case.

I would ask, Your Honor, that he be treated as a habitual criminal under the large statute. I believe that this is someone who has been – has a history of crimes. We have crimes starting in 1974 all the way to the present. A long history – he has been on parole, received numerous violations, he has proven again and again that he is unsupervisable. He is someone that needs to be warehoused, he has a prior robbery conviction. Going to prison and being on parole certainly didn't deter his conduct in this particular case, when he uses a weapon and he threatens the clerk of the Parkway Inn Motel. As she goes toward the phone, he threatened her safety. He got away with over a thousand dollars, and thanks to really excellent police work, he was caught that same afternoon.

I believe habitual criminal is appropriate when someone needs to be warehoused like this individual has proven over and over again, and I would ask for a definite 300 months with parole after 120 months. If you don't go for the large, I would ask that you max him out on an 8 to 20 year sentence under the small habitual. Thank you.

THE COURT: All right.

Counsel?

MS. DICKSON: Your Honor, Mr. Day has asked me to read his statement to the Court. He was feeling a little too nervous to read it himself. This is his statement:

Your Honor, may it please the Court. As the Court has been advised by Counsel, I have been diagnosed as having Hepatitis C. It is my understanding that Hepatitis C is a viral infection which affects the liver and generally results in cirrhosis or cancer of the liver, that's without a liver transplant which I will not receive in prison. I'll most likely die from it. I really don't want to die in prison, Judge. When my time comes, I hope to be allowed to go home to die around my family and loved ones. However, while the State was good enough to tell me I'm going to die from my illness, it was left to my imagination exactly how much longer I might expect to live. I've been in solitary confinement all these months, with no way to get information on my illness. I've asked for tests at the jail and Lakes Crossing to determine how far the disease has progressed, but was told I need to wait until I'm released or go to prison for that kind of test.

Judge, at some point during this case, counsel advised me that the State would pursue habitual criminal proceedings if I refused to accept the State's offer of a 3 to 10 year sentence. However, I advised her on several occasions that I felt compelled to decline the offer because, one, I am innocent, and two, I did not want to die in prison, and without knowing how far my disease has progressed, I could not accept the State's offer. I asked her to return to the prosecutor and explain my medical situation and asked him to reduce the minimum to two years, so that just in case the

Parole Board wanted to parole me for medical reasons it could do so, since I would be within my minimum in a short period of time. However, the State declined and the case proceeded to trial.

Your Honor, for the life of me I can't understand the concept of punishing a defendant who asserts his innocence more severely than one who admits his guilt. It's like duck season just opened and I'm the only duck left in town. The rest of them all plead guilty and get probation. Only because I've asserted my innocence, the State now wants a life sentence, where before it had been satisfied with a 3 to 10 year sentence.

Judge, if you'll notice in each of my arrests in over a 30-year period, in each case within a matter of weeks of my arrest, I've pled guilty and received a prison sentence – within weeks. I didn't stretch it out or play games to try to get less time. I owned up to what I did and took my medicine. Never once did I ask for or receive probation or a suspended sentence. However, in this case, Judge, I've maintained my innocence, even in the face of a life or a death sentence, whatever the case may be, from the very beginning, and continue to do so today. With this type of illness, Judge, almost any sentence could be a potential death sentence.

In closing, Your Honor, I would just like to say for the record that it is not my intent to seek sympathy from the Court, but rather to voice my objection to the State's action in offering me a deal and then to rescind the deal instead of providing me with a means to determine the extent of my illness, so that I might obtain a factual understanding of the nature and consequences of my plea.

Finally, Your Honor, I just want the Court to know that even with all the tattoos, the rough edges, and lifestyle portrayed by the State to the effect that I was a vagabond, the truth is that I've worked my whole life when I wasn't in jail. I was arrested at my place of work and a man I didn't even really know came to court in my behalf and told the Court that I'm a good worker and that we had worked together occasionally. He didn't owe me anything, Judge, he didn't have to come down here, I was really surprised. And as far as being a vagabond, Judge, the fact is I was out on the road on the trucks because I chose to be. Besides family, I had my own place down in Miami where my ex-girlfriend and her little boy still live. Up until my arrest, I paid the bills there. When I found out I was sick and could no longer have a relationship with her, it just seemed like being on the road was the right thing to do.

Anyhow, Judge, the only other thing I want to tell you is that while my record may reflect that I've broken the law in the past, it doesn't show that I've ever hurt anyone in my life.

Thank you, Judge, I just wanted you to know that.

MS. DICKSON: Your Honor, it's always difficult to address sentencing issues with a person who has alleged from the very beginning that he's innocent, who has taken his case to trial and has lost. Mr. Day has always maintained his innocence of this case, and I think it's important for the Court to realize and to point out that in every other case he's had, he did plead guilty, with one exception, and I think that's the DUI case that the District Attorney mentioned. He took that case to trial and my understanding

is he was found not guilty. Every other situation he's had, in all of the felonies here, he has pled guilty and in relatively short order. The most serious of these, of course, is the bank robbery and he pled guilty to that within two months of his arrest.

There are – you know, obviously we're here because he's been convicted. He still maintains his innocence, but there are two things that I wanted to point out about the trial, even though I know that we have to accept the fact that he has been convicted. But there were two things that came out in trial that we were completely unaware of before trial, and I think which had a serious impact on the jury's decision, and that was that the victim in this case told us for the first time at trial that she had been given a picture of Mr. Day on the day of the incident and that she's had that picture ever since. She was given that by the police. She's had his picture to look at for all these periods of time, all these months, and of course that would impact on her identification of Mr. Day as the person who robbed her.

The second thing that came out, Your Honor, and Your Honor is aware that we have filed motions seeking to obtain the identity of a witness to the case that the police spoke to and then released without obtaining his identity. Mr. Day told the police officer that he was working for that gentleman, but the officer didn't get his name, and we were unable to locate him because we had no means of identification, and of course Mr. Day has been in custody the entire time so he couldn't be out looking for him. But, over objection the police officer was allowed to testify that this gentleman who –

THE COURT: I heard all the testimony. You don't need to go over all the testimony.

MS. DICKSON: Yes, Your Honor, I just wanted to make this one point, that this officer was allowed to testify to something that we were not aware of because it wasn't in any of his reports and he testified that this witness had said that Mr. Day offered him a hundred dollars to go to New Orleans, which of course was extremely damaging to our case and was something we didn't know about before trial.

So, Mr. Day appears before you to be sentenced for a crime that he says he did not commit, and I think there are some questions about that. But, I think it's important to note that there was no one injured in this crime, there has never been anyone injured in anything that Mr. Day has done – at least physically, I'm sure psychological injuries have occurred – and all of his offenses up to this point have been non-violent offenses, including the bank robbery. Banks are probably the easiest thing to rob, except for the likelihood of being caught, because everyone in a bank knows that if someone comes in to rob the bank, you just hand over the money, you don't put up a fight. He went in, he gave them a note, he had no weapon, he made no verbal threats, no physical threats. He handed them a note, they handed him the money, and he left. And the District Attorney has read you the note that was provided to the bank employees.

His record goes back for 27 years, I believe it is, Your Honor, so some of these convictions that the State alleges should form the basis for the habitual criminal sanctions are extremely old cases. The very first case,

which occurred back in 1974, he was sentenced to prison. He was never given the opportunity of probation, and I know that's not even an option in this case, but he has served a sentence for every crime that he has been convicted of, even though all of those offenses are non-violent.

The Court is aware that there's no real information about Mr. Day in the Pre-Sentence Report because he did not choose to be interviewed and we went into that last time. But one of the things that was omitted from the Pre-Sentence Report, which I think is important for the Court to take into consideration, is the fact that Mr. Day does have some significant mental health problems. He was originally in this case found to be not competent to stand trial and was sent up to Lakes Crossing for a period of time, and then was returned after the doctors up there cured him. But since being returned from Lakes Crossing, he has been in a lock-up situation at the jail, even though he hasn't committed violations over there. When he was returned he was locked up and he's been locked up ever since. So, he has had probably greater restrictions on his liberty than most of the people that Your Honor sees who have been incarcerated.

As Mr. Day pointed out, he was offered a sentence of 3 to 10 years, and he turned that down for the two reasons that he set forth and those are the reasons he explained to me; one, that he wasn't guilty of the offense. I think that he might have been willing to enter a no contest plea despite that fact, because of the likelihood that he might be convicted and face a much more serious sentence, but he needed some assurance that he would not die in prison, and that was why in the end he turned down the

plea agreement that he was – that was his biggest concern, he doesn't want to die in prison. He is – with Hepatitis C, he is a dying man. That's basically a death sentence, the only question is how much longer he does have to live.

The minimum sentence that the Court can impose in this case is 4 years. I think that that, under all of the circumstances, is more than adequate to punish him for whatever he may have done, in light of the jury's conviction. And I would also point out that based on my knowledge of the Parole Board, it's extremely unlikely that Mr. Day is going to be paroled. It is minimum, and possibly ever, because of his priors. And also, whether or not it appears as a conviction on his record, they will be aware of the fact that he did have this escape charge as a parolee prior, so that that lessens his chances of ever being paroled and certainly limits his options when he is in custody and the kinds of programming he can be involved in.

For all of those reasons, Your Honor, and because this Court sees so many people who come in here with much worse records than Mr. Day, who don't receive habitual criminal sanctions, I think it's appropriate not to impose the habitual criminal sanction, to impose a sentence for the offenses that he has been convicted of, and I would ask the Court to impose the minimum sentence of 4 years.

THE DEFENDANT: Your Honor, may I say something briefly, just real briefly?

THE COURT: Briefly. You already had your letter read.

THE DEFENDANT: Your Honor, all I'm interested in is that you give

me a sentence that would allow me to get a medical parole when the time comes that, you know, that I'd be eligible for a parole, so I'd get out on a medical.

THE COURT: All right. Mr. Day, all you're interested in is trying to manipulate the system once again. You've had lots of experience at it. I listened to your testimony at trial, I listened to all the other witnesses. It was overwhelming evidence against you at trial. It wasn't even a close call. As far as the picture, we addressed that issue. Her identification was not based upon the picture that was given to her by the police. She was very clear on that. She'd seen the individual at the motel before.

All right, counsel approach on something.

(Whereupon a bench conference was held)

THE COURT: All right. Mr. Day, in addition to the $25 Administrative Assessment Fee, and the $250 DNA Analysis Fee, where you are to submit to a test to determine genetic markers on Count II, I am going to adjudicate you a Habitual Offender, and we are going to impose a sentence of 300 months Nevada Department of Prisons, with a minimum parole eligibility of 120 months, and you'll be given credit for time served of 375 days.

MS. DICKSON: Your Honor, that's up to last week. There should be another 7 days, I guess, added to that.

THE COURT: Through May 2nd, so 6 more days, 361 days credit for time served.

MS. DICKSON: Your Honor, I don't believe that's correct, it was –

MR. FATTIG: 381.

MS. DICKSON: 375, and it's another 7 days.

MR. FATTIG: 382.

THE COURT: 382? – 382 days credit for time served.

MS. DICKSON: Your Honor, could I have marked and made part of the record these documents that I have received from the State with respect to the –

THE COURT: You may. And have those attached to the PSI.

(Whereupon the matter was recalled)

MR. FATTIG: Your Honor, if we could just recall the Robert Day matter, briefly. There's a technical thing.

THE COURT: All right. Recalling Day.

MR. FATTIG: He technically needs to receive a sentence on both Count I and Count II. So, I would ask that he receive the same sentence on both concurrent.

THE COURT: When I adjudicate habitual, I sentence on the habitual, not on the two counts. He's adjudicated guilty on the two counts, but then I adjudicate him on the habitual, and he receives the sentence on that.

MR. FATTIG: And give him one sentence, okay.

THE COURT: Right.

(Proceedings concluded)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording in the above-entitled case.

Elizabeth Garcia
ELIZABETH GARCIA
Court Transcriber

59

ORIGINAL

ORDR
MORGAN D. HARRIS
PUBLIC DEFENDER
Nevada Bar #1879
309 South Third St., #226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

FILED
SEP 25 9 45 AM '01
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	CASE NO. C167783X DEPT. NO. IV

ORDER FOR TRANSCRIPT

Upon the ex parte application of the above-named Defendant, ROBERT JAMES DAY, by and through his attorney, DIANNE M. DICKSON, Deputy Public Defender, and good cause appearing therefor,

IT IS HEREBY ORDERED that the Court Recorder, Tina Smith, prepare and deliver to the Clark County Public Defender, at State expense, a copy of the transcript of the proceedings held on February 21, 2001, in Case No. C167783X in District Court No. IV.

DATED this 24th day of September, 2001.

DISTRICT JUDGE

Submitted by:
CLARK COUNTY PUBLIC DEFENDER

By
DIANNE M. DICKSON, #5620
DEPUTY PUBLIC DEFENDER

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SEP 25 2001
COUNTY CLERK

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ORIGINAL

FILED IN OPEN COURT
November 01, 2001
SHIRLEY B. PARRAGUIRRE, CLERK
BY Dorothy Kelly
DOROTHY KELLY, DEPUTY

TRAN

DISTRICT COURT

Clark County, Nevada

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	Case Number C 167783 Department IV Wednesday, February 21, 2001 9:00 a.m.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE KATHY A. HARDCASTLE

DISTRICT COURT JUDGE

CALENDAR CALL

APPEARANCES:

For the Plaintiff: CARA L. CAMPBELL, Deputy District Attorney

For the Defendant: BITA KHAMSI, Deputy Public Defender

Court Recorder/Transcriber: Tina Smith CET 00260

TS

LAS VEGAS, NEVADA, WEDNESDAY, FEBRUARY 21, 2001, 9:00 A.M.

THE COURT: C167783 State of Nevada versus Robert James Day. Mr. Day is present in custody. Status?

MS. KHAMSI: Your Honor, Ms. Dickson indicates that she's ready. She would ask this Court to start Tuesday or later, she's unavailable on Monday afternoon.

THE COURT: How many days for trial?

DEFENDANT DAY: Your Honor - -

THE COURT: Just a minute Mr. Day.

MS. KHAMSI: It looks like it's four to six witnesses and two days.

THE COURT: All right, we'll pass this until Friday. I'll give you a final trial order on Friday, see how many of the other cases are going.

MS. KHAMSI: Your Honor?

THE COURT: Yes?

MS. KHAMSI: If I may approach with the amended information?

MS. CAMPBELL: I have three different copies of it. This is Mr. Fattig's case, I haven't - -

THE COURT: All right.

MS. CAMPBELL: It was placed in the file this morning so I don't - -

DEFENDANT DAY: May I have a copy please?

THE COURT: Just a minute.

MS. CAMPBELL: I believe he wanted to file the habitual, I don't know.

DEFENDANT DAY: Your Honor?

THE COURT: All right, the amended information has been filed alleging the habitual offender charge. Mr. Day, we'll pass this until Friday, you can talk

to your attorney between now and Friday, answer any questions that you may have and we'll - -

DEFENDANT DAY: Okay, then we'll have - -

THE COURT: - - determine the status of the case on Friday.

DEFENDANT DAY: We'll have the - - the calendar call on Friday?

THE COURT: The calendar call has been passed for Friday.

DEFENDANT DAY: Can I have a copy of the amended information please?

THE COURT: As soon as the Clerk files it.

(Proceeding adjourned)

I CERTIFY that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Tina Smith 10-24-01

TINA SMITH CET 00260 Date

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FILED

FEB 15 3 08 PM '02

Shirley B. Parraguirre

CLERK

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV

ORDER FOR PRODUCTION OF INMATE
ROBERT JAMES DAY, BAC #69140

DATE OF HEARING: 2/27/02
TIME OF HEARING: 9:00 A.M.

TO: GEORGE GRIGAS, Warden of the High Desert State Prison;

TO: JERRY KELLER, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by STEWART L. BELL, District Attorney, through DAVID B. BARKER, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that GEORGE GRIGAS, Warden of the High Desert State Prison shall be, and is, hereby directed to produce ROBERT JAMES DAY, Defendant in Case No. C167783, on a charge of Robbery With Use of a Deadly Weapon and Burglary While in Possession of a Deadly Weapon wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said Defendant is currently incarcerated in the High Desert State Prison, located in Indian Springs, Nevada, and his presence will be required in Las Vegas, Nevada, commencing on

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COUNTY CLERK

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Wednesday, February 27, 2002, at the hour of 9:00 o'clock A.M. and continuing until completion of the prosecution's case against the said Defendant.

IT IS FURTHER ORDERED that JERRY KELLER, Sheriff of Clark County, Nevada, shall accept and retain custody of the said Defendant in the Clark County Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County, or until the further Order of this Court; or in the alternative shall make all arrangements for the transportation of the said Defendant to and from the Nevada State Prison facility which are necessary to insure the Defendant's appearance in Clark County pending completion of said matter, or until further Order of this Court.

DATED this 14th day of February, 2002.

DISTRICT JUDGE

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY
DAVID B. BARKER
Chief Deputy District Attorney
Nevada Bar #001648

66

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 38028

APR 10 12 31 PM '02

District Court Case No. C167783

CLERK

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of conviction AFFIRMED IN PART AND REMAND this matter to the district court for proceedings consistent with this order."

Judgment, as quoted above, entered this 15th day of November, 2001.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "Rehearing denied."

Judgment, as quoted above, entered this 27th day of March, 2002.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 11th day of April, 2002.

Janette M. Bloom, Supreme Court Clerk

By: J. Richards
Chief Deputy Clerk

S11

CE-05

APR 19 2002

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38028

FILED
MAR 27 2002
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Shearing, J.

Rose, J.

Becker, J.

cc: Hon. Kathy A. Hardcastle, District Judge
Clark County Public Defender
Robert James Day
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

02-05380

about the investigative deficiencies."[2] Appellant's counsel conducted such a cross-examination in this case. Under the circumstances, we conclude that the district court did not err in denying appellant's motion to dismiss.[3]

Appellant next contends that the district court abused its discretion by admitting testimony regarding an out-of-court statement by an unavailable witness. Based on our review of the record, we conclude that the district court did not abuse its discretion in finding that the statement was not inadmissible hearsay because it was not offered for the truth of the matter asserted.[4] Moreover, even assuming that the statement was inadmissible hearsay, we conclude that any error in admitting it was harmless given the overwhelming evidence of appellant's guilt.[5]

Appellant finally contends that the victim's identification of him at trial was unreliable because it was tainted by a one-on-one confrontation shortly after the robbery and because police gave the victim a picture of appellant after she identified him. We disagree.

As a preliminary matter, we note that appellant failed to challenge the identification at trial. As a result, we need not consider this issue.[6] Assuming that this issue was properly before us, we conclude that it lacks merit. After a careful review of the record, we conclude that, even assuming that the pretrial identification procedure was unnecessarily suggestive, the eyewitness' identification of appellant was reliable and

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[2]Id. at 267, 956 P.2d at 115.

[3]To the extent that appellant alleges a violation of Brady v. Maryland, 373 U.S. 83 (1963), based on the State's failure to obtain the witness's name or to disclose his statement to Sergeant Flaherty, we conclude that there was no such violation.

[4]See NRS 51.035 (defining "hearsay").

[5]See Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993) (stating that erroneous admission of hearsay is subject to harmless error analysis).

[6]See Gaitor v. State, 106 Nev. 785, 788-89, 801 P.2d 1372, 1375 (1990), overruled on other grounds by Barone v. State, 109 Nev. 1168, 866 P.2d 291 (1993).

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT JAMES DAY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 38028

FILED

NOV 15 2001

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

ORDER AFFIRMING IN PART AND REMANDING IN PART

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon and one count of burglary while in possession of a deadly weapon. The district court adjudicated appellant as a habitual offender and sentenced him to serve 10 to 25 years in prison.

Appellant first argues that the district court erred in denying his motion to dismiss based on the State's failure to preserve the identity of a material witness. We disagree.

Because the State never obtained the witness's name, appellant's allegation is properly analyzed as a claim that the State failed to gather evidence. In Daniels v. State,[1] we held that dismissal of criminal charges may be an available remedy for the State's failure to gather evidence where the evidence was material and the failure to gather the evidence was the result of a bad faith attempt to prejudice the defendant's case. Even assuming that the witness's testimony would have been material, we conclude that appellant failed to demonstrate that the failure to gather the witness's name was the result of a bad faith attempt to prejudice appellant's case. Accordingly, dismissal of the charges was not warranted. Moreover, we note that at the worst, the alleged failure to gather evidence appears to have been the result of mere negligence. In Daniels, we explained that such failures to gather evidence warrant no sanctions, "but the defendant can still examine the prosecution's witnesses

[1]114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998).

01-19122

(O)-4892

there was no denial of due process.[7] Moreover, it appears that the victim received the photograph of appellant after the pretrial identification and that the photograph did not affect the reliability of the eyewitness identification. Accordingly, we conclude that appellant's contention lacks merit.

Having considered appellant's contentions and concluded that they lack merit, we affirm the judgment of conviction. However, our review of the judgment of conviction revealed several defects that require a remand.

First, the judgment of conviction states that appellant pleaded guilty when, in fact, he was convicted pursuant to a jury verdict. This error must be corrected.

Second, the district court adjudicated appellant as a habitual criminal but failed to refer to the statute under which that adjudication was made. NRS 176.015(1)(c) provides that a judgment of conviction must include "a reference to the statute under which the defendant is sentenced." This error must also be corrected.

Lastly, the sentence set forth in the judgment of conviction provides for only one definite term: 10 to 25 years in prison. Appellant, however, was convicted of two offenses. Therefore, it appears that appellant was not sentenced to definite terms on each conviction.[8] This appears to have been the result of some confusion regarding the application of the habitual criminal statute. When the district court adjudicates a defendant as a habitual criminal, the habitual criminal statute allows for enhancement of the sentence for the substantive crimes charged.[9] Thus, in such cases, the district court uses the habitual criminal statute to determine the penalty to be imposed for the substantive crimes charged (here, robbery and burglary).[10] Moreover, our decision in Lisby v.

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[7]Cf. Wright v. State, 106 Nev. 647, 799 P.2d 548 (1990); Gehrke v. State, 96 Nev. 581, 613 P.2d 1028 (1980).

[8]See NRS 176.033(1)(b); NRS 176.035; Powell v. State, 113 Nev. 258, 264 n.9, 934 P.2d 224, 228 n.9 (1997).

[9]See NRS 207.010(1); Hollander v. State, 82 Nev. 345, 353, 418 P.2d 802, 806-07 (1966).

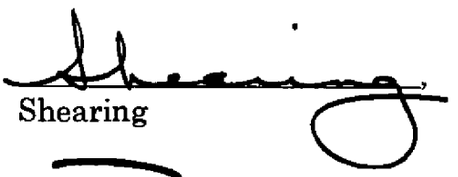
[10]Hollander, 82 Nev. at 353, 418 P.2d at 806-07.

(O)-4892

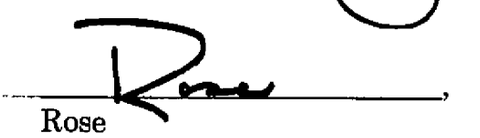
State[11] does not stand for the proposition that when a defendant is adjudicated as a habitual criminal he may receive only one sentence regardless of the number of substantive crimes charged. Rather, Lisby simply stands for the proposition that a defendant may not receive a sentence for the substantive crime charged and a separate sentence for being a habitual criminal.[12] The district court's failure to specify a sentence for each of appellant's convictions must also be corrected.[13]

For the reasons stated above, we

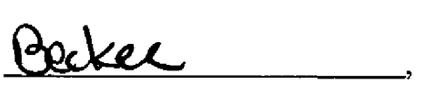
ORDER the judgment of conviction AFFIRMED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[14]



_____, J.
Shearing



_____, J.
Rose



_____, J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk

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[11]82 Nev. 183, 414 P.2d 592 (1966).

[12]Id. at 189, 414 P.2d at 595-96; see also Staude v. State, 112 Nev. 1, 7, 908 P.2d 1373, 1377 (1996).

[13]We note that the district court can enhance the sentence for the robbery pursuant to the deadly weapon enhancement statute or the habitual criminal statute, but not under both statutes. See Odoms v. State, 102 Nev. 27, 714 P.2d 568 (1986).

[14]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

(O)-4892

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT JAMES DAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 38028

District Court Case No. C167783

REMITTITUR

TO: Shirley Parraguirre, Clark County Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: April 11, 2002

Janette M. Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on APR 15 2002.

NORETA CALDWELL
County Clerk

02-05508

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FILED

2002 JUL 19 P 4:09

Shirley B. Parraguirre
CLERK

0001
MARCUS D. COOPER
PUBLIC DEFENDER
Nevada Bar #2290
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant
Public Defender File No. F-00-3002

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	CASE NO. C167783X DEPT. NO. IV DATE: 7-24-02 TIME: 9:00 a.m.

MOTION FOR A NEW TRIAL

COMES NOW Defendant, ROBERT JAMES DAY, by and through his attorney, DIANNE M. DICKSON, Deputy Public Defender, and hereby seeks an Order from this Court for a new trial.

This Motion is based upon the Memorandum of Points and Authorities and argument at the time set for hearing on this Motion.

DATED this 19th day of July, 2002.

Respectfully Submitted:

CLARK COUNTY PUBLIC DEFENDER

By: _____
DIANNE M. DICKSON
Nevada Bar #5620
Deputy Public Defender

MC

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MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF RELEVANT FACTS

Mr. DAY was charged with Robbery With Use Of A Deadly Weapon and Burglary While In Possession Of A Deadly Weapon for an offense which occurred on April 22, 2000, when the Parkway Inn Motel was robbed shortly before 1:00 p.m. Karen Walker, an employee of the motel, testified that an individual came behind the counter where she was working and removed all of the paper money from two cash drawers while holding a small knife. Ms. Walker gave the description of the robber as having gray hair, a mustache, approximately her height and age (5'5" and 52 years old), wearing blue jeans and a blue and white T-shirt. When Ms. Walker was asked whether or not the person had any tattoos, she said no. Mr. DAY'S arms are covered in tattoos. Mr. DAY is also 5'11" and was 46 years old.

Approximately twenty to thirty minutes later and about a half mile away, Sgt. Flaherty saw Mr. DAY walking among the trucks at the truck stop by the Wild Wild West Casino. Sgt. Flaherty said that Mr. DAY fit the description because he was wearing blue jeans and had gray hair. Sgt. Flaherty parked his vehicle partially in front of a truck where Mr. DAY was standing talking to the truck driver. Sgt. Flaherty had some conversation with Mr. DAY and the truck driver, following which Mr. DAY took off running South across Tropicana and climbed into another truck where he tried to hide. When Mr. DAY was apprehended and searched, Sgt. Flaherty found one thousand eighteen dollars and fifty-five cents crumpled up in his pocket. Mr. DAY also had a small pocket knife with a two inch blade. Karen Walker was brought to the area of Mr. DAY'S arrest,

was told by the police that they believed they had the person who had robbed her in custody and, while she was sitting in a police car approximately forty feet away from Mr. DAY who was in handcuffs and surrounded by police, she identified him as the robber. The defense learned for the first time at time of trial that one of the police officers gave Ms. Walker a picture of Mr. DAY, which picture she kept and the possession of which may well have tainted her in-court identification of Mr. DAY.

Mr. DAY testified that he had been in Las Vegas for approximately three months and that, during that period of time, he worked as a lumper at the Wild Wild West Truck stop, though he would occasionally go out on the road with truck drivers. In fact, he said that he had returned the day before his arrest from a week on the road where he had earned $560.00. Mr. DAY said that on April 22nd, he had obtained a job as a lumper along with two other men, working for a truck driver whose name he did not know, unloading furniture in the area of Craig Road. Upon their return to the truck stop, Mr. DAY and the other lumpers folded up the moving pads and cleaned up the back of the truck while the truck driver went to cash his check so that he could pay the lumpers. While waiting for the driver to return, Mr. DAY became involved in a craps game in the back of the truck with four other lumpers, none of whom he knew by name. Mr. DAY was winning at craps and, after he made his point, he quickly grabbed up the pot that he had won, stuffed the money in his pockets and went to talk to the truck driver who had just returned. He said that the truck driver paid him and that he was still speaking to the truck driver when Sgt. Flaherty approached. Initially, Mr. DAY thought that Sgt. Flaherty was security from Wild

Wild West, because the lumpers frequently had problems with security chasing them from the property. When he found that St. Flaherty was a police officer, he ran because he believed that he was going to be arrested for a parole violation he had. Mr. DAY testified that he had absconded from parole and that, though he had only a short time to finish on that parole case, he ran because he did not want to be arrested and returned to federal prison.

At time of trial, Mr. DAY had no proof that there actually was a parole violation pending. The District Attorney sought and was granted a flight instruction. The District Attorney argued that the fact that Mr. DAY ran when confronted by the police was proof that he was guilty of the crimes charged. The District Attorney belittled the defense argument and Mr. DAY'S testimony that he had run because he had a parole violation.

