

TT 11/12/03; wherein Van Ry cross-examines Detective Della, (Petitioner surveilled at Aussie Storage Unit on September 26, 2001; Page 129, Lines 4 - 20:

4 Q: And that's when you saw him taking something
5 from the van into the storage unit?
6 A: Yes
7 Q: It's not a crime to put something in a
8 storage unit, is it?
9 MS. RIGGS: Objection, it calls for a legal
10 conclusion.
11 THE COURT: The objection is overruled.
12 THE WITNESS: Just to put something in a
13 storage unit, no.
14 BY MR. VAN RY:
15 Q: Let's go to October 17th. And I believe you
16 testified that you saw my client pick up Mr. Bowman
17 around Third Street; is that correct?
18 A: Yes
19 Q: And then you testified that he went down to
20 Wal-Mart; is that correct?

TT 11/12/03; wherein Van Ry cross-examines Detective Della, as to Count IX, (Petitioner surveilled at Wal-Mart on October 17, 2001); Page 133, Lines 3 - 6:

3 Q: And you certainly didn't observe
4 Mr. Volpicelli put a UPC label on this bicycle tag, did
5 you?
6 A: I did not observe him in the store, sir.

TT 11/12/03; wherein Van Ry cross-examines Retail investigator Ellis, as to Count VI, (Petitioner surveilled at Lowes') on October 5, 2001); Page 152, Lines 2 - 9:

2 As you sit here you have no personal
3 knowledge as to who actually placed this other UPC label
4 over the existing label, do you?
5 A: No, Sir.
6 Q: So you can't say for certain that it was my
7 client that did that?
8 A: No, Sir.
9 MR. VAN RY: Thank You.

TT 11/13/03; wherein Van Ry cross-examines Detective Armitage, as to Count VIII, (Petitioner surveilled at Shopko on August 30, 2001); Page 39, Lines 13 - 19:

13 Q: Did you see Volpicelli take a Colorvision queen
14 size comforter out and remove it from --
15 A: No, I did not.
16 Q: Let me ask a better question. Did you see
17 Mr. Volpicelli remove a comforter from it's manufacturer's
18 package and put it into another?
19 A: I did not.

TT 11/13/03; wherein Van Ry cross-examines Detective Armitage, as to Count II, (Petitioner surveilled at Wal-Mart on September 4, 2001); Page 39, Lines 20 - 25; Page 40, Lines 1 - 25; Page 41, Lines 1 - 13:

20 Q: And let's finally get to the beginning of your
21 testimony where you testified about Northtowne
22 Wal-Mart. And what did you observe him in the
23 Northtown Wal-Mart?
24 A: September 4th.
25 Q: That September 4th, you observed Mr. Volpicelli
P.40
1 go to the sporting goods section of the store, is that
2 correct?
3 A: Yes
4 Q: And you followed him 20 to 30 feet behind?
5 A: Yes, Sir.
6 Q: As you walked into the store and the defendant
7 was in the store, you testified that he stopped and
8 looked at golf clubs and accessories, correct?
9 A: Correct
10 Q: And it appeared from your advantage point that
11 he was observing the label and the pricing information,
12 is that correct?
13 A: Yes.
14 Q: Observing pricing information isn't necessarily
15 a chargeable offense, is it?
16 MS. RIGGS: Objection. Calls for a legal
17 conclusion.
18 THE COURT: As I ruled yesterday, I will
19 overrule that objection. I'm not going to prevent
20 somebody from testifying as to a legal conclusion if it's
21 within their sphere of knowledge. And I would find that
22 this witness would know of these kinds of things.
23 THE WITNESS: Observing, no.
24 BY MR. VAN RY:
25 Q: How about writing down pricing information?
P. 41
1 A: Potentially, probably a crime.
2 Q: So you're saying if I walk in a Raley's, and I
3 write down price information for the milk and yogurt, and
4 I walk out of the store, that would be a chargeable

5 offense?
6 A: Not necessarily the pricing information, maybe
7 the bar code information.
8 Q: But you would need additional information?
9 A: Correct.
10 Q: But just by itself?
11 A: Correct.
12 MR. VAN RY: No further questions, Your Honor.
13 Thank you.

TT 11/13/03; wherein Van Ry cross-examines Detective Armitage, as to Count X, (Petitioner surveilled at Wal-Mart on October 17, 2001, in the presence of file with receipts, labels, and transposition list); Page 34, Lines 7 - 13:

7 Q: Do you know if there's been any DNA samples or
8 any way to identify who's possessed this in their
9 fingers?
10 A: No
11 Q: So you can't conclusively say that this has
12 been in my client's possession?
13 A: Correct.

TT 11/13/03; wherein Van Ry cross-examines Detective Armitage, as to Count IX, (Petitioner surveilled at Wal-Mart on October 17, 2001); Page 36, Lines 4 - 20:

4 Q: Did you actually see him, Volpicelli, place a
5 different UPC label on the tag of that bike?
6 A: I did not.
7 Q: So it's possible that between the time
8 Mr. Volpicelli left that area and Mr. Bowman came in and
9 approached that bike that Mr. Bowman placed that label on
10 there?
11 MS. RIGGS: Objection. Calls for speculation.
12 THE COURT: Well, we are limited to what this
13 witnesses knows. I sustain the objection.
14 BY MR. VAN RY:
15 Q: Let me ask you in a better way. Since you did
16 not see Mr. Volpicelli place a label, another or
17 different lable on that tag, is it possible for someone
18 else to have done it?
19 MS. RIGGS: Objection. Calls for speculation.
20 THE COURT: The objection is overruled.
21 THE WITNESS: Yes.

TT 11/13/03; wherein Van Ry cross-examines Detective Lodge, as to Count III, (Petitioner surveilled at Home Depot

on September 11 and September 19, 2001)); Page 50, Lines 14 - 20:

14 Q: Officer Lodge, sounds to me like you surveilled
15 my client and watched him walk into a store and walk out
16 without doing anything that would have been criminal, is
17 that correct?

18 A: At the time, sir, it didn't appear to be
19 criminal, no.

20 Q: Okay.

TT 11/13/03; wherein Van Ry cross-examines Detective Brown,
as to Count I, (Petitioner surveilled at Wal-Mart on September
28, 2001)); Page 57, Lines 7 - 25; Page 58, Lines 1 - 12:

7 Q: When you saw him inside the store, did you
8 observe him do anything that you would consider
9 inconsistent with someone who was a regular customer
10 inside of the store?

11 A: Looking at things on the shelves and writing
12 down whatever he was writing down was not something that
13 I considered normal.

14 Q: So you would say someone who went in to
15 comparison shop to write down prices would be
16 inconsistent with a regular customer?

17 A: It's not something I usually see people do.

18 Q: Little bit different question, same thing.
19 Based on your observations, was there enough to charge
20 him with a crime?

21 A: No

22 Q: And during the time of this surveillance you
23 didn't see him purchase anything, did you?

24 A: Not that I can recall.

25 Q: Okay. And I know that was repeated, kind of my
P. 58

1 fault there. A question you already answered.

2 You did not see my client adhere or affix any
3 any UPC labels to any labels on merchandise in that store,
4 did you?

5 A: In the store on Kietzke?

6 Q: The store you were just testifying about, the
7 Home Depot?

8 A: No

9 Q: Okay. And you did not observe my client
10 actually carrying the UPC label maker with him when he
11 went into the Wal-Mart, did you?

12 A: No

TT 11/13/03; wherein Van Ry cross-examines Retail Inves-
tigator Danielson, as to Counts II, V, VII, and IX, (Petitioner
surveilled at Wal-Mart during September/October, 2001); Page

71, Lines 2 - 10:

- 2 Q: Is it against Wal-Mart's policy to allow
3 customers to come in and do price checking on the
4 information that is listed on the price of the items?
5 A: No
6 Q: So I ask that in a positive better question, I
7 kind of muddled through that.
8 So it is allowable for customers to come into
9 Wal-Mart to check pricing information?
10 A: Yes, sir.

TT 11/13/03; wherein Van Ry cross-examines Retail Investigator Mowry, as to Count VIII, (Petitioner surveilled at Shopko on August 30, 2001 and October 17, 2001; Page 79, Lines 15 - 22:

- 15 Q: Mr. Mowery, as you observed that Sonicare
16 toothbrush in the packaging and the label that's affixed
17 over the box UPC label, isn't it true that you have no
18 personal knowledge of how it got there?
19 A: How it was affixed to the box, that's correct,
20 No, I have no idea.
21 Q: And you have no idea who may have done that?
22 A: No.

TT 11/13/03; wherein Van Ry cross-examines Detective Thomas (Case Agent), as to Counts I through X, (Petitioner surveilled at sundry retailers from August 30, 2001, through October 17, 2001); Page 133, Lines 13 - 23; Page 142, Lines 14 - 22:

- 13 Q: During the multiple days, and I believe you
14 said it was eight days that you followed my client, is
15 that correct?
16 A: That's correct.
17 Q: Did you ever see Mr. Volpicelli use Exhibit 9,
18 that label maker?
19 A: I did not.
20 Q: At any time during your surveillance did you
21 see Mr. Volpicelli affix a UPC label to merchandise in a
22 store?
23 A: I personally did not.
P. 142
14 Q: Just one question. It wasn't a crime on those
15 days when Mr. Volpicelli walked into those stores without
16 Mr. Bowman, was it?
17 A: It wasn't a crime to walk into the stores --
18 Q: Correct
19 A: -- without Mr. Bowman.
20 Q: And then to walk out?
21 A: That in itself does not show anything that's a
22 crime.

In addition, there was a lack of specificity, which precluded Petitioner's ability to defend the charges. Petitioner was prevented from being able to bring in witnesses to explain where he was, and why he was not with his co-defendant, BOWMAN. Hence, Petitioner was left with no ability to defend these charges.

It is patently clear from the testimony of Brett Bowman, that he did not meet Petitioner until June, 2001. There was not an overall agreement to achieve the objectives of one conspiracy. The dates charged by the prosecution demonstrate that Bowman acted alone on several of the alleged criminal activities. Therefore, there is insufficient evidence to support the conspiracy charge.

In this case, it was impossible for Petitioner to be indicted and/or convicted of a separate count for each activity, exclusive of one another, and/or separate from the conspiracy count. The counts are simply multiplicitous. Furthermore, the prosecution's theory of the case should be controlling. The prosecution charged Petitioner with a general conspiracy count. After that, the prosecution pieced each and every activity into a separate charge. Separate convictions for each activity are redundant and violate Petitioner's rights to be free from Double Jeopardy, and should be set aside by this Court.

Trial counsel was ineffective for allowing Petitioner to be subjected to the numerous multiplicitous and duplicitous charges as alleged by the prosecution. Petitioner has definitely been prejudiced as a result, as the subsequent multiple convictions prove. (See, Exhibit [**4] 2 letters to Jack Alian, Esq., dated 2/23/02 & 5/27/03, which were also sent to Van Ry, Esq., clearly emphasizing Petitioner's conviction of multiplicitous/duplicitous charges).

GROUND NINE

TRIAL COUNSEL WAS INEFFECTIVE FOR ALLOWING PETITIONER TO BE SUBJECTED TO A COMPLAINT/INDICTMENT AND SUBSEQUENT TRIAL BASED ON LESSER INCLUDED OFFENSES (WITH NO LESSER-INCLUDED INSTRUCTION TO THE JURY), THEREBY DENYING THE PETITIONER HIS RIGHTS TO EQUAL PROTECTION, A FAIR TRIAL, AND DUE PROCESS, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner was charged with a Conspiracy to Commit Crimes Against Property, (NRS 199.480, 205.060, 205.0832, 205.090, 205.110, 205.220, 205.240, 205.380, & 205.965), and multiple counts of Burglary (NRS 205.060), as well as a single count of Unlawful Possession, Making, Forgery, or Counterfeiting of Inventory Pricing Labels (NRS 205.965(2)(3)).

The above-noted charges are lesser-included offenses of each other, in particular, the Burglary charges are lesser-included offenses of each other with respect to the possession count under NRS 205.965.

To identify lesser-included offenses, federal courts follow the "elements" test. Under that test, an offense is not "lesser-included," unless: (1) the elements of the lesser offense are a subset of the elements of the charged offense; and, (2) it is impossible to commit the greater offense without first having committed the lesser. Schmuck v. United States, 489 US 705, 716, 109 Sct (1989). To be convicted of charges which are lesser-included offenses violated Double Jeopardy. Blockberger v. United States, 284 US 299, 52 Sct 180 (1932).

The elements test set forth in Schmuck requires a "textual comparison" of criminal statutes, an approach that we explained lends itself to certain and predictable outcome. Carter v. United States, 530 US 255, 120 Sct 2159 (2000).

It is at this precise juncture that Petitioner has been subjected to numerous convictions of Burglary which are a subset of the Conspiracy to Commit Burglary offense. Especially when taken into consideration that the alleged co-defendant, Brett Bowman, was never charged with Conspiracy, and/or many of

the alleged Burglaries.

Petitioner could not have committed the possession count under NRS 205.965. without committing the elements of the Burglary Offenses. If the prosecution's theory is to be taken as true, the testimonial evidence submitted at trial indicates that Petitioner was seen entering various retail establishments, "writing something down," - not a crime in itself. It was the Co-defendant, Brett Bowman, who testified that he entered the retail establishments and purchased the individual items, therefore committing the Burglaries and continued the Conspiracy.

It is clear from the record, and Brett Bowman's statements to RPD personnel, that Petitioner is not guilty of the numerous Burglary offenses, as his participation was nominal, at best, if Brett Bowman's testimony is to be believed.

Lastly, where the Court recognized in Keeble v. United States, 412 US 205, 212-213, 93 SCt 1997-1998, that where the jury may suspect that the Defendant is plainly guilty of some offense, but one of the elements of the charged offense remains in doubt, in the absence of a lesser-offense instruction, the jury will likely fail to give full effect to the reasonable-doubt standard; resolving its doubt in favor of conviction. Had counsel at least proffered the availability of a lesser-included-offense instruction, the Petitioner would have been potentially protected from any improper conviction. Schmuck, supra., at 1451.

Trial counsel was ineffective for failing to investigate into the facts surrounding the instant offense, and therefore, ineffective in allowing Petitioner to be subjected to such numerous and various offenses which are lesser-included of each other. Counsel was further ineffective for not, at the very least, proffering a lesser-included-offense instruction to the jury, in an effort to minimize the multiplicitous/duplicitous charging practice of the prosecutor, and to attempt to protect Petitioner from the same. As a result, Petitioner was prejudiced with multiple counts, multiple life sentences, and consecutive sentences.

GROUND TEN

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROTECT PETITIONER FROM SELECTIVE AND VINDICTIVE PROSECUTION, IN VIOLATION OF THE PETITIONER'S RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AND A FAIR TRIAL, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the entire judicial process in this case, the Prosecution sought to impose harsher and multiple penalties against the Petitioner for the fact that Petitioner insisted on his innocence, right to remain silent, and invoked his right to a preliminary hearing and a jury trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The Co-Defendant in this case, Brett Bowman, received a drastically reduced sentence under fewer imposed charges, in consideration for his testimony against Petitioner. Brett Bowman received one (1) felony conviction, serving 16 to 48 months of incarceration, versus Petitioner's multiple life sentences.

Central to this ground, the Petitioner notes that the Prosecution made the following statements:

Reno Police Department transcripts (hereafter 'RPDt') of 12/6/01; (Recorded testimonial, following Miranda, between Co-Defendant Bowman and Detective Thomas); Page 18, Lines 8 - 17: Exhibit ["*7"]

8 THOMAS: ... But the District Attorney's opinion is right now
9 that if he wants to play hard ball and he wants to
10 take this to a jury, then every time he
11 gets bound over on one of these cases, and I've got
12 about six (6) or seven (7) of em
13 right now, with about twenty (20) felonies facing
14 him, she's gonna be asking for the
15 twenty five (25) to life "bitch" every time. So.
16 That's what he's looking at. So we'll
17 see how much he really wants to play, if he wants
to risk that, as opposed to what
we're offering him. So, like I say, me talking to
you is really contingent upon him at
this point. If he wants to keep playing tough guy
and being an asshole, then I'll keep
charging him. But I may have to keep coming back
and talking to you and ah, piecing
together some more things.

RPDt 1/2/02, (Recorded testimonial, following Miranda, between Petitioner Volpicelli and Detective Thomas); Page 16, Lines 8 - 12, Lines 17 - 20, Lines 24 - 26, Lines 37 - 38, and Line 43; Page 17, Line 1: Exhibit [**8]

8 THOMAS: So her feeling right now is, fuck you.
9 You know? You want to play hard
10 ball? Fine, we'll play hard ball. Okay?
11 So, she's told me, "We're gonna start
12 filing the Intent to file the "big bitch,"
every time we bind him over on another
11 case. Every case that he gets bound over
on I'm gonna file the "big bitch" on
12 each one."
17 THOMAS: ...
18 ...You go to prelim, you get
bound over on those charges. Okay? Which
means now you got a trial date.
19 Right. After that prelim she's gonna file
her intent to file the "big bitch"
20 against you, which is basically ten (10) to
twenty five (25) years. Okay?
24 THOMAS: ...
25 And then we go to the next prelim and the
next case and you get bound over on
that one. Here it comes again, "I'm filing
the big bitch, ten (10) to twenty five
26 (25) years."
37 VOLPICELLI: ...
38 I know you've had discussions. What does
it look like that she's looking at?
What recommendation is she gonna make?
43 THOMAS: ...
P.17 ...she said, "Fine. Fuck him.
1 We'll start filing the big bitch."

RPDt 1/3/02, (Recorded testimonial, following Miranda, between Co-Defendant Bowman and Detective Thomas); Page 7, Lines 40 - 43; Exhibit [**9]

40 THOMAS: ... Cause I told him,
41 if he starts screwing with us and he wants
to keep dragging this thing out and doing
42 things like that, then we're just gonna start
filing the habitual criminal on him and he
43 can start looking at ten (10) to twenty five
(25). So that's his choice. You know?

RPDt 2/19/02, (Recorded testimonial, following Miranda, between Co-Defendant Bowman and Detective Thomas); Page 28, Lines 13 - 14: Exhibit [**10]

13 THOMAS: Oh yeah, if he wants to play we're gonna play.
14 And he's gonna go away for a lot
longer than that. So, you know.

The above-listed taped discussion evinces investigational and prosecutorial Conspiracy to violate the Petitioner's Constitutional Rights with Ad-Books (additional charges) and sentencing enhancements (i.e., the habitual criminal enhancement), solely due to Petitioner exercising his rights to preliminary hearing (binding-over), and a jury trial.

The Ninth Circuit Court of Appeals held in US v. Van Doren, 182 F3d 1077 (9th Cir, 1999):

Vindictive prosecution occurs when a prosecutor brings additional charges solely to punish a defendant for exercising a constitutional or statutory right, such as a criminal defendant's right to a preliminary hearing or jury trial, (i.e., Due Process).

Clearly, the prosecution was prejudicial and vindictive in their acts and prosecution of Petitioner; as there existed a Co-Defendant who admitted to more culpability in the instant offenses. In addition, Co-Defendant Bowman had an equal number or more, of prior felony convictions, thereby qualifying him as a more suitable candidate for sentencing under NRS 207.010 (Habitual Criminal Statute).

The Ninth Circuit Court of Appeals has held in US v. Noushfar, 78 F3d 1442, 1446 (9th Cir, 1996), that:

A prosecutor violates due process when he brings additional charges solely to punish the defendant for exercising a constitutional or statutory right. To establish a claim of vindictiveness, the defendant must make an initial showing that the charges of increased severity were filed because the accused exercised a statutory, procedural, or constitutional right, in circumstances that give rise to an appearance of vindictiveness.

As the statements of the prosecution are a clear indication of vindictiveness against Petitioner for invoking a constitutional right, Petitioner has met his burden, as outlined in US v. Noushfar, supra., and Petitioner's conviction should be vacated.

GROUND ELEVEN

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROTECT PETITIONER FROM THE ADMISSION OF IRRELEVANT TESTIMONY AND PERJURED TESTIMONY AT TRIAL, THUS DENYING PETITIONER DUE PROCESS, EQUAL PROTECTION, AND A FAIR TRIAL, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Trial counsel was ineffective under the guarantees of the Sixth Amendment to protect Petitioner from a plethora of irrelevant and perjured testimony at trial. It appears from the record, that counsel was: (1) ineffective in failing to utilize prior testimony of Brett Bowman; or, (2) counsel failed to investigate and secure transcripts of Brett Bowman's prior statements to police; or, (3) the prosecution may have failed in providing exculpatory evidence to counsel, prior to trial, in the form of transcripts of Brett Bowman's police interrogation.