Since being incarcerated in prison, Mr. DAY has been notified that a detainer has been lodged against him because of his parole violation! The State knew, or should have known, that there was a warrant for Mr. DAY'S arrest for absconding from parole at the time of trial. They failed to make this exculpatory information known to the defense and even suggested in the closing argument that this testimony was false: "Did he act like a person that possibly violated a parole for a crime occurring in 1984, a crime he admitted to on the stand, over a year before he thought his parole was almost over?" Trans. Vol. II, pp. 102 - 103.

LEGAL ARGUMENT

The Defendant seeks a new trial based on the grounds of newly discovered evidence. This Motion is governed by NRS 176.515. The standards for determining whether Mr. DAY is entitled to a new trial

are set forth in Sanborn v. State, 107 Nev. 399, 406; 812 P.2d 1279, 1284 (1991). In order to justify a new trial, the newly discovered evidence must be: (1) newly discovered; (2) material to the defense; (3) such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; (4) non-cumulative; (5) such as to render a different result upon retrial; (6) not only an attempt to contradict, impeach or discredit a former witness, unless the witness is so important that a different result would be reasonably probable and (7) the best evidence the case admits. All of those requirements are met in this case as discussed below.

The evidence which the defense has discovered is newly discovered. While Mr. DAY testified to the parole violation, the prosecution disparaged his testimony and argued that it was not believable. The State, who had Mr. DAY'S fingerprints and ran him through the NCIC system, knew or should have known that there was a warrant for his arrest. The fact that a detainer has been placed against Mr. DAY at Nevada State Prison is new confirmation of Mr. DAY'S trial testimony.

The fact that the defense can now show that Mr. DAY'S testimony with respect to the parole violation is true, despite the prosecution's argument to the contrary, is certainly a matter which is material to the defense. The prosecution's case was based in large part on the fact that Mr. DAY ran when approached by the police. They were permitted to introduce hearsay statements that he tried to hire a ride out of town. The jury repeatedly heard that Mr. DAY'S flight equaled guilt of the crimes charged. To be able to prove that he had other reasons to flee is material to his case.

During trial preparation, the defense relied on the open-file policy of the District Attorney. Defense counsel was provided with copies of everything in their file, including an NCIC report which did not indicate a warrant for parole violation. The defense has no access to NCIC reports independent of the prosecution. The defense has since learned that the NCIC report provided to them is not for this Defendant. The defense was reasonably diligent in seeking this information and in relying on the District Attorney's Office for information which the defense cannot itself obtain.

The evidence which has been discovered is non-cumulative. No other witness testified to support Mr. DAY'S testimony. The need for corroboration was particularly important in this case as Mr. DAY was impeached by his prior felony record and thus had problems with credibility to the jury. As indicated, the prosecutor scoffed at Mr. DAY'S reasons for running.

It is likely that if Mr. DAY is granted a new trial, the jury which hears this additional testimony will render a different result. The State's case consists of: an identification of Mr. DAY by Karen Walker, though that identification is tainted by the fact that she said that the robber had no tattoos when Mr. DAY clearly and obviously is covered with tattoos and by the fact that she was given a picture of Mr. DAY on the day of the offense, which she has had to study throughout the pendency of these proceedings; the fact that Mr. DAY ran when Sgt. Flaherty tried to apprehend him, which Mr. DAY explained by testifying that he believed that he would be arrested for violating the conditions of his parole for his Federal Bank Robbery conviction; and the fact that Mr. DAY had over a thousand dollars in his pockets at the time of arrest, which money

was crumpled into a ball. The jury in this case deliberated for several hours before finally managing to reach a verdict in this case. Obviously, the jury had some questions about the strength of the State's case and it is probable that the verdict would have been different had they had the benefit of this information to support Mr. DAY'S testimony.

With respect to the sixth requirement that the newly discovered evidence be more than an attempt to contradict, impeach or discredit a former witness, this evidence is not offered for any such purpose. This evidence would corroborate the testimony of the only defense witness on this issue, the Defendant himself.

Finally, the evidence proposed, the records of the parole violation issued by a Federal Court are certainly the best evidence which can be presented on this question.

The Defendant requests that the Court grant his Motion for New Trial.

DATED this 19th day of July, 2002

CLARK COUNTY PUBLIC DEFENDER

By:
DIANNE M. DICKSON
Nevada Bar #5620
Deputy Public Defender

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office has set the foregoing Motion For A New Trial for hearing on Wednesday the 24th Day of July, 2002, at 9:00 a.m. in Department IV of District Court.

DATED this 19th day of July, 2002.

CLARK COUNTY PUBLIC DEFENDER

By:
DIANNE M. DICKSON
Nevada Bar #5620
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing Motion For A New Trial and Notice of Motion is hereby acknowledged this 19 day of July, 2002.

CLARK COUNTY DISTRICT ATTORNEY

By:

20

14

FILED

2002 JUL 19 P 4:09

Shirley B. Parraguirre
CLERK

0226
MARCUS D. COOPER
PUBLIC DEFENDER
Nevada Bar #2290
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant
Public Defender File No. F-00-3002

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	CASE NO. C167783 DEPT. NO. IV DATE: 07-24-02 TIME: 9:00 a.m.

MOTION TO VACATE SENTENCE AS AN HABITUAL CRIMINAL

COMES NOW the Defendant, ROBERT JAMES DAY, by and through his attorney, DIANNE M. DICKSON, Deputy Public Defender, and files this Motion to Vacate Sentence as an Habitual Criminal.

This Motion is based upon the Declaration of Counsel and pleadings and papers on file herein and any oral argument allowed at the time of hearing on this matter.

DATED this 19th day of July, 2002.

Respectfully Submitted:

CLARK COUNTY PUBLIC DEFENDER

By: _____
DIANNE M. DICKSON
Nevada Bar #5620
Deputy Public Defender

MC

RECEIVED
JUL 19 2002
COUNTY CLERK

BIS

DECLARATION

DIANNE M. DICKSON, makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the Deputy Public Defender assigned to represent the Defendant in the instant matter, and I am familiar with the facts and circumstances of this case.

2. Defendant was charged with Robbery With Use of a Deadly Weapon and Burglary While In Possession of a Deadly Weapon, said charges arising out of an incident which occurred on April 22, 2000.

3. Mr. DAY was convicted of the aforesaid counts by jury verdict on March 15, 2001.

4. Upon motion of the District Attorney, Mr. DAY was sentenced as an habitual offender to a maximum term of imprisonment of three hundred months (300) with a minimum of one hundred twenty months (120).

5. At the time Mr. DAY was adjudicated as an habitual offender, the District Attorney submitted certified copies of records allegedly showing Mr. DAY'S prior felony convictions for bank robbery, controlled substance violations, embezzlement and obtaining property by false pretenses, and financial transaction card theft.

6. At the time Mr. DAY was adjudicated as an habitual criminal, Defendant's counsel accepted as true the State's representations that these records were those of Mr. DAY.

7. Following the appeal filed by Mr. DAY to the Supreme Court of Nevada, the Supreme Court ordered that Mr. DAY be re-sentenced.

8. Subsequent to Mr. DAY'S original sentence on May 9, 2001, the defense obtained copies of the documents which had been

submitted to the Court to support the habitual criminal allegations.

9. In reviewing these documents, the defense learned that these prior convictions are not those of this Defendant.

10. The defense requested that the Las Vegas Metropolitan Police Department perform a fingerprint analysis of the fingerprints taken from Mr. DAY at the time of his arrest on April 22, 2000 and the fingerprints submitted in conjunction with the alleged prior criminal records.

11. Cheryl Stubblefield, a Senior Law Enforcement Support Technician in the Fingerprint Bureau has issued a report indicating that the fingerprints which are part of the documentation for the alleged prior record of Mr. DAY do not match the fingerprints of Mr. DAY and that he is therefore not the same person who has acquired the prior criminal record which was submitted to this Court in order to justify the habitual criminal allegations.

12. The Defendant requests that he be re-sentenced, not as an habitual criminal, but simply on the charges for which he was convicted.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 19th day of July, 2002.

DIANNE M. DICKSON

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office has set the foregoing Motion to Vacate Sentence as an Habitual Criminal for hearing on Wednesday, the 24th day of July, 2002, at 9:00 a.m. in Department IV of District Court.

DATED this 19th day of July, 2002.

MARCUS D. COOPER
Nevada Bar #2290
PUBLIC DEFENDER

By: _____
DIANNE M. DICKSON
Nevada Bar #5620
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing Motion to Vacate Sentence as an Habitual Criminal is hereby acknowledged this 19 day of July, 2002.

CLARK COUNTY DISTRICT ATTORNEY

By: _____

Las Vegas Metropolitan Police Department
400 East Stewart Avenue
Las Vegas, Nevada 89101-2984
(702) 795-3111

JERRY KELLER, Sheriff

To Whom it May Concern:

Per the request of RUBEN AQUINO, INVESTIGATOR, from CLARK COUNTY, NEVADA, a fingerprint comparison was performed in the AFIS Section of the LVMPD Fingerprint Bureau on the following individual(s):

ROBERT JAMES DAY, AKA = GREGORY SCOTT HERMANSKI (ID #1679345)

The documents used in this fingerprint comparison were:

- LVMPD FINGERPRINTS DATED 4-22-00
- FINGERPRINTS (XEROX COPY) FROM FEDERAL CORRECTIONS COMPLEX-MED, COLEMAN, FL DATED 9-9-97
- FINGERPRINTS (XEROX COPY) FROM FEDERAL CORRECTIONS INST., BUTNER, NC DATED 10-2-95 AND 9-14-94

The findings from this comparison are as follows:

LVMPD FINGERPRINTS ARE NOT IDENTICAL WITH THE FEDERAL CORRECTIONS XEROX COPIES OF PRINTS THAT WERE SUPPLIED BY INVESTIGATOR RUBEN AQUINO.

Please contact the technician listed below should you require any further information regarding this fingerprint comparison.

Cheryl Stubblefield/4960
Name/P#
Senior Law Enforcement Support Technician
AFIS Section, Fingerprint Bureau
229- 30-2

3-20-2002
Date

Partners with the Community

LAS VEGAS, NEVADA

FINGERPRINT CARD

DAY, ROBERT JAMES — 01679345

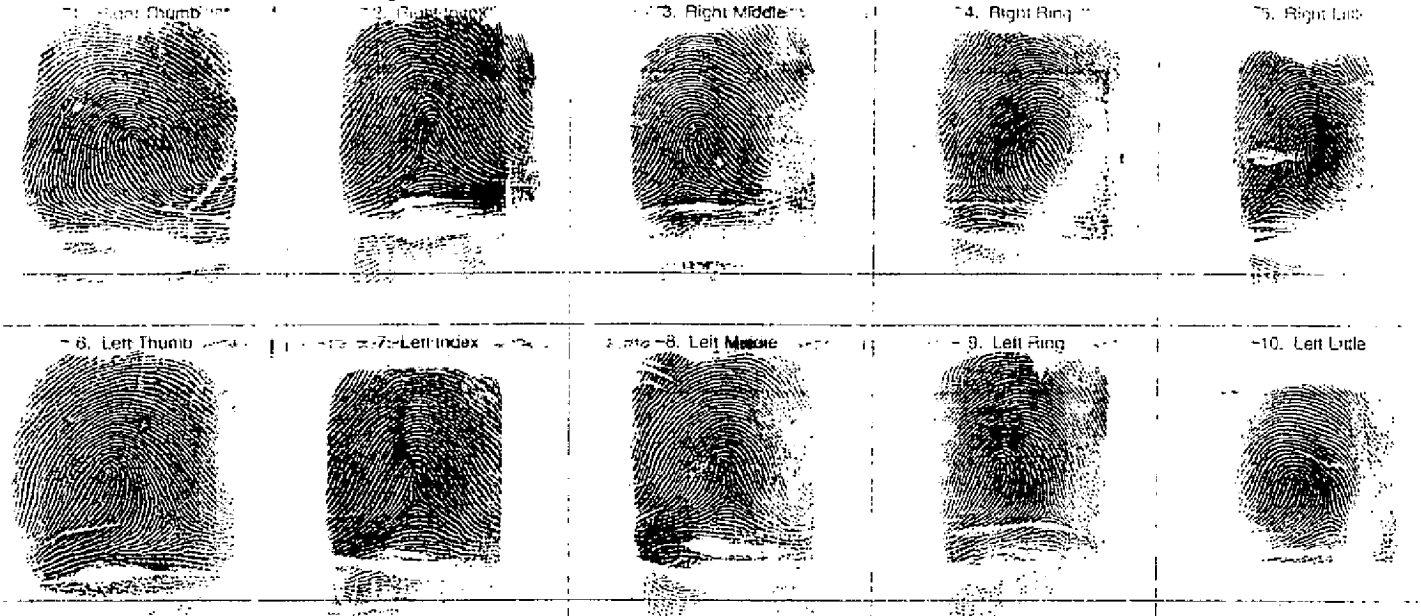
W M 02061954 511 180 GRY BRO

X

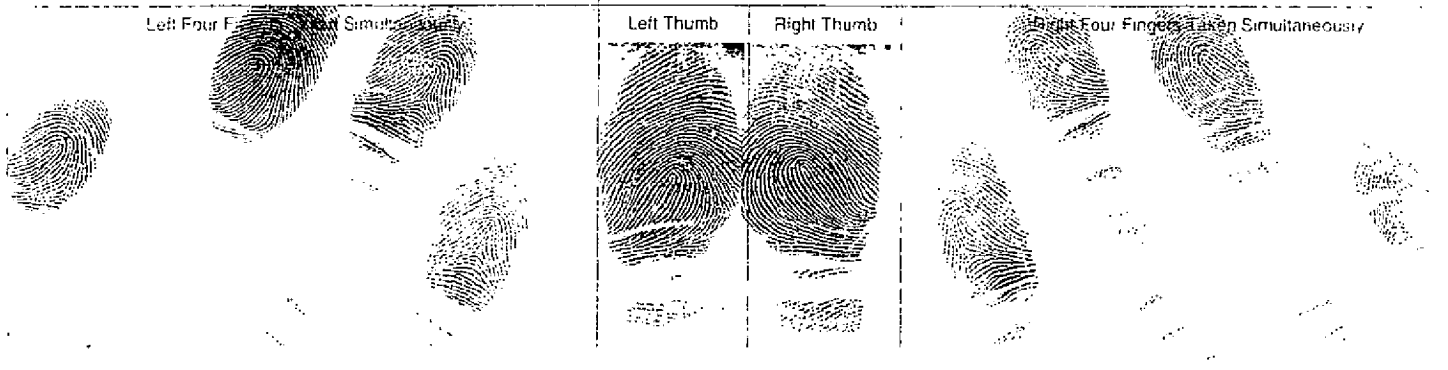
04/22/00

6297

M. Sanoja



DB 50X50G8 1133S5 #lvmpdtp1 19:52:46 [redacted] 5701L #lvslarp2 20000422-20:10



This is to certify that the document is a true and accurate copy of the original document now in possession of the Las Vegas Metropolitan Police Department

2-25-02 C. Stubblefield 4960

Date Signature & P#

LEAVE BLANK

TYPE OR PRINT ALL INFORMATION IN BLACK

LAST NAME NAM: DAY | FIRST NAME: Robert | MIDDLE NAME:

FBI LEAVE BLANK

STATE USAGE

ALIASES

CONTRIBUTOR: NC039017C FED CORR INST BUTNER, NC

SIGNATURE OF PERSON FINGERPRINTED: + Robert Day

DATE OF BIRTH DOB: Month 02 Day 06

THIS DATA MAY BE COMPARED WITH LOCAL, STATE AND NATIONAL FILES

DATE: 9-14-94 | SIGNATURE OF OFFICIAL TAKING FINGERPRINTS:

DATE ARRESTED OR RECEIVED DOA: 9-14-94 | SEX: M | RACE: W | HGT: 5'7" | WGT: 170 | EYES: BLU | HAIR: BRN | PLACE OF BIRTH POB: KS

CHARGE: Parole Violator; Bank Robbery

FINAL DISPOSITION

YOUR NO. OCA: 194460-040

FBI NO. FBI: 65 3443N8

SID NO. SID: SC 06654

SOCIAL SECURITY NO. SOC: 497 62 6026

LEAVE BLANK

CLASS.

REF

NCIC CLASS - FPC

CAUTION

7-20-94, 2099 Days Remaining

LEAVE BLANK

STATE USAGE

TYPE OR PRINT ALL INFORMATION IN BLACK

LAST NAME NAM: DAY | FIRST NAME: Robert | MIDDLE NAME: J.

FBI LEAVE BLANK

ALIASES

CONTRIBUTOR ORI: NC039017C FED CORR INST BUTNER, NC

SIGNATURE OF PERSON FINGERPRINTED: Robert Day

DATE OF BIRTH DOB: 04-06-54

THIS DATA MAY BE COMPUTERIZED IN LOCAL, STATE AND NATIONAL FILES

DATE ARRESTED OR RECEIVED DOA: 10-04-95

SEX	RACE	HGT.	WGT.	EYES	HAIR	PLACE OF BIRTH POB
M	W	5'11"	170	BL	BR	KS

DATE: 10-4-95 | SIGNATURE OF OFFICIAL TAKING FINGERPRINTS: [signature]

CHARGE

FOUR NO OCA: 194660-D44

FBI NO FBI: 652643N8

SID NO SID: F 02 06 54

SOCIAL SECURITY NO. SOC: 499629076

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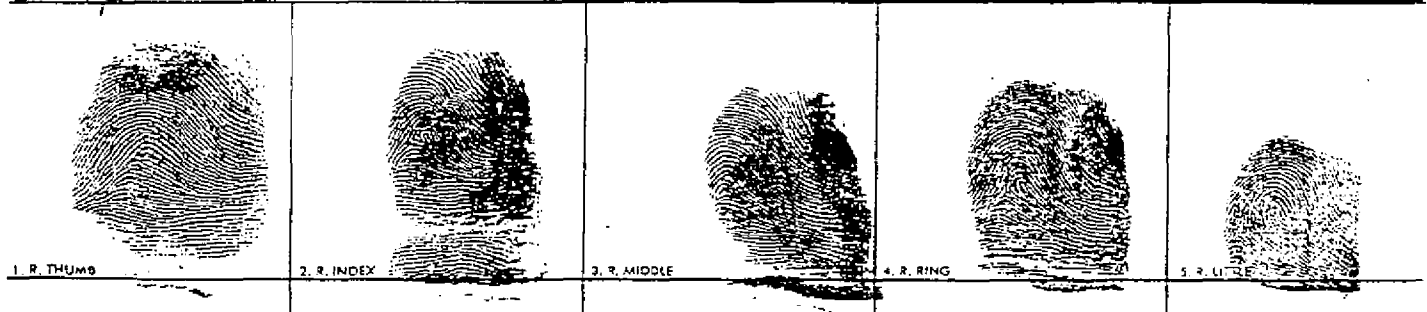
CLASS.

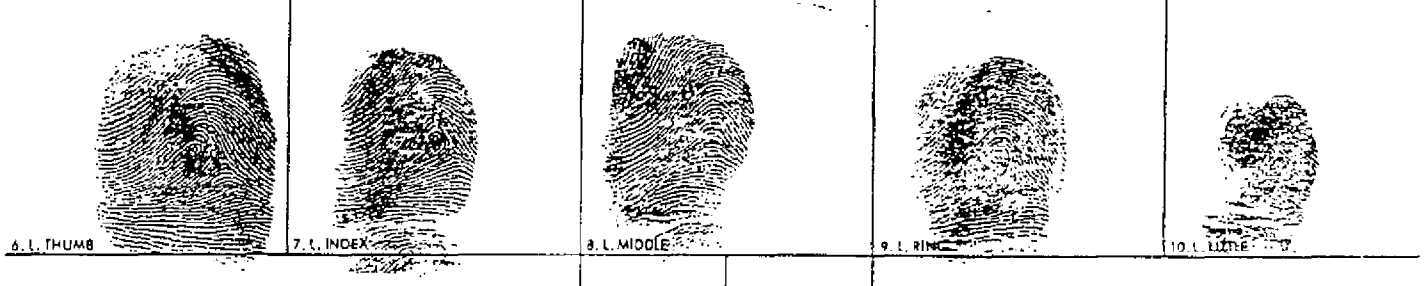
REF.

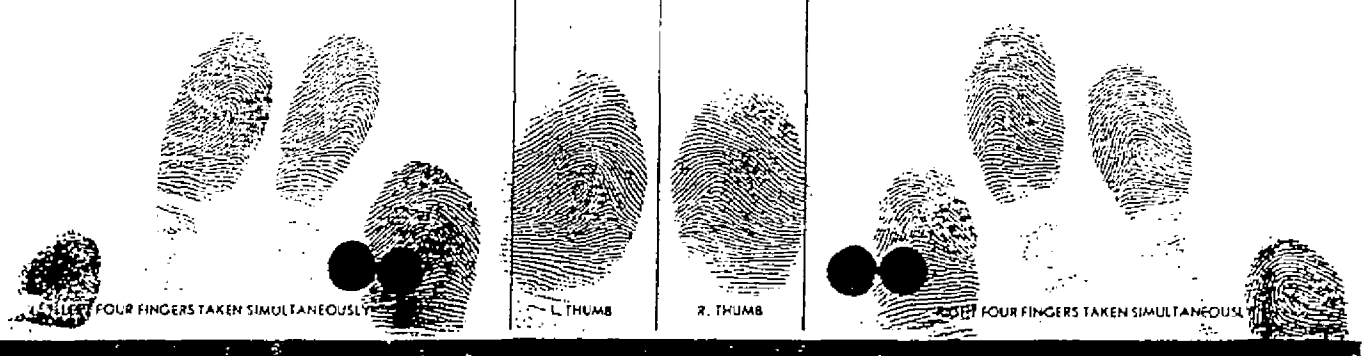
NCIC CLASS - FPC

FINAL DISPOSITION: Escape Return

CAUTION







LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY

RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY

LEAVE BLANK | CRIMINAL | (STAPLE HERE) | LEAVE BLANK

STATE USAGE

NFF SECOND SUBMISSION ☐ | APPROXIMATE CLASS ☐ | AMPUTATION ☐ | SCAR ☐

STATE USAGE

LAST NAME, FIRST NAME, MIDDLE NAME, SUFFIX

DAY, ROBERT JAMES

SIGNATURE OF PERSON FINGERPRINTED

Robert J Day

SOCIAL SECURITY NO.

498629076

LEAVE BLANK

ALIASES/MAIDEN
LAST NAME, FIRST NAME, MIDDLE NAME, SUFFIX

FBI NO.	STATE IDENTIFICATION NO.	DATE OF BIRTH MM DD YY	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
652643N8		02 06 1954	M	W	6 00	172	BLU	BR

1. R. THUMB

2. R. INDEX

3. R. MIDDLE

4. R. RING

5. R. LITTLE

6. L. THUMB

7. L. INDEX

8. L. MIDDLE

9. L. RING

10. L. LITTLE

LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY

L. THUMB

R. THUMB

RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
August 12, 2011 2:47 p.m.
Tracie K. Lindeman

GREGORY S. HERMANSKI,
Appellant(s),
vs.

STATE OF NEVADA,
Respondent(s),

Case No: 00C167783
SC No: 58688

RECORD ON APPEAL
VOLUME
1

ATTORNEY FOR APPELLANT
GREGORY S. HERMANSKI # 69140
PROPER PERSON
P.O. BOX 7000
CARSON CITY, NV 89702

ATTORNEY FOR RESPONDENT
DAVID ROGER, ESQ.
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NEVADA 89101

Docket 58688 Document 2011-24627

00C167783 STATE OF NEVADA VS. GREGORY S. HERMANSKI

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I N D E X

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3	10/02/2002	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO VACATE SENTENCE AS AN HABITUAL CRIMINAL	521 - 526
5	07/22/2011	STATE'S OPPOSITION TO DEFENDANT'S NOTICE OF MOTION/MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION	966 - 971
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I N D E X

VOL	DATE	PLEADING	PAGE NUMBER:
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FILED

JUN 0 [illegible] 55 AM '00

CLERK

Justice Court, Las Vegas Township

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

—vs—

DAY, ROBERT JAMES

Defendant.

District Court Case No. C147783

Justice Court Case No. 00F06978X

I. hereby certify the foregoing to be a full, true and correct copy of the proceedings as the same appear in the above case.

WITNESS my hand this 6TH day of JUNE, XX 2000

Justice of the Peace of Las Vegas Township

RECEIVED
JUN 11 X 2000
COUNTY CLERK

JC-6 (Criminal)
Rev. 12/89

Justice Court, Las Vegas Township

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

—vs—

DAY, ROBERT JAMES

Defendant.

Case No. 00F06978X

COMMITMENT
and
ORDER TO APPEAR

An Order having been made this day by me, that

DAY, ROBERT JAMES

be held to answer upon the charge of
COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON
COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

Committed in said Township and County, on or about the 22ND day of APRIL, XX 2000.

IT IS FURTHER ORDERED that the Sheriff of the County of Clark is hereby commanded to receive HIM into custody, and detain HIM until HE be legally discharged, and that HE be admitted to bail in the sum of COUNT I - 20000/20000/40000 COUNT II - 15000/15000/30000 Dollars, and be committed to the custody of the Sheriff of said County, until such bail is given; and

IT IS FURTHER ORDERED that said Defendant IS is/are commanded to appear in Department 4 of the Eighth Judicial District Court, Clark County Courthouse, Las Vegas, Nevada, at 9:00 A.M., on the 13TH day of JUNE, XX 2000 for arraignment and further proceedings on the within charge S.

DATED this 6TH day of JUNE, XX 2000

Justice of the Peace of Las Vegas Township

JC-7 (Criminal)
Rev. 06/97

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

FILED
2000 APR 25 A 9:03
JUSTICE COURT
LAS VEGAS, NEVADA
DEPUTY

THE STATE OF NEVADA,
Plaintiff,
-vs-
ROBERT JAMES DAY #1679345,
Defendant.

CASE NO. 00F06978X
DEPT. NO. 1

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony - NRS 205.060, 193.165), in the manner following, to-wit: That the said Defendant, on or about the 22nd day of April, 2000, at and within the County of Clark, State of Nevada,

COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of KAREN WALKER, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of the said KAREN WALKER, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a knife, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building occupied by PARKWAY INN, located at 5201 South Industrial, Las Vegas, Clark County, Nevada.

All of which is contrary to the form, force and effect of Statutes in such cases made and

///

///

///

COPY

provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

Thomas M. Carroll

4/25/00

00F06978X/rad
LVMPD EV#0004221105
RWDW; BURG WW - F
(TK1)

NEW

Page 1 of 1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
TEMPORARY CUSTODY RECORD

I.D. #: 1679345 Event #: 000422-1105

DATE OF ARREST: 4/22/00 TIME OF ARREST: 1320

I.D. ESTAB. BY:

PB

INTAKE NAME (AKA, ALIAS, ETC.) Last	First	Middle	TRUE NAME Last	First	Middle
DAY	ROBERT	JAMES			

ADDRESS NUMBER & STREET	BLDG./APT. #	CITY	STATE	ZIP
TRANSIENT				

DATE OF BIRTH	RACE	SEX	HEIGHT	WEIGHT	HAIR	EYES	SOCIAL SECURITY #	Speak English?	PLACE OF BIRTH
2-6-54	W	M	5'11	180	BLK	BRO	498-62-9076	☒ Yes ☐ No	KANSAS

LOCATION OF CRIME (# - Street - City - State ; Zip)	CC / LV	Citizen Arrest Y (N)	LOCATION OF ARREST	PCN #
5201 S. INDUSTRIAL LV NV 89118	☒ CC ☐ LV	Y (N)	3535 W TROPICANA LV NV	

BKG. CODE	CHARGE ORD / NRS #	M	GM	F	ARR TYPE*	EVENT NUMBER	WARR / NCIC NUMBER	COURT LV	COURT JC	COURT DC	COURT OTHER
5039	ROBBERY/WDW 1/200.380	☐	☐	☒	PC	000422-1105	00F06978X	☐	☒	☐	☐
5068	BURG W/WEAPON 205.060	☐	☐	☒	PC	"	" QC-1	☐	☒	☐	☐
5517	PSP 205.275	☐	☐	☒	PC	"	"	☐	☒	☐	☐
		☐	☐	☐				☐	☐	☐	☐
		☐	☐	☐				☐	☐	☐	☐
		☐	☐	☐				☐	☐	☐	☐

ARREST TYPE: PC – PROBABLE CAUSE BS – BONDSMAN SURRENDER BW – BENCH WARRANT WA – WARRANT RM – REMAND GJI – GRAND JURY IND.

OTHER COURT:

APPROVAL CONTROL # FOR ADDITIONAL CHARGES:

[redacted]

D. [illegible] / 3399 / LVMPD
Arresting Officer's Signature (Print Name) P # Agency

Transporting Officer's Signature (Print Name) P # Agency

Time Stamp at BOOKING

APR 22 7 54 PM '00

P #:

☒ FOR PROBABLE CAUSE/NCIC HIT ARREST SEE PAGE TWO FOR DETAILS.