The following excerpts are from Trial Transcripts (tt) and Reno Police Department Transcripts (RPDt), post-Miranda, and are examples of perjured and/or inconsistent testimony from the onset of the arrest, at the indictment, and later, at trial:

tt 11/12/03, District Attorney probes Co-Defendant Bowman;
Page 217, Lines 10 - 12:
10 Q: Were you threatened or promised anything in
11 exchange for your plea or your testimony here today?
12 A: No.

and
RPDt 12/3/01, Co-Defendant Bowman and Detective Thomas;
Page 1, Lines 5 - 22: Exhibit [**6]
5 BOWMAN: And I was promised (Inaudible) never find
6 that out, till we got to court.
7 THOMAS: Who were you promised that by?
8
9 BOWMAN: The detective.
10
11 THOMAS: Okay. I watched that interview tape and
12 never once heard that mentioned. Okay? I
13 never once heard that mentioned.
14 BOWMAN: It was said out in the corridor.
15
16 THOMAS: Well
17

18 BOWMAN: at Ferrill would never find out (Inaudible).
19
20 THOMAS: Well, that's water under the bridge now.
21
22 BOWMAN: Yeah

and

RPDt 12/6/01, Co-Defendant Bowman and Detective Thomas;
Page 10, Lines 9 - 17:

9 THOMAS: I have an obligation. Okay? It's not that
10 you know, if you tell me that stuff is stolen
11 that you and Volpicelli went out and did that
12 stuff, we have a deal in place. I can't
13 charge you with anything else. Okay? The
14 District Attorney has told me, "He's
15 cooperating. Don't charge, don't file any more
16 cases on him. If he tells you that he
17 did this and he did that, we can't charge him
at this point." Okay? The only way we
can start charging you again if you suddenly
get uncooperative and the district attorney
says, "You know what? He's being an asshole
again and all bets are off." Okay? So
that's kind of where we're at. So I'm telling
you, if I find anything in your apartment
that's stolen or that I think you bought with
Volpicelli, I can't charge you with it.

and

RPDt 1/3/02, Co-Defendant Bowman and Detective Thomas;
Page 11, Lines 15 - 16:

15 BOWMAN: They offered us a deal right, and, cause I was
16 gonna, I was probably gonna be faced
with twenty five (25) to life over this.
* * * *

tt 11/12/03, wherein Van Ry, Esq. cross-examines Co-Defendant
Bowman; Page 226, Lines 1 - 11:

1 BY MR. VAN RY:
2 Q: Let's go back to your plea agreement. During
3 the course of the negotiations of your plea agreement,
4 which means that where you were to enter a plea in return
5 for some agreement by the State, was there a discussion
6 of the habitual criminal statute?
7 A: For me?
8 Q: um-hum.
9 A: no.
10 Q: That didn't come up?
11 A: No.

and

RPDt 12/3/02, Co-Defendant Bowman and Detective THOMAS;
Page 64, Lines 11 - 15:

11 THOMAS: I know you are, I know you are. How many
felony convictions do you have?
12
13 BOWMAN: Probably five (5) now.
14
15 THOMAS: Five (5)?

and

RPDt 1/3/01, Co-Defendant Bowman and Detective Thomas;
Page 11, Lines 1 - 18:

1 BOWMAN: That's the way it'll look, you know. I'm being
2 hit with a burglary and I told her, "I'm
3 being hit with a burglary." And she goes, "I
4 don't believe it. (Inaudible) changing
5 price tags."
6 THOMAS: Um hmm.
7 BOWMAN: And you know?
8 THOMAS: Okay. Well as long as you were, you know,
9 honest with her, what you told her.
10 BOWMAN: I told her (Inaudible).
11 THOMAS: I'll tell her the same thing, it won't be
12 any difference.
13 BOWMAN: They offered us a deal, right, and, cause I
14 I was gonna, I was probably gonna be faced
15 with twenty five (25) to life over this.
16 THOMAS: Yeah.
17 * * * * *

tt 11/12/03, wherein the District Attorney probes Co-
Defendant Brett Bowman; Page 180, Lines 5 - 6, 15 -
21:

5 Q: Did you ever go to the storage unit?
6 A: No, I did not..
...
15 Q: So is it fair to say, Mr. Bowman, that the
16 defendant wouldn't allow you to go to the storage shed
17 with him?
18 A: Yes.
19 Q: You weren't allowed to see where all the
20 stuff was kept?
21 A: No

and

RPDt 12/3/01, Co-Defendant Bowman and Detective Thomas;
Page 51, Lines 38 - 41:

38 THOMAS: Would it be your opinion that everything in
39 the storage unit came from merchandise
40 like this that was probably bought fictitiously
41 or fraudulently?

41 BOWMAN: Ah, probably a good ninety percent (90%) of it.

and

AFFIDAVIT OF TRAVIS ALEXANDER VOLPICELLI, Page 1, Lines
10 - 12:

10 ...That on one occasion in particular, I observed
11 Bowman accessing the Aussie
12 storage unit belonging to my sister-in which my father
was not present and Bowman was
accompanied by another gentleman in a pick-up.

* * * * *

tt 11/12/03, wherein Van Ry, Esq. cross-examines Co-Defendant Bowman; page 224, Lines 8 - 12:

8 Q: During this time in the summer to the fall of
9 October, excuse me, of 2001, did you have access to a
10 computer?

11 A: No, I did not.

12 Q: You did not?

and
See Exhibits: [**11] Ridge House Letter, dated 1/7/04

and
AFFIDAVIT OF TRAVIS A VOLPICELLI, dated 4/21/04, Lines
7 - 10: Exhibit [**12]

7 That thereafter, I sporadically observed email communi-
8 cation between my father and Bowman
9 on my computer.

9 That I distinctly recall Bowman's unique domain name as
10 being listed at Yahoo and included his
year of birth.
* * * * *

tt 11/12/03, wherein District Attorney probes Co-Defendant
Bowman; Page 198, Lines 13 - 17:

13 Q: Sir, you said that Mr. Volpicelli did place
14 the UPC tag on this bike. Where was that located
15 specifically?

16 A: It was located specifically on the bar that
17 holds the seat to the bike.

and
RPDt 10/17/01, Co-Defendant Bowman and Detective Brown;
Page 13, Lines 17 - 35: Exhibit [**5]

17 BROWN: Okay? Now remember what I just told you again.
Just go back and describe the transaction.
18 with this bicycle, at the counter with the clerk.
19

20 BOWMAN: Okay. The transaction went, I walked up, I tore
off the bar code that was on the bike.
21 Right? I handed it to her. Right? She scanned
it. I paid for it. We talked about, she
22 asked me would the Security need to come up and
ah, clear this bike and she asked to
23 (Inaudible) right and I said no.
24

25 BROWN: Okay.

26
27 BOWMAN: As long as I had the receipt I didn't (Inaudible).
28

29 BROWN: Go back to where did you get the bar code from.
30

31 BOWMAN: I tore it off the, it was already on the bike.
32

33 BROWN: Where was it on the bike?
34

35 BOWMAN: the step of the bike, right front step.

and

RPDt 12/3/01, Co-Defendant Bowman and Detective Thomas;
Page 29, Lines 12 - 25:

12 BOWMAN: That's why I was getting so highly upset, cause
13 of (Inaudible) he's supposed to go in
and set it up, right, I was just supposed to go
in and buy it.

14
15 THOMAS: Okay.

16
17 BOWMAN: After that, I was getting ready to say something
to him that night. When we was
18 getting ready to leave ah, right ther, as we was
leaving Walmart with the bike, right,
19 he wouldn't even set that up.

20
21 THOMAS: Um hmm.

22
23 BOWMAN: Right? i was gonna tell him, "Look buddy, you
know, (Inaudible) you're supposed to
24 set it up, right?" I was gonna tell him right
flat out that I was gonna, I was done
25 running the bar code.

* * * * *

tt 11/24/03, wherein District Attorney probes Bowman;
Page 158, Lines 18 - 20, and, Page 160, Lines 16 - 19:

18 Q: What generally did he ask you to do?

19 A: To buy the merchandise after he placed a
20 fraudulent bar code on the merchandise.

...P.160

16 A: The original agreement was that he'd go in
17 the store, place the UPC bar code on an item and I'd come
18 in the store afterwards or a day later and purchase the
19 item.

and

RPDt 12/3/01, Co-Defendant Bowman and Detective Thomas;
In re: Count VII at Wal-Mart; Page 17, Lines 11 - 15, and
25 - 35; also, Page 19, Lines 15 - 17, and Page 20, Lines
37 - 43:

...P.17

11 BOWMAN: That was all me. That was when I went in. I
put the label on it and ah...

12
13 THOMAS: Which store?

14
15 BOWMAN: Walmart.

...
25 THOMAS: What was the name of the home entertainment
center, do you know, the brand name?

26
27 BOWMAN: Panasonic. Cause we specifically asked for one.

28
29 THOMAS: Okay. So did he go inside and do the bar code
switch?

30
 31 BOWMAN: No.
 32
 33 THOMAS: Huh? You did?
 34
 35 BOWMAN: I did.
 ...P.19
 15 THOMAS: So you had the bar code when you went into the
 store?
 16
 17 BOWMAN: Ah huh (affirmative).
 ...P.20
 37 THOMAS: Okay. Well at the Lowe's, did he have the bar
 code, or did you?
 38
 39 BOWMAN: The one where I bought the rug?
 40
 41 THOMAS: Yeah.
 42
 43 BOWMAN: Where I actually bought the rug, right? No,
 I had the bar code.
 * * * *

tt 11/12/03, wherein Van Ry, Esq. cross-examines Co-Defendant
 Bowman; Page 224, Lines 5 - 7:

5 Q: Have you ever purchased a Brother label maker
 6 at a Staples in California?
 7 A: No, I have not.

and

RPDt 12/3/01, Co-Defendant Bowman and Detective Thomas;
 Page 66, Lines 3 - 9: Exhibit [**16]

3 BOWMAN: And I bought the one we were using.
 4
 5 THOMAS: You bought, he had you buy the one he was using?
 Was that a fraudulent buy?
 6
 7 BOWMAN: No. It was kind of legal. It was an actual buy.
 8
 9 THOMAS: It was a good, legitimate, okay. Where did you
 buy it?
 * * * *

tt 11/12/03, wherein Van Ry, Esq. cross-examines Co-Defendant
 Bowman; Page 222, Lines 9 - 19:

9 Q: Did the detectives in this case ever assist
 10 you in obtaining a paycheck from the Sands?
 11 A: No
 12 Q: So your testimony is you never received
 13 assistance from the detectives in this matter to receive
 14 your paycheck from the Sands?
 15 A: To receive my paycheck?
 16 Q: Right.
 17 A: That's correct.
 18 Q: So that would be a no, it didn't happen?
 19 A: It didn't happen.

and

RPDt 1/3/02, Co-Defendant Bowman and Detective Thomas;
Page 14, Lines 8 - 9; and, Page 15, Lines 4 - 6: Exhibit G

8 BOWMAN: If you do (Inaudible) I've got two (2) paychecks
9 from the Sands sitting in my
property. They're gonna be expired.

...P.15

4 THOMAS: ...So I'll have to arrange to (Inaudible) get
em endorsed. But
5 let me talk to a deputy and find out exactly if
that's the way to go about doing that.
6 And I'll see what we can do.
* * * * *

tt 11/13/03, Van Ry, Esq. cross-examines Detective Thomas,
in re: Bowman's apartment property; Page 135, Lines 17 -
19, and, Page 136, Lines 14 - 23:

17 Q: Was there a search done of Mr. Bowman's
18 apartment?

19 A: Yes.

...P.136

14 Q: Did you try to compare any of the items in his
15 apartment with receipts you found in the accordion
16 folder?

17 A: I did not. Again, the only one would have been
18 the stereo system.

19 Q: Why did you not follow up on that stereo
20 System?

21 A: Again, it just didn't strike me as a new system
22 or didn't pique my interest at all to even attempt to
23 compare it. I wasn't concerned about it.

and

tt 11/13/03, wherein District Attorney probes Detective
Thomas; Page 140, Lines 20 - 25, and, Page 141, Lines 1 - 5:

20 Q: Detective, you just testified that you found
21 one item of electronic equipment in Brett Bowman's
22 apartment, is that true?

23 A: That's correct.

24 Q: It didn't raise your suspicion, it didn't seem
25 to be a super high-end item?

...P.141

1 A: I wasn't even convinced it was new. I didn't
2 know how old it was.

3 Q: And you basically weren't interested in it,
4 correct?

5 A: Correct.

and

RPDt 12/6/01, Co-Defendant Bowman and Detective Thomas;
Page 6, Lines 23 - 27 and 42; Page 7, Lines 32 - 33; and
Page 9, Lines 31 - 36:

23 THOMAS: In your phone call you described a home theater
24 system that was fairly new. Was that
one of the home theatre systems that you guys
went out and bought?

25
26 BOWMAN: No, it's my TV, my ah, surround sound and VCR,
or not VCR, ah, VCR and ah, CD
27 (Inaudible).

...

42 THOMAS: Okay. You said it was all and new is all.

...P.7

32 THOMAS: Okay. Well you also indicated in your phone call
33 that ah, you know, you didn't want
to talk about anything on the phone, that you'd
explain everything in a letter.

...P.9

31 THOMAS: ...I'm
32 interested in the stuff that you described on the
phone to your sister, the home theater
33 system and the way you explain it, which sounds
very similar to what you guys were
34 out buying. Okay?

35

36 BOWMAN: Oh that was what we were out buying, yeah.

and

RPDt 12/6/01, Co-Defendant Bowman and Detective Thomas;
Page 7, Lines 1 - 9:

1 BOWMAN: it was brand new, yeah. I bought it over a
period of time.

2

3 THOMAS: Okay.

4

5 BOWMAN: While I was at the Ridge House.

6

7 THOMAS: Where did you buy it?

8

9 BOWMAN: I got it at Shopko and ah, I got the CD player
at ah, Walmart.

and

tt 11/12/03, wherein Van Ry cross-examines Co-Defendant
Bowman; Page 223, Lines 21 - 22, and, Page 224, Lines
2 - 4:

21 Q: Isn't it true that you kept a CD player?

22 A: Not to my knowledge.

...P.224

2 Q: Is it also true that you kept one of those home
3 theater systems we talked about?

4 A: No, it is not.

* * * * *

Brett Bowman's trial testimony is clearly false, as his state-
ments to detectives, closer in time to the actual occurrence of
the alleged offenses, are considered more trustworthy, i.e., the
police interviews at WCSO on 10/17/01, 12/3/01, 12/6/01, and 1/3/02.

A conviction based on perjured testimony is fundamentally
unfair. Plyle v. Kansas, 317 US 213, 63 SCt 177. The conviction
must be set aside if there is any likelihood that the false testimony
could have affected the judgment of the jury. Giglio v. United

States, 405 US 150, 92 SCt 763. In this case, the excerpts show subsequent changes in Bowman's testimony, once a deal was made, and on material issues relevant to the Petitioner's involvement with the alleged activities.

It is unclear from the record, whether trial counsel had possession of Brett Bowman's police interview transcripts, or whether the prosecution failed to provide the transcripts pursuant to Brady v. Maryland, 373 US 83, 83 SCt 1194.

Therefore, Petitioner presents the instant ground for relief as ineffective assistance of counsel and as prosecutorial misconduct for failing to provide aforementioned transcripts and knowingly allowing Bowman to enter the perjured testimony. "The Fifth Amendment guarantee of Due Process protects the Defendant from consideration of improper or inaccurate information." United States v. Tucker, 404 US 443, 92 SCt 589, 591 (1972).

Counsel has a duty to investigate or to make a reasonable decision that makes particular investigations unnecessary. Correll v. Stewart, 137 F3d 1404 (9th Cir, 1998).

An evidentiary hearing is necessary in regard to this issue to ascertain counsel's reasoning for failing to investigate, failing to properly cross-examine Brett Bowman utilizing the transcripts of his prior inconsistent statements, and/or the prosecution's reasoning for failing to provide the Brady material.

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GROUND TWELVE

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, EQUAL PROTECTION, AND A FAIR TRIAL, WHEN NOT OBJECTING TO THE PROSECUTOR'S VOUCHING FOR THE CO-DEFENDANT'S KNOWN-TO-BE PERJURED TESTIMONY, IN VIOLATION OF PETITIONER'S RIGHTS, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In addition to trial counsel failing to protect Petitioner from being subjected to known-to-be perjured testimony, aptly outlined in Ground Eleven, the Prosecutor was at all times, throughout the proceedings, in possession of same (specifically the RPD transcripts dated 10/17/01 through 2/9/02, and the accompanying video/audio cassettes, involving contradictory testimonies between investigators and Co-Defendant Bowman, as compared to later Indictment and Trial testimony). United States v. Aichele, 941 F2d 761, 766 (9th Cir, 1991). To this, it is a prosecutor's duty to 'refrain from knowingly failing to disclose that the testimony used to convict defendant was false.'

In view of the testimonial statements by Co-Defendant Bowman and investigators, contrasted with subsequent amended versions, almost two (2) years later at the indictment and trial, it is patently clear that the State knew, or should have known, that Co-Defendant Bowman's testimony, as well as Detective Thomas' testimony, were false on numerous materially relevant issues which were central in relation to Petitioner's involvement in the alleged crimes. This rule rests upon the public policy(-ies) against corruption of the truth-seeking function of the trial process. Giglio v. United States, 405 US 150, 92 SCt 763 (1972); and, NAPUE v. ILLINOIS, US 264, 79 SCt 1173 (1959).

Deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' Giglio v. United States, supra.; citing, Mooney v.

During closing arguments at Petitioner's jury trial, the prosecutor vouched for the prosecution's witness, Brett Bowman, the Co-Defendant in this action.

It is patently obvious that, had the jury been aware of the Co-Defendant's perjured testimony, the results of the trial would have been different. Central to this, Brett Bowman made numerous statements prior to trial, and at trial, which were inconsistent. Defense counsel successfully brought some out. The inconsistencies in Brett Bowman's testimony were not all brought out to the jury, however. Many more would have been brought out if Defense counsel had thoroughly reviewed discovery. Brett Bowman's credibility was a key prosecution element of the trial, as Bowman attempted to place all blame for all of the charged offenses upon Petitioner in exchange for a very minimal sentence, which Bowman eventually received. Therefore, Brett Bowman had a clear motive to lie to the prosecution and the Court, and defense counsel had a duty to bring forth all the false testimony.

As observed in Austin v. State, 87 Nev 578, 589, 491 P2d 714, 728 (1971), "Courts have long recognized not only that the uncorroborated testimony of an accomplice has doubtful worth, but that his incrimination of another is not corroborated simply because he accurately describes the circumstances thereof." The federal courts have held similarly in United States v. Laing, 889 F2d 281 (DC Cir, 1989), wherein, the Court noted that a person could be considered an accomplice to all charged offenses due to his testimony.

As for further prosecutorial misconduct, the District Attorney vouched for the truthfulness of Brett Bowman's testimony by offering excuses for his inconsistent statements, as follows:

MS. RIGGS: He's working. Even when he's incarcerated, he's working. And you saw how tired he was on the stand.

(Trial Transcripts, Friday, November 14, 2003, afternoon session, Page 214, Lines 2 - 3).

* * * * *

MS. RIGGS: Perhaps he didn't remember that he did or that Detective Thomas had gotten that for him. (Id., at Lines 12 - 14).

* * * * *

The prosecutor attempted to provide excuses for Brett Bowman's testimony, by saying he was "tired" or "had forgotten" facts.

A prosecutor may not express his opinion of the Defendant's guilt or his belief in the credibility of government witnesses. (Emphasis added). United States v. Molina, 934 F2d 1440 (9th Cir., 1991). Vouching is especially problematic in cases where the credibility of the witness is crucial, and in cases applying the more lenient "harmless error" standard of review. Courts have held that such prosecutorial vouching requires reversal. Molina, at 1445.

Petitioner's rights to a fair trial, due process, and equal protection of the laws, were violated by the aforementioned prosecutorial vouching. Petitioner received ineffective assistance of counsel, as guaranteed by the Sixth Amendment when trial counsel failed to object or request a jury instruction concerning the Co-Defendant's testimony.

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GROUND THIRTEEN

COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND ARGUE THAT WITNESSES ACTED AS POLICE AGENTS, WITH CONDUCT IN DISREGARD FOR THE PETITIONER'S FOURTH AMENDMENT RIGHT TO PRIVACY, IN VIOLATION OF PETITIONER'S RIGHTS TO DUE PROCESS, EQUITABLE JUDICIAL PROCEEDINGS, AND EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

If the Prosecution provided all relevant discovery, in accordance with the District Court's July, 2003 Order for full discovery reciprocity, specifically with respect to their investigations through the employees/owners of Aussie Storage; or, had counsel subpoenaed Aussie Storages records for unit B-114, the Defense would have possessed documentation wherein counsel could have argued effectively the fact that Aussie storage representatives acted as agents for the police.

On no less than two (2) occasions, and with no disclosure to the Defense, investigations, in concert with employees of Aussie Storage, breached not only the terms of the lease agreement for rental of unit B-114, but the Petitioner's Fourth Amendment right to privacy, created and sustained by said lease agreement.

Government investigators, under color of law, elicited unauthorized entry to the premises of Aussie Storage facility, and/or extracted privy information concerning the Petitioner and his family, absent the approval of a magistrate, (See Exhibits [**13].), including, but not limited to; (1) a handwritten memorandum, wherein Detective Della engages Aussie personnel; and, (2) a typed Aussie Storage memorandum, wherein it is noted that Parole and Probation entered the premises.

Said Lease Agreement expressly states, at numbered paragraph nine (9), in regard to the "RIGHT TO ENTER," that, "the occupant grants the owner or its agents... including police and fire officials, access to the premises upon three (3) days NOTICE to occupant.

On September 26, 2001, and again on October 7, 2001, Detective Della and an unidentified probation officer entered the premises, with no prior notification given to occupant, absent any exigency or valid search warrant, at the respective times noted in the accompanying Exhibits, illicitly obtaining Occupants'/Petitioner's privy information, and/or to park a government vehicle so as to block the Petitioner's storage unit (B-114). Such entering the premises without notification to occupant by the owners, at the request of the police, not only breaches the owner's contract with the Petitioner and his co-renters, but also puts the owners in league with police agents by virtue of this violation/breach, and thus makes the owners of Aussie Storage unit (and its representatives) agents of the police in breaching said contract. In working as agents of the police, Aussie storage representatives cannot, in the interests of Petitioner's Constitutional Rights, give consent to search the premises, or release/relinquish any information in regard to, or belonging to, the Petitioner without a valid search warrant.

As there was no valid search warrant at the point in time when law enforcement personnel first engaged Aussie Storage representatives, any information obtained from these representatives, or from officer presence on the premises, is therefore 'fruit of a poisonous tree,' for evidentiary purposes. Additionally, this information could not then be used as probable cause to obtain a search warrant, either. Thus, any and all information and/or items obtained from the Aussie Storage facility, whether from Aussie Storage representatives, office staff, or from the storage unit (B-114) itself, and the premises thereabouts, should rightfully have been dismissed and not used in trial, as it was obtained illegally and in violation of Petitioner's Constitutional Rights.

If the aforementioned documentation had been available to the Defense, or sought by counsel, the Defense would have been in a position to file a pleading for suppression of the entire contents of Unit B-114 at the Aussie Storage facility. Hence, either through the Prosecution's convenient cover-up of such exculpatory evidence, or counsel's failure to investigate or argue the same, the Petitioner was adversely prejudiced. Such conduct on the part of the Prosecution, with total disregard for the Petitioner's civil rights, was a violation thereof. Jiminez v. State, 775 P2d 694 (1989, Nev); and, Holyfield v. State, 711 P2d 834 (1985, Nev).

In United States v. Stevens, 601 F2d 1077 (5th Cir), the Court ruled that under certain circumstances, private actors may be transformed into government agents by virtue of their involvement in the prevention of crime. See, Estelle v. Smith, 451 US 454 (1981).

With the search and seizure of the Aussie Storage Unit's Unit B-114 contents, (In excess of 90% of the evidence in support of Probable Cause for the Indictment, and subsequent conviction on Counts I through X), the suppression of the same was paramount to a viable defense.

Pursuant to the Fourth Amendment, "issues concerning exigent circumstances, consent, and whether an individual is acting as an agent for the police, all present mixed questions of law and fact." State v. Miller, 877 P2d 1047 (1994, Nev).