☐ BENCH WARRANT SERVED ON _____ BY _____

☐ WARRANT SERVED ON _____

☐ GRAND JURY INDICTMENT SERVED ON _____

TYPE OF I.D. FOR VERIFICATION _____

FILED

FIRST APPEARANCE: DATE: 4-24-00 TIME: 7:30am

COURT

☒ JUSTICE ☐ MUNICIPAL ☐ JUVENILE

☐ STANDARD BAIL ☐ O.R. RELEASE ☒ PROBABLE CAUSE ☐ I.A.D.

JUDGE: [illegible]

LVMPD 22 (REV. 7-98) (2) COURT • ORIGINAL

Page 5

Page 1 of 1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
DECLARATION OF ARREST

I.D. #: _____

True Name: DAY ROBERT JAMES Date of Arrest: 04/22/00 Time of Arrest: 1320

OTHER CHARGES RECOMMENDED FOR CONSIDERATION:
GRAND LARCENY AUTO ATTEMPT

THE UNDERSIGNED MAKES THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS: That I am a peace officer with LVMPD (Department), Clark County, Nevada, being so employed for a period of 13 years (months). That I learned the following facts and circumstances which lead me to believe that the above named subject committed (or was committing) the offense of ROBBERY/WDW at the location of 5301 S. INDUSTRIAL and that the offense occurred at approximately 1245 hours on the 22 day of APRIL of 2000

DETAILS FOR PROBABLE CAUSE:

SEE ARREST REPORT

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are a misdemeanor).

Declarant must sign second page with original signature.

Declarant's Signature 3399

D FLAHERTY 3399
Print Declarant's Name P#

LVMPD 22 – A (REV. 3-91) (1) ORIGINAL – COURT

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

ARREST REPORT

00F069784/1

[ ] City [X] County [X] Adult [ ] Juvenile Sector/Beat 01

ID/EVENT#	ARRESTEE'S NAME (Last, First, Middle)	S.S.#
1679345	DAY, ROBERT JAMES	

ARRESTEE'S ADDRESS (Number, Street, City, State, Zip Code)

CHARGES: ROBBERY WITH USE OF A DEADLY WEAPON IN THE COMMISSION OF A CRIME NRS 200.280
BURGLARY WITH USE OF A DEADLY WEAPON IN THE COMMISSION OF A CRIME NRS 905.060
POSSESSION OF STOLEN PROPERTY NRS 205.275

OCCURRED: DATE	DAY OF WEEK	TIME	LOCATION OF ARREST (Number, Street, City, State, Zip Code)
04-22-00	SATURDAY	1320	3535 WEST TROPICANA (MCDONALD'S PARKING LOT) LAS VEGAS, NV

RACE	SEX	D.O.B.	HT	WT	HAIR	EYES	PLACE OF BIRTH

CIRCUMSTANCES OF ARREST

LOCATION OF CRIME: PARKWAY INN
5201 S. INDUSTRIAL
LAS VEGAS, NV 89118

OFFICERS INVOLVED: SGT. D. FLAHERTY, P# 3399
OFFICER E. KING, P# 3488
OFFICER A. TEDESCO, P# 6009
OFFICER D. WEBB, P# 4391
OFFICER R. BOHANON, P# 5652

DETAILS:

On 4-22-00, Saturday, at approximately 1254 p.m., Mr. Robert James Day entered the address of 5201 S. Industrial, approached the counter, and demanded money from the employee at the Parkway Inn. The employee, Karen J. Walker, was behind the counter. The subject produced a knife and told Walker to give him all the money. The subject stated to Walker, "Don't even think about it, don't make me hurt you." The suspect then took approximately $1051.00 in US currency, placed it into his pocket and exited out the front door northbound. Walker then called 911.

At approximately 1300 hrs., I Sergeant Dan Flaherty, happened to be in the area of the 3500 block of East Tropicana, which is approximately 300-400 yards away from the location of the crime. I was patrolling the area when I noticed a subject fitting the description of the robbery suspect. The suspect was described as a white male, approximately mid-40's, with gray hair, a gray moustache, wearing blue jeans and boots and a white or blue t-shirt. I noticed that this subject was not wearing a shirt, however, he appeared to be walking between trucks located at the Wild Wild West, which is a local truck stop on East Tropicana.

ARRESTING OFFICER(S)	P#	APPROVED BY	CONNECTING RPTS. (Type or Event Number)
SGT D. FLAHERTY	3399	G 29308	000422-1105

LVMPD 602 (REV. 12-90) • AUTOMATED

I noticed this subject walked up to a truck driver and began a conversation. I then approached the subject, identified myself as a police officer, and told him to step in front of my vehicle. The subject refused and stated he was in a hurry because he was a truck driver. I then asked the subject to again step in front of the vehicle. He began to explain that he was driving a truck and he had been all over the United States this week including Georgia and California. He again asked why I was stopping him at which time I told him a robbery just occured down the street and he fit the description of the suspect.

The subject looked over his left shoulder and began to run southbound between two trucks. I asked the truck driver, unknown name, if he would watch my police vehicle at which time he stated he would. I began to pursue the suspect on foot southbound through the parking lot. The subject continued to run southbound at which time he ran to the east side of the Taco Bell and ran directly across the 3500 block of East Tropicana.

Let it be known that despite the heavy traffic, this subject continued running without stopping. The subject then made it across the street at which time I was able to stop traffic. I continued my foot pursuit while broadcasting the physical description and direction of travel. The subject then grabbed the driver's side door of a GMC cooler van, bearing CA license plate CP36896. He attempted to put the vehicle in gear, believing the vehicle was running. However, this turned out to be the refrigerator, over the cab of the vehicle, which made the vehicle appear to be running.

I then ordered the subject out and ordered him to lie on the ground at which time he refused. I then was forced to put an arm lock on his left wrist and place him into the Lateral Vascular Neck Restraint at which time Officers King and Tedesco got to my location. We were able to place him into custody without further resistance.

Let it be noted an officer told dispatch we were in custody with the subject at which time we decided to do a one-on-one identification with the employee, Karen Walker, SOC/561-78-3490. Karen Walker was driven to our location at which time she positively identified the subject, Robert James Day, as the subject who robbed her of approximately $1000.00.

Let it be noted that during a search incident to arrest, Mr. Day had approximately $1018.00 rolled up in a ball in his left and right pocket. Mr. Day began to laugh and stated that what he did should not be construed as a robbery, or words to that effect. He then stated that he had nothing to lose and he wished that I would have shot him. Mr. Day went on to say if had been wearing tennis shoes, he would have gotten away from this sergeant based on the fact he was a fast runner. Also, the driver of the white cooler van, bearing CA license plate CP36896, did not speak English, however, he stated that he did not know Mr. Robert James Day nor did Mr. Robert James Day have permission to enter his vehicle.

ID responded to our location at which time ID Specialist Thomas, P# 4032, photographed the suspect and the currency on the hood of the patrol car. This money was later released to the proprietor of the Parkway Inn Hotel.

On the way to the County Jail, Mr. Day again started making spontaneous statements claiming that what he did was not a robbery and that if he was wearing tennis shoes he would have perhaps been able to flee the police.

DF/dmj 0422-06
Job # 14353
Dictated: 042200 / 1526 Hrs
Transcribed: 042200 / 1655 Hrs

cc: SGT. Daniel P. Flaherty, P# 3399, SWAC

1714

CLARK COUNTY INTAKE QUESTIONNAIRE AND FINANCIAL AFFIDAVIT

Defendant: Day, Robert		
Arrest Date: 4-22-00	Arraign. Date:	
S.S.N.: 498-62-9076	I.D.: 1679345	
D.R. #:	D.O.B. 2-6-54	
M J Charge: Robb w/dw	DOF06978X	Bail: 20,000
M J Charge: Burg w/pn	↓	Bail: 15,000
M J Charge: RSP	↓	Bail: 3,000
M J Charge:		Bail:
M J Charge:		Bail:
M J Charge:		Bail:
M J Charge:		Bail:
M J Charge:		Bail:
M J Charge:		Bail:
M J Charge:		Bail:

BASED ON _____ VERIFIED POINTS THIS DEFENDANT HAS RECEIVED, AND THE INFORMATION GATHERED BY INTAKE SERVICES, THE FOLLOWING RECOMMENDATION IS MADE:

_____ Supervised Release with Conditions as Directed by Intake Services: _____

_____ Bail Reduction To: _____ _____ _____

_____ Not Recommended for an O/R Release or Bail Reduction Because: N.R.

NI - Type of Charges -

Release Granted: _____ Date: _____

Bail Reduction To: _____ _____ _____

Release Denied: _____ Date: _____

JC-1 (Intake Services)
Rev. 07/95
WHITE – Court CANARY – Intake Services

Justice Court, Las Vegas Township

CLARK COUNTY, NEVADA

INTAKE SERVICES INFORMATION SHEET

CASE NO. 00F06978X

NAME: DAY, ROBERT ID #: 1679345

CHARGE(S): ROBB WDW BURG WDW

CURRENT BAIL: 20,000 15,000

VERIFIED: Local Address: NOT INTERVIEWED

Out Of State Address:

With Whom/How Long:

VERIFIED: Employment:____ Unemployed:____ Disabled:____ Student:____

VERIFIED: Relatives: Local Not Local

Felony Convictions:
97 ESCAPE
97 PAROLE VIOL - NC
94 FRAUD - NC
94 FIN. TRANS. THEFT - NC
94 BANK ROBB - NC
88 PAROLE VIOL.
80 PCS - MO
75 SCS - MO

Misdemeanor Convictions:
84 OPUFP - NC
84 BANK ROBB - KY

Fail To Appear -0- Traffic Misdemeanor Felony

Pending Charges/Holds/Comments:

RECOMMENDATION: Release On Recognizance

Bail Reduction

House Arrest

Indigent Non-Indigent PD Recommended

050400
Date

INTAKE SERVICES

JC-18 (Intake Services)
Rev. 05 97

Justice Court, Las Vegas Township

CLARK COUNTY, NEVADA

INTAKE SERVICES INFORMATION SHEET

CASE NO. 00F06978X

NAME: DAY, ROBERT ID #: 1679345

CHARGE(S): ROBB WDW BURG WDW PSP

CURRENT BAIL: 20,000 15,000 3,000

VERIFIED: Local Address: NOT INTERVIEWED

Out Of State Address: _____

With Whom/How Long: _____

_____

VERIFIED: Employment:_____ Unemployed:_____ Disabled:_____ Student:_____

VERIFIED: Relatives: Local Not Local _____

Felony Convictions:
97 ESCAPE
97 PAROLE VIOL - NC
94 FRAUD - NC
94 FIN. TRANS. THEFT - NC
94 BANK ROBB - NC
88 PAROLE VIOL.
80 PCS - MO
75 SCS - MO

Misdemeanor Convictions:
84 OPUFP - NC
84 BANK ROBB - KY

Fail To Appear -0- Traffic Misdemeanor Felony

Pending Charges/Holds/Comments: _____

_____

_____

RECOMMENDATION: Release On Recognizance _____

Bail Reduction _____

House Arrest _____

Indigent Non-Indigent PD Recommended

4-25-00
Date

_____
INTAKE SERVICES

JC-18 (Intake Services)
Rev. 05/97

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

INTAKE SERVICES INFORMATION SHEET

CASE NO. 00F06978X
DEPT NO. JC-1

NAME: DAY, ROBERT JAMES **ID#:** 1679345
CHARGES: ROBB WDW BURG WDW
CURRENT BAIL: NO BAIL

VERIFIED: **ADDRESS:** NOT INTERVIEWED
WITH WHOM/HOW LONG:

VERIFIED: **EMPLOYMENT:** **UNEMPLOYED:**
DISABLED: **STUDENT:**

VERIFIED: **RELATIVES: LOCAL** **NOT LOCAL**

FELONY CONVICTIONS:
75 MO SCS 80 MO PCS
84 MO BANK ROBBERY 95 MO ESCAPE
84 NC OPUFP 94 NC FINAN CARD THEFT
94 NC FINAN CARD THEFT

FAIL TO APPEAR: -0-

PENDING CHARGES/HOLDS/COMMENTS: -0-

RECOMMENDATION:

DATE: 11-29-00 **INTAKE SERVICES: T. MORRIS**
JC-18 (INTAKE SERVICES) Rev. 10/00

CONFIDENTIAL

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

FILED
JUN 9 1 49 PM '00
Shirley B. Parraguirre
CLERK

I.A. 6/13/00
9:00 A.M.
PD

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167283
Dept. No. IV
Docket C

INFORMATION

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

STEWART L. BELL, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That ROBERT JAMES DAY, the Defendant(s) above named, having committed the crime of **ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony - NRS 205.060, 193.165)**, on or about the 22nd day of April, 2000, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of KAREN WALKER, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will

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JUN - 9 2000
COUNTY CLERK

C531

of the said KAREN WALKER, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a knife, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building occupied by PARKWAY INN, located at 5201 South Industrial, Las Vegas, Clark County, Nevada.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY William Hehn
WILLIAM HEHN
Deputy District Attorney
Nevada Bar #001538

DA#00F06978X/ajc
LVMPD EV#0004221105
RWDW; BURGLARY/WDW - F
(TK1)

The names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

NAME	ADDRESS
FLAHERTY, DANIEL P.	LVMPD P#3399
HUFFMASTER, DOUGLAS G.	LVMPD P#6010
MULLINS, TIMOTHY O.	LVMPD P#6414
TEDESCO, ANDREW J.	LVMPD P#6009
WALKER, KAREN	5900 W. TROPICANA AVE; LV NV

ORIGINAL

Jun 19 3 18 PM '00
Shirley B. Parraguirre
CLERK

ORDR
STEWART L. BELL
DISTRICT ATTORNEY
NEVADA BAR #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff
THE STATE OF NEVADA

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA

Plaintiff,

vs.

ROBERT JAMES DAY,
#1679345

Defendant.

Case no. C167783
Dept no. IV
Docket. C

ORDER
(COMMITMENT)

THIS MATTER came before the Court on the 13th day of June, 2000, when doubt arose as to competence of the defendant; the defendant being present with counsel, STACEY ROUNDTREE, Deputy Public Defender, the State being represented by STEWART L. BELL, DISTRICT ATTORNEY, through THOMAS MOREO, Chief Deputy, and the Court having considered reports of licensed and practicing psychologists and/or psychiatrists in the State of Nevada, finds the defendant incompetent, and that he is dangerous to himself or to society or that commitment is required for a determination of his ability to attain competence, and good cause appearing, it is hereby

ORDERED that, pursuant to NRS 178.425(1), the sheriff shall convey the defendant forthwith, together with a copy of the complaint, the commitment and the physicians' certificate, if any, into the custody of the administrator of the mental hygiene and mental

RECEIVED
JUN 19 2000
COUNTY CLERK

retardation division of the department of human resources for detention and treatment at a secure facility operated by the mental hygiene and mental retardation division, and it is

FURTHER ORDERED that, pursuant to NRS 178.425(2), the defendant must be held in such custody until a court orders his release or until he is returned for trial or judgment as provided in NRS 178.450 to 178.465, inclusive, and it is

FURTHER ORDERED that, pursuant to NRS 178.425(4), these proceedings against the defendant are suspended until the sanity commission finds him capable of standing trial as provided in NRS 178.400, and it is

FURTHER ORDERED that, pursuant to NRS 178.435, the expenses of the examination and of the transportation of the defendant to and from the custody of the administrator of the mental hygiene and mental retardation division of the department of human resources are chargeable to Clark County, and it is

FURTHER ORDERED that the administrator of the mental hygiene and mental retardation division of the department of human resources shall keep the defendant under observation and evaluated periodically, and it is

FURTHER ORDERED that the administrator shall notify in writing this Court and the Clark County District Attorney whether in his opinion, upon medical consultation, the defendant is of sufficient mentality to be able to understand the nature of the criminal charge against him and, by reason thereof, is able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter. The administrator shall submit such a notification within 6 months after this order and at 6-month intervals thereafter. If the administrator's opinion about the defendant is that he is not of sufficient mentality to understand the nature of the charge against him and assist in his own defense, the administrator shall also include in the notice his opinion whether:

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(a) there is a substantial probability that the defendant will attain competency to stand trial or receive pronouncement of judgment in the foreseeable future; and
(b) the defendant is at that time a danger to himself or to society.

DATED this 19 day of June, 2000.

JUDGE

Stewart L. Bell
District Attorney

By J. Charles Thompson
J. CHARLES THOMPSON,
ASSISTANT DISTRICT ATTORNEY
Nevada Bar #001726

TRAN

Case No. C167783

FILED

JUN 21 2 05 PM '00

Dept. 1

ORIGINAL

CLERK

IN THE JUSTICE COURT OF LAS VEGAS TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- ROBERT JAMES DAY, Defendant.	CONDITIONAL WAIVER OF PRELIMINARY HEARING Case No. 00F06978X

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE JUDGE DEBORAH J. LIPPIS, JUSTICE OF THE PEACE

Tuesday, June 6, 2000, 8:00 o'clock a.m.

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JUN 28 2000
COUNTY CLERK

APPEARANCES:

For the State: WILLIAM A. HEHN, ESQ.
Deputy District Attorney

For the Defendant: DOUGLAS P. DeJULIO, ESQ.
Deputy Public Defender

Reported by: DONNA J. MCCORD, CCR No. 337

LAS VEGAS, CLARK COUNTY, NEVADA; TUESDAY, JUNE 6, 2000

P R O C E E D I N G S

THE COURT: Robert Day.

THE CLERK: Status check on psyche reports.

THE COURT: Did we get a doctor's report back, Mr. DeJulio, on Mr. day?

MR. DeJULIO: Judge, we did get a doctor's report back.

THE COURT: Is Robert Day present?

MR. DeJULIO: I think he's in custody, Judge. That's fine.

THE COURT: I just wanted to see where you were, sir. Thank you.

MR. DeJULIO: Judge, do you want to look at the report at the bench?

THE COURT: You can tell me.

MR. DeJULIO: Judge, the report we have completed by Dr. John Paglini indicates that in his opinion Mr. Day is currently incompetent.

THE COURT: Let's order up the second psyche then and send it up to District Court, okay?

MR. DeJULIO: Conditional waiver?

THE COURT: Conditional waiver. Here's the next date.

THE CLERK: June 13th, Department IV.

(Proceedings concluded.)

--oOo--

ATTEST: Full, true, and accurate transcript of proceedings.

DONNA J. MCCORD
CCR No. 337

DISTRICT COURT

CLARK COUNTY NEVADA

FILED
AUG 25 4 04 PM '00
CLERK

IN THE MATTER OF) CASE NO. C167788

ROBERT J. DAY) DEPARTMENT IV

ORDER

The Administrator of the State Department of Mental Hygiene and Mental Retardation Division, having notified the Court that the above individual is of sufficient mentality to be returned to court for disposition, therefore pursuant to N.R.S. 178.455, and good cause appearing,

IT IS HEREBY ORDERED that a sanity commission be impaneled for the purpose of determining whether or not ROBERT J. DAY be returned to court for disposition.

IT IS FURTHER ORDERED that the commission shall be composed of Doctors Beth Klein, Elissa Slanger, and Frank Evarts. FURTHER, that each member of the commission shall include in his report his opinion as to:

1. Whether the person is of sufficient mentality to understand the nature of the offense charged;

2. Whether the person is of sufficient mentality to aid and assist counsel in the defense of the offense charged, or to show cause why judgment should not be pronounced; and

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3. If a finding of incompetence is reached, whether there is substantial probability that this person will attain competency in the foreseeable future.

DATED this 25th day of August, 2000

DISTRICT JUDGE

FILED

DISTRICT COURT

CLARK COUNTY NEVADA

SEP 27 2 21 PM '00

Shirley B. Parraguirre

CLERK

IN THE MATTER OF

ROBERT J. DAY

Case No. C167783

Department IV

ORDER

IT IS HEREBY ORDERED that the Mental Hygiene and Mental Retardation Division of the Department of Human Resources pay, pursuant to N.R.S. 178.465, Two Hundred, Sixty Dollars ($260.00) to Doctors Beth Klein, Elissa Slanger, and Frank Evarts, for services rendered in this matter.

DATED this 25th day of September, 2000.

DISTRICT JUDGE

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SEP 27 2000

COUNTY CLERK

GE31

ORIGINAL

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

FILED IN OPEN COURT
OCT 04 2000
SHIRLEY B. PARRAGUIRRE, CLERK
BY Billie Jo Craig DEPUTY
BILLIE JO CRAIG

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA
Plaintiff
vs.

ROBERT J. DAY
Id#1679345
Defendant

Case no. C167783
Dept no. IV
Docket C

FINDINGS
(OF COMPETENCY)

THIS MATTER HAVING COME on for hearing before the above-entitled Court on the 4th day of October, 2000, and it appearing that on the 13th day of June, 2000, pursuant to Order of this Court, that the above-named defendant was transported to the Lakes Crossing Center for psychiatric testing to determine his competency and it further appearing that subsequent thereto, a Sanity Commission, appointed by Order of the Eighth Judicial District Court, examined the defendant pursuant to NRS 178.455 with the reports of that examination being forwarded to the Court for its review thereof; and the Court having now reviewed said reports and there being no request for a hearing as provided for by NRS 178.460(1),

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OCT 04 2000
COUNTY CLERK

THE COURT FINDS pursuant to NRS 178.460, that the said defendant is competent to stand trial in the above-entitled matter.

DATED this 4th day of October, 2000.

DISTRICT JUDGE

STEWART L. BELL
District Attorney

By
J. CHARLES THOMPSON
Assistant District Attorney
Nevada Bar #001726

ORIGINAL

ORDR
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for the Plaintiff
THE STATE OF NEVADA

FILED IN OPEN COURT
OCT 04 2000
SHIRLEY B. PARRAGUIRRE, CLERK
BY Billie Jo Craig
BILLIE JO CRAIG DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA
Plaintiff

vs.

ROBERT JAMES DAY
Id #1679345

Defendant.

CASE NO. C167783
DEPT. NO. IV

DOCKET C

ORDER
To Transport Defendant
(Found Competent per NRS 178.460)

TO: JERRY KELLER, Sheriff, Clark County, Nevada:

WHEREAS, on the 13th day of June 2000, pursuant to Order of the above-entitled Court, you were directed to transport the above-named Defendant to the Lake's Crossing Center for necessary care and treatment; and

WHEREAS, a Sanity Commission impaneled by the Court on the 25th day of August, 2000, having examined the Defendant pursuant to NRS 178.455 with the reports of that examination being forwarded to the Court for its review thereof; and

WHEREAS, the Court having thereafter made and entered its Findings in the above-entitled matter that the said Defendant is now competent to stand trial.

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OCT 04 2000
COUNTY CLERK

NOW THEREFORE, in accordance with NRS 178.460, you, the Sheriff of Clark County, Nevada, are hereby ordered to transport the Defendant from the Lake's Crossing Center, Washoe County, Nevada, to the Clark County Jail, Las Vegas, Nevada, by the 24th day of October, 2000 when further proceedings have been scheduled by the Court in this matter.

IT IS FURTHER ORDERED that you, the Sheriff of Clark County, Nevada, shall accept and retain custody of said Defendant in the Clark County Jail, pending completion of proceedings in the above-captioned matter, or until the further Order of this Court.

DATED this 4th day of October, 2000.

DISTRICT JUDGE

STEWART L. BELL
District Attorney

BY J. Charles Thompson
J. CHARLES THOMPSON
Assistant District Attorney
Nevada Bar #001726

RMTJ

District Court
Clark County, Nevada

FILED

Nov 15 2 40 PM '00

CLERK

THE STATE OF NEVADA,

Appellant(s),

vs

ROBERT J. DAY,

Respondent(s).

Case No. C167783

Dept No. IV

Justice Court, LAS VEGAS TOWNSHIP
Case No. 00F06978X

REMITTITUR

To: CLERK, Justice Court, LAS VEGAS TOWNSHIP, Court Clerk

Pursuant to the rules of this Court, enclosed are the following:

Certified Copy of Minute Order
Justice Court, LAS VEGAS TOWNSHIP File

DATED this 14TH day of NOVEMBER, 2000.

SHIRLEY B. PARRAGUIRRE, CLERK OF COURT

By: Billie Jo Craig
BILLIE JO CRAIG, Deputy Clerk

cc: Hon. KATHY HARDCASTLE, Justice Court, LAS VEGAS TOWNSHIP
THE STATE OF NEVADA, Appellant(s)
ROBERT J. DAY, Respondent(s)

RECEIPT FOR REMITTITUR

RECEIVED of Shirley B. Parraguirre, Clerk of District Court, the above REMITTITUR on the 15 day of nov, 2000.

JUSTICE COURT, LAS VEGAS TOWNSHIP

By: Lucille H. Hill
Deputy Clerk

RMTT9/00/jbh

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12

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

FILED
Nov 17 12 29 PM '00
Shirley B. Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket C

ORDER
(Remand)

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

THIS MATTER having come on for hearing before the above- entitled Court on the 14th day of November, 2000, the Defendant being represented by ~~BITA KHAMSI~~ DOUGLAS P. DESOLIO, Deputy Public Defender, the Plaintiff being represented by STEWART L. BELL, District Attorney, through CARA L. CAMPBELL, Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

IT IS HEREBY ORDERED that the above-entitled matter shall be, and it is, hereby

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NOV 15 2000
COUNTY CLERK

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NOV 17 2000
COUNTY CLERK

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remanded to the Justice Court of Las Vegas Township, Department 1, for further proceedings, on the 20th day of November, 2000.

DATED this 16 day of November, 2000.

DISTRICT JUDGE

STEWART L. BELL
District Attorney
Nevada Bar #000477

BY Cara Campbell
CARA L. CAMPBELL
Deputy District Attorney
Nevada Bar #006246

FILED

JUSTICE COURT, LAS VEGAS TOWNSHIP

DEC 6 10 03 AM '00

Shirley Lynn Grieve
CLERK

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- ROBERT JAMES DAY Defendant.	District Court Case No.: C167783 Justice Court Case No.: 00F06978X

12-11

I hereby certify the foregoing to be a full, true and correct copy of the proceedings as the same appear in the above case.

WITNESS my hand this 5th day of DECEMBER, 2000.

Justice of the Peace of Las Vegas Township

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DEC 06 2000
COUNTY CLERK

MC

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

ROBERT JAMES DAY

Defendant.

Case No.00F06978X

COMMITMENT
and
ORDER TO APPEAR

An Order having been made this day by me, that ROBERT JAMES DAY

be held to answer upon the charge of Robbery with use of a deadly weapon, burglary while in possession of a deadly weapon Committed in said Township and County, on or about the 22nd day of April , 2000;

IT IS FURTHER ORDERED that the Sheriff of the County of Clark is hereby commanded to receive him into custody, and detain him until he can be legally discharged, and that he be admitted to bail in the sum of no bail Dollars, and be committed to the custody of the Sheriff of said County, until such bail is given; and

IT IS FURTHER ORDERED that said Defendant is commanded to appear in Department 4 of the Eighth Judicial District Court, Clark County Courthouse, Las Vegas, Nevada, at 9 A.M., on the 11th day of December , 2000, for arraignment and further proceedings on the within charge .

DATED this 5th day of December, 2000.