Counsel's ineffectiveness in not thoroughly investigating allowed for the Prosecution's cover-up of exculpatory evidence, which adversely prejudiced Petitioner and violated Due Process, thereby mandating this Court's reversal of the conviction.

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GROUND FOURTEEN

COUNSEL WAS INEFFECTIVE IN NOT THOROUGHLY INVESTIGATING DISCOVERY AND ITS DEFICIENCIES PRIOR TO TRIAL, THEREBY NOT PROTECTING THE PETITIONER FROM INVESTIGATIONAL AND PROSECUTORIAL MISCONDUCT, IN VIOLATION OF THE PETITIONER'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND EQUAL PROTECTION, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Prior to trial, counsel did not sufficiently review the Discovery in its entirety, nor did he investigate Discovery issues related to Prosecutorial transgressions, so as to unveil the State's purposeful withholding of exculpatory evidence. In lieu, counsel relied solely on the Prosecution's file and representations by the District Attorney, with utter disregard for the Petitioner's concerns for Discovery deficiencies.

To this, Petitioner sought to bring this dilemma to the Court's attention, not only by advising counsel in writing, but again at the November 10, 2003, hearing to Confirm Trial, as evidenced by the following excerpts from the hearing transcripts.

At Page 3, Lines 19 - 24:

19 THE DEFENDANT: Well, I don't think we're
20 prepared to go to trial because I have some issues here
21 with respect to - -

22 THE COURT: I can resolve that very quickly,
23 then.

24. Mr. Van Ry, are you prepared to go to trial?

* * *

At Page 4, Lines 1 - 21:

1 MR VAN RY: By Wednesday, I will be prepared
2 to go to trial, Your Honor, yes.

3. THE COURT: Okay. Well, that takes care of
4 that issue. Your attorney is prepared for trial, so is
5 there anything else you want?

6 THE DEFENDANT: Well, we're deficient
7 discovery, and I've been waiting for two years for it,
8 and I don't understand why between now and Wednesday
9 that's going to change any. I'll be glad to address the
10 Court - -

11 THE COURT: Apparently the discovery is not
12 deficient or your counsel wouldn't be saying that he's
13 prepared for trial.

14 THE DEFENDANT: So when I get on the stand
15 and testify and I have -- and it comes out in Court that
16 I can't substantiate that claim because certain
17 documentation was not provided pursuant to the discovery,
18 then where are we left at?

19 THE COURT: I guess, you know, that's a

20 problem for further action, I guess. Should you wind up
21 being convicted, you can raise these issues posttrial.

At Page 7, Lines 3 - 24:

3 THE COURT: Mr. Volpicelli, do you want to
4 represent yourself in this case?

5 THE DEFENDANT: Your Honor, I never made any
6 reference to that effect. I think Mr. Riggs is referring
7 to a unilateral decision on the part of my counsel to not
8 pursue any -- what I feel are critical pretrial motions,
9 and it just represents, I think, a conflict of interest,
10 and with regards to the discovery, I was assured, by
11 virtue of the fact that the two of them were going to get
12 together, that the discovery would be in place, and then
13 when it finally did -- I did receive it, I reviewed it,
14 and it's still deficient, and I've been calling
15 Mr. Van Ry's office, apprising his office of that, and it
16 was just left at the hearing today, if I wanted to bring
17 it to your attention.

18 THE COURT: Well, as long as your counsel is
19 prepared for trial and he has the discovery that he finds
20 is complete and sufficient to proceed to trial, I'm not
21 going to go further into that issue, and if you don't
22 want to represent yourself, there may be nothing else for
23 us to discuss here.

24 Mr. Van Ry, do you --

At Page 8, Lines 1 - 12

1 MR VAN RY: I do have a real concern in that
2 regard because we are at such loggerheads in terms of
3 what my client perceives is discovery and what is
4 deficient and what I perceive is not deficient and
5 further inculpatory evidence that I didn't want to have
6 anywhere near this case. I'm concerned about that. I
7 think it might be best of Mr. Volpicelli represented
8 himself in that light because of the -- I mean, we just
9 view this case in two entirely different lights, your
10 Honor, and as you can tell, Mr. Volpicelli has his
11 opinion, and I have mine, and I'm not convinced that it
12 would be in his best interest for us to remain as a --

At Page 9, Lines 2 - 6:

2 THE DEFENDANT: Your Honor, this 4 November,
3 2003 letter that I sent to my attorney was in regards to
4 a letter that he sent me the prior day, on November 3rd,
5 and in that letter, if you could read the contents,
6 there's no indication of any viable defense strategy.

At Page 9, Lines 13 - 20:

13 THE COURT: I can't possibly imagine it's in
14 your best interest to be discussing, you know, your trial
15 strategy in front of the prosecutor.

16 THE DEFENDANT: I understand that, you
17 Honor, but the fact is the letter was just clearly
18 indicative of a conflict of interest and just doesn't
19 leave much to be desired and give me much confidence
20 going into a trial.

As a result, exculpatory evidence relevant to the Discovery was not available for trial. In addition, and at two (2) days before trial, counsel had not reviewed the case video and audio tapes, or subpoenaed critical documents and witnesses for effective cross-examination.

CASE In POINT.

If the Prosecution had not withheld exculpatory evidence in the way of property records relevant to the search and seizure of Bowman's property at the time of arrest, or had counsel investigated the same, via subpoena, the Court would have been made aware at trial of the blatant nexus of property seized from the Aussie Storage Unit and Bowman's Courtyard Center Apartment. This was a controverted matter at trial, in which such evidence was critical for the defense. Ground Eleven elaborates on this matter with reference to the inconsistent/perjured testimony of both Bowman and Detective Thomas.

If the Prosecution had not withheld exculpatory evidence, in the way of Wal-Mart's video surveillance of the "Bicycle Section" on October 17, 2001, and/or any and all surveillance videos of the retail parking lots, or within the store's respective sections on the days in which Bowman claims Petitioner accompanied him to Wal-Mart, Home Depot, as well as, Bed, Bath, & Beyond; or, had counsel subpoenaed same, it would have been clear to the Court the Petitioner was not observed within the stores or their respective parking lots, either with or without Bowman, or, ever involved with activity inconsistent with that of a regular customer.

If the Prosecution had not withheld exculpatory evidence, in the way of Reno Police Department's Daily Surveillance Log of Petitioner, for October 17, 2001, or had counsel pressed the Reno Police Department for the same, the Court would have been made aware that the surveillance of Petitioner, on said day, was not continuous.

In fact, as relevant to Count VIII, at Shopko, the lack of continuous surveillance prevented a valid chain of custody on one (1) or more comforters allegedly purchased at a reduced price and then seized later that same evening. This was critical to the Petitioner's defense in having possession of the different comforters in his vehicle. In essence, the lack of continuous surveillance by R.O.P. does not conclusively negate the Petitioner's exchange of said comforters at his mother-in-law's during that same day.

If, at the scheduled discovery meeting between counsel and the prosecution, the District Attorney had not withheld the written transcripts, transcribed from the Audio/Video tapes relevant to the Reno Police Department's post-Miranda interrogations of both Bowman and the Petitioner, or, had counsel thoroughly reviewed the audio/video tapes in their entirety, the Court would have been made aware of the blatant inconsistent/perjured testimony(ies), as to facts specifically material to the Petitioner's alleged involvement in the Counts.

If the Prosecution had not withheld exculpatory evidence, via not returning all the receipts seized in the investigations, and not merely releasing those the Prosecution selectively deemed appropriate for their case, or, had counsel subpoenaed retail transactions substantiating the Petitioner's family's legitimate purchases of items seized under the search warrant(s), counsel would have been in possession of indicia to support a contention that Petitioner's family rightfully owned the property items, over and above those cited in the indictment, all of which was returned to stores, absent a Court Order of Forfeiture.

Attempts by Petitioner to procure the replacement of said receipts while in custody, and after retailers purged their annual receipt databases, was no small undertaking. However, Petitioner gleaned

one (1) such receipt. See, Exhibit [**14] where, full price was paid for a KDS monitor seized from Petitioner's family's storage unit and which was returned, erroneously, to Wal-Mart.

To withhold exculpatable evidence is a violation of Due Process, and motive for doing so is immaterial. Brady v. Maryland, 373 US 83, 83 Sct 494.

The Prosecution must disclose all evidence favorable to the accused when evidence is material to either guilt or punishment. Evidence is material, for purposes of the Prosecution's duty to disclose exculpatory evidence, if there is reasonable probability that the result of the trial would have been different. United States v. Augurs, 427 US 97, 112, 96 Sct 2392, 2401-02 (1976).

Evidence that would enable effective cross-examination and impeachment may be material, and the Prosecution's non-disclosure of such evidence may deprive the accused of a fair trial. Passana v. State, 103 Nev 212, 213, 735 P2d 321, 322 (1989). Suppression of favorable and material evidence includes situations in which the state, although not soliciting false evidence, allows evidence to go uncorrected when it appears. Auson v. McKaskie, 724 F2d 1153 (1984).

* * *

Had counsel investigated the Discovery in its entirety, and not rely exclusively upon the Prosecution's file, evidence in support of the following issues would be a part of the Court record and likely would have affected the Jury's decision.

If counsel had investigated, via subpoena, a transaction involving the acquisition of the labeler by Bowman at a Staple's Store, either customer service documentation and/or store security surveillance tapes could have confirmed perjured testimony on the part of Bowman, and proven that he did, in fact, transact the labeler via an exchange - in direct contradiction to his testimony at trial.

shows the transaction for the purchase of the ~~seller~~.

If counsel had investigated, via subpoena, the records of the Ridge House, the Courtyard Center Apartments, as well as, Online Search Engine/Portal "YAHOO", the Court would have been made aware that Bowman prevaricated in not only having access to computers, but was sufficiently proficient on the internet and that he attended computer literacy classes. See, Exhibits ^{11, 12} Ridge House Letter, and Travis Volpicelli's AFFIDAVIT in support of the foregoing.

If counsel had investigated the whereabouts of, and compelled the appearance of, defense witness Travis Volpicelli, material fact inconsistencies relevant to Bowman's statements concerning access to the storage unit, Bowman's use of computers to communicate with Petitioner, as well as, Bowman's expressed need and desire to acquire a bicycle for transportation, would have been clarified for the Court's record. See, AFFIDAVIT of Travis Volpicelli, post-trial, 4/04.

In Thomas v. Lockhart, 738 F2d 304, 308 (8th Cir), the Court concluded that an attorney's performance was deficient where counsel relied solely on the Prosecutor's file, and where counsel refused to prepare a defense based on information, questions for witnesses, and so on, as requested by Petitioner in support of his innocence. Kirksey v. State, 923 P2d 1102, 1111.

Lastly, and most significantly, since INTENT is the key element in terms of the Petitioner's complicity with Bowman in the Burglary counts, if counsel had thoroughly investigated/reviewed the Reno Police Department incident reports, and effectively cross-examined Officers Brown and Teasley, the Court record would show, that relative to Count IX on October 17, 2001, (the Wal-Mart bicycle acquisition), Officer Brown purported:

"I returned to my vehicle and continued to monitor the activity of Volpicelli. He drives his vehicle toward the front of the store and let Bowman out of his vehicle. Bowman went into the store and was followed by other detectives."

See, Exhibit [**15] RPD Incident Report, 10/25/01, Page 2 of 3, Officer Brown, at Paragraph 4.

* * * * *

"And when Bowman was buying the bike, Volpicelli drove his vehicle through the lot and then out onto Virginia Street, where he drove North, eventually re-entered the parking lot and parked in a different space."

RPD Incident Report, 10/18/01, Page 6 of 7, at Paragraph 5.

* * * * *

Counsel was ineffective at cross-examination to not proffer the scenario on October 17, 2001, wherein, petitioner's conduct displayed an attempt to extricate himself from Bowman's intentions to commit Burglary. Petitioner's overt conduct to leave Bowman and to head home to Reno, and only circle back because Petitioner became aware of his vehicle being followed by RPD, is indicative of Petitioner not sharing the same 'intent' as Bowman:

- 1) Since an aider and abettor to a 'specific intent' crime must share the 'specific intent' of the perpetrator; See, People v. Beeman, 674 P2d 1318; and,
- 2) That a Burglary cannot be committed unless... 'specific intent' exists at the time of entry, and...the jury should have been so instructed; People v. Hill, 429 P2d 586; and,
- 3) An aider and abettor to a Burglary must therefore have a 'specific intent' to assist the perpetrator in gaining unconsented entry for the perpetrator to commit the crime. People v. Montoya, 874 P2d 903.

Petitioner's lack of shared intent is further substantiated by Bowman, himself, on December 3, 2001, (closer in time to the actual Incident, and prior to having motive to fabricate and amend his statements), whereas Bowman stated:

"...as we was leaving Wal-Mart with the bike, right, he (Volpicelli) wouldn't even set that up."
See, RPDt 12/3/01, Investigator Lodge and Bowman, Page 29, Lines 18 - 19.

Clearly, the foregoing statement by Bowman alludes to Petitioner's conduct evincing a lack of cooperation or involvement, or withdrawal from the alleged Conspiracy, specifically a lack of shared intent. Again, the intent is the key element to alleged aiding and abetting the commission of Burglary.

To this, there is ample case law, wherein mere presence and knowledge of (Bowman's) intentions are insufficient to convict aiding and abetting culpability. Tarney v. State, 512 P2d 923, 924. That if evidence of any conduct (by Petitioner) is at least consistent with innocence, as with guilt, it is insufficient to sustain a guilty verdict. United States v. Berger, 224 F3d 107, 108. That no subsequent conviction with possession of property allegedly stolen as a result of Burglary can make one guilty of Burglary who was not connected, conclusively, with the original intent to commit upon entry. See, Hensel v. State, 604 P2d 222, 239, at n.69.

That Petitioner's acts of abandonment or disassociation (in not tagging the bike and leaving Bowman, as well as the parking lot, in the direction of home) came before Bowman's act was put in progress of final execution (entering the threshold with intent). Said conduct thereby displayed overt renunciation of any criminal intent (on Petitioner's part). That to avoid jury instruction violation with respect to the intent element of Burglary, the correct instruction in this case was advisement by counsel to focus on the (Petitioner's) intent more than the nature of acts committed by Bowman. Haight v. State, 654 P2d 1232, 1242; and, People v. Beeman, 674 P2d 1318, 1326.

That, according to NRS 205:165, the jury instruction is to include 'a requirement that the Defendant only provide some evidence to dispute the presumed element of criminal intent.' Redford v. State, 572 P2d 219, 222.

That a withdrawal of criminal activity can be demonstrated by one's conduct of taking definite, decisive, and positive steps to show (Petitioner's) attempt to separate or extricate himself from the crime. United States v. Lothian, 976 F2d 1257, 1261 (9th Cir, 1992).

But for counsel's failure to investigate the foregoing issues, and to proffer the same at trial, Petitioner's rights to effective assistance of counsel, a fair trial, and due process of law, were breached irreparably.

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GROUND FIFTEEN

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO APPEAL THE DISTRICT COURT'S DECISION TO NOT QUASH THE INDICTMENT, AS WELL AS FOR FAILING TO INVESTIGATE AND PROFFER OTHER INDICTMENT DEFICIENCIES, IN VIOLATION OF THE PETITIONER'S RIGHT TO DUE PROCESS, EQUITABLE GRAND JURY PROCEEDINGS, AND EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On November 7, 2003, Judge Hardesty rendered a decision with the pleadings relevant to the Prosecution's introduction of improper evidence to the Grand Jury. Said decision, in part, acknowledged the prejudicial taint of the improper evidence, with a suppression of the same. However, that consideration was moot, as the Grand Jurors had already been unduly influenced in their decision in June, 2003.

Apparently, Judge Hardesty's decision to ~~not~~ quash the indictment, despite the prosecutorial transgression, was based upon the sentiment that the probative value of all the evidence outweighed the prejudice stemming from the violative conduct of the Prosecution.

Had counsel further investigated the indictment for deficiencies, the Court's decision may likely have been different.

Case and Point: The Prosecution also misled the Grand Jurors when the District Attorney, at the onset of the June 11, 2003, hearing, specifically instructed the Grand Jurors that Bowman was not a target of the indictment, (nor referred to as a Defendant), and in fact, a witness.

Grand Jury Indictment Transcripts ("GJIt"), June 11, 2003, Page 7, Lines 14 - 16:

14 Q: Do you understand that you are not a target of this
15 Grand Jury but are simply called here as a witness today?
16 A: I do.

Yet, with respect to Count VI in said Indictment, further prejudice to the Petitioner ensued when erroneous testimony, either inadvertently or by design, reached the jurors when Lowes' investigator, Mr. Ellis, stated specifically that the Defendant is identified

and observed in the core's surveillance video, transacting the alleged fraudulently acquired rug.

GJIt June 11, 2003; Page 112, Lines 1 - 8:

1 Q: Were you able to see in a security video tape this
2 purchase being made?

3 A: Absolutely, yes, ma'am.

4 Q: Can you describe the person who was making the
5 purchase of the video tape, male or female?

6 A: Certainly. It was a male subject. I had previously
7 not had the opportunity to ever see this person before. He was
8 identified by detective Thomas as the defendant.

At that point, it was only logical to presume that the Grand Jurors believed it was the Petitioner - and not witness Bowman. After all, only minutes prior to that statement, the Prosecution made it clear that Bowman was not the Defendant. Hence, prejudice was obvious with no admonition by the Court. And that, in front of the trial jurors several months later, Bowman testified that it was him who entered the Lowes in the video, with the UPC tag, and transacted the purchase.

This transgression by the Prosecution went unchecked by counsel and culminated in a violation of NRS 51.035(2)(b), wherein, said statute was designed to rebut charges, claims or fabrication of improper influencing after a prior (in)consistent statement was made. To this, the Court has held in Napue that the Prosecution's use of known false testimony at an indictment is grounds for a reversal of conviction. Napue v. Illinois, 79 SCt 1173.

Another indictment insufficiency occurred at said hearing when the Prosecution specifically instructed the Grand Jurors that the presence of the Labeler within the Petitioner's vehicle was a Burglary tool - of sorts - under NRS 205.080, and that the charge of the same constituted the "intent element" of all the Burglary-related counts.

GJIt, June 11, 2003; Page 5, Lines 13 - 15:

13 Also at the beginning of your packet you have NRS
14 205.080 which defines the crime of possession of instruments
15 with burglary as the intent.

If so, then logic dictates an insufficiency within the indictment, insofar as, instructions for the intent element of Burglary, when the Jurors posed a clarification inquiry and eventually issued a NO TRUE BILL for Count XI - NRS 205.080 - Possession of Burglary Tools.

21 GJIT, June 11, 2003; Page 145, Lines 21 - 23:
22 THE FOREMAN: We have one question we would like
23 explained, that is the definition of implements and adapting of tools for use of burglary and crimes.

* * *

15 GJIT, June 11, 2003; Page 146, Lines 15 - 21:
16 (Whereupon the Grand Jury deliberated.)
17 (Whereupon the Deputy District Attorney and the Court
18 Reporter re-entered the Grand Jury room.)
19 THE FOREMAN: We have returned a true bill on
20 Counts I through X and a no True Bill on Count XI.
21 MS. HIER-JOHNSON: In light of the Grand Jury's findings, I will strike Count XI from the Indictment.

* * * * *

Needless to say, a Beeman violation had occurred in this matter, wherein, 'errors in instructing on "intent" element necessary to convict of Aiding and Abetting the Commission of a Crime in an Indictment of at Trial were no harmless error when inadequately instructed jurors required clarification to Court indicating confusion on point.' People v. Beeman, 674 P2d 1318.

The next insufficiency clouding the Indictment involves either a variance or constructive amendment issue.

From the onset of the judicial proceedings, initial cases 02-0145 & 02-0146 (later supplanted with 03-1263 at Indictment) alleged similar crimes of Bowman and Petitioner, and specifically cited NRS 195.020. Yet, at the re-indictment, wherein 02-0145 and 02-0146 were stayed, NRS 195.020, which is critical to the Prosecution's theory of Petitioner's complicity with Bowman, is not specifically cited in the Indictment, Counts I through X, nor in the closing statements of the District Attorney within the Grand Jury Transcripts. Central to this deficiency, NRS 173.075 is clear in the requirement that the

Indictment or Information must state, for each count, the official or customary citation of the statute, rule, regulation, or other provision of the law, which the Defendant is alleged therein to have violated.

Then, to have effectively averted a variance or constructive amendment issue between the Indictment and when the Prosecution asked for a conviction of Petitioner under NRS 195.020, Aiding and Abetting, said statute should have been present within the Indictment. Otherwise, If the Grand Jurors entered a True Bill absent NRS 195.020 for each Count, and specific only to NRS 199.480, NRS 205.060, NRS 205.0832, NRS 205.090, NRS 205.110, NRS 205.220, NRS 205.240, NRS 205.380, and NRS 205.965, then accordingly, the District Attorney's request of trial jurors to convict, (In her closing argument at trial, relating Petitioner with culpability under NRS 195.020 relevant to all Burglary counts I through X), constituted a variance or constructive amendment to that of the Indictment. As such, Petitioner's substantial rights are affected since it shows 'prejudice to his ability to defend himself at trial, and to the general fairness of the proceedings or to the Indictment's sufficiency to bar subsequent prosecutions.' United States v. Hathaway, 789 F2d 902, 910 (1986).

In view of the foregoing additional deficiencies with the indictment, it is clear that the prosecution overreached the Grand Jury, even if unintentional, causing illicit influence with improper and multiple instances of such. The cumulative effect of this is patently prejudicial, and denied the Petitioner his Constitutional right to a fair Grand Jury proceeding, which is an integral part of the judicial mechanism.

The test with respect to inappropriate comments (or improper evidence) by the Prosecutor, is whether the comments so infected the Jurors with unfairness as to make the resulting Indictment a denial

of Due Process. Benn v. State, 111 Nev 1099, 9 P2d 676 (1995).

In addition, higher Courts have ruled that even if the District Court ruled there was a sufficient amount of evidence presented to the Grand Jury to sustain the Indictment, if there is evidence of other misconduct issues which together, clearly destroy the existence of an independent and properly informed Grand Jury, then the irreparable impairment of fairness compels a reversal of conviction. Vasquez v. Hillery, 106 SCt 617, 623. Furthermore, even if a Grand Jury's determination of probable cause is confirmed in hindsight by a conviction of the indicted offenses, that confirmation, in no way, suggests that the prejudicial taint of improper evidence, indictment deficiencies, and prosecutorial misconduct did not infect the framing of the proceedings to come. Id., at 623.

Hence, the District Court's denial to quash the Indictment was an improper and discretionarily abused use of its supervisory power to which, counsel should have immediately filed an appeal, inclusive of the aforementioned issues. Counsel's failure to do so was a violation of Petitioner's right to Due Process guaranteed by the State of Nevada's Constitution, as well as that of the United States of America.

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GROUND SIXTEEN

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, EQUAL PROTECTION, AND A FAIR TRIAL, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHERE AN ACTUAL CONFLICT OF INTEREST EXISTED BETWEEN PETITIONER AND TRIAL COUNSEL.

Prior to November 10, 2003, prior to trial, Petitioner notified the Trial Court of a conflict of interest with appointed counsel, Bradley O. Van Ry, Esq., to which counsel concurred. Petitioner informed the Court that counsel refused to discuss potential trial issues with Petitioner and refused to seek Discovery and/or investigate into evidence to be produced at trial in support of Petitioner's innocence. (See Ground Fourteen).

At said hearing, held on November 10, 2003, counsel informed the Court, "We are at such loggerheads." (Transcripts of Proceedings, November 10, 2003, Page 8, Lines 1 - 3). Counsel continues, "I think it might be best if Mr. Volpicelli represented himself..." Id. at Lines 6-8.

The Court erred in denying Petitioner's request for conflict-free counsel, and further, giving Petitioner the choice of keeping ineffective counsel, or representing himself - which would have been equally as ineffective. The Court applied the improper standard, and delineated as follows:

I'm not interested in Mr. Volpicelli's views
and decisions regarding trial tactics.

(Id. at lines 16 - 18).

Apparently, the Court was unaware of the United States Supreme Court holding in United States v. Teague, 953 F2d 1525 (11th Cir, 1992, wherein the Court held that a "defendant is the master of his own defense." By the Court's statement, it is clear that the Court did not take into consideration the drastic differences between counsel's and Petitioner's tactics and theories on how to defend

Petitioner at trial.

In Halloway v. Arkansas, 435 US 475 (1978), the United States Supreme Court held that counsel is in the best position to determine if an actual conflict of interests exists. In the instant action, as quoted above, counsel informed the Court that it would be best if Petitioner represented himself, that they were at "loggerheads." Thus, the Court erred in refusing to accept counsel's perception of his relationship with Petitioner.

Petitioner has the right to conflict-free counsel. See, Cuyler v. Sullivan, 446 US 335, 344 (1980); and, United States v. Cronin, 466 US 648, 662, n.31 (1984), wherein Petitioner need not show actual prejudice to require reversal of a conviction based on counsel being in conflict with his client's best interests.

This Court failed to make the proper inquiry into Petitioner's claim of conflict of interest, and failed to heed counsel's interpretation of his attorney-client relationship, in violation of Petitioner's rights to Due Process. See, Mickens v. Taylor, 535 US (2002).

Further, this Court failed to consider that, 'the client is the master of his own defense, even though the counsel serves as an advocate for his client.' And, By exercising the constitutional right to assistance of counsel, a Defendant does not relinquish his right to set the parameters of that representation. ABA Rules of Professional Conduct, Rule 1.2; and, United States v. Teague, 953 F2d 1525 911th Circuit, 1992). The Teague Court also reminds us that, Defense counsel bears the primary responsibility for advising the Defendant of his rights, the strategic implications of retaining or waiving those rights and the choices relating to each, and that it is ultimately for the Defendant to make the final decisions. See also, United States Constitutional Amendments 5, 6, & 14.

In the instant case, the Petitioner attempted to notify the Court of his conflicts with counsel, and the hopes that the Court would aid in rectifying these conflicts, which incidently rose to violations of Petitioner's 5th, 6th, and 14th Amendment Rights. However, rather than the Court appointing conflict-free counsel to the Petitioner, the Court forced Petitioner into a catch-22 situation in asking him to either proceed with conflict-laden counsel (in violation of said rights), or waiving his right to counsel under duress, a judicial practice specifically denounced in Jackson v. James, 839 F2d 1513, 1516 (11th Cir, 1998).

As such, Petitioner was forced to proceed to trial with an ineffective counsel, laden with conflict issues, in violation of Petitioner's rights, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner's subsequent conviction is thus, constitutionally infirm, AND MUST BE VACATED.

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PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING HEARING, WHEN TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT A HOST OF MITIGATING INFORMATION, THUS DEPRIVING PETITIONER OF HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AND A FAIR TRIAL, IN VIOLATION OF THE GUARANTEES OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATE CONSTITUTION.

At Petitioner's Sentencing Hearing, held on April 1, 2004, counsel failed to present available mitigating evidence in support of a lesser available sentence. Counsel failed to investigate the facts surrounding the instant offenses, and to present those facts as mitigating evidence at sentencing. Counsel failed to interview Petitioner's family, friends, etc., as well as present their testimony at sentencing.

Petitioner desired to have the following persons provide testimonial evidence to the Sentencing Court:

NAME:

RELATIONSHIP:

Kevin Sigstad	Employer While on Parole in 2001
Travis Volpicelli	Eldest Son
Ashley Shilling	Step-Daughter
Chanel Volpicelli	Daughter
James Brooke, Esq.	Family Attorney
F.J. Volpicelli, M.D.	Father
Robert Fahrendorf	Family Friend
Sandra Ruggiero	Former Manager/Employee
Stacy Ballard	Neighbor
Karen Volpicelli	Sister
Carl Jorgensen	Fellow Associate in Real Estate
Mark Volpicelli	Brother
Commissioner Morrow	Nevada Parole and Probation
Lori Inman (AKA Lori Volpicelli)	Former Spouse until 1997

* * * * *

The above-named persons were willing to provide the Sentencing Court with testimony of Petitioner's social, ethical, and moral background, in an attempt to humanize Petitioner before the Court.

In Lockett v. Ohio, 438 US 586, 98 SCt 2954 (1978), the United States Supreme Court held that:

Possession of the fullest information possible concerning the Defendant's life and characteristics... is highly relevant, if not essential, to the selection of an appropriate sentence.

The Nevada Supreme Court has held similarly in Brown v. State, 110 Nev. 846 (1994), where "defense counsel neither presented any witnesses to testify on Brown's behalf, nor did he 'present any evidence of mitigating circumstances in an effective manner.'" Id., at 851. The Court went on to indicate, "When a judge has sentencing discretion, as in the instant case, possession of the fullest information possible regarding the Defendant's life and characteristics is essential to the selection of a proper sentence." Id., at 851. Additionally, in Brown, supra., the Court further held that the District Court erred in denying Brown's Petition for Post-Conviction Relief based on his counsel's failure to call any witnesses on his client's behalf or to properly request that Brown's sentences be run concurrently.

The United States Supreme Court, in Commonwealth of Pennsylvania v. Ashe, 302 US 51, 58 S.Ct 59 (1937), held:

In the determination of sentences, justice requires consideration of more than particular acts by which the crime was committed, and that there be taken into account the circumstances of the offense, together with the character and propensities of the offender, and his past may be taken to suggest the period of restraint and the kind of discipline that ought to be imposed.

Furthermore, the United States District Court of Nevada agrees with the principles laid out by the State of Nevada, by stating that, "counsel's complete failure to present any argument or evidence that might have persuaded the Judge to temper the severity of his sentence is sufficient to undermine our confidence in the outcome." Butler v. Sumner, 783 FSupp 519, 522 (D.Nev, 1991).

The above-named witnesses would have provided testimony as to the morals, character, and social/work ethics, etc., of Petitioner, at the Sentencing Hearing. Counsel's failure to call the witnesses or to present their testimony in any manner, to the Court, prejudiced

Petitioner and resulted in ineffective assistance, as outlined in Strickland v. Washington, supra.

The primary purpose of the penalty phase is to ensure that the sentence is individualized, by focusing on the particularized characteristics of the Defendant. Brownlee v. Hale, 306 F3d 1043, 1074, (11th Cir, 2002); cf., Siripongs v. Calderon, 35 F3d 1308, 1316 (9th Cir, 1994), (Finding counsel is ineffective during the penalty phase when he fails to conduct more than a cursory investigation of a Defendant's background and makes no attempt to humanize him before a jury.).

Compounding counsel's failure to investigate and develop a positive mitigating case, counsel allowed the prosecution to admit unfounded statements and speculation without objection or attempts to prevent the admission of the prejudicial testimony.

The prosecution entered a photograph at the sentencing hearing that was not, and could not, have been produced by the Petitioner. In summation, the prosecution alluded that Petitioner had taken the photograph of himself while incarcerated in federal prison and commented that the time was "worth it."

The prosecution also offered the testimony of Detective Reed Thomas at sentencing. Detective Thomas made numerous statements of falsity which were based on pure speculation. Detective Thomas testified that Petitioner reaped monetary rewards of \$49,140.00 to \$93,000.00 annually, based on criminal activity. (Sentencing Transcripts, April 4, 2004, Pages 24 and 25). The prosecution also presented numerous instances of charged and uncharged offenses that went uncontested by counsel, such as the prosecution implying that Petitioner was making a living from criminal activity, and being unemployed. Petitioner can prove that the above-noted inferences

are false.

The record indicates that Petitioner had been under continuous imprisonment from 1997 until the present day, wherein he was initially sentenced to ~~tax~~ perjury in the federal court, followed by consecutive sanctions with the state.

Exhibit [**17] provides letters of support in regard to the character of Petitioner as a person in general, a citizen, a neighbor, an employer of a sole-proprietorship, sibling, son, and father - all of which tell a varied story than that of the Prosecution. However, said letters were amongst Petitioner's legal files, seized from the Aussie storage unit, and purposefully not released by the Prosecution until subsequent to the Petitioner's sentencing hearing. Again, exculpatory evidence was withheld by the Prosecution, despite Petitioner's protestations to counsel and to the Court. Potential witness and former employer, Kevin Sigstad, would have testified to Petitioner's employment while he was on parole in 2001, Petitioner having been employed as a Market Specialist from the onset of his release from custody, until the date of his arrest, October 17, 2001. He further would have verified that Probation Officers personally verified Petitioner's continuous employment and that they procured monthly documentation from Sigstad in support thereof.

Potential witness, Travis Volpicelli, as eldest son of the Petitioner, would have personally testified, in lieu of the accompanying Affidavit - after the fact, to the contradictions in Bowman's testimony, relevant to Petitioner's contact with Bowman, as well as to Bowman's access to the Aussie Storage Unit.

Potential witness, Ashley Schilling (Petitioner's step-daughter), and Chanel Volpicelli, would have substantiated as to their procurement and needs for renting a storage unit and bank safety deposit.

box with their respective returns from college during the summer of 2001, and with no undue influence by Petitioner.

Potential witness, Commissioner Morrow, as part of the tribunal for the State, in regard to parole revocations, would have testified that, after considering the presentations by probation officers and nearly a dozen law enforcement officers from the Reno Police Department, he concluded that the Petitioner was, at all times on parole, cooperative with probation and not in violation of associating with Bowman. But, most significantly, the taped hearing of October 16, 2002, specifically purports the Commissioners' findings that the Petitioner was guilty of "Laws and Conduct" violations relevant to case number CR02-0147, and that in regard to the instant case, (formerly 02-01254 and 02-0146), the Commissioner states the case 'lacks foundation.' Had counsel subpoenaed the tapes of the Revocation Hearing, the foregoing would also be a part of this Court's record.

Lastly, and with respect to the controverted 'photo' of Petitioner proffered at trial by the prosecution, potential witness, and former spouse, Lori Inman, would have testified that she did not send the photo to the Reno Police Department, thereby contradicting Detective Hopkins' testimony. She would also have testified that, in fact, said photo was taken at a visit when former employee, Ann Stanfill, visited Petitioner during his custody at Safford FCI in Arizona. Furthermore, that, unbeknownst to Petitioner, Stanfill was responsible for typing the statement "I'm too sexy for this place, just missing stores," and sending same to law enforcement, in retaliation to the Petitioner's filing of complaints against Stanfill and her mother with law enforcement agencies in Nevada and California, regarding the identity theft and fraud perpetrated by the foregoing individuals during Petitioner's incarceration.

Clearly, the aforementioned scenarios paint the Petitioner in

a different light, but for counsel's errors, the outcome of the sentencing hearing would have been different. The law in this context does not require certainty and prejudice is shown where there is a reasonable probability of a different result. Mayfield v. Woodford, 270 F3d 915, 936 (9th Cir, 2001). Petitioner has proved that evidence would have been presented, but for counsel's errors, that would probably have rendered a substantially different result at the sentencing hearing.

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GROUND EIGHTEEN

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE IN ALLOWING PETITIONER TO BE SUBJECTED TO SENTENCING UNDER NEVADA'S HABITUAL CRIMINAL STATUTE, AS SET FORTH BELOW, IN VIOLATION OF PETITIONER'S RIGHTS TO DUE PROCESS, EQUAL PROTECTION, A FAIR TRIAL, AND EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. THE TRIAL COURT DID NOT PROPERLY ADJUDICATE PETITIONER AS A HABITUAL CRIMINAL AND/OR DID NOT APPLY THE PROPER STANDARDS.

Petitioner was sentenced to numerous life sentences under the provisions of NRS 207.010. The Prosecution must provide proof of prior felony convictions to the sentencing court to properly impose NRS 207.010. The Prosecution offered: (1) A conviction for "aiding and abetting in the commission of an attempt to obtain money under false pretenses," (2/11/04), (2) A conviction for Burglary (1998), and (3) A United States District Court conviction for Tax Perjury (1997). None of the aforementioned offenses, or the instant offense, are violent crimes..

Pursuant to the Ninth Circuit holding in Walker v. Deeds, 50 F3d 670, 673 (9th Cir, 1995):

Moreover, if the trial Court had weighed Walker's prior convictions, under Nevada law, a prior conviction record for non-violent property crimes, "though reprehensible, simply doesn't warrant the harsh sanction available under the habitual criminality statute." Sessions v. State, 106 Nev 186, 789 P2d 1242, 1245 (1990) (per curiam). The Nevada Supreme Court has determined that it may be an abuse of discretion to adjudge a defendant a habitual criminal if his prior felonies are minor property crimes and remote in time, as such a ruling "serves neither the purposes of the statute nor the interests of justice." See, also, Clark v. State, 851 P2d at 428.

The Nevada Legislature and the Courts did not intend for non-violent property crimes to be sentenced under the habitual criminal statutes. Trial and Appellate counsel were ineffective for not presenting or preserving this issue and protecting Petitioner from

such an unjust implementation of a harsh sentencing scheme, in violation of his rights, secured under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

B. THE PRIOR CONVICTION OF FEBRUARY 11, 2004, WAS NOT "FINAL" FOR PURPOSES OF ENHANCEMENT, AND DID NOT PRECEDE THE PRIMARY OFFENSE.

The prior conviction used by the Court to determine the imposition of the Habitual Sentences in this case was not "final." The Judgment of Conviction considered and incorporated was entered on February 11, 2004 (Case # CRO20148), and was eventually appealed to the Nevada Supreme Court. (Docket # 42971). On 4/1/04, the Nevada Supreme Court had not ruled on the merits of the appeal. 'Final Judgment is a decision by the District Court that ends the litigation on the merits.' Williamson v. UNUM Life Ins. Co. of America, 160 F3d 1247 (9th Cir, 1998). The conviction must be deemed final after the end of the appellate procedure on the doubt phase of the trial. Brady v. Maryland, 83 SCt 1194; and, Gretzler v. Stewart, 112 F3d 992, 1004. Since a Judgment of Conviction is final only upon issuance of a Remittitur, (See, NRS 34.726), said alleged prior conviction is not final for enhancement purposes.

In addition, Nevada's habitual criminal statute, NRS 207.010, allows for the imposition of an enhancement penalty only upon the proof of prior convictions. The Judgment of Conviction utilized by the Prosecution, entered on February 11, 2004, was not prior to Petitioner's criminal arrest in October, 2001 for the primary offenses. Hence, it is being applied in an ex-post-facto manner. All prior convictions used to enhance a sentence must have preceded the primary offense. Brown v. State, 624 P2d 1005; and, Carr v. State, 620 P2d 869 (Nev, 1980).

Due to the fact that the evidence presented by the Prosecution, purported to be a valid Judgment of Conviction, not, in actuality, being a valid Judgment of Conviction (final), and not being a "prior" felony conviction, Petitioner's multiple life sentences must be vacated, and a new sentencing hearing held.

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GROUND NINETEEN

COUNSEL WAS INEFFECTIVE IN NOT PROTECTING PETITIONER FROM THE VIOLATION OF HIS EIGHTH AMENDMENT RIGHT TO BE FREE FROM CRUEL & UNUSUAL PUNISHMENT WITH SUCH HARSH SENTENCES, IN VIOLATION OF PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW, AS WELL AS A FAIR SENTENCING HEARING, AS GUARANTEED BY THE SIXTH, FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On April 1, 2004, Petitioner was sanctioned in this case to nine (9) LIFE sentences, consecutive to his other sentences, which he was already serving out through expiration. In view of this, and over four (4) years subsequent to the beginning of the judicial proceedings in this case, Petitioner has not even commenced with serving any of his LIFE sentences; meanwhile, accomplice Bowman has expired his sixteen to forty-eight (16 - 48) month sanction, much of which has been served at a restitution center, wherein he toiled as a baker at Baldini's Casino.

Yet, the Petitioner endures a MAXIMUM-custody environment, in custody at the likes of state prisons such as the Nevada State Prison (NSP) and High Desert State Prison (HDSP). Oddly enough, it was accomplice Bowman who admitted to more culpable conduct, coupled with possessing an equally-storied criminal history.

This apparent disparity attests to the Petitioner's claim of prejudicially harsh sentencing, to which counsel was ineffective at protecting the Petitioner from such CRUEL & UNUSUAL PUNISHMENT.

In support of this, Petitioner now proffers numerous cases, wherein the disproportionate sentencing clearly "shocks the conscience of reasonable people."

Firstly, and as previously addressed in the Ground relevant to the Habitual Criminal Statute, NRS 207.010 creates a unique possibility that a Defendant will receive one (1) or more LIFE sentences which are not proportionate to the crime(s) the Defendant is convicted of, and disproportionate to that of his accomplice. Alvarez v. People,

This disparity in sentencing occurred because the Habitual Offender Statute is highly punitive, coupled with an ambiguity concerning the ambit of criminal statutes, wherein the Legislature's intent for said sentencing enhancement is not followed.

On March 28, 1995, Governor Bob Miller, of Nevada, testified before the Nevada Assembly's Justice Committee on Comprehensive Criminal Code Reform regarding AB 317, which contained the provisions for NRS 207.010. Specifically, Governor Miller addressed the Bill's criminal statutory scheme, including the genesis of the Habitual Criminal Statute and the need "to attack the problem of violent crime." See Exhibit [**18]

The testimony in said Exhibit contains no less than six (6) references to the fact that AB 317 is DESIGNED TO ADDRESS VIOLENT CRIME AND VIOLENT CRIMINALS. In the 1995 and 1997 Legislative sessions, which addressed the language of violent crimes of offenders in the statute, no discussion could be found regarding the Legislature's intent to include the likes of minor property crimes, or in the Petitioner's case, specifically with regard to Count II and Count V, entering a retailer to document pricing information. Here, it is respectfully argued that the Nevada Legislature did not intend for the Petitioner's alleged crimes to be sentenced under the Habitual Criminal statutory sentencing scheme.

To this, the United States Supreme Court has noted that the punishment in a state prison for multiple LIFE terms might be so disproportionate to the offense as to constitute CRUEL AND UNUSUAL PUNISHMENT, and shock the conscience of the people. Solem v. Helm, 103 SCt 3004.

That, in fact, a sentencing proportionality analysis should be guided by objective criteria, including the gravity of the offense,

and the harshness the penalty, the sentences imposed on other criminals in the same jurisdiction, and the same sentences imposed for the same crime in other jurisdictions, as held in United States v. Wilson, 787 F2d 375, CA 8; State v. Perkins, 699 P2d 364, Ari; and, State v. Childs, 466 S2d 1363, App 3 Cir, La.

It is patently obvious, in the Petitioner's case, that the harshness of the punishment imposed is out of sync with the gravity of the offense, disproportionate to Accomplice Bowman's sixteen to forty-eight (16 - 48) months for Burglary, and other similar criminal matters in Northern Nevada, as well as other jurisdictions. See, Exhibit [**19]. This is not to mention the basis of which is a result of vindictiveness and abuse of discretion by the prosecution and the Court for Petitioner exercising his Due Process Rights. See, Ground Ten.

As noted in United States v. Driscoll, 761 F2d 589, CA 10, Colo, the punishment should fit not only the crime, but the offender as well. In determining whether a sentence is excessive, each case must be considered on its own facts, State v. Humphrey, 445 S2d 1155, La; Schultz v. State, 715 P2d 485, Okla Crim, and considering all the facts and circumstances. As further noted in the previous grounds, it is clear from the record that the Court did not consider other mitigating factors (of) the ineffective assistance of counsel, as well as the prosecutorial misconduct issues. Petitioner has also presented a clear case that, not only did the District Court abuse its discretion in sentencing him as an habitual offender, but the process used by the District Court violated his rights to Due Process and Equal Protection of Law, by failing to weigh all the circumstances, the non-violent nature of the prior felonies, the absence of conformance to standards for use of prior convictions,

as well as by investigating similarly situated cases in the same and other jurisdictions before making an adjudication of punishment.

Furthermore, and as mentioned herein, the United States Supreme Court has held that "as a matter of principle, all criminal sentences must be proportionate to the crime for which the Defendant has been convicted. Solem v. Helm, 463 US 277, 290 (1983). In that case, the Higher Court affirmed the District Court's finding that Helm's sentence was grossly disproportionate to his crime. The Court, further, stated it may be useful to compare the sentences imposed with the sentences imposed for other crimes; if more serious crimes merit the same or similar sentences, the sentence may be excessive.

The Nevada Supreme Court has held that there are three (3) basic tenets for determining whether a sentence constitutes CRUEL & UNUSUAL PUNISHMENT: In view of all the circumstances, (1) is the punishment of such character as to shock the conscience of reasonable people and to violate the principles of fundamental fairness? (2) Is the punishment clearly disproportionate to the offense (or the sanction of his accomplice)? and, (3) Does the punishment go beyond what is necessary to achieve the aim of the public interest as expressed by the Legislature? Workman v. Commonwealth, 429 SW2d 374, 378 (Ky Ct App, 1968), as cited in Nauvanath v. State, 779 P2d 944 (1989).