Justice of the Peace of Las Vegas Township

Justice Court, Las Vegas Township

STATE VS. DAY, ROBERT CASE NO. 00F06978X

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES — HEARING	CONTINUED TO:
DECEMBER 4, 2000 D. LIPPIS L. LUZAICH, DA D. DICKSON, PD J MURRAY-DAVID,CR C. CINTOLA, CLK	TIME SET FOR PRELIMINARY HEARING DEFENDANT PRESENT IN COURT IN CUSTODY MOTION BY DEFENSE TO EXCLUDE WITNESS - MOTION GRANTED **STATE WITNESSES** 1. KAREN WALKER - WITNESS ID'D DEFENDANT **STATE RESTS** SUBMITTED WITHOUT ARGUMENT DEFENDANT BOUND OVER TO DISTRICT COURT AS CHARGED	12/11/00 9:00 #4 DISTRICT COURT
	DEFENDANT TO APPEAR IN THE EIGHTH JUDICIAL DISTRICT COURT DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF	CC DEC 6 2000 COUNTY CLERK'S OFFICE

JC-1 (Criminal)
Rev. 10/96

Justice Court, Las Vegas Township

STATE VS. DAY, ROBERT CASE NO. 00F06978X

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES — HEARING	CONTINUED TO:
04-25-00	CRIMINAL COMPLAINT FILED - COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON	stg
04-26-00 D. LIPPIS W. HEHN, DA G. FRANZEN, PD D. MCCORD, CR C. CINTOLA, CLK	INITIAL ARRAIGNMENT DEFENDANT PRESENT IN COURT IN CUSTODY DEFENDANT ADVISED/WAIVES READING OF COMPLAINT PRELIMINARY HEARING DATE SET DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF	05-09-00 9:00 #1 stg
MAY 9, 2000 D. LIPPIS C. CAMPBELL, DA G. FRANZEN, PD D. MCCORD,CR C. CINTOLA, CLK	TIME SET FOR PRELIMINARY HEARING DEFENDANT PRESENT IN COURT IN CUSTODY CONTINUED FOR STATUS CHECK ON PSYCHIATRIC EVALUATION DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF	6/6/00 8:00 #1 CC
JUNE 6, 2000 D. LIPPIS W. HEHN, DA D. DEJULIO, PD D. MCCORD, CR J. MONTERROSO, CLK	DEFENDANT PRESENT IN COURT **IN CUSTODY** PER DEFENSE, DEFENDANT WAS FOUND INCOMPETENT DEFENSE CONDITIONALLY WAIVES DEFENDANTS RIGHT TO A PRELIMINARY HEARING DEFENDANT BOUND OVER TO DISTRICT COURT FOR PURPOSES OF A PSYCHIATRIC EVALUATION DATE SET DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF	6-13-00 9AM DC4 jm
NOVEMBER 20, 2000 D. LIPPIS W. HEHN, DA T. ERICSSON, PD J MURRAY-DAVID,CR C. CINTOLA, CLK	DEFENDANT PRESENT IN COURT IN CUSTODY PRELIMINARY HEARING DATE SET DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF	12/04/00 9:00 #1 PAW

JC-1 (Criminal)
Rev. 10/96

COPY

Justice Court, Las Vegas Township

STATE VS. DAY, ROBERT CASE NO. 00F06978X

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES — HEARING	CONTINUED TO:
04-25-00	CRIMINAL COMPLAINT FILED - COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON	stg
04-26-00 D. LIPPIS W. HEHN, DA G. FRANZEN, PD D. MCCORD, CR C. CINTOLA, CLK	INITIAL ARRAIGNMENT DEFENDANT PRESENT IN COURT IN CUSTODY DEFENDANT ADVISED/WAIVES READING OF COMPLAINT PRELIMINARY HEARING DATE SET DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF	05-09-00 9:00 #1 stg
MAY 9, 2000 D. LIPPIS C. CAMPBELL, DA G. FRANZEN, PD D. MCCORD,CR C. CINTOLA, CLK	TIME SET FOR PRELIMINARY HEARING DEFENDANT PRESENT IN COURT IN CUSTODY CONTINUED FOR STATUS CHECK ON PSYCHIATRIC EVALUATION DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF	6/6/00 8:00 #1 CC
JUNE 6, 2000 D. LIPPIS W. HEHN, DA D. DEJULIO, PD D. MCCORD, CR J. MONTERROSO, CLK	DEFENDANT PRESENT IN COURT **IN CUSTODY** PER DEFENSE, DEFENDANT WAS FOUND INCOMPETENT DEFENSE CONDITIONALLY WAIVES DEFENDANTS RIGHT TO A PRELIMINARY HEARING DEFENDANT BOUND OVER TO DISTRICT COURT FOR PURPOSES OF A PSYCHIATRIC EVALUATION DATE SET DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF	6-13-00 9AM DC4 jm

JC-1 (Criminal)
Rev. 10/96

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY #1679345,

Defendant.

FILED
2000 APR 25 A 9:03
JUSTICE COURT
LAS VEGAS, NEVADA
COUNTY

CASE NO. 00F06978X

DEPT. NO. 1

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony - NRS 205.060, 193.165), in the manner following, to-wit: That the said Defendant, on or about the 22nd day of April, 2000, at and within the County of Clark, State of Nevada,

COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of KAREN WALKER, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of the said KAREN WALKER, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a knife, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building occupied by PARKWAY INN, located at 5201 South Industrial, Las Vegas, Clark County, Nevada.

All of which is contrary to the form, force and effect of Statutes in such cases made and

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provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

Thomas M. Carroll

4/25/00

00F06978X/rad
LVMPD EV#0004221105
RWDW; BURG WW - F
(TK1)

CRIMINAL COURT MINUTES

00-C-167783-C STATE OF NEVADA vs Day, Robert J

CONTINUED FROM PAGE: 002

11/14/00 09:00 AM 03 COURT ADMINISTRATIONS' REQUEST FOR STATUS CHECK

HEARD BY: Kathy Hardcastle, Judge; Dept. 4

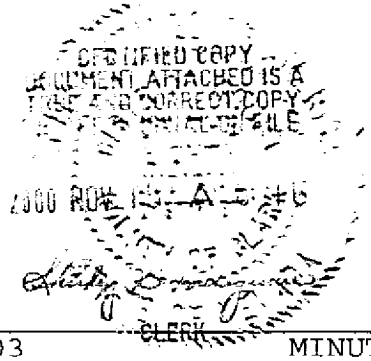
OFFICERS: BILLIE JO CRAIG, Relief Clerk
TINA SMITH, Reporter/Recorder

PARTIES:		
	STATE OF NEVADA	Y
006246	Campbell, Cara L.	Y
001 D1	Day, Robert J	Y
PUBDEF	Public Defender	Y
001231	Dejulio, Douglas P.	Y

Court noted defendant competent. COURT ORDERED, matter REMANDED TO JUSTICE COURT to start over with a Preliminary Hearing on charges.

CUSTODY

11/20/00 8:00 AM REMANDED TO JUSTICE COURT, DEPT. 1



CRIMINAL COURT MINUTES

00-C-167783-C STATE OF NEVADA vs Day, Robert J

CONTINUED FROM PAGE: 001

10/25/00 09:00 AM 01 COURT ADMINISTRATIONS' REQUEST FOR STATUS CHECK

HEARD BY: Kathy Hardcastle, Judge; Dept. 4

OFFICERS: DOROTHY KELLY, Court Clerk
TINA SMITH, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
002804	Villegas, Victoria A.	Y
001 D1	Day, Robert J	N
PUBDEF	Public Defender	Y
004735	Roundtree, Stacey	Y

COURT ORDERED, matter CONTINUED for deft's presence. Court instructed counsel to call Lakes Crossing.

L.C.

COURT'S ADMINISTRATION'S REQUEST FOR STATUS CHECK

CONTINUED TO: 11/08/00 09:00 AM 02

11/08/00 09:00 AM 02 COURT ADMINISTRATIONS' REQUEST FOR STATUS CHECK

HEARD BY: Kathy Hardcastle, Judge; Dept. 4

OFFICERS: DOROTHY KELLY, Court Clerk
TINA SMITH, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006246	Campbell, Cara L.	Y
001 D1	Day, Robert J	N
PUBDEF	Public Defender	Y
001231	Dejulio, Douglas P.	Y

Deft not transported; therefore, COURT ORDERED, matter CONTINUED.

L.C.

COURT ADMINSTRATION'S REQUEST FOR STATUS CHECK

CONTINUED TO: 11/14/00 09:00 AM 03

CONTINUED ON PAGE: 003

CRIMINAL COURT MINUTES

00-C-167783-C STATE OF NEVADA vs Day, Robert J

06/13/00 09:00 AM 00 INITIAL ARRAIGNMENT

HEARD BY: Kathy Hardcastle, Judge; Dept. 4

OFFICERS: BILLIE JO CRAIG, Relief Clerk
TINA SMITH, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
002415	Moreo, Thomas J.	Y
001 D1	Day, Robert J	Y
PUBDEF	Public Defender	Y
004735	Roundtree, Stacey	Y

Ms. Roundtree advised there were two incompetent reports and submitted the second report from Dr. Paglini. Pursuant to NRS 178.425, COURT ORDERED, defendant REMANDED to the custody of the Administrator of the Mental Hygiene and Mental Retardation Division for the Department of Human Rescurces for detention and treatment at a secure facility operated by the Mental Hygiene and Mental Retardation Division.

L.C.

10/04/00 09:00 AM 00 COURT ADMINISTRATIONS' REQUEST FOR STATUS CHECK

HEARD BY: Kathy Hardcastle, Judge; Dept. 4

OFFICERS: BILLIE JO CRAIG, Relief Clerk
TINA SMITH, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006246	Campbell, Cara L.	Y
001 D1	Day, Robert J	N
PUBDEF	Public Defender	Y
005686	Khamsi, Bita	Y

FINDINGS (OF COMPETENCY) AND ORDER TO TRANSPORT SIGNED AND FILED IN OPEN COURT. Court noted it received the reports. COURT ORDERED, matter CONTINUED for defendant to be present.

L.C.

CONTINUED TO: 10/25/00 09:00 AM 01

CONTINUED ON PAGE: 002

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

FILED
JUN 9 1 49 PM '00
Shirley B. Parraguirre
CLERK

I.A. 6/13/00
9:00 A.M.
PD

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket C

INFORMATION

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

STEWART L. BELL, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That ROBERT JAMES DAY, the Defendant(s) above named, having committed the crime of **ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony - NRS 205.060, 193.165)**, on or about the 22nd day of April, 2000, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of KAREN WALKER, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will

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COUNTY CLERK

of the said KAREN WALKER, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a knife, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building occupied by PARKWAY INN, located at 5201 South Industrial, Las Vegas, Clark County, Nevada.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY William Hehn
WILLIAM HEHN
Deputy District Attorney
Nevada Bar #001538

DA#00F06978X/ajc
LVMPD EV#0004221105
RWDW; BURGLARY/WDW - F
(TKI)

The names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

NAME	ADDRESS
FLAHERTY, DANIEL P.	LVMPD P#3399
HUFFMASTER, DOUGLAS G.	LVMPD P#6010
MULLINS, TIMOTHY O.	LVMPD P#6414
TEDESCO, ANDREW J.	LVMPD P#6009
WALKER, KAREN	5900 W. TROPICANA AVE; LV NV

ORIGINAL

FILED
Jun 19 3 18 PM '00
Shirley B. Parraguirre
CLERK

ORDR
STEWART L. BELL
DISTRICT ATTORNEY
NEVADA BAR #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff
THE STATE OF NEVADA

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA

Plaintiff,

vs.

ROBERT JAMES DAY,
#1679345

Defendant.

Case no. C167783
Dept no. IV
Docket. C

ORDER
(COMMITMENT)

THIS MATTER came before the Court on the 13th day of June, 2000, when doubt arose as to competence of the defendant; the defendant being present with counsel, STACEY ROUNDTREE, Deputy Public Defender, the State being represented by STEWART L. BELL, DISTRICT ATTORNEY, through THOMAS MOREO, Chief Deputy, and the Court having considered reports of licensed and practicing psychologists and/or psychiatrists in the State of Nevada, finds the defendant incompetent, and that he is dangerous to himself or to society or that commitment is required for a determination of his ability to attain competence, and good cause appearing, it is hereby

ORDERED that, pursuant to NRS 178.425(1), the sheriff shall convey the defendant forthwith, together with a copy of the complaint, the commitment and the physicians' certificate, if any, into the custody of the administrator of the mental hygiene and mental

RECEIVED
JUN 19 2000
COUNTY CLERK

2231

retardation division of the department of human resources for detention and treatment at a secure facility operated by the mental hygiene and mental retardation division, and it is

FURTHER ORDERED that, pursuant to NRS 178.425(2), the defendant must be held in such custody until a court orders his release or until he is returned for trial or judgment as provided in NRS 178.450 to 178.465, inclusive, and it is

FURTHER ORDERED that, pursuant to NRS 178.425(4), these proceedings against the defendant are suspended until the sanity commission finds him capable of standing trial as provided in NRS 178.400, and it is

FURTHER ORDERED that, pursuant to NRS 178.435, the expenses of the examination and of the transportation of the defendant to and from the custody of the administrator of the mental hygiene and mental retardation division of the department of human resources are chargeable to Clark County, and it is

FURTHER ORDERED that the administrator of the mental hygiene and mental retardation division of the department of human resources shall keep the defendant under observation and evaluated periodically, and it is

FURTHER ORDERED that the administrator shall notify in writing this Court and the Clark County District Attorney whether in his opinion, upon medical consultation, the defendant is of sufficient mentality to be able to understand the nature of the criminal charge against him and, by reason thereof, is able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter. The administrator shall submit such a notification within 6 months after this order and at 6-month intervals thereafter. If the administrator's opinion about the defendant is that he is not of sufficient mentality to understand the nature of the charge against him and assist in his own defense, the administrator shall also include in the notice his opinion whether:

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(a) there is a substantial probability that the defendant will attain competency to stand trial or receive pronouncement of judgment in the foreseeable future; and
(b) the defendant is at that time a danger to himself or to society.

DATED this 19 day of June, 2000.

JUDGE

Stewart L. Bell
District Attorney

By J. Charles Thompson
J. CHARLES THOMPSON,
ASSISTANT DISTRICT ATTORNEY
Nevada Bar #001726

TRAN

Case No. C167783

FILED

Jun 21 2 05 PM '00

Dept. 1

ORIGINAL

CLERK

IN THE JUSTICE COURT OF LAS VEGAS TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- ROBERT JAMES DAY, Defendant.	CONDITIONAL WAIVER OF PRELIMINARY HEARING Case No. 00F06978X

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE JUDGE DEBORAH J. LIPPIS, JUSTICE OF THE PEACE

Tuesday, June 6, 2000, 8:00 o'clock a.m.

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COUNTY CLERK

APPEARANCES:

For the State: WILLIAM A. HEHN, ESQ.
Deputy District Attorney

For the Defendant: DOUGLAS P. DeJULIO, ESQ.
Deputy Public Defender

Reported by: DONNA J. MCCORD, CCR No. 337

LAS VEGAS, CLARK COUNTY, NEVADA; TUESDAY, JUNE 6, 2000

P R O C E E D I N G S

THE COURT: Robert Day.

THE CLERK: Status check on psyche reports.

THE COURT: Did we get a doctor's report back, Mr. DeJulio, on Mr. day?

MR. DeJULIO: Judge, we did get a doctor's report back.

THE COURT: Is Robert Day present?

MR. DeJULIO: I think he's in custody, Judge. That's fine.

THE COURT: I just wanted to see where you were, sir. Thank you.

MR. DeJULIO: Judge, do you want to look at the report at the bench?

THE COURT: You can tell me.

MR. DeJULIO: Judge, the report we have completed by Dr. John Paglini indicates that in his opinion Mr. Day is currently incompetent.

THE COURT: Let's order up the second psyche then and send it up to District Court, okay?

MR. DeJULIO: Conditional waiver?

THE COURT: Conditional waiver. Here's the next date.

THE CLERK: June 13th, Department IV.

(Proceedings concluded.)

--oOo--

ATTEST: Full, true, and accurate transcript of proceedings.

DONNA J. MCCORD
CCR No. 337

DISTRICT COURT

CLARK COUNTY NEVADA

IN THE MATTER OF)

ROBERT J. DAY)

FILED
AUG 25 4 04 PM '88
CASE NO. C107788
DEPARTMENT IV
CLERK

ORDER

The Administrator of the State Department of Mental Hygiene and Mental Retardation Division, having notified the Court that the above individual is of sufficient mentality to be returned to court for disposition, therefore pursuant to N.R.S. 178.455, and good cause appearing,

IT IS HEREBY ORDERED that a sanity commission be impaneled for the purpose of determining whether or not ROBERT J. DAY be returned to court for disposition.

IT IS FURTHER ORDERED that the commission shall be composed of Doctors Beth Klein, Elissa Slanger, and Frank Evarts. FURTHER, that each member of the commission shall include in his report his opinion as to:

1. Whether the person is of sufficient mentality to understand the nature of the offense charged;

2. Whether the person is of sufficient mentality to aid and assist counsel in the defense of the offense charged, or to show cause why judgment should not be pronounced; and

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AUG 25 2000
COUNTY CLERK

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3. If a finding of incompetence is reached, whether there is substantial probability that this person will attain competency in the foreseeable future.

DATED this 25th day of August, 2000

DISTRICT JUDGE

FILED

DISTRICT COURT

CLARK COUNTY NEVADA

SEP 27 2 21 PM '00

IN THE MATTER OF

ROBERT J. DAY

Case No. C167783

CLERK Department IV

ORDER

IT IS HEREBY ORDERED that the Mental Hygiene and Mental Retardation Division of the Department of Human Resources pay, pursuant to N.R.S. 178.465, Two Hundred, Sixty Dollars ($260.00) to Doctors Beth Klein, Elissa Slanger, and Frank Evarts, for services rendered in this matter.

DATED this 25th day of September, 2000.

DISTRICT JUDGE

RECEIVED

SEP 27 2000

COUNTY CLERK

C231

ORIGINAL

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

FILED IN OPEN COURT
OCT 04 2000
SHIRLEY B. PARRAGUIRRE, CLERK
BY Billie Jo Craig DEPUTY
BILLIE JO CRAIG

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA
Plaintiff
vs.

ROBERT J. DAY
Id#1679345
Defendant

Case no. C167783
Dept no. IV
Docket C

FINDINGS
(OF COMPETENCY)

THIS MATTER HAVING COME on for hearing before the above-entitled Court on the 4th day of October, 2000, and it appearing that on the 13th day of June, 2000, pursuant to Order of this Court, that the above-named defendant was transported to the Lakes Crossing Center for psychiatric testing to determine his competency and it further appearing that subsequent thereto, a Sanity Commission, appointed by Order of the Eighth Judicial District Court, examined the defendant pursuant to NRS 178.455 with the reports of that examination being forwarded to the Court for its review thereof; and the Court having now reviewed said reports and there being no request for a hearing as provided for by NRS 178.460(1),

/ / /

/ / /

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OCT 04 2000
COUNTY CLERK

THE COURT FINDS pursuant to NRS 178.460, that the said defendant is competent to stand trial in the above-entitled matter.

DATED this 4th day of October, 2000.

DISTRICT JUDGE

STEWART L. BELL
District Attorney

By
J. CHARLES THOMPSON
Assistant District Attorney
Nevada Bar #001726

ORIGINAL

ORDR
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for the Plaintiff
THE STATE OF NEVADA

FILED IN OPEN COURT
OCT 04 2000
SHIRLEY B. PARRAGUIRRE, CLERK
BY Billie Jo Craig
BILLIE JO CRAIG DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA

Plaintiff

vs.

ROBERT JAMES DAY
Id #1679345

CASE NO. C167783
DEPT. NO. IV

DOCKET C

Defendant.

ORDER
To Transport Defendant
(Found Competent per NRS 178.460)

TO: JERRY KELLER, Sheriff, Clark County, Nevada:

WHEREAS, on the 13th day of June 2000, pursuant to Order of the above-entitled Court, you were directed to transport the above-named Defendant to the Lake's Crossing Center for necessary care and treatment; and

WHEREAS, a Sanity Commission impaneled by the Court on the 25th day of August, 2000, having examined the Defendant pursuant to NRS 178.455 with the reports of that examination being forwarded to the Court for its review thereof; and

WHEREAS, the Court having thereafter made and entered its Findings in the above-entitled matter that the said Defendant is now competent to stand trial.

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OCT 04 2000
COUNTY CLERK

NOW THEREFORE, in accordance with NRS 178.460, you, the Sheriff of Clark County, Nevada, are hereby ordered to transport the Defendant from the Lake's Crossing Center, Washoe County, Nevada, to the Clark County Jail, Las Vegas, Nevada, by the 27th day of October, 2000 when further proceedings have been scheduled by the Court in this matter.

IT IS FURTHER ORDERED that you, the Sheriff of Clark County, Nevada, shall accept and retain custody of said Defendant in the Clark County Jail, pending completion of proceedings in the above-captioned matter, or until the further Order of this Court.

DATED this 4th day of October, 2000.

DISTRICT JUDGE

STEWART L. BELL
District Attorney

BY J. Charles Thompson
J. CHARLES THOMPSON
Assistant District Attorney
Nevada Bar #001726

FILED

Justice Court, Las Vegas Township

CLERK

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

—vs—

DAY, ROBERT JAMES

Defendant.

District Court Case No. C147783

Justice Court Case No. 00F06978X

I. hereby certify the foregoing to be a full, true and correct copy of the proceedings as the same appear in the above case.

WITNESS my hand this 6TH day of JUNE, 2000

Justice of the Peace of Las Vegas Township

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JUN 14 2000
COUNTY CLERK

JC-6 (Criminal)
Rev. 12/89

Justice Court, Las Vegas Township

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

—vs—

DAY, ROBERT JAMES

Defendant.

Case No. 00F06978X

COMMITMENT
and
ORDER TO APPEAR

An Order having been made this day by me, that

DAY, ROBERT JAMES

be held to answer upon the charge of
COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON
COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

Committed in said Township and County, on or about the 22ND day of APRIL, XX 2000.

IT IS FURTHER ORDERED that the Sheriff of the County of Clark is hereby commanded to receive HIM into custody, and detain HIM until HE be legally discharged, and that HE be admitted to bail in the sum of COUNT I - 20000/20000/40000 COUNT II - 15000/15000/30000 Dollars, and be committed to the custody of the Sheriff of said County, until such bail is given; and

IT IS FURTHER ORDERED that said Defendant IS is/are commanded to appear in Department 4 of the Eighth Judicial District Court, Clark County Courthouse, Las Vegas, Nevada, at 9:00 A.M., on the 13TH day of JUNE, XX 2000 for arraignment and further proceedings on the within charge S.

DATED this 6TH day of JUNE, XX 2000

Justice of the Peace of Las Vegas Township

JC-7 (Criminal)
Rev. 06/97

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

FILED

2000 APR 25 A 9:03

JUSTICE COURT
LAS VEGAS, NEVADA

DEPUTY

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY #1679345,

Defendant.

CASE NO. 00F06978X

DEPT. NO. I

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony - NRS 205.060, 193.165), in the manner following, to-wit: That the said Defendant, on or about the 22nd day of April, 2000, at and within the County of Clark, State of Nevada,

COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of KAREN WALKER, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of the said KAREN WALKER, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a knife, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building occupied by PARKWAY INN, located at 5201 South Industrial, Las Vegas, Clark County, Nevada.

All of which is contrary to the form, force and effect of Statutes in such cases made and

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COPY

provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

Thomas M. Carroll

4/25/00

00F06978X/rad
LVMPD EV#0004221105
RWDW; BURG WW - F
(TK1)

NEW

Page 1 of 1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
TEMPORARY CUSTODY RECORD

I.D. #: 1079345 Event #: 000422-1105

PB

DATE OF ARREST: 4/22/00 TIME OF ARREST: 1320 I.D. ESTAB. BY:

INTAKE NAME (AKA, ALIAS, ETC.) Last	First	Middle	TRUE NAME Last	First	Middle
DAY	ROBERT	JAMES			

ADDRESS NUMBER & STREET	BLDG./APT. #	CITY	STATE	ZIP
TRANSIENT				

DATE OF BIRTH	RACE	SEX	HEIGHT	WEIGHT	HAIR	EYES	SOCIAL SECURITY #	Speak English?	PLACE OF BIRTH
2-6-54	W	M	5'11	180	BLK	BRO	498-62-9076	☑ Yes ☐ No	KANSAS

LOCATION OF CRIME (# - Street - City - State - Zip)	CC / LV	Citizen Arrest	LOCATION OF ARREST	PCN #
5201 S. INDUSTRIAL LV NV 89118	☑ CC ☐ LV	Y (N)	3535 W TROPICANA LV NV	

BKG. CODE	CHARGE ORD / NRS #	M	GM	F	ARR TYPE*	EVENT NUMBER	WARR / NCIC NUMBER	COURT LV	COURT JC	COURT DC	COURT OTHER
5039	ROBBERY/NDW 200.380	☐	☐	☑	PC	000422-1105	00F06978X	☐	☑	☐	☐
5068	BWAG w/WEAPON 205.060	☐	☐	☒	PC	"	" 9C-1	☐	☑	☐	☐
5517	PSP 205.275	☐	☐	☒	PC	"	"	☐	☑	☐	☐
		☐	☐	☐				☐	☐	☐	☐
		☐	☐	☐				☐	☐	☐	☐
		☐	☐	☐				☐	☐	☐	☐

*ARREST TYPE: PC – PROBABLE CAUSE BS – BONDSMAN SURRENDER BW – BENCH WARRANT WA – WARRANT RM – REMAND GJI – GRAND JURY IND.

OTHER COURT:

Arresting Officer's Signature — D. [illegible] / 3399 / LVMPD (Print Name / P # / Agency)

Transporting Officer's Signature — SA / / / (Print Name / P # / Agency)

APPROVAL CONTROL # FOR ADDITIONAL CHARGES:

Time Stamp at BOOKING

APR 22 2000 PM 2:51

P #:

☐ FOR PROBABLE CAUSE/NCIC HIT ARREST SEE PAGE TWO FOR DETAILS.

☐ BENCH WARRANT SERVED ON _____

☐ WARRANT SERVED ON _____

☐ GRAND JURY INDICTMENT SERVED ON _____

TYPE OF I.D. FOR VERIFICATION _____

FILED

APR 22 7 54 PM '00

JUSTICE COURT LAS VEGAS NEVADA

DEPUTY BY

FIRST APPEARANCE: DATE: 4-24-00 TIME: 7:30AM

COURT

☑ JUSTICE

☐ MUNICIPAL

☐ JUVENILE

☐ STANDARD BAIL

☐ O.R. RELEASE

☑ PROBABLE CAUSE

☐ I.A.D.

JUDGE: _____

LVMPD 22 (REV. 7-98) (2) COURT • ORIGINAL

Page 63

Page 1 of 1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
DECLARATION OF ARREST

I.D. #: _____

True Name: DAY ROBERT JAMES Date of Arrest: 04/22/00 Time of Arrest: 1320

OTHER CHARGES RECOMMENDED FOR CONSIDERATION:
GRAND LARCENY AUTO ATTEMPT

THE UNDERSIGNED MAKES THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS: That I am a peace officer with LVMPD (Department), Clark County, Nevada, being so employed for a period of 13 years (months). That I learned the following facts and circumstances which lead me to believe that the above named subject committed (or was committing) the offense of ROBBERY/WDW at the location of 5301 S. INDUSTRIAL and that the offense occurred at approximately 1245 hours on the 22 day of APRIL ~~19~~ 2000

DETAILS FOR PROBABLE CAUSE:

SEE ARREST REPORT

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are a misdemeanor).

Declarant must sign second page with original signature.

3399
Declarant's Signature

D FLAHERTY 3399
Print Declarant's Name P#

LVMPD 22 – A (REV. 3-91) (1) ORIGINAL – COURT

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

ARREST REPORT

00F069784/1

[ ] City [X] County [X] Adult [ ] Juvenile Sector/Beat 01

ID/EVENT#	ARRESTEE'S NAME (Last, First, Middle)	S.S.#
1679345	DAY, ROBERT JAMES	

ARRESTEE'S ADDRESS (Number, Street, City, State, Zip Code)

CHARGES: ROBBERY WITH USE OF A DEADLY WEAPON IN THE COMMISSION OF A CRIME NRS 200.280
BURGLARY WITH USE OF A DEADLY WEAPON IN THE COMMISSION OF A CRIME NRS 905.060
POSSESSION OF STOLEN PROPERTY NRS 205.275

OCCURRED:	DATE	DAY OF WEEK	TIME	LOCATION OF ARREST (Number, Street, City, State, Zip Code)
	04-22-00	SATURDAY	1320	3535 WEST TROPICANA (MCDONALD'S PARKING LOT) LAS VEGAS, NV

RACE	SEX	D.O.B.	HT	WT	HAIR	EYES	PLACE OF BIRTH

CIRCUMSTANCES OF ARREST

LOCATION OF CRIME: PARKWAY INN
5201 S. INDUSTRIAL
LAS VEGAS, NV 89118

OFFICERS INVOLVED: SGT. D. FLAHERTY, P# 3399
OFFICER E. KING, P# 3488
OFFICER A. TEDESCO, P# 6009
OFFICER D. WEBB, P# 4391
OFFICER R. BOHANON, P# 5652

DETAILS:

On 4-22-00, Saturday, at approximately 1254 p.m., Mr. Robert James Day entered the address of 5201 S. Industrial, approached the counter, and demanded money from the employee at the Parkway Inn. The employee, Karen J. Walker, was behind the counter. The subject produced a knife and told Walker to give him all the money. The subject stated to Walker, "Don't even think about it, don't make me hurt you." The suspect then took approximately $1051.00 in US currency, placed it into his pocket and exited out the front door northbound. Walker then called 911.

At approximately 1300 hrs., I Sergeant Dan Flaherty, happened to be in the area of the 3500 block of East Tropicana, which is approximately 300-400 yards away from the location of the crime. I was patrolling the area when I noticed a subject fitting the description of the robbery suspect. The suspect was described as a white male, approximately mid-40's, with gray hair, a gray moustache, wearing blue jeans and boots and a white or blue t-shirt. I noticed that this subject was not wearing a shirt, however, he appeared to be walking between trucks located at the Wild Wild West, which is a local truck stop on East Tropicana.

ARRESTING OFFICER(S)	P#	APPROVED BY	CONNECTING RPTS. (Type or Event Number)
SGT D. FLAHERTY	3399	G2930	000422-1105

LVMPD 602 (REV. 12-90) • AUTOMATED

I noticed this subject walked up to a truck driver and began a conversation. I then approached the subject, identified myself as a police officer, and told him to step in front of my vehicle. The subject refused and stated he was in a hurry because he was a truck driver. I then asked the subject to again step in front of the vehicle. He began to explain that he was driving a truck and he had been all over the United States this week including Georgia and California. He again asked why I was stopping him at which time I told him a robbery just occured down the street and he fit the description of the suspect.