Whereas our Habitual Criminality Statute exists to enable the criminal justice system to deal determinably with career criminals who pose a serious threat to public safety. Odoms v. State, 714 P2d 568, 571-72 (1986, Nev).

That, as seen in Gaines v. State, 998 P2d 166 (2000, Nev), the Court stated, "It is a well recognized tenet of statutory con-

struction that multiple Legislative provisions be construed as a whole, and where possible, a statute should be read to give plain meaning to all its parts." The statutes should be read in per materia, and a construction should be adopted which operates in favor of life and liberty.

Lastly, and most significantly, as held in Speer v. State, 5 P3d 1063, Nev. and, Pelligrini v. State, 34 P3d 519 (2001, Nev.), "Courts are not at liberty to go fishing in the Legislative mind where the statute is clear and unambiguous."

With that said, and in view of the Nevada Legislature's intentions of directing the Habitual Criminal statutory Sentencing Scheme at violent criminals who are a threat to public safety, it is abundantly clear that the Petitioner's harsh sentences are grossly disproportionate to the crimes; and, not in the best interest of the system or society, and constituting CRUEL & UNUSUAL PUNISHMENT for the Petitioner. This is a clear violation under the Eighth Amendment to the US Constitution, to which counsel failed to protect the Petitioner from incurring.

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GROUND TWENTY

COUNSEL WAS INEFFECTIVE FOR NOT PROTECTING PETITIONER FROM PROSECUTION OF COUNTS II AND V, WHEREAS PETITIONER'S FIRST AMENDMENT RIGHTS WERE BREACHED, IN VIOLATION OF PETITIONER'S RIGHTS TO DUE PROCESS, FAIR TRIAL, AND EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE FIRST, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Due to trial Counsel's failure to object at the Indictment, and at trial, to the Prosecution of Counts II and V, Petitioner incurred multiple LIFE sentences, wherein NO crime was committed, and in violation of Petitioner's Civil Rights.

Testimonials throughout the Court proceedings established that the Petitioner was surveilled on September 4, 2001, and September 28, 2001, by Detectives Armitage and Brown, respectively.

Petitioner was observed, innocently gleaning information from retail items and shelves in Wal-Mart's Golf Club Accessories and Auto Alarms/Stereo sections on the above dates.

* * *

GJt, Detective Armitage, Page 102, Lines 9 - 12:

9 A: I watched him walk to the back of the store where car
10 stereos and car alarms are sold. And he was writing down
11 numbers while he was looking at some of the items that were on
12 the shelves.

* * * * *

GJt, Detective Brown, Page 55, Lines 4 - 5, 8 - 10:

4 Q: And the labels corresponding to which items?
5 A: It looked like the golf accessories.

8 A: At one point, I was less than ten feet from him.
9 Q: What were you doing?
10 A: I was feigning interest in an extremely small bicycle...

* * *

Retail investigators testified that the conduct of the Petitioner was not inconsistent with customers welcome and having lawful privileged entry.

* * *

Tt, November 13, 2003, Van Ry cross-examines Detective Danielson, Page 71, Lines 2 - 10:

2 Q: Is it against Wal-Mart's policy to allow
3 customers to come in and do price checking on the
4 information that is listed on the price of the items?
5 A. No
6 Q: So I ask that in a positive better question, I

7 kind of muddled through that.
8 So it is allowable for customers to come into
9 Wal-Mart to check pricing information?
10 A: Yes, Sir.

* * *

Detective Thomas, the Lead investigator, further testified that it was not illegal to enter the stores, absent Bowman.

* * *

Tt, November 13, 2003, Van Ry cross-examines Detective Brown, Page 142, Lines 14 - 23:
14 Q: Just one question. It wasn't a crime on those
15 days when Mr. Volpicelli walked into those stores without
16 Mr. Bowman, was it?
17 A: It wasn't a crime to walk into the stores --
18 Q: Correct.
19 A: -- without Mr. Bowman?
20 Q: And then to walk out.
21 A: That in itself does not show anything that's a
22 crime!
23 MR. VAN RY: Nothing further.

* * *

But, most significantly, counsel failed to inform the Court that, despite Law Enforcement's perceived criminal thoughts of the Petitioner on the above-listed two (2) days, there was not any nexus between the items specifically cited in the Indictment, seized under the Search Warrant, nor any transactions purported by Bowman or the Investigators, relevant to golf club accessories or auto alarms/ stereos.

Yet, despite the compelling evidence in favor of acquittal on said Counts, the Petitioner was found guilty. This finding is inconsistent with the facts of the case and the law. To this, the Nevada Supreme Court has ruled "committing a non-criminal act, with (or without) intent, is not a crime." Further, "that (perceived) thoughts alone do not constitute a crime." Childs v. State, 864 P2d 277.

In addition, provisions of 42 USC 2000(a)-1, guarantee that all persons are entitled to be free at any establishment or place from discrimination of any kind, on the ground of religion - INCLUSIVE of Freedom of Thought, which is protected by the First Amend-

ment.

Based on the convictions on Counts II and V, it appears discriminatory that, any time the Petitioner enters a retail establishment, regardless of the innocence of his conduct, he is in violation of NRS 205.060. This is unconstitutional, wherein a State's Law Enforcement can arbitrarily enforce a statute on the desirability of controlling a person's perceived private thoughts. Stanley v. Georgia, 89 SCt 1243, 1248. In said case, the United States Supreme Court declared that ... "the assertions that the State or its representatives have the right to control the moral context of a person's perceived thoughts - is wholly inconsistent with the philosophy of the First Amendment."

If intent is a state of mind, then it has the same protection as "Freedom of Religion," and the protection of the First Amendment is available, regardless of motivation or intent. LeBlanc-Streburg v. Fletcher, 781 FSupp 261, 266 (1991); and, Sustre v. Rockefeller, 312 FSupp 863, 865 (1970).

In which case, the Petitioner's conviction on Counts II and V were a breach of Petitioner's Civil Rights, and Counsel's decision to not protect Petitioner from such, constituted violations of Due Process and the right to Effective Assistance of Counsel.

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GROUND TWENTY-ONE

COUNSEL WAS INEFFECTIVE IN ALLOWING PETITIONER TO BE SUBJECTED TO PROSECUTION OF NRS 205.060 AND 205.965, WHICH ARE UNCONSTITUTIONALLY VAGUE UNDER THE DUE PROCESS CLAUSE, IN VIOLATION OF PETITIONER'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

NRS 207.010

Petitioner's convictions under NRS 205.060 and 205.965 are unconstitutional. Said statutes are unconstitutionally vague and overbroad, under both NOTICE and an ARBITRARY ENFORCEMENT ANALYSIS.

Grayned v. City of Rockford, 408 US 104, 108 - 109.

As referenced in GROUND TWENTY, wherein Petitioner's convictions for Counts II and V violated his First AMENDMENT rights, the above statutes fail to give fair NOTICE of the conduct proscribed or fail to provide explicit standards for those who enforce it, thereby allowing discriminatory enforcement.

CASE AND POINT.

The Nevada Supreme Court has held that, without defining the crime and understanding the proscribed conduct to persons of ordinary intelligence, there is no prosecutable offense. Childs v. State, supra., quoting Lyons, 105 Nev at 320, 775 P2d at 221.

CASE AND POINT.

At trial, counsel cross-examined Detective Armitage, and it becomes clear that said Detective discriminately assumes Petitioner's every entry into a retail establishment to "comparison shop" constitutes the intent to commit Larceny or a felony.

* * *

Tt, November 13, 2003, Van Ry cross-examines Detective Armitage, Page 40, Lines 1 - 25, and Page 41, Lines 1 - 13:

1 go to the sporting goods section of the store, is that
2 correct?

3 A: Yes.

4 Q: And you followed him 20 to 30 feet behind?

5 A: Yes, sir.

6 Q: As you walked into the store and the defendant
7 was in the store, you testified that he stopped and
8 looked at golf clubs and accessories, correct?

9 A: Correct
 10 Q: And it appeared from your advantage point that
 11 he was observing the label and the pricing information,
 12 is that correct?
 13 A: Yes.
 14 Q: Observing pricing information isn't necessarily
 15 a chargeable offense, is it?
 16 MS. RIGGS: Objection. Calls for a legal
 17 conclusion.
 18 THE COURT: As I ruled yesterday, I will
 19 overrule that objection. I'm not going to prevent
 20 somebody from testifying as to a legal conclusion if it's
 21 within their sphere of knowledge. And I would find that
 22 witness would know of these kinds of things.
 23 THE WITNESS: Observing, no.
 24 BY MR. VAN RY:
 25 Q: How about writing down pricing information?
 --- P.41
 1 A: Potentially, probably a crime.
 2 Q: So you're saying if I walk in a Raley's, and I
 3 write down price information for milk and yogurt, and
 4 I walk out of the store, that would be a chargeable
 5 offense?
 6 A: Not necessarily the pricing information, maybe
 7 the bar code information.
 8 Q: But you would need additional information?
 9 A: Correct.
 10 Q: But just by itself?
 11 A: Correct.
 12 MR. VAN RY: No further questions, Your Honor.
 13 Thank you.

* * *

Such arbitrary and discriminatory enforcement, as well as prosecution, under these two (2) Nevada statutes are unconstitutional.

To be prosecuted for NRS 205.060 and 205.965, upon the basis of an arbitrarily-ascribed intent by law enforcement, when an individual merely enters establishments or places open to the public, within the scope of 42 USC 2000(a) and 2000(a)-1, is repugnant to the Fourteenth Amendment to the United States Constitution. Said Amendment prohibits the State of Nevada from making or enforcing any law which abridges the privileges or immunities of citizens of this country.

Lastly, the arbitrary enforcement and prosecution of such exceeds the limit fixed by the Legislature, with regard to the extensions of the common-law scope of the Statute, as expressed in the file

of the enactment thereof. See, Laws of Nevada Fifty-Sixth Session, Chapter 547, Page 1161.

But for Counsel's failure to protect Petitioner's rights in this action, said ineffectiveness in representation falls below the objective standards of reasonableness.

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GROUND TWENTY-TWO

PETITIONER WAS DENIED HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, EQUAL PROTECTION, EFFECTIVE ASSISTANCE OF COUNSEL, AND A FAIR TRIBUNAL, DUE TO THE CUMULATIVE EFFECT OF ERRORS COMMITTED BY COUNSELS, THE PROSECUTION, AND THE COURT, RESULTING IN PETITIONER BEING CONVICTED OF MULTIPLE LIFE SENTENCES.

Petitioner's convictions and sentences are invalid under the Federal and State Constitutional guarantees of Due Process, Equal Protection, Effective Assistance of Counsel, and a Fair Tribunal, due to the cumulative effect of errors, as presented herein, such as in the admission of evidence, gross misconduct of the Prosecutor, and the systematic deprivation of the Petitioner's right to Effective Assistance of Counsel. The Government's case against the Petitioner is weak; the only substantial evidence submitted to convict Petitioner at trial was the highly-tainted, perjured testimony of a more culpable Co-Defendant Brett Bowman.

The Court, Counsel, and the Prosecution, committed numerous errors throughout Petitioner's trial, sentencing hearing, and direct appeal, which include, but are not limited to, the following areas:

1. Ineffective assistance of appellate counsel for failing to present issues to the Nevada Supreme Court in a proper, Federalized fashion.
2. The Nevada Supreme Court failed to conduct a proper appellate review.
3. The Grand Jury Indictment is flawed due to the Prosecution proffering a prior Burglary conviction thereof.
4. Petitioner's mental competency was in question at the time of the alleged crimes.
5. Petitioner's sentences and convictions are invalid, due to insufficient evidence.
6. Petitioner's sentence and convictions are unconstitutional due to the imposition of the Habitual Criminal Enhancement.
7. Trial Counsel was ineffective for allowing Petitioner to be subjected to excessive restitution.

8. Trial counsel was ineffective for allowing Petitioner to be subjected to multiplicitous and duplicative counts.
9. Trial Counsel was ineffective for allowing Petitioner to be subjected to lesser-included offenses.
10. Trial Counsel was ineffective for allowing Petitioner to be subjected to vindictive prosecution and/or selective prosecution.
11. Trial Counsel was ineffective for allowing Petitioner to be subjected to irrelevant and perjured testimony.
12. Trial Counsel was ineffective for allowing Petitioner's jury to be subjected to known-to-be perjured testimony and vouching by the
13. Trial Counsel was ineffective for not investigating and arguing that witnesses acted as police agents with violative conduct.
14. Trial Counsel was ineffective for not thoroughly investigating Discovery, thereby allowing Petitioner to be subjected to Prosecutorial Misconduct.
15. Trial Counsel was ineffective for not appealing the Court's decision to not quash the Indictment and proffer other Indictment deficiencies.
16. Trial counsel was ineffective due to an actual conflict of interest.
17. Trial Counsel was ineffective at Petitioner's Sentencing Hearing for not investigating and proffering a host of mitigating evidence.
18. Petitioner's Habitual Criminal sentences are unconstitutional due to priors not being violent and compliant with standards for enhancement.
19. Counsel was ineffective in not protecting Petitioner from prosecution, whereas Petitioner's Eighth Amendment rights were breached.
20. Counsel was ineffective in not protecting Petitioner from prosecution, whereas Petitioner's First Amendment rights were breached.
21. Counsel was ineffective in allowing Petitioner to be subjected to prosecution of NRS 205.060 and 205.965, which are unconstitutionally vague under the Due Process Clause.

In United States v. Frederick, 78 F3d 1370, 1381, (9th Cir., 1996), the Ninth Circuit Court of Appeals opined that:

In some cases, although no single trial error examined in isolation is sufficiently prejudiced to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. Where, as here, there are a number of errors at trial, a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors.

Although individual errors looked at separately may not rise to the level of reversible error, the cumulative effect may nevertheless be so prejudiced as to require reversal. United States v. Necoechea, 986 F2d 1273 (9th Cir, 1993).

Petitioner's substantive rights were violated as demonstrated by the issues presented herein, let alone, the deprivation of his constitutional rights to a fair trial, due to cumulative errors.

Unless an aggregate harmless determination can be made, corrective error will mandate reversal, just as surely as will individual error that cannot be considered harmless. United States v. Rivera, 900 F2d 1467, at 1470 (10th Cir, 1990).

Due to the cumulative effect of errors, Petitioner's conviction requires reversal.

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GROUND TWENTY-THREE

TRIAL COUNSEL WAS INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT IN FAILING TO PROTECT PETITIONER FROM THE ERRONEOUS IMPLICATION OF THE HABITUAL CRIMINAL STATUTE - NRS 207.010 - WHICH DENIED PETITIONER HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

On October 9, 2003, the prosecution filed a NOTICE OF INTENT TO SEEK HABITUAL CRIMINAL STATUS against Petitioner in the instant action.

Nevada's Habitual Criminal Statute, NRS 207.010, reads as follows:

NRS 207.010 Habitual Criminals: Definition; Punishment..

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 stte 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 felon, 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.
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 if 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.

Nevada Revised Statute 207.016 sets forth the procedure a court must follow in imposition of NRS 207.010.

NRS 207.016 states, in relevant part:

3. If a defendant charged pursuant to NRS 207.010, 207.012 or 207.014 pleads guilty to or is found guilty of the primary offense but denies any previous conviction charged, the court shall determine the issue of the previous conviction after hearing all relevant evidence presented on the issue by the prosecution and the defendant. At such a hearing, the defendant may not challenge the validity of a previous conviction. The court shall impose sentence:

(a) Pursuant to NRS 207.010 upon finding that the defendant has suffered previous convictions sufficient to support an adjudication of habitual criminality;

A hearing was held, apparently pursuant to the provisions of NRS 207.016(3), in this Honorable Court on April 1, 2004.

At the hearing, the prosecution admitted evidence of Petitioner's three (3) prior convictions, one of which is a conviction from February 11, 2004, (Sentencing Transcripts "ST", Page 4, lines 16 - 17), with respect to the Three-times convicted NRS 207.010(1)(b)(2).

Petitioner asserts the February 11, 2004 conviction is not a valid or final conviction, and therefore, the court should not have relied on the conviction for enhancement purposes under 207.010. Counsel failed to ensure the conviction was valid and/or final. Counsel failed to object or otherwise subject the conviction to scrutiny, thus prejudicing Petitioner. Therefore, reversible error has occurred in that this court relied on a conviction that was not valid and/or final, as it was currently under review by the Nevada Supreme Court.

Additionally, in support of seeking habitual criminal status against Petitioner, the prosecution brought forth testimonial evidence of Detective Scott A. Hopkins at the hearing held April 1, 2004. This testimonial evidence was presented to the court, outside the presence of the jury, and related to allegations by the state concerning Petitioner's prior bad acts, both charged and uncharged, which were never brought forth in the State's case in chief against petitioner during the jury trial.

Detective Scott A. Hopkins' testimony, in relevant part, is as follows:

A. . . . During that contact he made the comment to me that 22 months was worth a million.

. . .

What that meant to me is in reference to the federal case that they had done, that he had made a million dollars through is various fraud scams.

(ST, Page 9, lines 14 - 16, lines 24 -25, Page 10, lines 1 - 4).

Q. Sir, at some point did somebody forward a photograph of this defendant to you, a photograph of himself in the federal penitentiary?

A. Yes.

(ST, Page 10, lines 5 - 13, where the State entered the photograph as evidence, Exhibit 4)

Detective Scott A. Hopkins then proceeds to testify as to an apparent conversation he had between himself and Petitioner's ex-spouse, Lori Volpicelli. This amounts to hearsay testimony without Petitioner being able to confront or cross-examine Lori Volpicelli. (ST, Page 12, lines 18 - 22)

The Prosecution then produces Detective Reed Thomas, and the court allows his testimony at the sentencing hearing. Mr. Thomas is allowed to proffer hearsay testimony concerning conversations with Brett Bowman, the alleged co-conspirator in this action.

Mr. Thomas states that "the defendant invited Bowman to join his conspiracy." (ST, Page 16, lines 22 - 23) Mr. Thomas continues to testify about alleged prior criminal activity concerning Petitioner, regarding a conviction currently under appellate review. (ST, Pages 17 & 18)

Mr. Thomas continues to admit testimony concerning an alleged prior bad act regarding credit cards. (ST, Pages 19 & 20, lines 1 - 5).

Continuing, Mr. Thomas and the prosecution enter evidence at sentencing that was not admitted as evidence at Petitioner's jury trial.

Q. Were there many items that were not admitted as evidence?

A. Oh, yes.

Q. And how many stores do you estimate were involved? or let me rephrase the question. How many stores were you able to match products that you found in that storage shed to?

A. There were probably ten to 12 stores that were listed in the grand jury indictment that we suspected.

(ST, Page 21, lines 16 - 25)

The prosecution also admits evidence of a prior conviction through hearsay evidence of Mr. Thomas:

Q. And he was eventually convicted of both of those charges, lewdness and indecent exposure, correct?

A. That is correct.

(ST, Page 22, lines 20 - 22)

Once again, the prosecution admits evidence of prior bad acts, uncharged, and not proven to the jury, as follows:

A. It's a prediction is what this report is.

Q. . . . what do you estimate -- what damage amount do you put on his criminal acts . . .

A. . . . \$49,140 in tax free income per year. That's the low end. And that's assuming that he was engaging in this scheme once a week five times a day for one calendar year.

(ST, Pages 23 and 24).

After the plethora of evidence admitted by the prosecution at the sentencing hearing, the court enters its' recommendation.

And under all the evidence that I see here, I do in fact find that Mr. Volpicelli is a habitual criminal.

In fact, you are the poster child for habitual criminality

And with that, I will sentence you as a habitual criminal. I think society needs to be protected from this level of theft where you're actually making a full good living from stealing.

(ST, page 58, lines 7 - 21)

The court, as stated above, made its determination based on "all the evidence." Id. Therefore, the court did not only use the fact of Petitioner's prior convictions, one of which was not a valid or final conviction, but utilized the evidence proffered by the prosecution, all of which was not proffered as evidence at Petitioner's jury trial.

A. DUE PROCESS AND FAIR TRIAL VIOLATION

The United States Supreme Court has held in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt,"

In Blakely v. Washington, 542 U.S. ___, 124 S.Ct. 2531 (2004), the United States Supreme Court continued to address the issue of enhanced sentences, stating:

Our precedents make clear, however, that the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

In the instant action, the court succinctly states it considered "all the evidence" introduced at the sentencing hearing with respect to the Two-times convicted NRS 207.010(1)(a).

The evidence the court relied on in imposing the habitual criminal statute against petitioner, was not introduced or proven beyond a reasonable doubt to the jury. Therefore, the court violated Petitioner's Sixth Amendment right to a fair trial and Fifth and Fourteenth Amendment rights to due process of law by relying on unproven evidence. See Blakely v. Washington, Supra.

The Nevada Supreme Court, in Sessions v. State, 789 P.2d 1242 (Nev. 1990), stated that "when the prior offenses are stale or trivial, or in other circumstances where an adjudication of habitual criminality would not serve the purposes of the statute or the interests of justice," the court abuses its' discretion.

Petitioner asserts in the instant action the court abused its' discretion in considering irrelevant evidence to support its' findings and ultimately imposing multiple life sentences against petitioner in accord with Three-times convicted NRS 207.010(1)(b)(2)

Additionally, the Nevada Supreme Courts' ruling in Sessions v. State, Supra, indicates that the imposition of NRS 207.010 is not mandated and/or automatic based on prior convictions, hence, it is the extrinsic evidence admitted at the sentencing hearing, and relied upon by the court, that is utilized to impose NRS 207.010's sentencing scheme against defendants in similar situations as Petitioner.

In Walker v. Deeds, 50 P.3d 670 (9th Cir. 1995), the Ninth Circuit Court of Appeals found that Nevada's habitual criminal

enhancement is not warranted simply on finding that a defendant has committed three felonies. (NRS 207.010).

Recently, in the case of Kaua v. Frank, Published Opinion Filed January 11, 2006, No. 05-15059, (opinion by Judge Thomas G. Nelson), the Ninth Circuit Court of Appeals addressed Hawaii's enhancement statutes, similar to Nevada's NRS 207.010 and 207.016, wherein a two-step process is utilized to find a defendant an habitual criminal. The court found that the court may not exempt the court from adherein to the mandates of Apprendi v. New Jersey, Supra, and continued to hold that a court may not rely on evidence from a hearing, outside the presence of a jury, in determining to impose an enhanced sentence against a convicted defendant.

Kaua v. Frank is directly on point with the instant action. The sentencing court in this case stated "I think society needs to be protected from this level of theft . ." (ST, Page 58, lines 7 - 21). In Kaua v. Frank, Supra, the court held, "Because the effect of the public protection finding was to increase Kaua's sentence above that authorized by the jury's guilty verdict, the Sixth Amendment required a jury to make the finding. Therefore, the district court's grant of Kaua's petition for a writ of habeas corpus is Affirmed."