The subject looked over his left shoulder and began to run southbound between two trucks. I asked the truck driver, unknown name, if he would watch my police vehicle at which time he stated he would. I began to pursue the suspect on foot southbound through the parking lot. The subject continued to run southbound at which time he ran to the east side of the Taco Bell and ran directly across the 3500 block of East Tropicana.

Let it be known that despite the heavy traffic, this subject continued running without stopping. The subject then made it across the street at which time I was able to stop traffic. I continued my foot pursuit while broadcasting the physical description and direction of travel. The subject then grabbed the driver's side door of a GMC cooler van, bearing CA license plate CP36896. He attempted to put the vehicle in gear, believing the vehicle was running. However, this turned out to be the refrigerator, over the cab of the vehicle, which made the vehicle appear to be running.

I then ordered the subject out and ordered him to lie on the ground at which time he refused. I then was forced to put an arm lock on his left wrist and place him into the Lateral Vascular Neck Restraint at which time Officers King and Tedesco got to my location. We were able to place him into custody without further resistance.

Let it be noted an officer told dispatch we were in custody with the subject at which time we decided to do a one-on-one identification with the employee, Karen Walker, SOC/561-78-3490. Karen Walker was driven to our location at which time she positively identified the subject, Robert James Day, as the subject who robbed her of approximately $1000.00.

Let it be noted that during a search incident to arrest, Mr. Day had approximately $1018.00 rolled up in a ball in his left and right pocket. Mr. Day began to laugh and stated that what he did should not be construed as a robbery, or words to that effect. He then stated that he had nothing to lose and he wished that I would have shot him. Mr. Day went on to say if had been wearing tennis shoes, he would have gotten away from this sergeant based on the fact he was a fast runner. Also, the driver of the white cooler van, bearing CA license plate CP36896, did not speak English, however, he stated that he did not know Mr. Robert James Day nor did Mr. Robert James Day have permission to enter his vehicle.

ID responded to our location at which time ID Specialist Thomas, P# 4032, photographed the suspect and the currency on the hood of the patrol car. This money was later released to the proprietor of the Parkway Inn Hotel.

On the way to the County Jail, Mr. Day again started making spontaneous statements claiming that what he did was not a robbery and that if he was wearing tennis shoes he would have perhaps been able to flee the police.

DF/dmj 0422-06
Job # 14353
Dictated: 042200 / 1526 Hrs
Transcribed: 042200 / 1655 Hrs

cc: SGT. Daniel P. Flaherty, P# 3399, SWAC

1714

CLARK COUNTY INTAKE QUESTIONNAIRE AND FINANCIAL AFFIDAVIT

Defendant: Day, Robert		
Arrest Date: 4-22-00	Arraign. Date:	
S.S.N.: 498-62-9076	I.D.: 1679345	
D.R. #:	D.O.B. 2-6-54	
M J Charge: Robb wdw	DOF06978X	Bail: 20,000
M J Charge: Burg wpn	↓	Bail: 15,000
M J Charge: RSP	↓	Bail: 3,000
M J Charge:		Bail:
M J Charge:		Bail:
M J Charge:		Bail:
M J Charge:		Bail:
M J Charge:		Bail:
M J Charge:		Bail:

BASED ON _____ VERIFIED POINTS THIS DEFENDANT HAS RECEIVED, AND THE INFORMATION GATHERED BY INTAKE SERVICES, THE FOLLOWING RECOMMENDATION IS MADE:

_____ Supervised Release with Conditions as Directed by Intake Services: _____

_____ Bail Reduction To: _____ _____ _____

_____ Not Recommended for an O/R Release or Bail Reduction Because: N.R.

NI - Type of Charges -

Release Granted: _____ Date: _____

Bail Reduction To: _____ _____ _____

Release Denied: _____ Date: _____

JC-1 (Intake Services)
Rev. 07/95
WHITE – Court CANARY – Intake Services

Justice Court, Las Vegas Township

CLARK COUNTY, NEVADA

INTAKE SERVICES INFORMATION SHEET

CASE NO. 00F06978X

NAME: DAY, ROBERT ID #: 1679345

CHARGE(S): ROBB WDW BURG WDW

CURRENT BAIL: 20,000 15,000

VERIFIED: Local Address: NOT INTERVIEWED

Out Of State Address:

With Whom/How Long:

VERIFIED: Employment:____ Unemployed:____ Disabled:____ Student:____

VERIFIED: Relatives: Local Not Local

Felony Convictions:
97 ESCAPE
97 PAROLE VIOL - NC
94 FRAUD - NC
94 FIN. TRANS. THEFT - NC
94 BANK ROBB - NC
88 PAROLE VIOL.
80 PCS - MO
75 SCS - MO

Misdemeanor Convictions:
84 OPUFP - NC
84 BANK ROBB - KY

Fail To Appear -0- Traffic Misdemeanor Felony

Pending Charges/Holds/Comments:

RECOMMENDATION: Release On Recognizance

Bail Reduction

House Arrest

Indigent Non-Indigent PD Recommended

050400
Date

INTAKE SERVICES

JC-18 (Intake Services)
Rev. 05 97

Justice Court, Las Vegas Township

CLARK COUNTY, NEVADA

INTAKE SERVICES INFORMATION SHEET

CASE NO. 00F06978X

NAME: DAY, ROBERT ID #: 1679345

CHARGE(S): ROBB WDW BURG WDW PSP

CURRENT BAIL: 20,000 15,000 3,000

VERIFIED: Local Address: NOT INTERVIEWED

Out Of State Address: _____

With Whom/How Long: _____

VERIFIED: Employment:_____ Unemployed:_____ Disabled:_____ Student:_____

VERIFIED: Relatives: Local Not Local _____

Felony Convictions:
97 ESCAPE
97 PAROLE VIOL - NC
94 FRAUD - NC
94 FIN. TRANS. THEFT - NC
94 BANK ROBB - NC
88 PAROLE VIOL.
80 PCS - MO
75 SCS - MO

Misdemeanor Convictions:
84 OPUFP - NC
84 BANK ROBB - KY

Fail To Appear -0- Traffic Misdemeanor Felony

Pending Charges/Holds/Comments: _____

RECOMMENDATION: Release On Recognizance _____

Bail Reduction _____

House Arrest _____

Indigent Non-Indigent PD Recommended

4-25-00
Date

INTAKE SERVICES

JC-18 (Intake Services)
Rev. 05/97

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

INTAKE SERVICES INFORMATION SHEET

CASE NO. 00F06978X
DEPT NO. JC-1

NAME: DAY, ROBERT JAMES **ID#:** 1679345
CHARGES: ROBB WDW BURG WDW
CURRENT BAIL: NO BAIL

VERIFIED: **ADDRESS:** NOT INTERVIEWED
WITH WHOM/HOW LONG:

VERIFIED: **EMPLOYMENT:** **UNEMPLOYED:**
DISABLED: **STUDENT:**

VERIFIED: **RELATIVES: LOCAL** **NOT LOCAL**

FELONY CONVICTIONS:

75 MO SCS
80 MO PCS
84 MO BANK ROBBERY
95 MO ESCAPE
84 NC OPUFP
94 NC FINAN CARD THEFT
94 NC FINAN CARD THEFT

FAIL TO APPEAR: -0-

PENDING CHARGES/HOLDS/COMMENTS: -0-

RECOMMENDATION:

DATE: 11-29-00 **INTAKE SERVICES: T. MORRIS**

JC-18 (INTAKE SERVICES) Rev. 10/00

CONFIDENTIAL

16

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

FILED
DEC 7 1 07 PM '00
Shirley B. Parraguirre
CLERK

I.A. 12/11/00
9:00 A.M.
PD

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket C

INFORMATION

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

STEWART L. BELL, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That ROBERT JAMES DAY, the Defendant(s) above named, having committed the crimes of **ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony - NRS 205.060)**, on or about the 22nd day of April, 2000, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of KAREN WALKER, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will

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COUNTY CLERK

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of the said KAREN WALKER, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a knife, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building occupied by PARKWAY INN, located at 5201 South Industrial, Las Vegas, Clark County, Nevada.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY Robert B. Turner
ROBERT B. TURNER
Deputy District Attorney
Nevada Bar #006526

DA#00F06978X/ajc
LVMPD EV#0004221105
RWDW; BURGLARY WHILE IN POSS OF F/A - F
(TK1)

The names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

NAME	ADDRESS
FLAHERTY, DANIEL P.	LVMPD P#3399
HUFFMASTER, DOUGLAS G.	LVMPD P#6010
JOHNSON, HOWARD	2038 PALM AVE; LV NV
MULLINS, TIMOTHY O.	LVMPD P#6414
TEDESCO, ANDREW J.	LVMPD P#6009
WALKER, KAREN	5900 W. TROPICANA AVE; LV NV

CASE NO. C167783

TRAN

Dept. No. 1

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IN THE JUSTICE'S COURT OF LAS VEGAS TOWNSHIP
COUNTY OF CLARK, STATE OF NEVADA

ORIGINAL

STATE OF NEVADA, Plaintiff,	
vs.	CASE NO. 00F06978X
ROBERT JAMES DAY, Defendant.	

REPORTER'S TRANSCRIPT

OF

PRELIMINARY HEARING

BEFORE THE HONORABLE DEBORAH LIPPIS
JUSTICE OF THE PEACE
MONDAY, DECEMBER 4, 2000

APPEARANCES:

For the State: ELISSA LUZAICH, ESQ.
Deputy District Attorney

For the Defendant: DIANNE M. DICKSON, ESQ.
Deputy Public Defender

REPORTED BY: JANICE MURRAY-DAVID, CCR NO. 405, RPR

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W I T N E S S E S

STATE'S	Dr.	Cr.	Redr.	Recr.	VD.
KAREN WALKER					
By Ms. Luzaich:	4				
By Ms. Dickson:		10			

* * * * *

E X H I B I T S

(NONE)

LAS VEGAS, NEVADA, DECEMBER 4, 2000, 9:00 A.M.

* * * * *

THE COURT: Robert Day? Sir, you can come down. Have a seat next to your attorney. State, we're on the record with regard to Robert James Day, who's present in custody with his attorney, Ms. Dickson, Ms. Luzaich for the State.

This is Karen walker?

MS. LUZAICH: Yes, judge.

THE COURT: Ma'am, if you'll come up here with me, please, remain standing, raise your right hand, we'll get you sworn in.

KAREN JEAN WALKER,

called as a witness, and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Please be seated. State your name and spell your first and last name for the record, please.

THE WITNESS: Karen Jean Walker.

MS. DICKSON: Your Honor, we would ask any other witnesses be excluded.

MS. LUZAICH: Nobody else is present.

THE COURT: All right.

DIRECT EXAMINATION

BY MS. LUZAICH:

Q. Good morning, ma'am. I'm going to direct your attention back to April 22nd of the year 2000. Where were you working on that date?

A. Parkway Inn Motel.

Q. What did you do for Parkway Inn?

A. A desk clerk.

Q. Are you still employed there?

A. No.

Q. What did your duties include at the time?

A. Renting rooms, taking money, check-outs, giving check-out, new check-outs to the maid.

Q. Okay. So, part of your responsibility was checking money when people went in to pay for the rooms?

A. That's correct.

Q. And on April 22nd of this year did something unusual happen?

A. Yes.

Q. And what time was that?

A. It was just right after lunch. The maids had lunch about 1:00 o'clock.

Q. Okay. What happened?

A. I was on the phone with the maid giving them new check-outs to do, and Mr. Day came in behind the desk. When I looked up, he was standing there with a knife in his hand and demanded me to open the money drawers to give him the money. And I told him they were unlocked.

Q. Okay. I'm going to take you back for one second. You said Mr. Day. Do you see him here in court today?

A. That's correct.

Q. Can you describe --

A. He's sitting right over there with the plaid shirt.

MS LUZAICH: May the record reflect identification of the defendant?

THE COURT: Yes.

BY MS. LUZAICH:

Q. Prior to him walking around the counter on this date had you seen him before?

A. Yes, ma'am.

Q. How often had you seen him before, how

many times?

A. I can't recall how many times. He would rent a room there once in a while or come in there and ask about somebody who had a room there.

Q. So, you had seen him on more than one occasion previously?

A. Yes.

Q. Was he employed by the Parkway Inn Motel?

A. No.

Q. So, when you say he came around the counter, is that a location where only employees should be?

A. That's correct.

Q. And had you -- or strike that.

You say he held out a knife. Can you describe the knife?

A. It was a small pocket knife with a blade about two and a half inches, maybe three.

Q. Was the blade extended?

A. Yes, it was.

Q. So, you could see it?

A. Yes.

Q. Did you want him to point a knife at you and tell you to give him the money?

A. No.

Q. Okay. So, after he told you that what did you do?

A. I proceeded to stand back and told him the drawers were open. And he opened the drawers, because he needed to get the monies out of the drawers. And I attempted to make a move to dial 911. He saw me do this, and he told me not to move. Be still. Don't even think about it. He didn't want to hurt me. And that was --

Q. And did he do anything with the money?

A. He took the money. He grabbed all the money out of the drawers. He ran over on the other side of the desk and started putting, stuffing the money in his pocket. When he did that, when I seen it was safe to do so, I ran, and latched the gate there by the desk and ran out the back door and ran and got my manager, told him to call 911. We were just robbed. And then I ran around the side of the building, and I saw Mr. Day leave. And I proceeded to follow him, not close but far enough back to where I could just see where he went to and when the law got there, I could tell them.

Q. Now, when he had walked around the

counter and was putting the money in his pockets, did you see anything happen to any of that money?

A. Some of it dropped on the floor on the other side --

Q. Okay.

A. -- of the desk.

Q. And the money that dropped on the floor, did he bend over and pick it up, or did he just leave it there?

A. He just left it there.

Q. How much money was there in the drawer when he took the money?

A. A little over a thousand dollars.

Q. And when, go ahead.

A. There was two drawers. One had five, and then one had two plus what I had brought in that morning.

Q. And did he enter both drawers?

A. Yes, ma'am.

Q. And took all of the money out of both drawers?

A. He took all the bills. He didn't take any change.

Q. Okay. Did he take all of the bills out of both drawers?

A. Yes, ma'am.

Q. Now, you mentioned that you asked your manager to call the police. Did the police show up?

A. Yes, quite, right away.

Q. Okay. And did you speak with an officer?

A. Yes, I did.

Q. And did you explain to the officer what happened?

A. Yes.

Q. Did you give a description of the individual who did this?

A. Yes, I did.

Q. Did you, in fact, tell the officer who he was?

A. I didn't really know his real name, because he used a different name.

Q. Okay. Did you also give the officer a description of where the defendant went when you saw him run?

A. Yes, I did.

Q. And did you see the defendant again a short time thereafter?

A. Yes, I did.

Q. About how long later did you see him?
A. About 30 minutes later I went to identify him.
Q. And where was he when you went to identify him?
A. At McDonald's on Tropicana.
Q. And was he with anybody?
A. Officers.
Q. Is the Parkway Inn Motel in Las Vegas, Clark County, Nevada?
A. Yes.
Q. Is it on 5201 South Industrial?
A. That's correct.
MS. LUZAICH: Pass the witness.
THE COURT: Cross?

CROSS-EXAMINATION

BY MS. DICKSON:
Q. Thank you. Ms. Walker, you no longer work there; is that correct?
A. That's correct.
Q. When did you stop working there?
A. About two months later.
Q. Are you still located in town?
A. Yes, ma'am.

Q. And I assume the district attorney will provide us with your address.

A. Yes. I'll give you my new address.

Q. You don't need to do that now. We can get that later. And you indicated that you had seen this gentleman before?

A. Yes, ma'am.

Q. About how many times?

A. Several times. I don't recall, maybe 10 times. He used to come in the motel quite often.

Q. And over what period of time is that? Is that over a year, over a few months?

A. Over one year that I worked there.

Q. So, you worked there for one year?

A. Yeah.

Q. Is that correct? So, over that year that you worked there you saw him approximately 10 times; is that correct?

A. Probably more. I'm not sure.

Q. And you said that he rented rooms at that motel; is that correct?

A. Yes, ma'am.

Q. Whose name were the rooms rented in?

A. I don't remember what he used, but he

didn't use Robert Day.

Q. Okay. You sure that it wasn't Robert Day, but you don't know what name it was?

A. That's correct.

Q. Have you ever gone back to look at the registers to see what name it was?

A. No.

Q. Do you still have them, or would the hotel still have those registers?

A. I'm not sure. They probably would.

Q. Do you have any idea how long they're kept?

A. No, I don't.

Q. When he rented rooms from you, he paid for those rooms; is that correct?

A. That's correct.

Q. Did he rent them alone or with anyone else?

A. He would rent them alone. Once in a while he would have a friend with him that was staying there, but I don't know who they are or their name.

Q. Did you, in fact, ever get in trouble for renting rooms that were supposed to be reserved for somebody else?

MS. LUZAICH: That's not relevant.

THE COURT: Sustained.

THE WITNESS: No, not really. No.

BY MS. DICKSON:

Q. Ma'am, you were asked to give a description of, of the person that you had seen; is that correct?

A. Correct.

Q. And that's when the police came out initially?

A. That's correct.

Q. And you said that was almost right away; is that right?

A. Right.

Q. So, within just a few minutes of your manager calling the police were there?

A. That's correct.

Q. Less than five minutes?

A. Less than five minutes.

Q. And at that time you spoke to an officer and gave him a description; is that correct?

A. That's correct.

Q. Did you tell the officer the person was thin?

A. Thin.

Q. Do you remember what you told the officer?

A. Yes, ma'am.

Q. What did you tell him?

A. I told him the man had salt and pepper gray hair, a mustache. He was wearing a blue and white T-shirt with Levy jeans on. And that was about it. That's what I told him.

Q. Did he ask for a description about height or weight?

A. Right. I told him he was about my height.

Q. Okay. How tall are you, ma'am?

A. About 5'5".

Q. Okay. So, you told the officer the person was about 5'5". About how much did he weigh?

A. Around 165 maybe.

Q. Okay. Is that, now is that what you told the officer? Is that what --

A. I don't remember, ma'am, if I told him how much he weighed. I don't even remember if they asked me that.

Q. What I'm asking you today, ma'am, is

what you told the officer back then, not what you remember now, about the description. Okay? So, if you don't remember what you told the officer, just tell me that.

A. All right. I don't remember, then.

Q. All right. So, you don't remember the weight, but you did tell him he was about your height and salt and pepper hair and a mustache?

A. Right.

Q. Did the officer ask you if there were unusual speech patterns, things of that nature?

A. Not that I recall.

Q. Did they ask you if there were tattoos?

A. He may have, but I don't remember.

Q. Okay. Do you remember whether you told the officer that you didn't observe any tattoos?

A. I don't remember.

Q. Do you remember if you observed any tattoos?

A. No.

Q. Okay. No, you don't remember or, no, you didn't?

A. No. I don't remember, ma'am.

Q. How long was this person in the office?

A. Not long, maybe a minute or two.

Q. A minute or two? And during that period of time I assume you were frightened.

A. Yes, I was.

Q. Okay. Were you looking at the person the entire time?

A. Yes.

Q. And he was wearing a blue and white T-shirt, you said; is that correct?

A. That's correct.

Q. And a short-sleeve shirt, correct?

A. It was maybe mid arm.

Q. Standard T-shirt length or longer?

A. It was three-quarter length arms and just a regular T-shirt. It had blue. It was kind of cross like this, and it had the blue arms and the white center.

Q. Oh, the body of the shirt was white, and the arms were blue?

A. Right.

Q. Correct? When the police officer came, did you tell him, I knew who the person was?

A. I told him I knew who he was, because I didn't really know him. I just knew who he was from being at the Parkway Inn.

Q. Did you tell the police officer that

his name would be in the registration for the inn?

A. Yes. It should be.

Q. Do you know whether anybody looked in those registration books?

A. No.

Q. Did the police ask to take custody of them or to see them at all?

A. I don't recall.

Q. Okay. Did the police speak to the manager at the time or just you?

A. I think he spoke to both of us.

Q. Now, the amount that was taken from the inn, were you involved in calculating how much that was?

A. Well, the manager did that. All I did was gone into the computer, and I have so much new bank for change, which was 500. And the drawer that I used is 200 plus whatever I brought in. And that's in the computer, what I brought in.

Q. Now, on the day that this happened were you asked to check in the computer what the amount was that you had brought in that day?

A. Well, my manager and I both did.

Q. Okay. Do you remember what that amount was?

A. It was over a thousand dollars. I don't know exactly the amount.

Q. Was it over a thousand dollars that you had brought in or including the 700 that was already there?

A. It was everything that was taken.

Q. Okay. But there already was 700 that you start with, correct?

A. Right. That's correct.

Q. So, we're talking about 300 or a little more; is that correct?

A. That's correct.

Q. That you brought in?

A. Correct.

Q. And you were also asked to write a statement; is that correct?

A. That's correct.

Q. Do you remember when it was that you were asked to write that?

A. You mean the date?

Q. Okay. Was it the same date, or was it different?

A. It was right after it happened.

Q. Okay. Within an hour or two or how much?

A. Within, I don't know, 15, 20 minutes.

Q. Was that, I'm sorry. I didn't mean to interrupt you. So, within 15 or 20 minutes, you think?

A. I think. I'm not sure.

Q. Do you remember whether or not you were asked to write this statement before you were taken to the McDonald's to identify somebody, or was that afterwards?

A. I started it before.

Q. Okay. And you finished it afterwards?

A. That's correct.

Q. Now, you said that after the person grabbed the money, put it in their pockets, as soon as you saw your chance you went and you latched the gate?

A. That's correct.

Q. Is that the gate that goes behind the counter?

A. Right.

Q. And then you went out back and told your manager what happened?

A. Yes. There was a door to the back office, and I just went out that back door.

Q. And then you said you went around the

building to follow the person?

A. I went around there, really just looked to see if I could see where he went. And I seen him going around the building. He was far enough away to where I could follow him without being in danger, just to see where he had gone.

Q. And where did you see him go?

A. I seen him go around the building. He was over across the Ali Baba and Industrial area, and he went through there with, I don't know the address.

Q. So, where was he the last time you saw him?

A. He was on Ali Baba going through an industrial yard towards Tropicana.

Q. And did you then go back to the motel?

A. Yes. I, I never left the motel.

Q. So, you just observed this standing in the parking lot or whatever?

A. That's correct.

Q. So, you didn't actually follow him anywhere; is that right?

A. No. No.

MS. DICKSON: I have no other questions.

THE COURT: Anything further?

BY MS. DICKSON:

Q. Court's indulgence just a minute. When you went to, to identify the person at McDonald's, is it?

A. Yes.

Q. Did you see money then? Did you see --

A. No. I didn't even get out of the car.

Q. Okay. Did you see any money sticking out of this gentleman's pockets?

A. When I went to identify him?

Q. Yes.

A. I didn't even get near him. No.

Q. Well, you must have got near enough to identify him.

A. I was in a car, ma'am.

Q. How far away from him were you, ma'am?

A. Just in the other parking lot, close enough to see who he was.

Q. Okay. So, he was in the McDonald's parking lot?

A. Right.

Q. And you were where?

A. In the, there's a Harley-Davidson shop, I think, right next door to that. I was in that

parking lot.

Q. About how far away from him were you?

A. A few feet, not very far.

Q. But it was in a different parking lot?

A. Right next door, yeah.

Q. Okay. And you stayed in the car the entire time; is that correct?

A. That's correct.

Q. Okay. And that was a police vehicle, I assume; is that correct?

A. Yeah.

MS. DICKSON: I have no other questions.

THE COURT: Thank you very much. State rest?

MS. LUZAICH: Yes.

THE COURT: State has rested.

MS. DICKSON: We have no evidence to present, your Honor.

THE COURT: Any argument?

MS. DICKSON: No, your Honor.

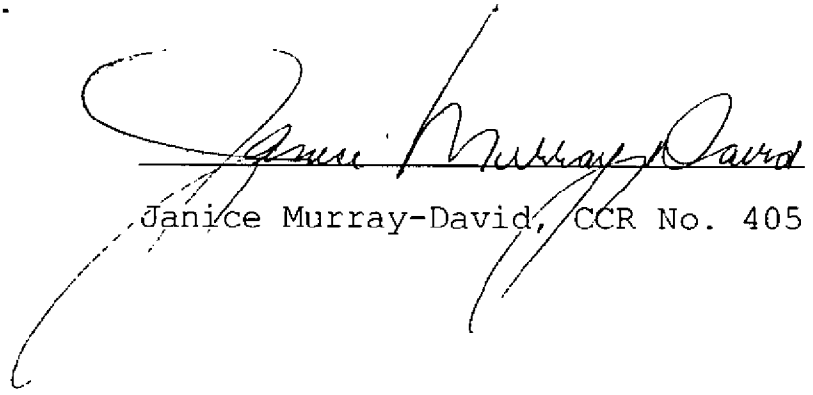
THE COURT: Sir, I'm going to hold you to answer to those charges. You are to appear for your District Court arraignment on this date:

THE CLERK: December 11th at 9:00 a.m.,

District Court, Department 4

* * * * *

Attest: Full, true, accurate transcript of proceedings.



Janice Murray-David, CCR No. 405

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JAN 23 4 32 PM '01

Shirley B. Parraguirre
CLERK

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket C

NOTICE OF WITNESSES
[NRS 174.234 (1)(b)]

TO: ROBERT JAMES DAY, Defendant; and

TO: OFFICE OF THE PUBLIC DEFENDER, Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF NEVADA intends to call the following witnesses in its case in chief:

NAME	ADDRESS
BOHANAN, OFFICER R.	LVMPD P#5652
CRUZ, JORGE	1925 N. JONES; LV NV
KING, OFFICER E.	LVMPD P#3488
MONTOYA, OFFICER M.	LVMPD P#3590
THOMAS, OFFICER K.	LVMPD P#4032
WEBB, OFFICER D.	LVMPD P#4391

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COUNTY CLERK

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These witnesses are in addition to those witnesses endorsed on the Information and any other witness for which a separate Notice has been filed.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Notice of Witnesses, was made this 23rd day of January, 2001, by facsimile transmission to:

OFFICE OF THE PUBLIC DEFENDER
455-5112

BY _____
Employee of the District Attorney's Office

00F06978X/ajc

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	2033
CONNECTION TEL	4555112
SUBADDRESS	
CONNECTION ID	CLARK CO. PUBLIC
ST. TIME	01/23 08:49
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RESULT	OK

FILED IN OPEN COURT
SHIRLEY B. PARRAGUIRRE, CLERK
MAR 13 2001
BY _____ DEPUTY

AMENDED BY ORDER OF THE COURT
SHIRLEY B. PARRAGUIRRE, CLERK
BY _____, DEPUTY
MAR 12 2001

RECEIVED
FEB 21 2001
COUNTY CLERK

ORIGINAL

FILED IN OPEN COURT
FEB 21 2001
SHIRLEY B. PARRAGUIRRE, CLERK
BY Dorothy Kelly
DOROTHY KELLY DEPUTY

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket C

AMENDED
INFORMATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

STEWART L. BELL, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That ROBERT JAMES DAY, the Defendant above named, having committed the crimes of **ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165)** and **BURGLARY WHILE IN POSSESSION OF A ~~FIREARM~~ DEADLY WEAPON (Felony - NRS 205.060)**, on or about the 22nd day of April, 2000, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT I - ROBERT JAMES DAY

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of KAREN WALKER, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will

KH

C167783

of the said KAREN WALKER, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a knife, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building occupied by PARKWAY INN, located at 5201 South Industrial, Las Vegas, Clark County, Nevada.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
J. TIMOTHY EATTIG
Deputy District Attorney
Nevada Bar #006639

The names of witnesses known to the District Attorney's Office at the time of filing this Amended Information are as follows:

NAME	ADDRESS
FLAHERTY, DANIEL P.	LVMPD P#3399
HUFFMASTER, DOUGLAS G.	LVMPD P#6010
JOHNSON, HOWARD	2038 PALM AVE; LV NV
MULLINS, TIMOTHY O.	LVMPD P#6414
TEDESCO, ANDREW J.	LVMPD P#6009
WALKER, KAREN	5900 W. TROPICANA AVE; LV NV

UNDER NO CIRCUMSTANCES IS THE LANGUAGE CONTAINED HEREINAFTER TO BE READ TO A JURY HEARING THE PRIMARY OFFENSE FOR WHICH THE DEFENDANT IS PRESENTLY CHARGED.

Defendant ROBERT JAMES DAY, hereinbefore named, is placed on notice that, in

accordance with the authorization of NRS 207.010, punishment imposed pursuant to the above-stated habitual criminal statute will be urged upon the Court if said Defendant is found guilty on the primary offenses of ROBBERY WITH USE OF A DEADLY WEAPON and BURGLARY WHILE IN POSSESSION OF A FIREARM (F), for which the Defendant is presently charged.

This page concerning the prior convictions hereinbelow set forth is to be considered by the Court in its discretion ONLY after the finding of guilty of Defendant on the primary charge herein.

That said Defendant ROBERT JAMES DAY, has been FOUR (4) times convicted of crimes, which, under the laws of the situs of the crime and/or the State of Nevada, amount to felonies, to-wit:

1. That on or about 1982, the Defendant was convicted in the State of North Carolina, for the crime of Obtaining Property Under False Pretenses

2. That on or about 1984, the Defendant was convicted in the State of Missouri, for the crime of Bank Robbery.

3. That on or about 1994, the Defendant was convicted in the State of North Carolina, for the crime of Use of Stolen Credit Cards

4. That on or about 1994, the Defendant was convicted in the State of North Carolina, for the crime of Financial Card Theft.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

DO NOT READ TO THE JURY

DA#00F06978X/ajc
LVMPD EV#0004221105
(TK1)

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

FEB 2 1 2001

DOROTHY KELLY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket C

AMENDED

INFORMATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

STEWART L. BELL, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That ROBERT JAMES DAY, the Defendant above named, having committed the crimes of **ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165)** DEADLY WEAPON KH **and BURGLARY WHILE IN POSSESSION OF A ~~FIREARM~~ (Felony - NRS 205.060)**, on or about the 22nd day of April, 2000, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of KAREN WALKER, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will

of the said KAREN WALKER, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a knife, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building occupied by PARKWAY INN, located at 5201 South Industrial, Las Vegas, Clark County, Nevada.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
J. TIMOTHY EATTIG
Deputy District Attorney
Nevada Bar #006639

The names of witnesses known to the District Attorney's Office at the time of filing this Amended Information are as follows:

NAME	ADDRESS
FLAHERTY, DANIEL P.	LVMPD P#3399
HUFFMASTER, DOUGLAS G.	LVMPD P#6010
JOHNSON, HOWARD	2038 PALM AVE; LV NV
MULLINS, TIMOTHY O.	LVMPD P#6414
TEDESCO, ANDREW J.	LVMPD P#6009
WALKER, KAREN	5900 W. TROPICANA AVE; LV NV

UNDER NO CIRCUMSTANCES IS THE LANGUAGE CONTAINED HEREINAFTER TO BE READ TO A JURY HEARING THE PRIMARY OFFENSE FOR WHICH THE DEFENDANT IS PRESENTLY CHARGED.

Defendant ROBERT JAMES DAY, hereinbefore named, is placed on notice that, in

accordance with the authorization of NRS 207.010, punishment imposed pursuant to the above-stated habitual criminal statute will be urged upon the Court if said Defendant is found guilty on the primary offenses of ROBBERY WITH USE OF A DEADLY WEAPON and BURGLARY WHILE IN POSSESSION OF A FIREARM (F), for which the Defendant is presently charged.

This page concerning the prior convictions hereinbelow set forth is to be considered by the Court in its discretion ONLY after the finding of guilty of Defendant on the primary charge herein.

That said Defendant ROBERT JAMES DAY, has been FOUR (4) times convicted of crimes, which, under the laws of the situs of the crime and/or the State of Nevada, amount to felonies, to-wit:

1. That on or about 1982, the Defendant was convicted in the State of North Carolina, for the crime of Obtaining Property Under False Pretenses

2. That on or about 1984, the Defendant was convicted in the State of Missouri, for the crime of Bank Robbery.

3. That on or about 1994, the Defendant was convicted in the State of North Carolina, for the crime of Use of Stolen Credit Cards

4. That on or about 1994, the Defendant was convicted in the State of North Carolina, for the crime of Financial Card Theft.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

DO NOT READ TO THE JURY

DA#00F06978X/ajc
LVMPD EV#0004221105
(TK1)

FILED IN OPEN COURT
SHIRLEY B. PARRAGUIRRE, CLERK
MAR 13 2001
BY _____ DEPUTY

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

FILED IN OPEN COURT
FEB 21 2001
SHIRLEY B. PARRAGUIRRE, CLERK
BY Dorothy Kelly DEPUTY
DOROTHY KELLY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket C

AMENDED
INFORMATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

STEWART L. BELL, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That ROBERT JAMES DAY, the Defendant above named, having committed the crimes of **ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165)** DEADLY WEAPON KH **and BURGLARY WHILE IN POSSESSION OF A ~~FIREARM~~ (Felony - NRS 205.060)**, on or about the 22nd day of April, 2000, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of KAREN WALKER, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will

AMENDED BY ORDER OF THE COURT
SHIRLEY B. PARRAGUIRRE, CLERK
BY _____ DEPUTY
MAR 12 2001

RECEIVED
FEB 21 2001
CLERK

of the said KAREN WALKER, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a knife, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building occupied by PARKWAY INN, located at 5201 South Industrial, Las Vegas, Clark County, Nevada.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

The names of witnesses known to the District Attorney's Office at the time of filing this Amended Information are as follows:

NAME	ADDRESS
FLAHERTY, DANIEL P.	LVMPD P#3399
HUFFMASTER, DOUGLAS G.	LVMPD P#6010
JOHNSON, HOWARD	2038 PALM AVE; LV NV
MULLINS, TIMOTHY O.	LVMPD P#6414
TEDESCO, ANDREW J.	LVMPD P#6009
WALKER, KAREN	5900 W. TROPICANA AVE; LV NV

UNDER NO CIRCUMSTANCES IS THE LANGUAGE CONTAINED HEREINAFTER TO BE READ TO A JURY HEARING THE PRIMARY OFFENSE FOR WHICH THE DEFENDANT IS PRESENTLY CHARGED.

Defendant ROBERT JAMES DAY, hereinbefore named, is placed on notice that, in

accordance with the authorization of NRS 207.010, punishment imposed pursuant to the above-stated habitual criminal statute will be urged upon the Court if said Defendant is found guilty on the primary offenses of ROBBERY WITH USE OF A DEADLY WEAPON and BURGLARY WHILE IN POSSESSION OF A FIREARM (F), for which the Defendant is presently charged.

This page concerning the prior convictions hereinbelow set forth is to be considered by the Court in its discretion ONLY after the finding of guilty of Defendant on the primary charge herein.

That said Defendant ROBERT JAMES DAY, has been FOUR (4) times convicted of crimes, which, under the laws of the situs of the crime and/or the State of Nevada, amount to felonies, to-wit:

1. That on or about 1982, the Defendant was convicted in the State of North Carolina, for the crime of Obtaining Property Under False Pretenses

2. That on or about 1984, the Defendant was convicted in the State of Missouri, for the crime of Bank Robbery.

3. That on or about 1994, the Defendant was convicted in the State of North Carolina, for the crime of Use of Stolen Credit Cards

4. That on or about 1994, the Defendant was convicted in the State of North Carolina, for the crime of Financial Card Theft.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

DO NOT READ TO THE JURY

DA#00F06978X/ajc
LVMPD EV#0004221105
(TK1)

FILED IN OPEN COURT
FEB 21 2001
SHIRLEY B. PARRAGUIRRE, CLERK
BY Dorothy Kelly
DOROTHY KELLY DEPUTY

0212
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket C

MOTION AND NOTICE OF MOTION TO AMEND INFORMATION

DATE OF HEARING: 2/21/01
TIME OF HEARING: 9:00 A.M.

TO: Defendant above named, and

TO: Your Counsel of Record: OFFICE OF THE PUBLIC DEFENDER

YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that, on the 21st day of February, 2001, at the hour of 9:00 o'clock, A.M., or as soon thereafter as Counsel can be heard, in the Courthouse, Las Vegas, Clark County, Nevada, the STATE OF NEVADA will move the Court for an Order permitting the Information heretofore filed in the above entitled action to be

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COUNTY CLERK

amended to include an additional count charging Defendant above named as an habitual criminal, pursuant to, and in accordance with NRS 207.010.

DATED this _____ day of February, 2001.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

J. TIMOTHY FATTIG, being first duly sworn, deposes and says:

That Affiant is a Deputy District Attorney of Clark County, Nevada; that Information has heretofore been filed in the within action; that since the filing of said Information Affiant has learned that Defendant has been previously convicted of offenses which are felonies under the laws of the State of Nevada and Defendant should be charged accordingly as an habitual criminal.

WHEREFORE, Affiant prays that the Court enter an Order permitting the Clark County District Attorney to file an Amended Information herein, pursuant to NRS 207.010.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2-20-01
(Date)

_____
(Signature)

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POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO AMEND INFORMATION

An amendment may be made at any time after defendant pleads when it can be done without prejudice to the substantial rights of the defendant. NRS 173.095.

NRS 207.010 provides as follows:

"1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this state of:

(a) Any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who has previously been two times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been three times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, is a habitual criminal and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years.

(b) Any felony, who has previously been three times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or the intent to defraud is an element, is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(3) for a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

2. It is within the discretion of the prosecuting attorney whether to include a count under this section in any information or file a notice of habitual criminality if an indictment is found. The trial judge may, at his discretion, dismiss a count under this section which is included in any

indictment or information."

A statement of a previous conviction under habitual criminal act does not charge an offense. It is only the averment of a fact which may affect the punishment.

State v. Bardmess, 54 Nev. 84;

Hollander v. State, 82 Nev. 345, 418 P.2d 802

DATED this 20th day of February, 2001.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Notice of Motion and Motion to Amend Information, was made this 21st day of February, 2001, by facsimile transmission to:

OFFICE OF THE PUBLIC DEFENDER
455-5112

BY Aileen Collins
Employee of the District Attorney's Office

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

FILED IN OPEN COURT
FEB 21 2001
SHIRLEY B. PARRAGUIRRE, CLERK
BY Dorothy Kelly
DOROTHY KELLY DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket C

ORDER TO AMEND INFORMATION

Upon Motion of the STATE OF NEVADA, Plaintiff, by and through the Clark County District Attorney, and Notice to Defendant above named by and through Defendant's Counsel, OFFICE OF THE PUBLIC DEFENDER, and good cause appearing therefor,

IT IS HEREBY ORDERED that the Information heretofore filed in the within action be,

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COUNTY CLERK

and the same is hereby amended to include an additional count charging Defendant above named as an habitual criminal.

DATED this 21st day of February, 2001.

DISTRICT JUDGE

STEWART L. BELL
District Attorney
Nevada Bar #000477

BY
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

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Shirley B. Parraguirre
CLERK

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MORGAN D. HARRIS
PUBLIC DEFENDER
Nevada Bar No. 1879
309 South Third Street
Las Vegas NV 89155
702-455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	CASE NO. C167783X DEPT. NO. IV DATE OF HEARING: 3/5/01 TIME OF HEARING: 9:00

MOTION TO DISMISS INFORMATION

COMES NOW defendant, ROBERT JAMES DAY, by and through his attorney, DIANNE M. DICKSON, Deputy Public Defender, and hereby seeks an order from this court granting Defendant's Motion To Dismiss Information. This Motion is based upon the Motion prepared by Defendant attached hereto.

DATED this 22nd day of February, 2001.

MORGAN D. HARRIS
CLARK COUNTY PUBLIC DEFENDER

By _____, FOR
DIANNE M. DICKSON, #5620
Deputy Public Defender

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FEB 22 2001
COUNTY CLERK
CMC

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District Court
Clark County, Nevada

State of Nevada,
plaintiff

vs.

Robert James Day,
defendant.

Case No. C167783
Dept. No. IV
Docket No. C

Motion to Dismiss Information.

Comes Now the defendant, Robert James Day, pro se, and hereby respectfully moves this Honorable Court to Dismiss the Information in this case for violation of defendant's fifth amendment right to due process and his sixth amendment right to compulsory process. In support thereof, defendant would show as follows:

Procedural Background

1. On or about April 22, 2000 the Parkway INN motel was allegedly robbed by a lone robber.

2. Within minutes of the alleged offense defendant was arrested in the company of an unknown named individual. (See Arrest Report).

3. Defendant alleges that said unKnown name individual is a material witness in this case. (See Arrest Report).

4. Defendant alleges that said witness is a "truck driver" who employed defendant on the day and time of the alleged offense. (See Arrest Report).

5. Defendant alleges that he is a freelance laborer who obtains daily employment at truck stops from long-haul truck drivers, loading/unloading household furniture and convention exhibits for daily pay.

6. Defendant alleges that he was arrested at the Wild Wild West truck stop where he was working. (See Arrest Report).

7. Defendant alleges that he is personally unaware of the identity or whereabouts of said witness.

8. Defendant further alleges that upon his arrest he advised the arresting officer that he was in the employ of said witness, however, the officer failed to inquire and verify. (See, Arrest Report).

9. Defendant further alleges that the arresting officer's failure to interview and/or identify the witness has acted to place this witness beyond defendant's reach.

10. Defendant alleges that said witness would have provided alibi testimony as well as impeachment testimony to the State's version of defendant's

arrest.

11. Defendant pleads not guilty and demands trial by jury.

Argument

"Defendant asserts that his fifth amendment right to due process and his sixth amendment right to compulsory process was violated when he was deprived of the testimony of a witness who would have benefited his defense". (Evidenciary hearing requested).

Points and Authorities

It is well-established that a defendant's right to obtain the testimony of witnesses and to compel thier attendance is a fundamental element of due process guaranteed by the sixth amendment. Washington v. Texas, 388 U.S. 14, 18-19, 87 S.Ct. 1920, 1923, 18 L.Ed. 2d 1019 (1967). "The right to offer testimony of witnesses, and to compel thier attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington, supra, at 19.

In cases of Constitutionally guaranteed access to evidence wherein the State loses potentially exculpatory evidence, the U.S. Supreme Court applies a "two prong test of bad faith and prejudice". Under this two prong test a defendant must make an initial showing that the State acted in bad faith and that this conduct resulted in prejudice to the defendant's case. To prevail under the prejudice prong a defendant must make a plausible showing that the testimony of the unavailable witness would have been "..material and favorable to his defense in ways not merely cumulative to the testimony of available witnesses." United States v. Valenzuela-Bernal, 458 U.S. 858, 873, 102 S.Ct. 3440, 3449, 73 L.Ed 2d 1193 (1982).

In the instant case defendant was arrested in the company of the witness "within minutes OF the alleged offense" Moreover, defendant advised the officer that he was working for the witness. Thus, it was abundantly clear that the witness could provide exculpatory evidence as to defendant's whereabouts at the time of the alleged offense, and the officer acted in bad faith when he failed to interview and/or identify him as a material witness and thereby preserve defendant's access to him.

Defendant asserts that the officer's failure to interview and/or identify the witness acted to

prejudice defendant's ability to formulate his defense. The Ninth Circuit Court of Appeals has interpreted the right to compulsory process to include a defendant's right to "... formulate his defense uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense". United States v. Tsutagawa, 500 F.2d 420, 423 (9th Cir 1974); See, also, United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir 1971).

In Mendez-Rodriguez, supra, the defendant was convicted of transporting illegal aliens and he appealed, claiming, inter alia, that his right to compulsory process was violated when the government deported alien witness before he had opportunity to interview them.

In reversing the conviction the Ninth Circuit held that the government's action in deporting alien witnesses beyond the court's subpoena power, before the defendant could interview them, violated his fifth amendment right to due process and his sixth amendment right to compulsory process.

The considerations which prompted that decision was more fully explained in Tsutagawa, supra, at 423 where the Ninth Circuit explained "... the

thrust of Mendez-Rodriguez is to prevent the basic unfairness of allowing the government to determine which witnesses will not help either side and then to release those witnesses, for all practical purposes, beyond the reach of the defendant." Id.

In the instant case defendant asserts that the bad faith act of the officer in his failure to interview and/or identify this material witness acted to place the witness beyond the reach of defendant.

Defendant further asserts that the unavailable witness would have provided alibi testimony as well as impeachment testimony to the State's version of the facts concerning defendant's arrest. However, the witness' unavailability has prejudiced defendant in his ability to formulate his defense and to recieve a fair trial.

Wherefore, defendant prays this Honorable Court will recognize the limits on defendant's knowledge of law and not hold him to the professionalism of a lawyer, as well as find that defendant's constitutional rights in this case have been violated and dismiss this case with prejudice.

Respectfully Submitted,

Robert James Day

Robert James Day

II 1679345

C.C.U.C.

DATED THIS 21st day of February, 2001.

I, Robert James Day, do solemnly swear, under the penalty of perjury, that the above Motion to Dismiss Information is accurate, correct, and true to the best of my knowledge.

NRS 171.102 and NRS 208.165.

Respectfully submitted

Robert James Day

Defendant

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office has set the foregoing Motion To Dismiss Information on March 5, 2001, at the hour of 9:00 a.m. in Department IV of the Eighth Judicial District Court or as soon thereafter as counsel may be heard.

DATED this 22nd day of February, 2001.

CLARK COUNTY PUBLIC DEFENDER

By Douglas P. Gubler, FOR
DIANNE M. DICKSON, #5620
DEPUTY PUBLIC DEFENDER

RECEIPT OF A COPY of the foregoing Motion To Dismiss Information and Notice of Motion is hereby acknowledged this 22 day of February, 2001.

CLARK COUNTY DISTRICT ATTORNEY

By Tonee Schmidt

ORIGINAL FILED

FEB 22 3 45 PM '01

Shirley B. Parraguirre
CLERK

NCA
MORGAN D. HARRIS
PUBLIC DEFENDER
Nevada Bar #1879
309 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	CASE NO. C167783X DEPT. NO. IV

WITNESS LIST

The defense may intend to call the following:

NAME/ADDRESS

1. Price Beesley
   Cell 743-7316

DATED this 22nd day of February, 2001.

Respectfully submitted,

CLARK COUNTY PUBLIC DEFENDER

By J Jenson, FOR
Dianne M. Dickson
Deputy Public Defender
Nevada Bar #5620

RECEIVED
FEB 22 2001
COUNTY CLERK

RECEIPT OF COPY OF THE foregoing Witness List is hereby acknowledged this 22 day of February, 2001.

CLARK COUNTY DISTRICT ATTORNEY

By Tara Schneider

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

FILED
FEB 27 2 08 PM '01
Shirley B. Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket

NOTICE OF WITNESSES
[NRS 174.234 (1)(b)]

TO: ROBERT JAMES DAY, Defendant; and

TO: OFFICE OF THE PUBLIC DEFENDER, Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF NEVADA intends to call the following witnesses in its case in chief:

NAME	ADDRESS
BOHANAN, ROBERT	LVMPD P#5652
RAMIREZ, BILLY	PARKWAY INN 5201 INDUSTRIAL RD; LV NV

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CLERK

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These witnesses are in addition to those witnesses endorsed on the Information and any other witness for which a separate Notice has been filed.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Notice of Witnesses, was made this 26th day of February, 2001, by facsimile transmission to:

OFFICE OF THE PUBLIC DEFENDER
455-5112

BY _____
Employee of the District Attorney's Office

JTF/ajc

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0448
CONNECTION TEL	4555112
SUBADDRESS	
CONNECTION ID	CLARK CO. PUBLIC
ST. TIME	02/26 14:21
USAGE T	00'56
PGS.	2
RESULT	OK

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket

NOTICE OF WITNESSES
[NRS 174.234 (1)(b)]

TO: ROBERT JAMES DAY, Defendant; and

TO: OFFICE OF THE PUBLIC DEFENDER, Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF NEVADA intends to call the following witnesses in its case in chief:

NAME ADDRESS

34.

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CLERK

0056
MORGAN D. HARRIS
PUBLIC DEFENDER
Nevada Bar #1879
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY Defendant.	CASE NO. C167783X DEPT. NO. IV DATE: 3/12/01 TIME: 9:00 A.M.

MOTION TO DISMISS FOR FAILURE TO PRESERVE EVIDENCE

COMES NOW, the Defendant, ROBERT JAMES DAY, by and through his attorney, DIANNE M. DICKSON, Deputy Public Defender, and respectfully requests this Honorable Court to dismiss the above-entitled case due to the failure to preserve evidence.

This Motion is based upon the Points and Authorities contained herein.

POINTS AND AUTHORITIES

STATEMENT OF FACTS

Prior to his arrest on April 22, 2000, Robert Day worked as a "lumper." A lumper is an individual who obtains temporary employment working for truck drivers, primarily helping them load and unload their cargo. Additionally, Mr. Day would sometimes

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COUNTY CLERK

accompany the drivers on trips to assist them. He was paid, in cash, for each job performed. Mr. Day would gather with other lumpers in the vicinity of the Wild Wild West Casino on West Tropicana. The casino did not allow the lumpers to stand on their property and lumpers were always on the lookout for the security officers who would, at a minimum, chase them from the property.

On April 22, 2000, the Parkway Inn, located at 5201 South Industrial, was robbed. A description was broadcast of the robber, that description being a "white male adult with gray hair, a blue shirt and blue jeans." Officer Flaherty of the police department was on patrol on West Tropicana when he said he saw Mr. Day, whom he said fit the description. In his police report, Officer Flaherty added "boots" to the description, though that was never part of the description. Mr. Day is a white mail adult with gray hair who was wearing blue jeans and boots, but no shirt at the time the officer saw him. The biggest discrepancy in the description is that Mr. Day is covered with tattoos and the victim of the robbery indicated that the robber had no such marks.

At the time the officer saw Mr. Day, Mr. Day was in conversation with a truck driver (hereinafter, "Mr. X"). The officer approached Mr. Day and Mr. X. Shortly after the police contacted him, Mr. Day ran from the area, chased by the police officer who first made sure that Mr. X, whose truck the police car was blocking in, would watch the police vehicle. Mr. Day would testify at trial that the reason he ran was because he thought he had an out-of-state warrant for a case for which he

had never completed parole. Presumably, at some point Officer Flaherty returned to his vehicle and moved it so that Mr. X could leave. Officer Flaherty never obtained the name of Mr. X and neither Mr. Day nor his counsel have any means of discovering the truck driver's identity.

The testimony of this truck driver is vital to the defense of Robert Day. Mr. X would verify that Mr. Day had been working for him that very day. He could testify that, at about the time of the robbery, Mr. Day was shooting craps in the back of the truck with other lumpers while waiting to be paid by Mr. X for the work Mr. Day had done. He could provide both an alibi for Mr. Day for the time of the offense as well as explain why Mr. Day had cash in his pockets at the time of his arrest. He could also attest to the brief conversation between Mr. Day and Officer Flaherty, Mr. Day's recollection of which is different from that reported by the officer.

ARGUMENT

Pursuant to **Brady v. Maryland, 373 US 83 (1963)**, the prosecution must produce for discovery by the defense in a criminal case any and all exculpatory evidence, or evidence which is material to either guilt or innocence or to punishment. The Supreme Court of Nevada, citing **Brady**, **supra**, held in the case of **State v. Havas, 95 Nev 706, 601 P.2d 1197 (1979)**, that the State's failure to preserve and produce such evidence for discovery and inspection by the defense in a criminal case constitutes a violation of due process of law.

In order to establish a due process violation resulting from the state's loss or destruction of evidence, a defendant must

demonstrate either (1) that the state lost or destroyed the evidence in bad faith; **or** (2) that the loss unduly prejudiced the defendant's case and the evidence possessed an exculpatory value that was apparent before the evidence was destroyed. The burden of demonstrating prejudice lies with the defendant and requires **some** showing that it could be reasonably anticipated that the evidence sought would be exculpatory and material to appellant's defense. **Sheriff v. Warner, 112 Nev. 1234, 926 P2d 775 (1996).**

The United States Supreme Court has not attempted to precisely define "material evidence" or the degree of prejudice which must be shown by the defendant to make out a violation. *See* **Giles v. Maryland, 386 U.S. 66, 73-74 (1967).** Other courts have defined materiality quite broadly. *See, e.g.,* **Levin v. Katzenbach, 124 U.S.App.D.C. 158, 363 F.2d 287, 291 (1966)** (evidence which "might have led the jury to entertain a reasonable doubt about [the defendant''s] guilt"); **Griffin v. United States, 87 U.S.App.D.C. 172, 183 F.2d 990, 993 (1950)** ("evidence that may reasonably be considered admissible and useful to the defense"); **Curran v. Delaware, 259 F.2d 707, 711 (3d. Cir. 1958)** ("pertinent facts relating to [the] defense"). Of course, neither the police nor the prosecution are in a position to decide for the defense what is favorable or material evidence.

The defense is not required to show bad faith on the part of the prosecution. The rule is well settled: "When an accused seeks dismissal for the State's good-faith loss or destruction of material evidence, he or she must show prejudice flowing from the unavailability of the evidence. To establish prejudice, the accused must make 'some showing that it could be reasonably

anticipated that the evidence sought would be exculpatory.'" **Deere v. Nevada, 100 Nev 565, 688 P.2d 322 (1984)** (citing **Boggs v. State, 95 Nev 911, 913, 604 P.2d 107, 108 (1979).**) The defense avers that Mr. X would serve to provide an alibi for Mr. Day, would explain the source of at least some of Mr. Day's money and possibly contradict the police officer as to his recollection of what happened. His testimony is clearly and obviously material and exculpatory. Consequently, the defense doesn't even address the issue of whether or not the officer was acting in bad faith,

The police officer was aware that this truck driver was a potential witness based on the fact that Mr. Day was talking to him shortly after the offense occurred and that Mr. Day told him that he was working with Mr. X. While one might question why the police officer didn't even bother to take the name of this witness, there is no denying that his evidence would have been extremely helpful to the defense. This is especially true in a situation such as this where, if Mr. Day testifies, he can be impeached by the use of his prior felony record. Because his testimony will be discredited by this impeachment, it is particularly important that he be able to produce this independent witness whose identity has been lost by the state.

Because the State allowed this witness to leave without obtaining identification from him and because his testimony would

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. . .

. . .

be material and exculpatory, the charges against the Defendant should be dismissed.

DATED this 8th day of March, 2001.

Respectfully Submitted:

CLARK COUNTY PUBLIC DEFENDER

By _____
DIANNE M. DICKSON
Nevada Bar #5620
DEPUTY PUBLIC DEFENDER

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office has set the foregoing MOTION TO DISMISS FOR FAILURE TO PRESERVE EVIDENCE for hearing on Monday, the 12th day of March, 2001, at 9:00 A.M. in Department IV # of District Court.

DATED this 8th day of March, 2001.

MORGAN D. HARRIS
Nevada Bar #1879
PUBLIC DEFENDER

By _____
DIANNE M. DICKSON
Nevada Bar #5620
DEPUTY PUBLIC DEFENDER

RECEIPT OF COPY of the foregoing MOTION TO DISMISS FOR FAILURE TO PRESERVE EVIDENCE is hereby acknowledged this 9 day of March, 2001.

CLARK COUNTY DISTRICT ATTORNEY

By _____

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DISTRICT COURT FEB 14 AM 7:23

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs

ROBERT JAMES DAY,

Defendant(s).

Case No. C167783

Dept. No. IV

JURY

1. GARY M. CANTARA
2. CHRISTINE LAURA HENDERSON
3. NANCY C. GARNETT
4. DEBORAH R. HERNANDEZ
5. KATHLEEN M. MEZO
6. ROBERT GENE HAMLIN
7. RENEE DABNEY
8. JEFFREY L. KENNEDY
9. PATRICIA D. ROSS
10. JEROME F. UNGER
11. KENNETH F. SHANAHAN
12. MARSHA L. JACKSON

ALTERNATE

1. CARMEN A. DENTINO

S

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INST

FILED IN OPEN COURT
MAR 15 2001 2:08P
SHIRLEY B. PARRAGUIRRE, CLERK
BY Billie Jo Craig
DEPUTY
BILLIE JO CRAIG

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,

Defendant.

Case No. C167783
Dept. No. IV
Docket C

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

MEMBERS OF THE JURY:

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

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

INSTRUCTION NO. 2

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

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

INSTRUCTION NO. 3

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

In this case, it is charged in an Information that on or about the 22nd day of April, 2000, the Defendant committed the offenses of ROBBERY WITH USE OF A DEADLY WEAPON (F) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (F)

COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of KAREN WALKER, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of the said KAREN WALKER, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a knife, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building occupied by PARKWAY INN, located at 5201 South Industrial, Las Vegas, Clark County, Nevada..

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

INSTRUCTION NO. 4

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

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

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

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

INSTRUCTION NO. 5

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

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

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

INSTRUCTION NO. 5

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

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

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

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

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

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

INSTRUCTION NO. 6

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

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

INSTRUCTION NO. 7

During the trial, you have heard evidence concerning prior felony convictions(s) of the defendant. You may consider that evidence only as it may affect defendant's believability as a witness. You may not consider a prior conviction as evidence of the guilt of the crime for which defendant is now on trial. It is simply one of the circumstances that you are to take into consideration in weighing the testimony of the defendant.

INSTRUCTION NO. 8

Every person who, by day or night, enters any building with the intent to commit larceny and/or a felony therein is guilty of Burglary.

INSTRUCTION NO. 9

In the State of Nevada, the crime of robbery is a felony.

INSTRUCTION NO. 10

Larceny is defined as the stealing, taking and carrying away of the personal goods or property of another with the intent to permanently deprive the owner thereof.

INSTRUCTION NO. 11

It is not necessary that the State prove the defendant actually committed a larceny and/or a robbery inside the building after he entered in order for you to find him guilty of burglary. The gist of the crime of burglary is the unlawful entry with criminal intent. Therefore, a burglary was committed if the defendant entered the building with the intent to commit a larceny and/or a robbery regardless of whether or not that crime occurred.