B. EQUAL PROTECTION VIOLATION

Petitioner asserts that Nevada does not impose the provisions of NRS 207.010 against all similarly situated individuals as Petitioner, thus making it a violation of

Petitioner's rights under the Equal Protection clause to be sentenced under the scheme created by NRS 207.010.

NRS 207.010 contains mandatory language, in that it states, "is a habitual criminal and shall be punished for a Category A felony . . ."

While the statute contains mandatory language, the various courts and / or prosecutors throughout Nevada do not impose this harsh sentencing scheme to all persons similarly situated as Petitioner.

It is rather apparent that the prosecutor has used discretion in applying NRS 207.010 against Petitioner, and thereby imposed an indeterminate prison sentence.

The test of a statute is by the Constitution regardless of Supreme Court decisions. R.C. Tway Coal Co. v. Glenn, 12 F.Supp. 570 (1935).

The equal protection clause is essentially a direction that all persons similarly situated should be treated the same. City of Cleburne Texas v. Cleburne Living Center, 105 S.Ct. 3249 (1985); Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982); and United States v. Harding, 971 F.2d 410 (9th Cir. 1992).

Sentencing rationale considers the aggravating and mitigating circumstances relevant in each instance. Ostensibly, the greater the aggravating circumstances warrant and compel the imposition of the harsher sentence. However, it is precisely at this juncture that equal protection is fouled in this case. Petitioner received a substantially more severe punishment than other persons convicted of the same crime, especially if this court is to look at the minor sentence. Petitioner's alleged co-conspirator recieved.

THE DUE PROCESS AND EQUAL PROTECTION CLAUSES

require that penal statutes be structured so as to prevent penalty from being administered in arbitrary and unpredictable fashion. California v. Brown, 107 S.Ct. 837 (1987).

Applying NRS 207.010 to Petitioner clearly and absolutely prescribes drastically differing degrees of punishment for the same offense, committed under similar circumstances, by persons in like situations, specifically increasing the punishment for the defendant with less culpability.

Counsel's failure to object or otherwise protect Petitioner from the application of NRS 207.010 fell below an objective standard of reasonableness as required by Strickland v. Washington, Supra, and resulted in the deprivation of Petitioner's right to equal protection as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Additionally, by the Nevada legislature enacting this statute that allows a prosecutor to selectively impose this statute arbitrarily as he wishes, clearly violates the Constitutional guarantee of equal protection and a fair sentencing hearing.

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GROUND TWENTY FOUR

COUNSEL WAS INEFFECTIVE FOR NOT PROTECTING PETITIONER FROM THE IMPOSITION OF AN ILLEGAL SENTENCE IN CONTRAVENTION OF DUE PROCESS AND EQUAL PROTECTION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

GROUND TWENTY FIVE

THE DISTRICT COURTS' IMPOSITION OF AN ILLEGAL SENTENCE CONTRAVENED DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Arguments

Petitioner asserts that his sentence is illegal & that pursuant to NRS 176.555 he is entitled to relief because the District Court relied upon a misapprehension as to the Petitioner's criminal record; inclusive of his imprisonment record.

A. The District Court erred in its reliance upon a misapprehension as to exhibit 1 for the adjudication of an

1 Habitual Criminal as it was not a valid prior for Purposes of
2 NRS 207.010 (1)(b)(2).

3 Petitioner was prejudiced with substantial right violations when
4 he was adjudicated an Habitual Criminal absent proof beyond a
5 reasonable doubt of the 'three-times convicted of a felony'

6 provision specific to NRS 207.010 (1)(b)(2).

7 At the sentencing hearing on April 1, 2004, the State sought the
8 Habitual Criminal enhancement specific to NRS 207.010 (1)(b)(2)
9 with three corresponding exhibits; each of which were correlated
10 to the requisite 'three-times convicted of a felony' clause of
11 said statute.
12

13 Referring to the District Court's trial transcript on April 1,
14 2004, the prosecutor informed the Court to wit:
15

16 "The State moves to have marked and admitted into evidence the
17 State certified proof of this Defendant's prior felony
18 convictions three of his prior felony convictions": Sentencing
19 transcript pg. 4. (*Emphasis added that the State proffered the*
20 *exhibits as each corresponding to the three separate cases*
21 *necessary for the 'three-times convicted of a felony' clause of*
22 *NRS 207.010 (1)(b)(2).*) "The first would be his cert. from
23 2004... The second would be his 1998 conviction on two counts
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1 of Burglary (emphasis added that the State proffered the exhibit
2 as one conviction for adjudication purposes-despite 2 counts in
3 judgment of conviction). ...And the third prior...is a
4 conviction of four counts of Tax Perjury in the United States
5 District Court of Nevada 1997" (Again, emphasis added that

6 despite judgment of conviction including 4 counts, State
7 proffered and Court accepted it as only one felony
8 conviction/prior towards the requisite 'three-times convicted of
9 a felony' clause under NRS 207.010 (1)(b)(2)): Sentencing
10 transcript pg. 4.
11

12 "Accordingly, the State is asking you to impose Habitual
13 Offender status to this Defendant, and we're asking for a
14 sentence of life imprisonment with ten years minimum served in
15 the Nevada State Prison on each felony count": Sentencing
16 transcript pg. 4.
17

18 Hence, the State and the Court were on the same page as
19 providing and accepting the foregoing three exhibits in their
20 entirety towards the requisite 'three-times convicted of a
21 felony' clause specific to NRS 207.010 (1)(b)(2). With those
22 specific parameters in place, the sentencing Judge stated for
23 the record to wit; "I have had a chance to look at these
24 exhibits and in each case Mr. Volpicelli was afforded
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1 appropriate constitutional rights, and the record here does meet
2 all constitutional requirements for use to prove the prior
3 convictions at this type of hearing. So, exhibits 1, 2 & 3 are
4 admitted": Sentencing transcript pg. 43.

5 At that point in the proceeding, the Court was convinced that
6 there existed beyond a reasonable doubt sufficient evidence with
7 all three exhibits as satisfying the requisite 'three-times
8 convicted of a felony' provision specific to NRS 207.010
9 (1) (b) (2). There was never any mention or consideration given
10 to the notion that said exhibits duly noted a total of seven
11 felonies, or that if there was any deficiency with one or more
12 of the exhibits, the State and Court would rely on the 4 counts
13 in the Federal case as being sufficient to qualify alone so as
14 to satisfy the requisite 'three-times convicted of a felony'
15 clause.
16

17
18 That said, Petitioner refers this Court to the Nevada Supreme
19 Court's Review of Petitioner's claim that exhibit 1,
20 specifically case CR02-0148, was not a valid prior for purposes
21 of adjudication under NRS 207.010 (1) (b) (2). Therein, the High
22 Court agreed that said exhibit was considered erroneously by the
23 District Court. (Case# 51622)
24

25 Hence, the District Court's reliance on exhibit 1 translated to
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1 a misapprehension of the Petitioner's criminal record at
2 sentencing when adjudicating the Petitioner an Habitual
3 Criminal. As such, the Petitioner was significantly prejudiced
4 because, had the Petitioner's counsel, or the Court recognized
5 the error, the requisite 'three-times convicted of a felony'
6 clause would not have been met and the Court would have been
7 compelled to rely on exhibits 2 and 3 only which, by themselves,
8 fail to satisfy the requisite criteria for NRS 201.010(1)(b)(2).
9 This would have demonstrated that the State failed to meet its
10 burden beyond a reasonable doubt in the adjudication specific to
11 NRS 201.010 (1)(b)(2).
12
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15 B. The District Court erred in its reliance upon the
16 misapprehension of Petitioner's imprisonment record in the
17 adjudication as an Habitual Criminal for Purposes of NRS 207.010
18 (1)(b)(2).

19 Petitioner asserts that he was prejudiced with the District
20 Court's erroneous reliance upon the misconception as to the
21 Petitioner's record of imprisonment which is indicative of his
22 criminal record.
23

24 At the April 1, 2004 sentencing hearing, wherein Petitioner was
25 deemed by the District Court an Habitual Criminal, the
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1 sentencing Judge stated to wit: "And under all the evidence that
2 I see here, I do in fact find Mr. Volpicelli is a habitual
3 criminal. In fact, you are the poster child for habitual
4 criminality in that every time you're released from custody it
5 seems like you're out making a full-time living stealing."

6 Sentencing transcript p.58.

7 Yet, the District Court gave no heed to the Petitioner's
8 proffered mitigating evidence in the PSI's facts of the
9 Petitioner's actual imprisonment record. Said record clearly
10 indicated that Petitioner had never served any jail time
11 whatsoever. Furthermore, that Petitioner's first commitment to
12 prison was at the age of 42, wherein he served a continuous
13 stint of imprisonment from 1/98 through 6/01 for the judgment of
14 convictions aptly cited in Exhibit 2's case and Exhibit 3's
15 case. And, that he had only one release from imprisonment
16 wherein he did incur the charges while on parole from the second
17 exhibit's case. Again, the District Court was under the
18 misguided conception that the Petitioner was re-offending at his
19 release from imprisonment with all 3 of the proffered exhibits.
20 When, in reality, there had only been one.

21 Petitioner asserts that this has particular relevance as to the
22 letter and spirit of the legislative intent underlying the
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2 State's Habitual Criminal Act. More specifically, it has to do
3 with the factor of reformation in between those 'three-times
4 convicted of a felony' cases.

5 Clearly, the Nevada Courts have recognized the reformation
6 factor in between felony case priors as evidenced in Rezin v
7 State and Tanksley v Nevada. But the District Court failed to
8 apply that standard in interpreting the Petitioner's actual
9 incarceration record. Matter of fact, the Nevada Supreme Court
10 has recognized the importance of such an opportunity to reform
11 in between episodes of imprisonment in its case O'Neil v Nevada.
12 Therein, the high court's opinion in O'Neil aptly makes
13 reference to its Recidivism Statute with comparison to that of
14 the State of New York. Moreover, both States' highest courts
15 agree that the only fact-finding necessary for the imposition of
16 an enhancement of a recidivist is the requisite number of prior
17 convictions, as well as the promotion of reformation as part of
18 the legislative intent.
19 But, a closer comparison of the similarity of the intent of the
20 two States' recidivist statutory considerations, shows the
21 following: That under New York's Penal Law § 70.10(1)(c) 'For
22 purposes of determining whether a person has two or more
23 convictions of crimes that were committed prior to the time
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2 Defendant was actually imprisoned under sentence, for any such
3 convictions shall be deemed to be only one conviction.' see
4 Brown v Greiner 409 F3d 523, 525 (2nd cir 2005).

5 Thus, Petitioner's incarceration and opportunity for reformation
6 involving exhibit cases two & three as priors should count for
7 but one 'strike' only towards the requisite 'three-times
8 convicted clause of NRS 207.010 (1)(b)(2). If so, and since the
9 Nevada Supreme Court has already ruled exhibit 1's case as being
10 an invalid prior for consideration under NRS 207.010 (1)(b)(2),
11 then Petitioner, by way of logic and legislative intent, falls
12 short of the qualifications of either a Habitual Criminal and/or
13 a Habitual Felon.
14

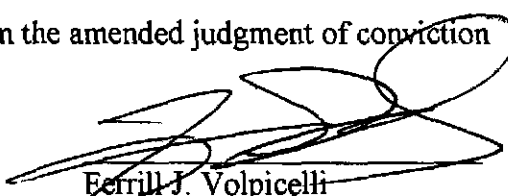
15
16 After all, its only appropriate to turn to applications of other
17 sister State's legislative intent on such statutes of
18 recidivism, as articulated by The United States Supreme Court
19 case, U.S. V Ron Rair Enterprise, Inc, 109 Sct 1031 (1989),
20 wherein "the intention of the drafters controls rather than the
21 strict language."
22

23
24 This court should reverse the Petitioner's life sentence enhancements under the habitual
25 criminal statute because the district court relied on a misapprehension as to Petitioner's
26 criminal record and imprisonment record, thereby violating Petitioner's due process and
27 equal protection rights which clearly worked to the Petitioner's extreme detriment.
28

CONCLUSION

Wherefore, for the facts and arguments as set forth herein above Petitioner respectfully requests this Honorable Court grant relief from the amended judgment of conviction dated on or about June 4, 2013.

Dated this 28
day of June, 2013.




Ferrill J. Volpicelli
79565 @ LCC
1200 Prison Rd
Lovelock, NV 89419

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing MEMORANDUM OF PET IN SUPPORT OF APPEAL to the below address(es) on this 28 day of JUNE, 2013, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

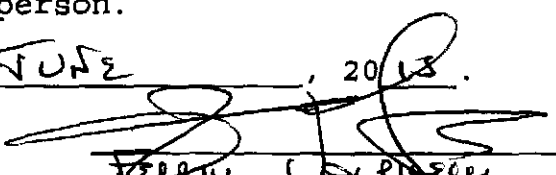
CHADSEY COUNTRY
DISTRICT ATTORNEY
POB 3053
Reno, NV 89520-3053


FERNAN LOPEZ #72068
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
FERNAN LOPEZ In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding MEMORANDUM OF PET IN SUPPORT OF APPEAL filed in District Court Case No. C253-1267 does not contain the social security number of any person.

Dated this 28 day of JUNE, 2013.


FERNAN LOPEZ
FERNAN LOPEZ In Pro Se

INDEX TO EXHIBITS

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District Court 07/01/2013 10 29 AM
Washoe County 1960
EX1 ASMITP

EXHIBIT 1

EXHIBIT 1

I N D E X

STATE'S WITNESSES	DR	CR	REDR	RECR	VD
SCOTT HOPKINS	6	14			
REED THOMAS	15	26	34		

STATE'S EXHIBITS	IDENTIFICATION	EVIDENCE
1 - 2004 Prior conviction	4	43
2 - 1998 Prior conviction	4	43
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4 - Photograph	10	14
5 - Report prepared by Detective Thomas	15	36

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6 - Letters of completion	45	45
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District Court 07/01/2013 10:29 AM
Washoe County 1960
FX2 ASMITP

EXHIBIT 2

EXHIBIT 2

<u>ITEM</u>	<u>EVID. NO.</u>	<u>OWNER</u>	<u>STATUS</u>
One (1) Radius 15" Liquid Crystal Monitor*	A87919	WalMart	Returned
One (1) Compaq Model 5000 NIB Computer System*	A87920	WalMart	Returned
One (1) HP V-40 Fax-Copier*	A87921	WalMart	Returned
One (1) HP V-40 Fax-Copier*	A87922	WalMart	Returned
One (1) Panasonic SC-HT70 Dyna Movie*	A87923	Target	Returned
One (1) Panasonic SC-HT70 Dyna Movie*	A87924	Target	Returned
One (1) Hoover Wind Tunnel Vacuum*	A87925	WalMart	Returned
One (1) Fountain Blue Wool Handcrafted Rug*	A87926	Lowe's	Returned
One (1) Panasonic Cordless Answering System Box - empty	A87927	F. Volpicelli	In Evidence
One (1) Computer Keyboard	A87927	F. Volpicelli	In Evidence
One (1) Computer Mouse	A87927	F. Volpicelli	In Evidence
Two (2) Power Strips	A87927	F. Volpicelli	In Evidence
One (1) Phantom Wildcat Vacuum*	A87928	KMart	Returned
One (1) Memorex 9" Miniview Travel Television*	A87929	Target	Returned
One (1) V-3 Racing Wheel NIB Game*	A87930	KMart	Returned
One (1) Playstation Open Force Driving Game*	A87931	KMart	Return Pending
One (1) Deflect-O Bath N' Spa Exhaust Kit*	A87932	Home Depot	Returned
One (1) Simplicity Serge Pro Sewing Machine*	A87933	WalMart	Returned
One (1) Kodak Slide Projector*	A87934	Office Max	Return Pending
One (1) Krups Espresso Machine*	A87935	Bed, Bath & Beyond	Return Pending

**RPD CASE NO. 01-216321
INVENTORY OF PROPERTY**

<u>ITEM</u>	<u>EVID. NO.</u>	<u>OWNER</u>	<u>STATUS</u>
One (1) Emerson EWC19D1 Television*	A87909	WalMart	Returned
One (1) Emerson EWC19D1 Television*	A87910	WalMart	Returned
One (1) Emerson EWC19D1 Television & DVD Combo Set*	A87911	WalMart	Returned
One (1) Panasonic SC-DK10 DVD Stereo System*	A87912	WalMart	Returned
One (1) Kohler Rosario Low Flow Toilet*	A87913	Home Depot	Returned
One (1) Computer	A87914	F. Volpicelli	In Evidence
Various colored empty plastic bags from several local merchants	A87915	F. Volpicelli	In Evidence
One (1) Art Explosion Label Factory Deluxe	A87915	F. Volpicelli	In Evidence
One (1) Panasonic 2.4 GHz Cordless Answering System	A87915	F. Volpicelli	In Evidence
One (1) Nokia Phone Box - Empty	A87915	F. Volpicelli	In Evidence
One (1) Samsonite Charger	A87915	F. Volpicelli	In Evidence
Two (2) Avery #8165 Labels	A87915	F. Volpicelli	In Evidence
One (1) Multi-Tool	A87915	F. Volpicelli	In Evidence
One (1) Texas Instrument Connectivity Value Kit	A87915	F. Volpicelli	In Evidence
One (1) Texas Instrument TI-89 Calculator	A87915	F. Volpicelli	In Evidence
One (1) Hoover Steam Vacuum*	A87916	Shopko	Return Pending
One (1) Brother Fax Machine*	A87917	Custom Office	Return Pending
One (1) KDS-RAD5 Monitor*	A87918	WalMart	Returned

<u>ITEM</u>	<u>EVID. NO.</u>	<u>OWNER</u>	<u>STATUS</u>
One (1) Closetmaid Closet	A87936	F. Volpicelli	In Evidence
Two (2) Aero Minute Air Beds*	A87937	WalMart	Returned
One (1) Ozark Queen Size Air Bed*	A87938	WalMart	Returned
One (1) Optima Amplified TV Antenna	A87939	F. Volpicelli	In Evidence
One (1) V-Tech 2.4 ghz Digital Telephone Multi Handset Combo*	A87940	Target	Returned
One (1) V-Tech 2.4ghz Digital Telephone & Answering System*	A87941	Target	Returned
Four (4) Brother Correctable Film Ribbons	A87942	F. Volpicelli	In Evidence
Five (5) Gelikan Lift Tabs	A87942	F. Volpicelli	In Evidence
One (1) Plastic Knob	A87942	F. Volpicelli	In Evidence
One (1) Avery Clear Ink Jet Labels Package	A87942	F. Volpicelli	In Evidence
Two (2) Audiovox Handi Talkies, with Chargers	A87942	F. Volpicelli	In Evidence
One (1) Norelco Shaver	A87942	F. Volpicelli	In Evidence
One (1) Braun Syncro Shaver System	A87942	F. Volpicelli	In Evidence
Thres (3) Red & one (1) black plastic folder containing miscellaneous papers	A87942	F. Volpicelli	Returned
One (1) NIB Electronic Brother Brand Labeling System Control*	A87943	Office Depot	Returned
Three (3) Kodak Digital Cameras	A87944	F. Volpicelli	In Evidence
One (1) Stereo	A87945	F. Volpicelli	In Evidence
Two (2) Stereo Speakers	A87945	F. Volpicelli	In Evidence
One (1) Lego Movie Maker Toy*	A87946	Toys R US	Return Pending

<u>ITEM</u>	<u>EVID. NO.</u>	<u>OWNER</u>	<u>STATUS</u>
One (1) Sharp TV/VCR	A87947	F. Volpicelli	In Evidence
One (1) Jean Computer Monitor	A87948	F. Volpicelli	In Evidence
One (1) Sonya TV Box - empty	A87949	F. Volpicelli	In Evidence
One (1) Brother Typewriter - no case	A87950	F. Volpicelli	In Evidence
One (1) Steel Horse Wireless Headphones box - empty	A87951	F. Volpicelli	In Evidence
One (1) Moen Extensa Faucet*	A87952	Home Depot	Returned
Several unopened packages of Filler paper - 200 count each	A87953	F. Volpicelli	In Evidence
One (1) empty box Playstation 2 Gran Turismo	A87954	F. Volpicelli	In Evidence
One (1) grey folder containing miscellaneous paperwork	A87955	F. Volpicelli	Returned
Five (5) receipts	A87974	F. Volpicelli	Court
Three (3) ShopKo receipts	A87988	F. Volpicelli	Court
One (1) envelope w/fictitious UPC tags	A88171	F. Volpicelli	Destroy
Transposition Sheet	A88172	F. Volpicelli	Court
Miscellaneous Paperwork	A88172	F. Volpicelli	Returned
One (1) accordion folder containing receipts from numerous retail stores	A88173	F. Volpicelli	Court
Miscellaneous merchandise & gift cards	A88174	F. Volpicelli	Returned
Great Basin checkbook & duplicate DL paperwork	A88174	F. Volpicelli	Returned
Two (2) Key Rings w/Keys	A88174	F. Volpicelli	In Evidence
One (1) Separate Key Safe Deposit Box	A88174	Wells Fargo	Return Pending

<u>ITEM</u>	<u>EVID. NO.</u>	<u>OWNER</u>	<u>STATUS</u>
One (1) Brother Label Maker in black canvas case containing several fictitious UPC labels	A88175	F. Volpicelli	Court
One (1) Cigarette Lighter Jumper	A88176	F. Volpicelli	In Evidence
One (1) Sport Nylon Jacket	A88176	F. Volpicelli	In Evidence
One (1) box of miscellaneous files	A88177	F. Volpicelli	Returned
One (1) Panasonic KP-150 Electric Pencil Sharpener	A88178	F. Volpicelli	In Evidence
One (1) Orbital Wallarm VCR/ DVD Mount	A88179	F. Volpicelli	In Evidence
Two (2) Audio Tapes of Interview	A88277	RPD	In Evidence
Two (2) Audio Tapes of Interview	A88278	RPD	In Evidence
One (1) Video Tape of Interview	A88279	RPD	In Evidence
One (1) Video Tape of Interview	A88280	RPD	In Evidence
One (1) brown Perry Ellis wallet containing miscellaneous cards	A88281	F. Volpicelli	Returned
One (1) Capital One Mastercard	A88663	F. Volpicelli	Returned
One (1) Video Tape	A88663	RPD	In Evidence
One (1) Gateway Laptop Computer in case	A88664	F. Volpicelli	In Evidence
\$886.00 U.S. Currency	A88700	F. Volpicelli	I.R.S. lien
Miscellaneous Paperwork	A90208	Chanel Volpicelli	Return Pending
One (1) Loose Diamond	A90208	Chanel Volpicelli	Return Pending
One (1) Black & Decker Variable Speed Drill	A90208	F. Volpicelli	In Evidence
Computer Disks	A90208	F. Volpicelli	In Evidence
Laminating Sheets	A90208	F. Volpicelli	In Evidence
Credit Cards	A90208	F. Volpicelli	In Evidence

<u>ITEM</u>	<u>EVID. NO.</u>	<u>OWNER</u>	<u>STATUS</u>
IDs	A90208	F. Volpicelli	In Evidence
CD-ROM	A90208	F. Volpicelli	In Evidence
One (1) blue plastic zipper file folder containing miscellaneous paperwork	A90208	F. Volpicelli	Returned
One (1) Gottschalks Card	A90208	F. Volpicelli	Returned
Miscellaneous Paperwork	A90208	F. Volpicelli	Returned
One (1) blue zippered pocket organizer	A90208	F. Volpicelli	In Evidence
One (1) Cross pen in box	A90208	F. Volpicelli	In Evidence
One (1) set Koss earphones	A90208	F. Volpicelli	In Evidence
One (1) telephone cord	A90208	F. Volpicelli	In Evidence
One (1) bottle sticker & decal remover	A90208	F. Volpicelli	In Evidence
\$2,300.00 U.S. Currency	A90683	F. Volpicelli	I.R.S. lien
One (1) Floppy Disk	A91662	F. Volpicelli	In Evidence
One (1) Floppy Disk with photos	A91662	RPD	In Evidence
One (1) voided WalMart receipt	A92683	F. Volpicelli	Court
Video & Audio Tapes	A94257	RPD	In Evidence
Video & Audio Tapes	A94258	RPD	In Evidence
Video of Search from Wells Fargo	B01442	RPD	In Evidence
One (1) Bulldog Security Remote Starter*	#6 on log	ShopKo	Return Pending
One (1) Casio Cassiopeia Automatic PC*	#8 on log	ShopKo	Return Pending
Sonicare Plus Electric Toothbrush		ShopKo	Court
Two (2) Mabis Smart Read Plus Digital Blood Pressure Monitors*		KMart	Returned

<u>ITEM</u>	<u>EVID. NO.</u>	<u>OWNER</u>	<u>STATUS</u>
One (1) Quicken Business Lawyer 2001 Deluxe*		Office Depot	Returned
One (1) Book BXI checks		F. Volpicelli	In Evidence

* Restitution items



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STATE VS. FERRILL JOSEPH VO 11 Pages
District Court 07/01/2013 10 29 AM
Washoe County 1960
EX3 ASMITH

EXHIBIT 3

EXHIBIT 3

FILED

DA # 314735

RPD RP01-216321/RP01-216452/RP01-219145/RP01-220307/RP01-221241

2003 JUN 11 PM 4:15
RONALD A. LONGTIN, JR.

G. Velarde

BY DEPUTY

1 CODE 1795
2 Richard A. Gammick
3 #001510
4 P.O. Box 30083
5 Reno, NV 89520-3083
6 (775) 328-3200
7 Attorney for Plaintiff

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10 IN AND FOR THE COUNTY OF WASHOE.