INSTRUCTION NO. 12

The intention with which entry was made is a question of fact which may be inferred from the defendant's conduct and all other circumstances disclosed by the evidence.

INSTRUCTION NO. 13

A person who enters an establishment with the intent to commit a larceny and/or a robbery therein is guilty of burglary even though the entry was made through the public entrance during business hours.

The authority to enter a building open to the public extends only to those who enter with a purpose consistent with the reason the building is open. An entry with intent to commit a larceny and/or a robbery therein cannot be said to be within the authority granted customers of a business establishment. The fact, therefore, that the establishment is open to the general public is not a defense to the charge of burglary so long as the defendant is shown to have made the entry with the intent to commit a larceny and/or a robbery therein.

INSTRUCTION NO. 14

Every person who commits the crime of burglary, who has in his possession or gains possession of any deadly weapon at any time during the commission of the crime, at any time before leaving the structure, or upon leaving the structure, is guilty of burglary while in possession of a deadly weapon.

INSTRUCTION NO. 15

If you find the defendant guilty of burglary, you must also determine whether or not the defendant possessed a deadly weapon during the commission of this crime. If you find beyond a reasonable doubt that the defendant committed Burglary While In Possession of a Deadly Weapon, then you are instructed that the verdict of Burglary While In Possession of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not possessed during the commission of the crime, but you do find that a Burglary was committed, then you are instructed that the verdict of Burglary Without the Possession of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Burglary While In Possession of a Deadly Weapon and Burglary Without the Possession of a Deadly Weapon.

INSTRUCTION NO. 16

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

INSTRUCTION NO. 17

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

a) obtain or retain possession of the property;

b) prevent or overcome resistance to the taking; or

c) facilitate escape

The degree of force is immaterial if used to compel acquiescence to the taking of or escaping with the property.

INSTRUCTION NO. 18

If you find beyond a reasonable doubt that the defendant committed Robbery With the Use of a Deadly Weapon, then you are instructed that the verdict of Robbery With the Use of a Deadly Weapon is the appropriate verdict.

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

You are instructed that you cannot return a verdict of both Robbery With the Use of a Deadly Weapon and Robbery Without the Use of a Deadly Weapon.

INSTRUCTION NO. 19

"Substantial bodily harm" means:

1) bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or

2) prolonged physical pain.

INSTRUCTION NO. 20

In order to "use" a deadly weapon there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of the deadly weapon in aiding the commission of the crime.

INSTRUCTION NO. 21

"Deadly weapon" means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

INSTRUCTION NO. 22

The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.

INSTRUCTION NO. 23

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

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

INSTRUCTION NO. 24

In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court. Your duty is confined to the determination of the guilt or innocence of the Defendant.

INSTRUCTION NO. 25

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

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

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

INSTRUCTION NO. _____

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

GIVEN: _____
DISTRICT JUDGE

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DISTRICT COURT

CLARK COUNTY, NEVADA

FILED IN OPEN COURT
MAR 15 2001
SHIRLEY B. PARRAGUIRRE, CLERK
BY Billie Jo Craig
BILLIE JO CRAIG DEPUTY

THE STATE OF NEVADA,

Plaintiff,

vs

ROBERT JAMES DAY,

Defendant.

Case No. C167783

Dept No. IV

PROPOSED JURY INSTRUCTIONS NOT USED AT TRIAL

Attached hereto are the proposed jury instructions which were not used during the trial in the above action.

DATED: This 15TH day of MARCH, 2002001.

SHIRLEY B. PARRAGUIRRE, Clerk of the Court

By: _____
BILLIE JO CRAIG, Deputy Clerk

PINU/8-00/jbh

INSTRUCTION NO. _____

You have heard evidence that the prosecution has failed to obtain and preserve the identity of the truck driver who was a witness to some events relevant to this case. If you find that this witness's testimony would have been material to your determination of this case and you find that the police failed to preserve this evidence, you may presume that the witness's testimony would have been adverse to the prosecution.

INSTRUCTION NO. _____

If the evidence in this case is subject to two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to innocence, it is your duty to adapt the interpretation which will admit the defendant's innocence and reject that which points to guilt.

You will notice the rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, even if the reasonable deduction points to the defendant's guilt, the entire proof must be beyond a reasonable doubt to support a verdict of guilt.

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FILED IN OPEN COURT
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SHIRLEY B. PARRAGUIRRE, CLERK
BY Billie J. Davis DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,

Defendant.

Case No. C167783
Dept. No. IV
Docket C

VERDICT

We, the jury in the above entitled case, find the Defendant as follows:

COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON

☑ GUILTY

☐ NOT GUILTY

☐ GUILTY OF ROBBERY (WITHOUT USE OF A DEADLY WEAPON)

COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

☑ GUILTY

☐ NOT GUILTY

☐ GUILTY OF BURGLARY (WITHOUT A DEADLY WEAPON)

DATED this 15th day of March, 2001.

Nancy Garnett
FOREPERSON

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket C

MOTION AND NOTICE OF MOTION TO AMEND INFORMATION

DATE OF HEARING: 3/26/01
TIME OF HEARING: 9:00 A.M.

TO: Defendant above named, and

TO: Your Counsel of Record: DIANNE DICKSON, Deputy Public Defender,

YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that, on the 26th day of March, 2001, at the hour of 9:00 o'clock, A.M., or as soon thereafter as Counsel can be heard, in the Courthouse, Las Vegas, Clark County, Nevada, the STATE OF NEVADA will move the Court for an Order permitting the Information heretofore filed in the above entitled action to be

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amended as to the number of prior felony convictions and the years in which they were incurred, in accordance with NRS 207.010 and 207.016.

DATED this 20th day of March, 2001.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

J. TIMOTHY FATTIG, being first duly sworn, deposes and says:

That affiant is a Deputy District Attorney of Clark County, Nevada; that two Informations have heretofore been filed in the instant action; that the original Information charged the defendant with one count of Robbery With use of a Deadly Weapon and one count of Burglary While In Possession of a Deadly Weapon; the affiant then filed an Amended Information alleging that the Defendant is a Habitual Criminal under NRS 207.010; that since the filing of said Amended Information affiant learned of an additional felony that previously was not included on the Amended Information; affiant also has learned of more accurate information concerning the names of the felonies and the years in which the defendant has been convicted; that said information was learned from certified judgments of conviction and a presentence report from an earlier conviction that recently arrived in the office of the District Attorney; based on this new information, the affiant moves to amend the said Amended Information by adding this additional prior felony conviction as well as clarifying the names of the prior felony convictions and the years in which they occurred; that said amendment does not constitute an additional or different offense and does not prejudice the substantial rights of the defendant and,

as such, should be amended pursuant to NRS 173.095(1); that said amendment is also authorized pursuant to NRS 207.016 which allows the State to amend an Information regarding an allegation of habitual criminal status up until 15 days prior to rendition of sentence.

WHEREFORE, affiant prays that the Court enter an Order permitting the Clark County District Attorney to file an Amended Information herein, pursuant to NRS 173.095(1) and NRS 207.016.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on 7-20-01
(Date)

J. TIMOTHY FATTIG

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

TO AMEND INFORMATION

NRS 173.035(1) provides that the "The Information must be filed within 15 days after the holding or waiver of the preliminary hearing examination. Each such information must set forth the crime committed according to the facts."

NRS 173.095(1) provides that "[t]he Court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." See also State v. District Court, 116 Nev. Adv. Op. 40 (March 13, 2000); Nall v. State, 85 Nev. 1, 448 P.2d 826 (1989); Green v. State, 94 Nev. 176, 576 P.2d 1123 (1978). NRS 207.016 allows the State to file an Information alleging that an offender is a habitual criminal *after* conviction of the primary offense up until 15 days prior to sentencing. In the instant case, the defendant was convicted via verdicts of guilty on March 15, 2001. Rendition of sentence is scheduled for May 2, 2001. Since this motion is seeking an amendment of the priors listed in the previous Information and since the motion is occurring more than 15 days prior to rendition of sentence, such amendment is authorized by NRS 207.016. The amendment is also authorized by NRS 173.095(1) because it is not seeking to add an additional or different offense and is not prejudicing the substantial rights of the defendant. The amendment is merely adding a prior felony conviction that was previously unknown and clarifying information on other felonies that were previously listed

DATED this 20th day of March, 2001.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Notice of Motion and Motion to Amend Information, was made this 20th day of March, 2001, by facsimile transmission to:

DIANNE DICKSON
455-5112

BY Aileen Collins
Employee of the District Attorney's Office

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

ORIGINAL

FILED IN OPEN COURT
MAR 2 6 2001
SHIRLEY B. PARRAGUIRRE, CLERK
BY Billie Jo Craig
BILLIE JO CRAIG, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket C

ORDER TO AMEND INFORMATION

Upon Motion of the STATE OF NEVADA, Plaintiff, by and through the Clark County District Attorney, and Notice to Defendant above named by and through Defendant's Counsel, DIANNE DICKSON, and good cause appearing therefor,

IT IS HEREBY ORDERED that the Information heretofore filed in the within action be, and the same is hereby amended to include an additional count charging Defendant above named

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MAR 2 6 2001
COUNTY CLERK

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as an habitual criminal.

DATED this 26th day of March, 2001.

DISTRICT JUDGE

STEWART L. BELL
District Attorney
Nevada Bar #000477

BY
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

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ORIGINAL

FILED IN OPEN COURT
MAR 26 2001
SHIRLEY B. PARRAGUIRRE, CLERK
BY Billie Jo Craig
BILLIE JO CRAIG DEPUTY

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV
Docket C

SECOND
AMENDED

INFORMATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

STEWART L. BELL, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That ROBERT JAMES DAY, the Defendant above named, having committed the crimes of **ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony - NRS 205.060)**, on or about the 22nd day of April, 2000, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of KAREN WALKER, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will

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of the said KAREN WALKER, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a knife, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building occupied by PARKWAY INN, located at 5201 South Industrial, Las Vegas, Clark County, Nevada.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

The names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

NAME	ADDRESS
FLAHERTY, DANIEL P.	LVMPD P#3399
HUFFMASTER, DOUGLAS G.	LVMPD P#6010
MULLINS, TIMOTHY O.	LVMPD P#6414
WALKER, KAREN	5900 W. TROPICANA AVE; LV NV

UNDER NO CIRCUMSTANCES IS THE LANGUAGE CONTAINED HEREINAFTER TO BE READ TO A JURY HEARING THE PRIMARY OFFENSE FOR WHICH THE DEFENDANT IS PRESENTLY CHARGED.

Defendant ROBERT JAMES DAY, hereinbefore named, is placed on notice that, in accordance with the authorization of NRS 207.010, punishment imposed pursuant to the above-stated habitual criminal statute will be urged upon the Court if said Defendant is found guilty

on the primary offenses of ROBBERY WITH USE OF A DEADLY WEAPON (Felony) and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony) , for which the Defendant is presently charged.

This page concerning the prior convictions hereinbelow set forth is to be considered by the Court in its discretion ONLY after the finding of guilty of Defendant on the primary charge herein.

That said Defendant ROBERT JAMES DAY, has been five (5) times convicted of crimes, which, under the laws of the situs of the crime and/or the State of Nevada, amount to felonies, to-wit:

1. That on or about 1974, the Defendant was convicted in the Statc of Missouri, Boone County, for the crime of Sale of Controlled Substance,

2. That on or about the 1984, the Defendant was convicted in the State of Missouri, for the Federal crime of Bank Robbery;

3. That on or about 1985, the Defendant was convicted in the State of North Carolina, Wake County, for the crime of Embezzlement,

4. That on or about the 1985, the Defendant was convicted in the State of North Carolina, Wake County, for the crime of Obtaining Money Under False Pretenses

5. That on or about 1994, the Defendant was convicted in the State of North Carolina, Wake County, for the crime of Financial Transaction Card Theft.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
J. TIMOTHY FATTIG
Deputy District Attorney
Nevada Bar #006639

DO NOT READ TO THE JURY

DA#00F06978X/ajc
LVMPD EV#0004221105
(TK1)

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

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV

JUDGMENT OF CONVICTION
(PLEA OF GUILTY)

The Defendant previously appeared before the Court herein with counsel and entered a plea of guilty to the crime(s) of COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) and COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Catgory B Felony), in violation of NRS 200.380, 193.165, 205.060; thereafter, on the 11th day of May, 2001, the Defendant was present in court for sentencing with his counsel, DIANNE M. DICKSON, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the $25.00 Administrative Assessment Fee, and $250.00 DNA Analysis Fee and defendant to submit to a blood and/or saliva test to determine genetic markers or secretor status, Defendant AJUDGED an HABITUAL OFFENDER. Defendant SENTENCED to a MAXIMUM of THREE HUNDRED (300) MONTHS and a MINIMUM of ONE HUNDRED

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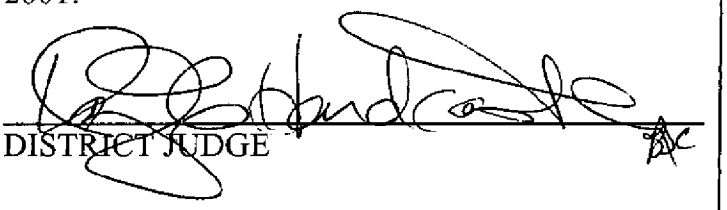
COUNTY CLERK

TWENTY (120) MONTHS in the Nevada Department of Prisons, with THREE HUNDRED EIGHT-TWO (382) DAYS Credit For Time Served.

DATED this 16th day of May, 2001.



DISTRICT JUDGE

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

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT JAMES DAY,
#1679345

Defendant.

Case No. C167783
Dept. No. IV

JUDGMENT OF CONVICTION
~~(PLEA OF GUILTY)~~

The Defendant previously appeared before the Court herein with counsel and ~~entered a~~ PURSUANT TO ~~plea of guilty to the crime(s)~~ JURY VERDICT DEFT. FOUND GUILTY of COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) and COUNT II - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Catgory B Felony), in violation of NRS 200.380, 193.165, 205.060; thereafter, on the 8th day of May, 2001, the Defendant was present in court for sentencing with his counsel, DIANNE M. DICKSON, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the $25.00 Administrative Assessment Fee, and $250.00 DNA Analysis Fee and defendant to submit to a blood and/or saliva test to determine genetic markers or secretor status, Defendant AJUDGED an HABITUAL OFFENDER. Defendant SENTENCED to a MAXIMUM of THREE HUNDRED (300) MONTHS and a MINIMUM of ONE HUNDRED

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MAY 21 2001

AMENDED BY ORDER OF THE COURT
SHIRLEY B. PARRAGUIRRE, CLERK
BY Dorothy Kelly, DEPUTY DOROTHY KELLY
October 2, 2002

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MAY 14 2001
COUNTY CLERK

TWENTY (120) MONTHS in the Nevada Department of Prisons, with THREE HUNDRED EIGHT-TWO (382) DAYS Credit For Time Served.

DATED this 16th day of May, 2001.

DISTRICT JUDGE

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CAS
MORGAN D. HARRIS
CLARK COUNTY PUBLIC DEFENDER
Nevada Bar #1879
309 South Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	Case No. C167783 Dept. No. IV

CASE APPEAL STATEMENT

1. **Appellant filing this case appeal statement:** Robert James Day.

2. **Judge issuing the decision, judgment, or order appealed from:** Kathy A. Hardcastle.

3. **All parties to the proceedings in the district court (the use of et al. To denote parties is prohibited):** The State of Nevada, Plaintiff; Robert James Day, Defendant.

4. **All parties involved in this appeal (the use of et al. To denote parties is prohibited):** Robert James Day, Appellant; The State of Nevada, Respondent.

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5. **Name, law firm, address, and telephone number of all counsel on appeal and party or parties whom they represent:**

MORGAN D. HARRIS
Clark County Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155-2610

Attorney for Appellant

STEWART L. BELL
Clark County District Attorney
200 South Third Street
Las Vegas, Nevada 89155

FRANKIE SUE DEL PAPA
Attorney General
Nevada Bar No. 000192
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 687-3538

Counsel for Respondent

6. **Whether appellant was represented by appointed or retained counsel in the district court:** Appointed.

7. **Whether appellant is represented by appointed or retained counsel on appeal:** Appointed.

8. **Whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:** N/A

9. **Date proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed):** Information filed June 9, 2000; Information filed December 7, 2000; Amended Information filed February 21, 2001; Second Amended Information filed March 26, 2001.

DATED this 8th day of June, 2001.

MORGAN D. HARRIS
CLARK COUNTY PUBLIC DEFENDER

By _____
DIANNE M. DICKSON
NEVADA BAR #5620
DEPUTY PUBLIC DEFENDER
309 SOUTH THIRD STREET, SUITE 226
LAS VEGAS, NEVADA 89155-2610
(702) 455-4685

RECEIPT OF COPY of the foregoing CASE APPEAL STATEMENT is hereby acknowledged this 8th day of May, 2001.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By Jadene Mulkey

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NOAS
MORGAN D. HARRIS
CLARK COUNTY PUBLIC DEFENDER
Nevada Bar #1879
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	Case No. C167783 Dept. No. IV **NOTICE OF APPEAL**

TO: THE STATE OF NEVADA

STEWART BELL, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and DEPARTMENT IV OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that ROBERT JAMES DAY, presently incarcerated in the Nevada State Prison, appeals to the Supreme Court of the State of Nevada from the judgment entered against said Defendant on the 9th day of May, 2001, whereby he was convicted of Count I--Robbery With Use of a Deadly Weapon and Count II--Burglary While in Possession of a Deadly Weapon, sentenced to a maximum of three hundred months and a minimum of one hundred (120) months in the Nevada Department of Prisons, with 382 days credit for time served; pay $25 Administrative Assessment Fee and $250 DNA Analysis . . .

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Fee; submit to a blood and/or saliva test to determine genetic markers or secretor status; Defendant adjudged a habitual offender.

DATED this 8th day of June, 2001.

MORGAN D. HARRIS
CLARK COUNTY PUBLIC DEFENDER

By _____
DIANNE M. DICKSON
NEVADA BAR #5620
DEPUTY PUBLIC DEFENDER
309 SOUTH THIRD STREET, SUITE #226
LAS VEGAS, NEVADA 89155-2610
(702) 455-4685

DECLARATION OF MAILING

DEENA DANIEL, an employee with the Clark County Public Defender's Office, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 8th day of June, 2001, declarant deposited in the United States mail at Las Vegas, Nevada, a copy of the Notice of Appeal in the case of The State of Nevada v. Robert James Day, Case No. C167783, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to Robert James Day #69140, High Desert State Prison, P.O. Box 650, Indian Springs, NV 89070. That there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 8th day of June, 2001.

Deena Daniel

RECEIPT OF A COPY of the foregoing Notice of Appeal is hereby acknowledged this 8th day of May, 2001.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By Nadine Mulkey

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REQUEST FOR ROUGH DRAFT TRANSCRIPT

MORGAN D. HARRIS
CLARK COUNTY PUBLIC DEFENDER
Nevada Bar #1879
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ROBERT JAMES DAY, Defendant.	Case No. C167783 Dept. No. IV

REQUEST FOR ROUGH DRAFT TRANSCRIPT

TO: TINA SMITH, COURT RECORDER - DEPARTMENT NO. IV

ROBERT JAMES DAY, defendant named above, requests preparation of a rough draft transcript of certain portions of the proceedings before the district court, as follows:

Date or dates of proceeding: 3/12/01; trial commencing 3/13/01 and ending 3/15/01; 5/9/01.

Portions of the transcript requested: 3/12/01, all proceedings; trial commencing 3/13/01 and ending 3/15/01, including all matters heard outside the presence of the jury, settling of jury instructions, and closing arguments; 5/9/01, all proceedings.

This notice requests a transcript of only those portions of the district court proceedings which counsel reasonably and in

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good faith believes are necessary to determine whether appellate issues are present. Voir dire examination of jurors, opening statements and closing arguments of trial counsel, and the reading of jury instructions shall not be transcribed unless specifically requested above.

I recognize that I must personally serve a copy of this form on the above named court reporter and opposing counsel.

That the above named court reporter shall have twenty (20) days from June 8, 2001, to prepare an original plus three copies at State expense and file in the district court clerk the original rough draft transcript(s) requested herein.

Further, pursuant to NRAP 3C(d)(3)(iii), **the court reporter shall also deliver copies of the rough draft transcript to the Supreme Court clerk, to appellant's counsel and respondent counsel** no more than twenty (20)days after the date of the appellant's request.

DATED this 8th day of June, 2001.

MORGAN D. HARRIS
CLARK COUNTY PUBLIC DEFENDER

By _____
DIANNE M. DICKSON
NEVADA BAR #5620
DEPUTY PUBLIC DEFENDER
309 SOUTH THIRD STREET, SUITE #226
LAS VEGAS, NEVADA 89155-2610
(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2001, I served a true and correct copy of the foregoing Request for Rough Draft Transcripts on:

Tina Smith, Court Recorder
Department IV
200 S. Third St.
Las Vegas, NV 89155

An employee of the Clark County
Public Defender's Office

RECEIPT OF A COPY of the foregoing Request for Rough Draft Transcript is hereby acknowledged this 8th day of May, 2001.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

ROBERT JAMES DAY,

Defendant.

CASE NO. C167783

DEPT. NO. IV

BEFORE THE HONORABLE KATHY A. HARDCASTLE, DISTRICT JUDGE

MONDAY, MARCH 12, 2001

RECORDER'S TRANSCRIPT RE:
DEFENDANT'S MOTION TO DISMISS INFORMATION

APPEARANCES:

For the State: TIM FATTIG, ESQ.
Deputy District Attorney

WILLIAM A. HEHN, ESQ.
Deputy District Attorney

For the Defendant: DIANNE DICKSON, ESQ.
Deputy Public Defender

RECORDED BY: Liz Garcia, Court Recorder/Transcriber

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LAS VEGAS, NEVADA; MONDAY, MARCH 12, 2001; 9:00 A.M.

THE COURT: All right, C167783, State of Nevada versus Robert James Day. This is defendant's motion to dismiss information. Mr. Day is present in custody. The basis that he set forth in the motion is not a legal basis for me to dismiss the information.

MS. DICKSON: Your Honor, did you get the supplemental motion on file? There was a supplemental motion filed on Friday to it.

THE COURT: No, do you have a copy of it?

MS. DICKSON: I do, Your Honor.

THE COURT: Let me take a look at it. You have to make sure we get courtesy copies.

MS. DICKSON: Yes, Your Honor, I apologize for that.

THE COURT: Basis – that you set forth in your motion is not something that would form the basis of a failure to preserve evidence. The motion is denied for that reason.

All right. The trial date is set for today?

MS. DICKSON; Your Honor, I had discussed with the District Attorney negotiations depending on the outcome of this motion and I believe we are not going to trial.

MR. HEHN: I show a guilty plea agreement and a second amended information in the file.

THE COURT: All right, then do you have a copy of those?

All right, we'll trail it.

(Whereupon the matter was trailed)

THE COURT: All right, recalling Day.

MS. DICKSON: Mr. Day is reading this document, Your Honor. Could we –

THE COURT: All right. What we'll do is we'll go ahead and take recess, they can take everybody else out and then bring him back.

MS. DICKSON: Would it be possible to pass it until Wednesday, Your Honor, so I can go over everything with him? It's a very important decision. I think he's made the decision, but –

THE COURT: No, we've got a jury coming in at 1:30 this afternoon, so I'm not going to make them come back. All right, we'll take a recess. They can bring him back. You can talk to him as long as you need to.

(Whereupon a recess was taken
and the Court reconvened
at 1:30 p.m.)

THE COURT: All right, we'll be on the record. This will be on C167783, State of Nevada versus Robert James Day. Mr. Day is present, counsel is present.

Do you have something you wanted to put on the record?

MS. DICKSON; Yes, Your Honor. Mr. Day has been spending a lot of time in the law library and has actually come up with some very good things, but one of the things that he's concerned about is the fact that he's never been re-arraigned on the amended information that was filed.

THE COURT: We can take care of that right now. The only thing the

amended information added was - wasn't this the one where they added the habitual?

MR. FATTIG: Yes.

THE COURT: That's all it adds?

MS. DICKSON: One of the concerns that Mr. Day has, Your Honor, is that the amended information charges him with Burglary and Possession of a Firearm, which is not the situation.

THE COURT: The original information charged him with Robbery With Use of a Deadly Weapon and Burglary While in Possession of a Firearm.

MR. FATTIG: The firearm language, Your Honor, looks like a typo.

THE COURT: And the amended information - huh?

MR. FATTIG: The firearm language looks like a typo, it was actually a knife rather than a firearm.

THE COURT: All right, weapon. Well, the -

MR. FATTIG: There's a statute, Burglary While in Possession of a Deadly Weapon.

THE COURT: In the body of the information it says Burglary While in Possession of Firearm, but when you get to the actual charge itself, Count II is Burglary While in Possession of a Deadly Weapon.

MS. DICKSON: Yes, Your Honor, and we would be concerned that the jury be properly advised.

THE COURT: We can correct that. We can correct that, that's not a problem.

MS. DICKSON: Thank you, Your Honor.

THE COURT: Actually, the habitual offender doesn't require a plea of not guilty to that, so there's nothing to re-arraign on.

MS. DICKSON: The other matter of concern, Your Honor, is that Mr. Day – as the Court knows, the Court has denied our motion because of the failure of the State to preserve one of the witnesses against us. Mr. Day is going to have to take the stand. He does have a prior criminal record, and I wish to make certain before we go into it which offenses the State is going to be allowed to introduce against him.

THE COURT: Which ones are you going to seek to introduce if he takes the stand?

MR. FATTIG: Currently, Your Honor, we have a certified judgment of conviction of a prior conviction for bank robbery in 1984. He was sentenced to a period of 10 years, of which he was on probation and/or parole into the '90's, the mid-'90's. Under the statute, we are allowed to introduce certified judgments of conviction for impeachment of a witness if the period of confinement and/or period off of –

THE COURT: I understand that. So, you've got the '84 conviction –

MR. FATTIG: Yes.

THE COURT: Have you got the '94 conviction?

MR. FATTIG; As of right now, I do not. They have been ordered and we may obtain them in the next day, if he testifies tomorrow. But as of right now, I do not have either of the convictions out of North Carolina in the mid-'90's.

THE COURT: All right.

MS. DICKSON: Your Honor, we would object to the State actually being allowed to use any of Mr. Day's prior record because of the prejudicial composition of that and because of the fact that he virtually has no one else who can present his defense, other than himself. If the Court's inclined to let the State introduce any prior record, I would argue that they should only be allowed to introduce the one they have a certified judgment for now as we start the trial, and that they be precluded from introducing any others.

THE COURT: They can introduce the evidence from the 1984 conviction. If they receive the certified copies, they can introduce the other two.

MS. DICKSON: So, we will not know until some point in the future whether or not Mr. Day is going to be impeached with those convictions?

THE COURT: Well, actually, technically they could ask about the other two convictions, but they'd have to be prepared to present evidence if he denied the other two convictions.

MS. DICKSON: Right.

THE COURT: So, they would need the certified copies.

All right. Anything else?

MS. DICKSON; No, Your Honor.

THE COURT: All right, are we ready to go forward?

MR. FATTIG: Yes.

MS. DICKSON: Yes, Your Honor.

. . . . .

. . . . .

THE COURT: All right. Then, when you've got the jury in, I'll come back in.

(Proceedings adjourned by Order of the Court until 10:30 a.m. the following day)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording in the above-entitled case.

Elizabeth Garcia
ELIZABETH GARCIA
Court Transcriber

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DISTRICT COURT
CLARK COUNTY, NEVADA

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Shirley B. Parraguirre
CLERK

STATE OF NEVADA,
Plaintiff,
vs.
ROBERT JAMES DAY,
Defendant.

CASE NO. C167783
DEPT. NO. IV

BEFORE THE HONORABLE KATHY A. HARDCASTLE, DISTRICT JUDGE
TUESDAY, MARCH 13, 2001

RECORDER'S TRANSCRIPT RE:
TRIAL BY JURY
VOLUME I - DAY 1

APPEARANCES:

For the State: TIM FATTIG, ESQ.
Deputy District Attorney

For the Defendant: DIANNE DICKSON, ESQ.
Deputy Public Defender

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RECORDED BY: Liz Garcia, Court Recorder/Transcriber

INDEX
OF
WITNESSES

NAME:	DIRECT	CROSS	REDIRECT	RECROSS
PLAINTIFF'S WITNESSES:				
Karen Walker	I- 7	I- 19	I-47	I-48
Douglas Huffmaster	I- 49	I- 51	--	--
Billy Ramirez	I- 60	I- 63	I-72	I-73
Jorge Cruz	I- 75	I- 78	--	--
Daniel Flaherty	I- 80	II-16	II-33	II-35
* * * *				
DEFENDANT'S WITNESSES:				
Robert Day	II-36	II-59	II-81	--
Price Beasley	II-87	II-89	--	--
* * * *				

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OF

EXHIBITS

		IDENTIFIED	ADMITTED
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2	Photo of Mr. Day's pants pocket	I- 93	I- 94
3	Photo of money from pocket	I- 93	I- 94
4	Map of Parkway Inn area	I- 94	I- 95
5	Sealed evidence envelope (containing knife)	I- 13	II- 14
5-A	Knife	II- 14	II- 15

* * * *

DEFENDANT'S:		
A	Photo of Mr. Day at time of arrest	II- 24

* * * *

LAS VEGAS, NEVADA; TUESDAY, MARCH 13, 2001; 2:50 P.M.

(Whereupon the following proceedings were held in the presence of the jury)

THE COURT: The record can reflect we're back in the presence of the jury, all members of the jury panel are present, counsel for both sides are present, as is Mr. Day.

Counsel, you may make your opening statement.

MR. FATTIG: Thank you, Your Honor.

OPENING STATEMENT

BY MR. FATTIG:

On April 22nd of last year, at just before one in the afternoon, the evidence in this case is going to show that the defendant walked into the Parkway Inn Motel, located at 5201 South Industrial. When he walked into the front lobby area, he did so with the intent to steal, by force if necessary, because he had a knife in his possession.

Karen Walker was working the front desk that day. She will testify that when she turned around and looked up, she saw the defendant back behind the counter where the customers are not supposed to be. She will testify that she saw the defendant hold a knife, a pocket knife, and demanded – the defendant demanded from her that she open up the cash drawer to the register. Ms. Walker stepped back and told the defendant that the drawer was unlocked. The defendant then went to the drawers and opened them up, and began grabbing the money out using both hands.

At one point, Karen Walker will testify that she made a movement, a slight movement towards the telephone and that when she did that, the defendant told her, don't move, don't make me hurt you.

After the defendant emptied the register, Ms. Walker felt it was safe, so she began to leave through a back door to this front desk office area. She will testify that before she made it out that back door, she saw the defendant stuffing the money which was in his hands into his jeans pocket. She then exited out the back door, went to her manager and told him what happened. The evidence will show that she then went around the corner and saw the defendant. The last time she saw the defendant he was headed northbound across a street called Ali Baba towards Tropicana. And the evidence in this case is going to show that this particular hotel is located a couple of blocks south of Tropicana Boulevard on Industrial.

Within minutes, police were called and a description of the defendant was given over the radio. The description also included his direction of travel at that point in time. The evidence is going to show in this case that when that broadcast occurred, a police officer by the name of Dan Flaherty heard the broadcast. And Officer Flaherty heard the call and proceeded to go into that particular area of town. At some time just after one that afternoon, within a few minutes of the robbery at the Parkway, Dan Flaherty was driving westbound on Tropicana Boulevard. The testimony will be that Dan Flaherty saw an individual fitting the description of the robber at the hotel. When he did that, he pulled a U-turn, he came around, and he approached that person. That person was the defendant.

The testimony will be that Sergeant Flaherty, when he approached him, he saw the defendant talking to a truck driver at the Wild Wild West Truck Stop, right there on Tropicana. The testimony will be that Sergeant Flaherty exited his car – and he was not in a marked patrol car because he was a sergeant at the time and not a patrol officer; he was their supervisor. And when he got out of the car, he identified himself to the defendant as a police officer. He asked the defendant to please step in front of his car, and the evidence will show that the defendant was not very cooperative with Sergeant Flaherty, that when he asked him to step in front of his car, the defendant was rather agitated.

The testimony will be that at a certain point in time, the defendant asked Sergeant Flaherty why he was questioning him, and the evidence will show that Sergeant Flaherty mentioned a robbery down the street. Right after he mentioned the word robbery, the defendant bolted. The defendant ran southbound through the parking lot of the truck stop, onto a very busy Tropicana Boulevard. The evidence will show that the defendant managed to avoid cars and run across Tropicana Boulevard. In hot pursuit at that time was Sergeant Flaherty. Sergeant Flaherty was able to stop a couple cars and safely get across the road as well.

The evidence is going to show that the defendant attempted to escape by getting into a semi-truck that was parked at the McDonald's. And the defendant got into the truck, it was unoccupied at the time, and the evidence will show that Sergeant Flaherty was able to catch up to him and he ordered him from the truck. The defendant didn't comply with his

demands. At this point in time, backup arrived for Sergeant Flaherty. At a point in time, Sergeant Flaherty even had his firearm out and he was aiming it at the defendant, giving him orders. The defendant didn't comply. In fact, the evidence will show the defendant told him, just shoot me. Luckily, Sergeant Flaherty was able to get the defendant out of the vehicle, the cab of that truck. He was able to use moderate force, take him out, they both fall to the ground, with some backup assisting him, and the defendant was arrested.

A search incident to arrest reveals two important pieces of evidence in this case. The defendant, at the time he was arrested, had slightly over a thousand dollars in cash balled up and stuffed into each of his two front pockets in his jeans. The defendant also had a small pocket knife in his pocket. The thousand dollars, slightly over a thousand dollars you will hear, was taken over – taken out of the Parkway Inn that day.

Ladies and gentlemen, an opening statement is a chance for both sides to lay out essentially coming attractions, the evidence, what evidence we expect we will prove in this case. At this point in time, it is your role as jurors to sit back and listen to the evidence as it comes from witnesses from the stand. You are the fact finders. It is your sole duty to determine what facts exist.

Once you do that, at the end of the case Judge Hardcastle will give you jury instructions. Those jury instructions are the law. You shouldn't be concerned about the law at this point, that will come later in your deliberations. And after you have a chance to apply those instructions

to the facts that you hear from witnesses on that stand, the State is going to ask you to return verdicts of guilty on Count I - Robbery With Use of a Deadly Weapon, and Count II - Burglary While in Possession of a Deadly Weapon. Thank you.

THE COURT: Counsel?

MS. DICKSON: Thank you, Your Honor.

OPENING STATEMENT

BY MS. DICKSON:

Ladies and gentlemen, Robert James Day is a lumper. Some of you may not know what that is, as I didn't myself until I got involved in this case. A lumper is someone who helps truck drivers, usually by helping them load or unload, doing other odd jobs. And lumpers in this town, at least some of the lumpers in this town, hang out outside the Wild Wild West Truck Stop because truckers know that's where they are. And they come to them when they need help and they hire lumpers for the day, for the hour, for two days, for however much time they need. And that's what Mr. Day did to earn a living last year at the time of his arrest.

And, in fact, on this very day that's what he was doing, he was working for a truck driver. He had helped him that day, he was waiting to be paid, and while he was waiting to be paid he was shooting craps in the back of the truck with some of the other lumpers. The truck driver came back, Mr. Day went up to talk to him to get paid for what he had done, and it was at that time that the police officer appeared and spoke to him. Mr. Day and all of the lumpers live a little bit on the edge of what they're

supposed to be doing, because the Wild Wild West doesn't want them on their property and they're frequently chased away, both by the security and by the police. So, he's always on the look-out for somebody who is about to chase him off, and he ran. And there's some other reasons why he ran, which he will explain to you when he testifies, as I told you he would. And you're going to hear a lot more about Mr. Day, and because the trial is going to be very short, I'm not going to go into everything that you can be expected to hear during the trial.

But, I would ask you to keep an open mind. The State has to go first, so you get to hear all of their witnesses first, but keep an open mind until you've heard all of the witnesses, including Mr. Day. And at the end of the trial, I'm going to ask you to find him not guilty. This is just a case of mistaken identity. Mr. Day is not the person who robbed the Parkway Inn. Thank you.

MR. FATTIG: Karen Walker?

THE CLERK: Come all the way forward.

KAREN WALKER

Having been called as a witness and being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. FATTIG:

Q Ma'am –

A Yes?

Q Where are you employed?

A Now?
Q Yes.
A I'd rather not say.
Q Okay. What type of job do you have?
A I'm a desk clerk and a night auditor.
Q Is it for a hotel here in town?
A Yes.
Q Back on April 22nd of 2000, where were you employed?
A Parkway Inn.
Q And is that located at 5201 South Industrial?
A It is.
Q And that's here in Las Vegas, Clark County, Nevada?
A Yes.
Q And what was your job assignment that day?
A I'm a desk clerk.
Q When did you come on duty?
A Seven o'clock that morning.
Q Did something unusual happen that particular day?
A Yes.
Q What time did it start?
A A little before one.
Q Is that one in the afternoon?
A Yes.
Q The Parkway Inn, is that – could you describe a little bit in

terms of where it's located?

A It's right along I-15 and it's on Industrial and Ali Baba, right on the corner.

Q Is it close to Tropicana?

A Yes, not far.

Q Tropicana is north of that?

A Right.

Q A little before one in the afternoon on April 22nd, what was the first thing you noticed that was unusual?

A I had Mr. Day behind the desk after I got off -- I was on the phone with a maid, and I turned around and looked up and Mr. Day was behind the desk.

Q When you say Mr. Day was behind the desk, do you see Mr. Day here in Court today?

A I do.

Q Could you please point to him and identify a piece of clothing he's wearing today?

A He's sitting over there in the white shirt.

MR. FATTIG: May the record reflect the identification of the defendant?

THE COURT: It may.

MR. FATTIG: Thank you.

BY MR. FATTIG:

Q Could you describe where the check-in area of the hotel is

located?

A Yes. There's a – right on the front of Industrial Road there's an office and there's a drive-thru. It's right in front of Industrial Road.

Q Is the check-in area in sort of a separate building?

A It is.

Q Is there only – how many doors go into this building?

A There's two.

Q And where are those located?

A One is in the front entrance-way and one is in the back office in the back.

Q Are customers normally allowed to go in and out of the back office?

A No.

Q So, the only way to come in is through the front door?

A Right.

Q How close is it between the front door and the reception desk of the hotel?

A I would say about from here to you.

Q Okay. And may the record reflect that's approximately 14, 15 feet.

THE COURT: 12 feet.

MR. FATTIG: 12 feet. Thank you.

THE COURT: We've previously measured the courtroom.

MR FATTIG: Okay, thank you.

BY MR. FATTIG:

Q Before you saw the defendant behind the counter area, was anyone else in the building with you?

A No.

Q Did you see the defendant enter the building?

A No.

Q Is it normal for customers to get behind the area, the counter area, where you saw the defendant?

A No.

Q How do you go about getting to that area?

A You have to go through a little gate and it goes behind the desk. There's just a small gate that goes through there to get back there.

Q What were you doing immediately before you saw the defendant behind the counter?

A I was talking to the head maid on the phone.

Q Did you hang up with that conversation before you saw the defendant?

A I hung up and then saw the defendant.

MS. DICKSON: Excuse me, I'm sorry, could you maybe move the microphone closer to you.

THE COURT: Go ahead and move it just a little bit closer and you'll pick up a little better. Thank you.

All right. You may proceed.

MR. FATTIG: Thank you.

BY MR. FATTIG:

Q Were you in that back area as well when you saw the defendant?

A I was behind the desk, yes.

Q How close were you when you first saw him?

A He was standing right beside me when I first saw him.

Q What did you do when you first saw him? Were you startled?

A Yes. I asked him what he was doing back there and that he knew better, he's not supposed to be behind here – to leave.

Q And did he say anything?

A He said, just stand over there, be quiet, and open your money drawers.

Q And what did you tell him?

A The money drawers are open.

Q What happened next?

A I stood beside the phone over there where I was at the phone, and he had a knife in his hand and just told me to stand over there, and he proceeded to take all the money out, the bills, anyway.

Q How much money was in the register?

A There was just a little over a thousand dollars.

Q And that was all in cash?

A Right.

Q How – could you describe how he was taking the money out of the register?

A He was just grabbing it with both hands.
Q Did he have any weapon or anything?
A He had a small knife in his hand.
Q When did you first see that knife?
A As soon as he wanted the drawers open, he had the knife in his hand.
Q Could you describe what the knife looked like?
A It looked like a little pocket knife. The blade was open, it was about two and a half, three inches.
Q Two and a half, three inch long blade?
A Yes.
Q Could you tell what the body of the knife looked like?
A No.
Q Why was that?
A It was in his hand.
Q Did you ever attempt to contact help?
A I started to dial 9-1-1, but he saw me and told me to be still, don't move, and he said, don't make me hurt you, and so I just stood still.
Q And he had the knife in his hand when he said that?
A Yes.
Q Did you – were you able to leave the office area?
A After he grabbed all the money that he could, then he ran over on the other side of the desk real fast, and when I seen that it was safe, I ran and latched the gate door and I ran out the back office door and

knocked on the door to the manager's apartment and told him to dial 9-1-1, we'd just been robbed.

Q Did you see whether or not the defendant was doing anything with the money in his hands?

A Yes, he was stuffing it in his pocket and he dropped a few bills on the floor.

Q Could you tell what kind of pants he was wearing?

A He was wearing blue Levi's, blue jeans.

Q Did you tell whether or not the defendant obtained all of the money out of the drawer?

A He just – no.

Q Did he obtain all of the currency, the paper money?

A The paper money. He left the change in the drawer.

Q So, he did take all the currency?

A Right.

Q Do you have more than one drawer there at the Parkway?

A We have two.

Q Are they close to each other?

A Right next to each other.

Q Why do you have two drawers there?

A Well, one is for our bank in case we need change, and the other one is to – is just to use for when we make change and for people that come in and pay for their rooms, if we need to make change. And if we don't have the correct change, then we have to get into the other drawer

and make more change, for larger bills.

Q And how much money do you keep on hand for change?

A Five hundred.

Q And then, the additional money would have been money you took in?

A Yeah, all but two hundred, a hundred.

Q Was that money in there when you came on duty, the two hundred?

A Right. Two hundred, yes.

Q And then you took in approximately three hundred and some?

A Right.

Q Did you see the defendant actually leave out those front doors?

A No.

Q He was still standing on the other side of the counter stuffing money the last time you saw him, before you left the office building?

A Yes.

Q You mentioned you went and went for help, where did you go, specifically?

A I ran out the back office door and the manager's – his apartment is right there, right behind the office.

Q And you informed him what had occurred?

A That I had just been robbed and to call 9-1-1.

Q What did you do after you did that?

A Then I ran around the building and looked around to see if I could see where Mr. Day was going. And I saw him running between the laundry room and the other building where the other rooms are on the other side of the office. And then I ran around and followed him and stayed far enough away to where he couldn't see me, and then I saw him going over across Ali Baba and through some industrial buildings towards Tropicana.

Q So, is it fair to say he was heading north across Ali Baba?

A Yes.

Q Towards Tropicana?

A Right.

Q Did he have a shirt on at that time?

A Yes.

Q What kind of shirt was it?

A He had a blue and white T-shirt on.

Q Did the police arrive on the scene?

A As soon as I went back around the building, they were sitting there.

Q How much time elapsed?

A A couple of minutes, maybe five, not much.

Q Not much?

A No.

Q Did you give the police a description of the robber?

A I did.

Q Did you give them the direction you saw him going?

A Yes, I did.

Q And, just for the record, was he running or walking, or how was he – driving or –

A He was just kind of between walking and running, just in a hurry.

Q You didn't see him get in a vehicle?

A No.

Q After the police came and you gave them the information, were you taken to another location?

A Yes, I was.

Q And how much time elapsed before you were taken somewhere?

A Maybe 20 minutes or so.

Q Where were you taken?

A I was taken to the Harley shop over on Tropicana, next to McDonald's.

Q And that would be 3535 West Tropicana?

A I'm not sure what the address is, I just know where it was.

Q Was it fairly close to where the Parkway Inn is at?

MS. DICKSON: Your Honor, I'm going to object to that. I think that's – fairly close is subjective.

THE COURT: Overruled.

BY MR. FATTIG:

Q What did you see when you got there?

A I seen a lot of policemen and I seen Mr. Day standing over by the officers' car.

Q You saw the defendant there?

A Right.

Q Had the defendant changed his appearance at all?

A His shirt was off.

Q Had you – prior to April 22nd of 2000, had you seen the defendant before?

A Yes.

Q How many times?

A Quite a few times, maybe ten times or so. Not often, but he had been there a few times to rent a room.

Q And the context of your meeting him was business only?

A That's correct.

Q He stayed at the Parkway Inn occasionally?

A Occasionally, yes.

MR. FATTIG: Court's indulgence.

BY MR. FATTIG:

Q Were you present when the police gave some money back to the Parkway Inn?

A Yes, I was.

Q So, you know how much money they gave the Parkway Inn back?

A I think they gave almost all of it back but around twelve

bucks, or twelve dollars, and that –

MR. FATTIG: Nothing further.

CROSS EXAMINATION

BY MS. DICKSON:

Q Ms. Walker, you no longer work at the Parkway Inn, is that correct?

A That's correct.

Q How long has it been since you worked there?

A I left there around June of last year – yeah.

Q And how long had you worked there?

A A little over a year.

Q During that time you were the desk clerk?

A Yes.

Q So, for a little over a year, you were the desk clerk at the Parkway Inn, is that correct?

A That's correct.

Q Now, you said that you saw Mr. Day in that Inn before?

A Yes.

Q How many times?

A I'm not sure exactly how many times. I seen him a few times, he'd come in and rent a room.

Q And when someone comes to the Parkway Inn to rent a room, they have to present I.D., don't they?

A Most of the time, yes.

Q Isn't that required legally to have I.D. to rent a room?
A Yes.
Q Have you ever looked through the books since this time to see if you've seen Mr. Day's name in any of those books?
A No, ma'am.
Q Has anybody asked you to do that?
A No, ma'am.
Q Can you give me a time frame during which you saw Mr. Day at the Inn?
A No, I really can't. Usually in the evening he'd come in and sometimes he would call.
Q I'm sorry, I wasn't clear. What I meant was, you said you saw him maybe ten times, is this over a period of a month, six months, a year, two years? How long a period?
A In the time that I had been working there.
Q So, you'd been seeing him for about a year or over a year?
A Right.
Q Had you ever had any conversation with him?
A Some.
Q What kind of conversation?
A Just regular conversation about – mostly about a room.
Q Nothing other than business kinds of talk, no chit-chat about family or friends or where he's going or what you're doing, nothing like that?
A No.

Q Now, this – let's go back to April of last year, about one o'clock in the afternoon is when this had happened, is that correct?

A That's correct.

Q And you said that you hadn't seen anyone come into the office. Was your back towards the door when you were on the phone?

A Yes, it was.

Q So, the next thing you know there's somebody standing next to you, is that right?

A Yes.

Q Behind you, right next to you – where exactly?

A In front of me, over to the side of me.

Q So, sort of front and side?

A Right.

Q And were you still on the phone?

A I just put the phone down.

Q So, you put the phone down, did you kind of turn at that point?

A Right.

Q And that's when you noticed him?

A Yes.

Q How big is this office area?

A Behind it, the desk, or what?

Q The whole office where things take place, registration.

A Maybe to the front desk there to about the middle of your

desk to right over about here where I'm at.

Q Over to the wall?

A No, to – in front of this right here.

Q Where the jury – where the jurors are?

A Yeah.

Q So, from about the front of the jury box to about here?

A In the front of your desk, ma'am.

Q The front of my desk?

A Yes.

Q Then up to that wall?

A About right here where I'm sitting, maybe a little smaller, I'm not sure.

Q And it's been awhile since you've been there?

A Yeah.

Q You didn't go back after you left there in June, just to refresh your memory or anything about it?

A No, but I've been back there. I've had –

Q Still friends there?

A Yeah.

Q And there's a counter. Does this run the entire length of the room or just part of the room?

A Well, there's a wall, a small wall about so big, and then there's a gate, and then the desk runs all the way over to the wall. It's wall to wall, though.

Q Okay, that was my question, wall to wall. Is this gate locked at all?

A It's supposed to be locked, but the maids were coming in and out for rooms and information from me, so I wasn't – I just didn't lock it, I didn't have it locked.

Q How does it lock?

A There's two latches, one on the top and one on the bottom, and we latched the bottom and the top one.

Q Do you need a key to unlatch it?

A No, it's just a little latch that just comes down and then pulls over.

Q So, if someone wanted to get behind this gate even if it was latched, they could just reach over and unlatch it?

A Only if they unlatch the bottom one, too. If it's locked, it's usually both latches are locked.

Q But, in any case, it wasn't locked on this date is what you're saying?

A It wasn't locked, no.

Q And you hadn't heard anybody come in, is that right?

A No, I didn't.

Q And I assume there was nobody else in the office at this time?

A No.

Q Now, when you put down the phone, sort of turned and saw

the person standing next to you, did you see any weapon at that point?

A I saw a knife in his hand.

Q You saw it at that point?

A Yes.

Q Okay. Now, I had understood you to say you first saw it when he was in the drawers, but you saw it before that?

A No, he had it in his hand when he was –

Q Which hand?

A He had it in his right hand, I think. I'm not –

Q You're not sure?

A No.

Q And all you could see was a two and a half, three inch blade, is that what you said?

A That's correct.

Q You couldn't see any more of the knife?

A No.

Q Was he doing anything in particular with the knife?

A No, he just held it in his hand.

Q Where was his hand – up, down?

A It was at his side or kind of to his side, or on mid-waist. Around – about his waist, at first.

Q So, like with his arm bent, like I'm standing, something like this?

A Yeah, he just had it, just kind of a little down –

Q Down further?
A Yeah.
Q Okay. So, maybe it's sort of calf high?
A Yeah.
Q How long was this person in the office?
A Not very long, just long enough to grab all the money and leave.
Q Which probably took less than a minute?
A Well, it might have been a little longer than that because he stood over on the other side of the desk and stuffed it in his pockets, and I ran out and I don't know.
Q Okay, that's correct, you said you didn't actually see him leave?
A No.
Q How long were you in the office with him?
A Long enough to latch that door and run out the back door after he had taken the money – not very long.
Q Now, do I understand, you didn't open the drawers, he opened them himself?
A Yes.
Q Did you, like, indicate where they were or something, or was it obvious that these were the money drawers?
A I think it was obvious to most everybody that came in there which – where the money drawers were.

Q You said when you start your shift you have some money in one drawer to make change from?

A Um-hum.

Q And that's a fixed amount, is that correct?

A Right.

Q Of five hundred dollars?

A Yes.

Q Is that every day it was five hundred dollars?

A At all times it's five hundred.

Q Now, if somebody comes in and you don't have enough change in your other drawer, then you would make change out of that drawer?

A Yes.

Q But you would always keep five hundred dollars in there?

A Yes.

Q So, if you needed change for a hundred dollar bill, you would put the hundred dollar bill in the five hundred dollar drawer, correct, and take out five twenties or something?

A Yes, if I don't have it in the first drawer, yes, I would.

Q Now, did you – you told us that there was some money in the second drawer before you started your shift, is that correct?

A Yes.

Q And how much was that?

A It was two hundred when I started; a little over.

Q So, you actually started the day with seven hundred dollars?
A Right.
Q And you had at least that when you were robbed at about one o'clock?
A Well, I had that and plus what I had taken in.
Q Now, that was my next question. Do you know how much you took in?
A A little over three hundred or a little less than three hundred.
Q Do you know exactly how much you took in?
A No.
Q Have you ever looked at the records to see how much you took in?
A At the time that we were robbed, I looked in the computer and I got an estimated figure out, but I don't remember what it was exactly.
Q And did you tell the police what that estimated figure was?
A Yes.
Q Does the figure $1,051 ring a bell?
A It's close, yes.
Q When you say it's close, it's like – you're not sure?
A I'm really not sure. I don't remember how much exactly.
Q Do you know whether anyone else did an exact count of how much was missing?
A I think my – the manager and I did it together.
Q Okay, when was that, afterwards?

A Yes.

Q Obviously it was afterwards, after the police had gone or while they were still there?

A No, I think they were gone. I'm not really sure, I don't remember if it was –

Q But you don't remember what that exact count was either, is that correct?

A I just know that it was over a thousand dollars. I don't know the exact count, no.

Q Now, this is all computerized at the Parkway, is that correct?

A Yes.

Q So, when someone comes in you enter it in the computer to show that you've received however much a room costs, is that correct?

A Yes.

Q Is there anything that indicates what kind of denominations of bills you take in?

A No.

Q So that your machine wouldn't show like, somebody gave you a fifty dollar bill and you had to make change?

A No.

Q Now, you said that you basically told him the drawers are unlocked and he can go ahead and help himself, correct?

A Correct.

Q And you said he was taking money with both hands, is that

correct?

A Yes.

Q Was the knife still in his hand at that time?

A Yes.

Q So, he was taking money with both hands and stuffing it in his pockets at that point, or not?

A No.

Q Just taking it in his hands and then he's out the gate, is that right?

A Right, yes.

Q With the money still in his hands?

A Yes.

Q Now, when he's leaving he has his back to you, though, is that right?

A Yes.

Q And then you – what did you see him do?

A The only thing I seen him do is stuffing the money in his pockets.

Q Okay, again, did he have his back to you while he's doing that?

A No, he's just standing there, he's sideways to me.

Q Sort of sideways?

A Yes.

Q And you saw him putting this into both pockets?

A I don't recall him putting it in both pockets. I just remember him stuffing it in one pocket, or I don't remember. I ran out the back door. I wasn't concerned about that.

Q And while he was stuffing it in either one or two pockets, did you still see the knife?

A No.

Q Do you know what happened to it?

A No.

Q Now, you went back to the manager's – is it an office or is it his room there, or what is this where the manager is?

A Where he lives?

Q Is that – he lives at the Parkway Inn?

A Right.

Q So, this is his residence, basically, that you're going to, is that right?

A Right.

Q Does he have an office there as well, or does he use the office that you were using when he uses an office?

A There's an office in the back of where I was.

Q And is that where he was?

A No, he was in his apartment.

Q So, you went back to his apartment, which I think you told Mr. Fattig is a separate building, is that right?

A Yeah, it's right out the door, the back door.

Q Now, the Parkway Inn itself has how many rooms?

A One hundred and thirty-two, I think, or thirty-one.

Q And I don't know the exact configuration, but there's rooms on the north side and rooms on the south side, and then the office is in the middle of them, is that correct?

A Correct.

Q And you actually drive through like an archway of some sort in between the buildings, correct?

A Correct.

Q And that's where you were going – you had been in the office and that's where you went, further into that sort of arched area to your manager's apartment?

A No.

Q Where is the manager's apartment?

A The manager's office is behind the arch, behind the office.

Q In between the two?

A It's on the south side, yes.

Q And you went back there, told him we've been robbed, to call 9-1-1?

A Yes.

Q Did you immediately leave then or did you wait while he made the phone call?

A No, I left.

Q Did you give him any kind of description to give the police?

A No.

Q Did you get on the 9-1-1 call at all?

A No.

Q So, you didn't give 9-1-1 any description and you didn't give your manager any description to give them, is that right?

A That's correct.

Q You don't know how 9-1-1 would have gotten the description do you?

A No – oh, no, I don't know personally, no.

Q What was the – well, did you give any description before the police actually arrived?

A Well, actually there was a worker there that had came in, he saw me running around and I told him what happened and what the guy looked like, and he ran after him. So –

Q And who was that man?

A His name was Julio, and that's a possibility that, from what I understand, he was the one that called, too.

Q So, was that before or after you talked to your manager?

A It was after – I'm not sure.

Q Okay. So, you talked to your manager and you talked to Julio, you're not quite sure the order, is that correct?

A I talked to Julio first, but – no, I don't remember the order.

Q And then you went back out to the front of the building, is that right?

A Right.

Q To see if you could see where the person had gone?

A Yes.

Q And when you go out the front, you're heading east, is that correct, to go through the archway towards I-15?

A Excuse me, would you repeat that?

Q Let me start again. When you go through this archway that's in the front of the Parkway Inn –

A Right.

Q – if you're going through that, you're facing towards the east, is that correct?

A If you drive through that, you're going to the south, so you would be headed south, I think.

Q Doesn't the archway face on I-15?

A Yeah, it does.

Q And then I-15 runs to the east of the Parkway Inn, is that correct?

A Right.

Q So then, you went out through the archway, and did you actually go to the north or did you just look to the north at that point?

A I only looked at that point. When I left the manager's apartment, I only looked around the corner.

Q And when you say the corner, are you talking still in the front of the building or are you actually going around to the side?

A Behind the – no, behind the office. And I went around to the side of the office and looked around the side of the office to see if I could see Mr. Day and where he was going. I just seen him going between the laundry room and the building on the north side.

Q Okay, now where's the laundry room?

A It's right in front of the office. It's the other side of the archway.

Q And what direction was he heading in at that time?

A He was heading north. He was going around the building, so he would be heading towards I-15 and then he went straight over to Ali Baba and over towards the industrial buildings over there, across the street from Ali Baba.

Q So, you saw him come out the front and go – Ali Baba is the little street right to the north of the Parkway Inn, is that right?

A I didn't see him coming out of the front, I only seen him walking over between the buildings.

Q Okay, I'm sorry, I misstated. You saw him crossing Ali Baba, which is the street directly to the north of the Parkway Inn, is that correct?

A Yes.

Q And then you saw him going into an industrial area, did you say?

A Yes.

Q Into some buildings or just like lots, what are you talking about?

PLEADING CONTINUES IN NEXT VOLUME