11 * * *

12 THE STATE OF NEVADA,

13 Plaintiff,

14 v.

Case No. CR03-1263

15 FERRILL JOSEPH VOLPICELLI,

Dept. No. 9

16 Defendant.

17 INDICTMENT

18 The defendant, FERRILL JOSEPH VOLPICELLI, is accused by
19 the Grand Jury of Washoe County, State of Nevada, of the
20 following:

21 COUNT I. CONSPIRACY TO COMMIT CRIMES AGAINST PROPERTY,
22 violation of NRS 199.480, NRS 205.060, NRS 205.0832, NRS 205.090,
23 NRS 205.110, NRS 205.220, NRS 205.240, NRS 205.380 and NRS
24 205.965, a gross misdemeanor, committed as follows:

25 That the said defendant on or between the 21st day of
26 June A.D. 2001, and the 17th day of October A.D. 2001, or
thereabout, at the County of Washoe, State of Nevada, did
willfully, unlawfully, and with the intent to permanently

V6.1319

1 deprive, cheat or defraud conspire with BRETT BOWMAN with the
2 intent then and there to commit Burglary, Theft, Forgery,
3 Uttering a Forged Instrument, Larceny, Obtaining Property by
4 False Pretenses, and/or Unlawful Possession, Making, Forgery or
5 Counterfeiting of Inventory Pricing Labels, through a scheme
6 where property and/or money was obtained from several stores in
7 Washoe County, to wit: WALMART, K-MART, SHOPKO, TARGET, LOWE's,
8 HOME DEPOT, OFFICE MAX, OFFICE DEPOT, BED BATH and BEYOND, BEST
9 BUY, COMP USA, TOYS-R-US, and/or PETSMART by 1) entering said
10 stores for the purpose of obtaining universal pricing label
11 information to create false and forged universal pricing labels;
12 2) by affixing false, forged or counterfeit universal pricing
13 labels to merchandise at said stores to purchase said merchandise
14 for less than the posted retail price; 3) by purchasing said
15 merchandise under the false pretense that the forged or
16 counterfeit pricing label is a true and valid document; and/or 4)
17 by removing the false and forged inventory pricing labels and
18 subsequently returning some of the fraudulently discounted
19 merchandise for the original valid retail price, thereby making a
20 profit.

21 COUNT II. BURGLARY, a violation of NRS 205.060, a
22 felony, committed as follows:

23 That the said defendant on the 4th day of September
24 A.D. 2001, or thereabout, at the County of Washoe, State of
25 Nevada, did willfully and unlawfully enter a certain WALMART
26 located at 2863 Northtowne Lane, Reno, Washoe County, Nevada,

1 with the intent then and there to commit Theft, Forgery, Uttering
2 a Forged Instrument, Larceny, and/or Obtaining Property
3 by False Pretenses therein, by entering to obtain UPC label
4 and/or other pricing information, after having been previously
5 convicted of Burglary in 1998.

6 COUNT III. BURGLARY, a violation of NRS 205.060, a
7 felony, committed as follows:

8 That the said defendant on or between the 11th day of
9 September A.D. 2001, and the 29th day of September A.D. 2001, or
10 thereabout, at the County of Washoe, State of Nevada, on one or

11 more occasions did willfully and unlawfully enter a certain HOME
12 DEPOT located at 5125 Summit Ridge Court and/or 2955 Northtowne
13 Lane, Reno, Washoe County, Nevada, with the intent then and there
14 to commit Theft, Forgery, Uttering a Forged Instrument, Larceny,
15 and/or Obtaining Property by False Pretenses therein by entering
16 to scout miscellaneous UPC label and/or other pricing information
17 and/or obtain a toilet; and/or said defendant did aid and abet
18 BRETT BOWMAN in the commission of said burglary by providing him
19 a fictitious UPC bar code label to affix to said merchandise, by
20 providing him with U.S. currency to fraudulently purchase said
21 merchandise, by driving him to and/or from the scene, by acting
22 as a look-out, by counseling, encouraging, inducing, or otherwise
23 procuring him to enter said store and fraudulently obtain said
24 merchandise with said fictitious UPC bar code label, after having
25 been previously convicted of Burglary in 1998.

26 ///

1 COUNT IV. BURGLARY, a violation of NRS 205.060, a
2 felony, committed as follows:

3 That the said defendant on the 21st day of September
4 A.D. 2001, or thereabout, at the County of Washoe, State of
5 Nevada, did willfully and unlawfully enter a certain BED BATH and
6 BEYOND located at 4983 South Virginia Street, Reno, Washoe
7 County, Nevada, with the intent then and there to commit Theft,
8 Forgery, Uttering a Forged Instrument, Larceny, and/or Obtaining
9 Property by False Pretenses therein by entering with the intent
10 to fraudulently obtain one or more coffee pots and/or scout

11 pricing information related to said merchandise; and/or did aid
12 and abet BRETT BOWMAN in the commission of said burglary by
13 providing him a fictitious UPC bar code label to affix to said
14 merchandise, by providing him with U.S. currency to fraudulently
15 purchase said merchandise, by driving him to and/or from the
16 scene, by acting as a look-out, by counseling, encouraging,
17 inducing, or otherwise procuring him to enter said store and
18 fraudulently obtain said merchandise with said fictitious UPC bar
19 code label, after having been previously convicted of Burglary in
20 1998.

21 COUNT V. BURGLARY, a violation of NRS 205.060, a
22 felony, committed as follows:

23 That the said defendant on the 28th day of September
24 A.D. 2001, or thereabout, at the County of Washoe, State of
25 Nevada, did willfully and unlawfully enter a certain WALMART
26 located at 4855 Kietzke Lane, Reno, Washoe County, Nevada, with

1 the intent then and there to commit Theft, Forgery, Uttering a
2 Forged Instrument, Larceny, and/or Obtaining Property by False
3 Pretenses therein by entering to obtain UPC label and/or other
4 pricing information to be used for an unlawful purpose, after
5 having been previously convicted of Burglary in 1998.

6 COUNT VI. BURGLARY, a violation of NRS 205.060, a
7 felony, committed as follows:

8 That the said defendant on the 5th day of October A.D.
9 2001, or thereabout, at the County of Washoe, State of Nevada, on
10 one or more occasions did willfully and unlawfully enter a

11 certain LOWE'S HOME IMPROVEMENT STORE located at 5075 Kietzke
12 Lane, Reno, Washoe County, Nevada, with the intent then and there
13 to commit Theft, Forgery, Uttering a Forged Instrument, Larceny,
14 and/or Obtaining Property by False Pretenses, and/or Unlawful
15 Possession, Making, Forgery or Counterfeiting of Inventory
16 Pricing Labels therein, by entering with the intent to
17 fraudulently obtain one or more wool rugs and/or scout pricing
18 information related to said rugs, and/or said defendant did aid
19 and abet BRETT BOWMAN in the commission of said burglary by
20 providing him a fictitious UPC bar code label to affix to said
21 merchandise, by providing him with U.S. currency to fraudulently
22 purchase said merchandise, by driving him to and/or from the
23 scene, by acting as a look-out, by counseling, encouraging,
24 inducing, or otherwise procuring him to enter said store and

25 ///

26 ///

1 fraudulently obtain said merchandise with said fictitious UPC bar
2 code label, after having been previously convicted of Burglary in
3 1998.

4 COUNT VII. BURGLARY, a violation of NRS 205.060, a
5 felony, committed as follows:

6 That the said defendant on or between the 30th day of
7 August A.D. 2001, and the 13th day of October A.D. 2001, or
8 thereabout, at the County of Washoe, State of Nevada, on one or
9 more occasions did willfully and unlawfully enter a certain
10 WALMART located at 2863 Northtowne Lane and/or 155 Damonte Ranch

11 Parkway, Reno, Washoe County, Nevada, with the intent then and
12 there to commit Theft, Forgery, Uttering a Forged Instrument,
13 Larceny, and/or Obtaining Property by False Pretenses, and/or
14 Unlawful Possession, Making, Forgery or Counterfeiting of
15 Inventory Pricing Labels, therein by entering with the intent to
16 fraudulently obtain ^{DESIGNATES ONE OF EACH} a Panasonic Home Theater system, Emerson 19"
17 DVD-TV combo, KDS Rad-5 15" monitor, Serger sewing machine and/or
18 a Hewlett-Packard printer and/or scout pricing information
19 related to said merchandise; and/or said defendant did aid and
20 abet BRETT BOWMAN in the commission of said burglary or
21 burglaries by providing him a fictitious UPC bar code label to
22 affix to said merchandise, by providing him with U.S. currency to
23 fraudulently purchase said merchandise, by driving him to and/or
24 from the scene, by acting as a look-out, by counseling,
25 encouraging, inducing, or otherwise procuring him to enter said

26 ///

1 store and fraudulently obtain said merchandise with said
2 fictitious UPC bar code label, after having been previously
3 convicted of Burglary in 1998.

4 COUNT VIII. BURGLARY, a violation of NRS 205.060, a
5 felony, committed as follows:

6 That the said defendant on or between the 30th day of
7 August A.D. 2001, and the 17th day of October A.D. 2001, or
8 thereabout, at the County of Washoe, State of Nevada, on one or
9 more occasions did willfully and unlawfully enter a certain
10 SHOPKO located at 5150 MaeAnne Avenue and/or 6139 South Virginia

11 Street, Reno, Washoe County, Nevada, with the intent then and
12 there to commit Theft, Forgery, Uttering a Forged Instrument,
13 Larceny, and/or Obtaining Property by False Pretenses, and/or
14 Unlawful Possession, Making, Forgery or Counterfeiting of
15 Inventory Pricing Labels, therein, by entering with the intent to
16 fraudulently obtain a Sonicare electric toothbrush and/or one or
17 more Willow Bay comforters, after having been previously
18 convicted of Burglary in 1998.

19 COUNT IX. BURGLARY, a violation of NRS 205.060, a
20 felony, committed as follows:

21 That the said defendant on the 17th day of October A.D.
22 2001, or thereabout, at the County of Washoe, State of Nevada,
23 did willfully and unlawfully enter a certain WALMART located at
24 155 Damonte Ranch Parkway, Reno, Washoe County, Nevada, with the
25 intent then and there to commit Theft, Forgery, Uttering a Forged
26 Instrument, Larceny, and/or Obtaining Property by False

1 Pretenses, and/or Unlawful Possession, Making, Forgery or
2 Counterfeiting of Inventory Pricing Labels, therein, by entering
3 with the intent to fraudulently obtain a Mongoose bicycle and/or
4 scout pricing information related to said bicycle; and/or said
5 defendant did aid and abet BRETT BOWMAN in the commission of said
6 burglary by affixing a fictitious UPC bar code label to said
7 merchandise, by providing BOWMAN with U.S. currency to
8 fraudulently purchase said merchandise, by driving him to and/or
9 from the scene, by acting as a look-out, by counseling,
10 encouraging, inducing, or otherwise procuring him to enter said

11 store and fraudulently obtain said merchandise with said
12 fictitious UPC bar code label, after having been previously
13 convicted of Burglary in 1998.

14 COUNT X. UNLAWFUL POSSESSION, MAKING, FORGERY OR
15 COUNTERFEITING OF INVENTORY PRICING LABELS, a violation of NRS
16 205.965(2) and (3), a felony, committed as follows:

17 That the said defendant on the 17th day of October A.D.
18 2001, or thereabout, at the County of Washoe, State of Nevada,
19 did willfully, unlawfully, and with the intent to cheat or
20 defraud a retailer, possess, make, forge or counterfeit fifteen

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

1 or more inventory pricing labels, commonly known as "UPC bar code
2 labels," in a motor vehicle located at the 9400 block of South
3 Virginia Street, Reno, Washoe County, Nevada.

4
5 Dated this 14th day of June, 2003.

6 RICHARD A. GAMMICK
7 District Attorney

8
9 By *Cheryl Aier-Johnson*
10 CHERYL AIER-JOHNSON
5021
Deputy District Attorney

11
12
13
14
15
16
17
18
19
20
21
22
23 PCN 82444285
81788297
24 81625263
82444206
25 82444252

26 06105145

1 The following are the names of witnesses examined
2 before the Grand Jury:

3 REED THOMAS

4 MICHAEL BROWN

5 SCOTT ARMITAGE

6 LARRY LODGE

7 BRETT BOWMAN

8 ~~MATT CARTER~~
 ~~GREGORY DANIELSON~~

9 DAVID DELLA

10 JENNIFER POWELL

11 JOHN D. ELLIS

12

13

14

15

"A TRUE BILL"

16

Chairman & Juror
FOREMAN

17

18

"NO TRUE BILL"

19

20

FOREMAN

21

22

23

24

25

26

CR03-1263
STATE VS FERRILL
District Court
Washoe County
EX4
DC-9900047177-008
JOSEPH VOL 4 Pages
07/01/2013 10:29 AM
1960
ASMITH

EXHIBIT 4

EXHIBIT 4

5/27/03

FERRILL VOLPICELLI
03-06779 @ WCSC
911 PARK BLVD
RENO, NV 89512

LAW
OFFICE

DEAR JACK,

OF

JACK

ALAN

ESQ.

BASED ON OUR LAST CONVERSATION BY TELEPHONE, YOU HAVE MERELY CONFIRMED MY SENTIMENT THAT YOU HAVE NO INTENTION WITH INTERPRETING THE LAW IN MY BEST INTEREST. IT IS TRULY A TRAVESTY, WHEN I HAVE PATIENTLY WAITED FOR YOU TO FILE THE MANY PRE-TRIAL MOTIONS THAT YOU PROMISED AND NONE OF WHICH HAVE BEEN FILED SOME 20 MONTHS AFTER MY ARREST.

THE MOTION TO DISMISS THE BURGLARY RELATED CHARGES SHOULD HAVE BEEN SUBMITTED AT THE PRELIMINARY HEARINGS. ADDITIONALLY, TO ENTER TRIAL DEVOID OF ALL THE DISCOVERY IS INSANITY.

CONSEQUENTLY, WE ARE UNPREPARED FOR TRIAL ON THESE MATTERS.

CLEARLY, PRACTICING LAW IS NOT ABOUT JUGGLING CASE LOADS AND ACCOMMODATING THE PROSECUTION'S CREATIVE AND MANIPULATIVE, STAGED, MULTIPICIOUS & DUPLICIOUS CHARGES. IT INVOLVES A FIDUCIARY RELATIONSHIP WITH THE CLIENT TO PROFESSIONALLY AND VIBLY CHALLENGE THE WELL GROOMED PROSECUTOR'S CASE

July 23, 2002

Ferrill Volpicelli
#60076 2 NSP
Box 607
Carson City, NV 89702

Jack Allan, Esq.
160 W. Liberty
Reno, NV 89509

RE: PRE-TRIAL PREPARATION

Dear Jack,

I am writing you to confirm the issues discussed in our 7/17/02 telephone conversation.

Firstly, please forward to me a copy of the District Attorney's April letter regarding the plea bargain offered in my case. As I indicated in our last conversation, that offer is unacceptable.

I believe the referenced plea bargain offer reflects bad faith and misconduct by the prosecution. The offer to dismiss the charge against my son, Travis, in exchange for my guilty plea, clearly demonstrates that the charges should not have been filed in the first place. In addition, the pending threat to bring charges against my daughter, unless I accept the plea bargain offer, further demonstrates the prosecution's bad faith and misconduct.

Similarly, this same manipulative tactic was leveraged against Bowman, the codefendant, in exchange for his testimony against me. To alter Bowman's plea, the prosecution threatened him with the filing of the *habitual criminal enhancement* in the event that he did not cooperate with them. Further embellishment on the part of Bowman ensued when ROP's detective Thomas offered consideration to Bowman by accommodating the transfer of Bowman's paycheck to an account in County Jail. In addition, the detective promised the seizure, safekeeping and return of all Bowman's apartment property, knowing full well that all of items were the fruits of Bowman's illegal activities.

Moreover, I will not be a party to such coercion and manipulation. Please investigate and conduct appropriate legal research on these matters. Such behavior by public servants should not be tolerated or legally acceptable.

As far as my daughter, Ashley, is concerned, she is not guilty of possessing any stolen property. She merely rented a storage unit for her family. Other than her visit to the facility's office to open the account, she never visited the unit itself until after 17 October 2001. Furthermore, she had no knowledge of the contents of the unit. Any attempt to prove otherwise will be futile.

I am also concerned with the timely filing of the motions referenced in my 6-18-02 letter to you. In our 7/17/02 conversation, you specifically indicated that we could file those motions one at a time. You also stated that a continuance of the projected trial date is likely, and that we are not in jeopardy for not filing all those motions immediately and concomitantly.

Please confirm these matters to me in writing, since I am very concerned with the filing of these motions well before the scheduled trial date.

When you file the motion for a bail reduction, and as I requested in my 6/18/02 letter, I insist that you file a motion to remand my cases back to the Justice Court for a preliminary hearing. Despite your sentiments that such a motion would be denied, I believe it is imperative that the attempt be made. Again, please review my 6/18/02 letter pertaining to this motion. In the event that the motion is denied, we can then file an appropriate motion in the District Court to dismiss, or cause election, on the multiplicitous and duplicitous charges.

According to my information, on 4/23/02, an agreement for reciprocal discovery was filed. To date, I have not received any additional discovery, except the deficient material provided to me at the February Preliminary Hearing. As I previously indicated to you in my 2/1/02, 2/21/02, 3/21/02/ 6/02/02 and 6/18/01 letters, I want a copy of ALL discoverable materials provided to me.

Please advise me when you intend to provide me with the discovery materials clearly outlined in those letters. Additionally, please advise me of when you are going to review the prosecution's file for discoverable materials. I believe you have been less than diligent in this matter and I respectfully request you give "discovery" in my cases your immediate attention.

Again, please respond to the above referenced matters in writing as soon as possible.

Thank you very much for your prompt attention to these matters.

Sincerely,

Ferrill Volpicelli

Cc: file

CR03-1263 DC-9900047177-009
STATE VS. FERRILL JOSEPH VOL 3 Pages
District Court 07/01/2013 10 29 AM
Washoe County 1960
EXS ASMITP

EXHIBIT 5

EXHIBIT 5

**RENO POLICE DEPARTMENT
TRANSCRIPT**

CASE # 01-216321

PERSON GIVING STATEMENT: Brent BOWMAN
SEX/RACE/DOB: -----1958
AGE: 43 Years

RESIDENCE ADDRESS: 695 W. 3rd St., Apt. #332, Reno, Nevada
HOME PHONE: 284-2280

EMPLOYMENT: Sand's Hotel - Cabana Deli - Lead Supervisor

TAKEN BY: Detective Mike BROWN - Sparks P.D. and
Detective Larry LODGE - W.C. Sheriff's Office

ON: 10-17-01 FROM: TO:

LOCATION OF INTERVIEW:

IN THE PRESENCE OF:

This is NOT a certified transcript. Although every effort has been made to ensure accuracy, you need to refer to the original or a copy of the source audio/video tape.

1 LODGE. Okay. Up until, who's your P.O?
2
3 BOWMAN. Myers.
4
5 LODGE. Myers?
6
7 BOWMAN.. Um hmm (affirmative)
8
9 LODGE. And August two thousand two (2002)?
10
11 BOWMAN. Um hmm (affirmative)
12
13 LODGE. How much a tail you got hanging over you?
14
15 BOWMAN. That's, what do you mean by tail?
16
17 LODGE. If you get violated?
18
19 BOWMAN. Ah, that's my expiration date.

Mary Kessler - Transcriber

1

V6.1334

10-17-01

1 BOWMAN. No conversation, just ah, "Howdy. How's the night going?" Things like that. Basic
2 patron/clerk conversation. Nothing special or specific.
3
4 BROWN. Okay. You remember what we were talking of before we started the interview here,
5 about us already knowing the answers to some questions? R
6
7 BOWMAN. Hm umm (affirmative)
8
9 BROWN. Okay, keep that in mind as you're talking to us. Okay? L
10
11 BOWMAN. Um hmm (affirmative)
12
13 BROWN. Or asking you questions.
14
15 BOWMAN. Alright.
16
17 BROWN. Okay? Now remember what I just told you again. Just go back and describe the
18 transaction with this bicycle, at the counter with the clerk.
19
20 BOWMAN. Okay. The transaction went, I walked up, I tore off the bar code that was on the bike.
21 Right? I handed it to her. Right? She scanned it. I paid for it. We talked about, she
22 asked me would the Security need to come up and ah, clear this bike and she asked to
23 (Inaudible) right and I said no.
24
25 BROWN. Okay.
26
27 BOWMAN. As long as I had the receipt I didn't (Inaudible)
28
29 BROWN. Go back to where did you get the bar code from.
30
31 BOWMAN. I tore it off the, it was already on the bike.
32
33 BROWN. Where was it on the bike?
34
35 BOWMAN. On the step of the bike, right front step. L
36
37 BROWN. Why did you tear it off?
38
39 BOWMAN. To hand her the receipt, to hand to the clerk to scan it.
40
41 BROWN. Is that something you normally do on all those things you buy?
42
43 BOWMAN. No.

CONSPIRACY TO
AMEND BOWMAN'S
TESTIMONY WITH
THE BIKE
ACQUISITION
TRANSACTION

EXHIBIT 6

EXHIBIT 6

CR03-1263 DC-9900047177-010
STATE VS FERRILL JOSEPH VOL 8 Pages
District Court 07/01/2013 10 29 AM
Washoe County 1980
FVS ASMITL

RENO POLICE DEPARTMENT
TRANSCRIPT

CASE # 01-216321

PERSON GIVING STATEMENT: Brett BOWMAN
SEX/RACE/DOB:

RESIDENCE ADDRESS:

EMPLOYMENT:

TAKEN BY: Detective Reed THOMAS

ON: 12-03-01


FROM:

TO:

LOCATION OF INTERVIEW:

IN THE PRESENCE OF:

This is NOT a certified transcript. Although every effort has been made to ensure accuracy, you need to refer to the original or a copy of the source audio/video tape.

1 BOWMAN. ...he asked him.
2
3 THOMAS. Okay.
4
5 BOWMAN. And I was promised (Inaudible) never find that out, till we got to court.
6
7 THOMAS. Who were you promised that by?
8
9 BOWMAN. The detective. 
10
11 THOMAS. Okay. I watched that interview tape and never once heard that mentioned. Okay? I
12 never once heard that mentioned.
13
14 BOWMAN. It was said out in the corridor.
15
16 THOMAS. Well..
17
18 BOWMAN. That Ferrill would never find out (Inaudible)
19
20 THOMAS. Well, that's water under the bridge now.
21
22 BOWMAN. Yeah.

Mary Kessler - Transcriber

1

V6.1337

1 bought something? I mean I know, based on the receipts and what not, that we found
2 in this vehicle and the merchandise we found in the storage unit, I mean I know he was
3 buying. But rather than spoon feed you, I'd rather align your memory to see if you can
4 recall specifically what items you bought or returned, that you'd know were
5 fraudulent, what kind of items?
6
7 BOWMAN. (Inaudible) There was (Inaudible)
8
9 THOMAS. Um hmm.
10
11 BOWMAN. That was all me. That was when I went in I put the label on it and ah....
12
13 THOMAS. Which store?
14
15 BOWMAN. Ah, Walmart.
16
17 THOMAS. Which one?
18
19 BOWMAN. The one ah, up by here (Inaudible)
20
21 THOMAS. (Inaudible) line?
22
23 BOWMAN. Yeah. For a camcorder, I believe that's what we got.
24
25 THOMAS. What was the name of the home entertainment center, do you know, the brand name?
26
27 BOWMAN. Panasonic. Cause we specifically asked for one.
28
29 THOMAS. Okay. So did he go inside and do the bar code switch?
30
31 BOWMAN. No. *I NEVER DID AND HE'LL COMPLETELY MISS IT LATER ON.*
32
33 THOMAS. Huh? You did?
34
35 BOWMAN. I did.
36
37 THOMAS. What did he do?
38
39 BOWMAN. He just made, designed the label and said, "This is what I want and go in and get it.
40 I'm gonna go get gas for the vehicle."
41
42 THOMAS. So he handed you the label and what was this label like? Was it sticky on the back or
43 something, so you could stick it onto the box?

Transcript (Con't)

CASE # 01-216321

1 BOWMAN. Yeah. (Inaudible)
2
3 THOMAS. Yeah. Okay. Do you recall any other, what other merchandise?
4
5 BOWMAN. Ah... A rug, a hose ah...
6
7 THOMAS. And that's what you've already been booked for.
8
9 BOWMAN. Um humm (affirmative)
10
11 THOMAS. What happened there?
12
13 BOWMAN. He told me whatever he wanted, right? I went and got it. I put this bar code to it.
14
15 THOMAS. So you had the bar code when you went into the store?
16
17 BOWMAN. Ah, huh (affirmative)
18
19 THOMAS. And he told you which one he wanted, so (Inaudible)
20
21 BOWMAN. He said (Inaudible)
22
23 THOMAS. And the bin?
24
25 BOWMAN. When he went in the store he told me what bin it was it. I went and got it out of the
26 bin, on the way up to the deal I put the bar code over the old, the original bar code,
27 right? And paid for it.
28
29 THOMAS. Were you guys ever inside the store at the same time?
30
31 BOWMAN. ~~Yeah.~~ *True*
32 *Never.*
33 THOMAS. And
34
35 BOWMAN. For several times.
36
37 THOMAS. Why was that?
38
39 BOWMAN. There'd be times when he'd have the bar code himself.
40
41 THOMAS. Okay.
42
43 BOWMAN. He'd set it up, leave it in the basket or on floor for me to pick up and I'd buy it.

*↓ KRMMS
ADDED VPC LABEL*

Transcript (Con't)

CASE # 01-216321

1 THOMAS. Okay. Did he ever say why he wasn't doing it himself?
2
3 BOWMAN. No.
4
5 THOMAS. I mean it's obvious to me why he's not doing it himself. He doesn't want to get
6 caught. So he's willing to pay you to do it, right? Is that the feeling you got?
7
8 BOWMAN. That's the feeling I got.
9
10 THOMAS. Okay.
11
12 BOWMAN. That's why I was getting so highly upset, cause of (Inaudible) he's supposed to go in
13 and set it up, right, I was just supposed to go in and buy it. *He ALWAYS SETUP & ALWAYS PURCHASED*
14
15 THOMAS. Okay.
16
17 BOWMAN. After that, I was getting ready to say something to him that night. When we was
18 getting ready to leave ah, right there, as we was leaving Walmart with the bike, right,
19 he wouldn't even set that up. *CRUISES IN A LIE*
20
21 THOMAS. Um hmm. *BIKE NOT ON TRANS ASSIGNMENT. LOT. IF WAS HIM FIC HIM*
22
23 BOWMAN. Right? I was gonna tell him, "Look buddy, you know, (Inaudible) you're supposed to
24 set it up, right?" I was gonna tell him right flat out that I was gonna, I was done
25 running the bar code.
26
27 THOMAS. Um hmm.
28
29 BOWMAN. If he wanted any more, right, then he had to set up his own bar code.
30
31 THOMAS. Okay. How many other stops you planning on making that night before you were
32 arrested? Because you only made the one (1) right?
33
34 BOWMAN. Three (3) He gave me three (3) stops. *B.S. HOW TO MEET DAUGHTER & HE WAS COMING TO RIDE BIKE HOME THOMAS WHY I LEFT WITH PARENTS LOT.*
35
36 THOMAS. You were gonna do three (3)? Do you know where the other two (2) were gonna be?
37
38 BOWMAN. I have no idea.
39
40 THOMAS. So he hadn't told you yet?
41
42 BOWMAN. No.
43

12-3-01

Transcript (Con't)

CASE # 01-216321

1 THOMAS. Do you know what he's in for?
2
3 BOWMAN. Uttering.
4
5 THOMAS. Uttering?
6
7 BOWMAN. Uh hmm (affirmative)
8
9 THOMAS. Do you ever talk to him about what you did?
10
11 BOWMAN. A little bit. As little as possible I talk to him.
12
13 THOMAS. What's he say? Hmm?
14
15 BOWMAN. As little as possible. I try to talk to him about this case as little as possible.
16
17 THOMAS. Did you ever buy a slide projector (Inaudible)
18
19 BOWMAN. Yes, I did.
20
21 THOMAS. Where did you buy it?
22
23 BOWMAN. At one of the office supply stores.
24
25 THOMAS. Was it a legitimate purchase or was it fictitious?
26
27 BOWMAN. It was fictitious.
28
29 THOMAS. How much did you pay for it?
30
31 BOWMAN. I really don't remember. It was one of the first things I bought for him.
32
33
34 THOMAS. Do you know how much it was worth, how much it originally sold for?
35
36 BOWMAN. No.
37
38 THOMAS. Would it be your opinion that everything in the storage unit came from merchandise
39 like this that was probably bought fictitiously or fraudulently?
40
41 — BOWMAN. Ah, probably a good ninety percent (90%) of it.
42
43 THOMAS. What did you say, a good...

*I thought he
was NEVER THERE
SO HOW DOES HE KNOW
THIS TO BE FACT?*

12-3-01

Transcript (Con't)

CASE # 01-216321

1 BOWMAN. A hundred, I think it was a hundred and seventy five (175), I think.

2 THOMAS. Okay.

3 BOWMAN. I'm not exactly sure.

4 THOMAS. Okay. Oh let's see here.

5 BOWMAN. I'm doing the best I can for you.

6 THOMAS. I know you are, I know you are. How many felony convictions do you have?

7 BOWMAN. Probably five (5) now.

8 THOMAS. Five (5)?

9 BOWMAN. Utah's dropped two (2) felony holds against (Inaudible) three (3) there, probably (Inaudible)

10 THOMAS. What are they all for?

11 BOWMAN. Ah, one (1) is a Criminal Mischief. A guy stole five hundred (500) bucks from me. I couldn't find him but I found his car.

12 THOMAS. Okay.

13 BOWMAN. And I trashed his car.

14 THOMAS. Okay.

15 BOWMAN. Ah, Forgery and Burglary.

16 THOMAS. Were those in Utah you said?

17 BOWMAN. Yeah.

18 THOMAS. How much prison time did you do there?

19 BOWMAN. None, I was on probation (Inaudible) probation. And then they said the last two (2) convictions, right, I ah, I guess they dropped em ah, and run em concurrent with the time I was doing here in Nevada.

20 THOMAS. Okay.

BOWMAN HAD THE
SAME IF NOT MORE
PRISON TIME
FOR THE
HABITUAL
FELONY.

IF NOT
MORE THAN ME

Transcript (Con't)

CASE # 01-216321

1 THOMAS. Um hmm.

2
3 BOWMAN. And I bought the one we were using.

4
5 THOMAS. You bought, he had you buy the one he was using? Was that a fraudulent buy?

6
7 BOWMAN. No. It was kind of legal, It was an actual buy.

8
9 THOMAS. It was a good, legitimate, okay. Where did you buy it?

10
11 BOWMAN. Either Office Max or Office Depot, one of the two. I can never keep those two
12 straight. I mean they're both the same to me actually.

13
14 THOMAS. Okay.

15
16 BOWMAN. When we were doing five (5) to ten (10) stores, each night we were out, right? They
17 all kind of run together.

18
19 THOMAS. Oh I'm sure.

20
21 BOWMAN. And to try to separate each one is tough.

22
23 THOMAS. Um hmm. Yeah I'm sure.

24
25 BOWMAN. But like I said, from what he was telling me right, that you guys basically got, you
26 guys cleaned him out. (Inaudible) storage unit, right. He told me you guys pretty
27 much cleaned him out.

28
29 THOMAS. Um hmm.

30
31 BOWMAN. Ah, all the (Inaudible) done, right, he said was in that storage unit.

32
33 THOMAS. Okay. And you said all those purchases were all fraudulent?

34
35 BOWMAN. Ah huh (affirmative)

36
37 THOMAS. That you were involved in.

38
39 BOWMAN. That I was involved in, right, all the ones I had bought, right, were fraudulent.

40
41 THOMAS. Okay.

42
43 BOWMAN. There were several times, right, I went with the bar code myself. He'd make the bar

BOWMAN ADMITS TO THE
PURCHASE OF
LABELMAKER AND
CHANGES HIS STORY

FOR
JURY

STAPLES

INCONSISTENCY
HE JUST SAID THE LABEL MAKER WAS
A LEGITIMATE BUY

CR03-1263 DC-9900047177-011
STATE VS FERRILL JOSEPH VOL 6 Pages
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Washoe County 1960
EX7 ASMTL

EXHIBIT 7

EXHIBIT 7

RENO POLICE DEPARTMENT
TRANSCRIPT

CASE # 01-216321

PERSON GIVING STATEMENT: Brett BOWMAN
SEX/RACE/DOB:

RESIDENCE ADDRESS:

EMPLOYMENT:

TAKEN BY: Detective Reed THOMAS

ON: 12-06-01 FROM: TO:

LOCATION OF INTERVIEW:

IN THE PRESENCE OF:

This is NOT a certified transcript. Although every effort has been made to ensure accuracy, you need to refer to the original or a copy of the source audio/video tape.

1 THOMAS. Did you ask him not to?

2
3 BOWMAN. It ain't done a damn bit of good.

4
5 THOMAS. I don't know if they can. It may be policy. Maybe you can do it out in corridor
6 (Inaudible) C-3.

7
8 THOMAS. Is that right?

9
10 BOWMAN. Yeah, out of sight and out of mind.

11
12 THOMAS. Yeah? Well hopefully this is the last time I got to come see you. I know every time
13 you got to get yanked out people are wondering.

14
15 BOWMAN. Yeah.

16
17 THOMAS. So it goes without saying. Alright. I'm up here for a couple of reasons. We were
18 talking about.... the last time I spoke to you, (Inaudible) and (Inaudible) there and also
19 about a car video.

20
21 BOWMAN. Yeah.

22

Mary Kessler - Transcriber

1

V6.1345

1 lease.
2
3 THOMAS. Okay. Well I spoke to the apartment manager yesterday and she said nothing's been
4 done.
5
6 BOWMAN. Nothing's been done?
7
8 THOMAS. Nothing's been done. She said, "As a matter of fact the eviction notice was supposed
9 to come out this morning." Okay? And she said she, by law, has to keep your stuff for
10 45 days from today.
11
12 BOWMAN. Okay.
13
14 THOMAS. Okay? So that's apparently what's happened. So she said nobody's been to your
15 apartment to collect anything.
16
17 BOWMAN. Okay.
18
19 THOMAS. Okay? So your stuff should all still be there.
20
21 BOWMAN. Alright.
22
23 THOMAS. In your phone call you described a home theater system that was fairly new. Was that
24 one of the home theater systems that you guys went out and bought?
25
26 BOWMAN. No, it's my TV, my ah, surround sound and VCR, or not VCR, ah, VCR and ah, CD
27 (Inaudible)
28
29 THOMAS. So this is stuff that you bought on your own some time in the past? It wasn't from
30 Volpicelli?
31
32 BOWMAN. No.
33
34 THOMAS. Are you sure?
35
36 BOWMAN. Yeah.
37
38 THOMAS. Okay. Because you seem to be very particular about that.
39
40 BOWMAN. Well that's the only thing I had in my life, that's the only thing I owned.
41
42 THOMAS. Okay. You said it was all brand new is all.
43

B.S. THE FRUIT OF
THE ILLEGAL ACTIVITIES.
THE ITEMS IN SUZANNE
MARCH THOSE AT HIS
APARTMENT.
CUFFED BOWMAN.
HOME THEATER
SYSTEM

COURT
TRANSCRIPT SHOWS THOMAS
CONTRADICTS
THIS

12-6-01

Transcript (Con't)

CASE # 01-216321

1 BOWMAN. It was brand new, yeah. I bought it over a period of time.
2
3 THOMAS. Okay.
4
5 BOWMAN. While I was at the Ridge House.
6
7 THOMAS. Where did you buy it?
8
9 BOWMAN. I got it at Shopko and ah, I got the CD player at ah, Walmart.
10
11 THOMAS. Okay, you have the boxes and everything for em?
12
13 BOWMAN. No, I threw em all out.
14
15 THOMAS. Okay.
16
17 BOWMAN. Ah, all it is, is it's a little studio apartment is what it is.
18
19 THOMAS. Um hmm.
20
21 BOWMAN. And I don't have a whole lot of room there. I don't have any storage to keep boxes.
22 So.
23
24 THOMAS. Okay.
25
26 BOWMAN. (Inaudible) my bed and my clothes.
27
28 THOMAS. Um hmm.
29
30 BOWMAN. You know, it's everything I own in my life.
31
32 THOMAS. Okay. Well you also indicated in your phone call that ah, you know, you didn't want
33 to talk about anything on the phone, that you'd explain everything in a letter.
34
35 BOWMAN. Yeah.
36
37 THOMAS. Okay?
38
39 BOWMAN. I just (Inaudible) The reason I didn't want to explain everything over the phone was
40 because of what was going on.
41
42 THOMAS. Okay.
43

Shaver
T.V.
cassette
VCR
home theater
system

BOWMAN LYING
ABOUT THE
ACQUISITIONS IN HIS
APARTMENT

12-6-91

Transcript (Con't)

CASE # 01-216321

1 THOMAS. So.
2
3 BOWMAN. With two (2) felony holds, right?
4
5 THOMAS. Two (2) warrants, yeah.
6
7 BOWMAN. Two (2) warrants, yeah.
8
9 THOMAS. Apparently you failed to appear for an interview, for doing a PSI in Utah.
10
11 BOWMAN. Right.
12
13 THOMAS. So, although I would imagine those are extraditable warrants.
14
15 BOWMAN. Ah, not any more. They were dropped.
16
17 THOMAS. They were dropped?
18
19 BOWMAN. While I was in custody for em, yeah.
20
21 THOMAS. Okay. So you don't have to worry about having to go to Utah?
22
23 BOWMAN. No. I wouldn't of gotten out if they hadn't dropped em. You know?
24
25 THOMAS. Yeah, that's true. Okay. Well this is what I want to do. Ah ... because of what you
26 described on the phone and because of what you guys were involved in.
27
28 BOWMAN. Ah huh.
29
30 THOMAS. I would like to go to your apartment and look at that home theater stuff. I'm not gonna
31 turn your apartment upside down. Okay? I'm not interested in anything else. I'm
32 interested in the stuff that you described on the phone to your sister, the home theater
33 system and the way you explain it, which sounds very similar to what you guys were
34 out buying. Okay?
35
36 BOWMAN. Oh that was what we were out buying, yeah.
37
38 THOMAS. Okay. Well I want to go look at it. And if I think it's something that you guys bought
39 together I'm gonna take it. Okay? And it's gonna be held in Evidence and we can
40 deal with it later, once this is all over. Okay?
41
42 BOWMAN. Yeah.
43

BINGO

C. HANCOCK 11/3

STORY ABOUT THE

Home

THANKS

12-6-91

BOTH LIED
AT TRIAL

1 BOWMAN. (Inaudible)
2
3 THOMAS. Okay. Okay. Alrighty. Well, I guess that's it for now. I hope I won't have to come
4 up and talk to you again. Ah, it's all really contingent on how far he wants to take this.
5 Ah, I'll tell you right now that if he wants, he's got another preliminary hearing
6 coming up next week. Ah, I don't know if you do as well. I think they'll probably drag
7 you down there as well and I'll try and make sure that they don't bring you guys in the
8 same vehicle and keep you separated. (But the district attorney's opinion is right now
9 that if he wants to play hard ball and he wants to take this to a jury, then every time he
10 gets bound over on one of these cases, and I've got about six (6) or seven (7) of em
11 right now, with about twenty (20) felonies facing him, she's gonna be asking for the
12 twenty five (25) to life "bitch" every time. So. That's what he's looking at. So we'll
13 see how much he really wants to play, if he wants to risk that, as opposed to what
14 we're offering him. So, like I say, me talking to you is really contingent upon him at
15 this point. If he wants to keep playing tough guy and being an asshole, then I'll keep
16 charging him. But I may have to keep coming back and talking to you and ah, piecing
17 together some more things)
18
19 BOWMAN. (Inaudible)
20
21 THOMAS. Okay?
22
23 BOWMAN. (Inaudible)
24
25 THOMAS. I understand. And you know what's ah, and like I say, it's all really contingent on
26 him. I mean he's the one that's (Inaudible) gonna make this thing go away or he's the
27 one that can drag it out. So. Alright?
28
29 BOWMAN. Right.
30
31 THOMAS. Okay.
32
33 BOWMAN. (Inaudible) talking about those coffee pots?
34
35 THOMAS. The coffee pots? Yeah.
36
37 BOWMAN. You'll (Inaudible) Volpicelli. Like I told you, I told you the other day (Inaudible)
38
39 THOMAS. Okay. Was that one bought legitimately or was it (Inaudible)
40
41 BOWMAN. No. You got the receipt for it.
42
43 THOMAS. Do I?

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Washoe County 1960
EX8 RSMITL

EXHIBIT 8

EXHIBIT 8

RENO POLICE DEPARTMENT
TRANSCRIPT

1-2-02
Conflict/Plan

DA# 213980

CASE # 01-216321

PERSON GIVING STATEMENT: Ferrill VOLPICELLI
SEX/RACE/DOB:

RESIDENCE ADDRESS:

EMPLOYMENT:

TAKEN BY: Detective Reed THOMAS - #4042

ON: 01-02-02

FROM: TO:

LOCATION OF INTERVIEW:

IN THE PRESENCE OF:

This is NOT a certified transcript. Although every effort has been made to ensure accuracy, you need to refer to the original or a copy of the source audio/video tape.

1 VOLPICELLI.for your protection?
2
3 THOMAS. Ah, you asked to speak with me. Yeah. I don't want there to be any dispute
4 down the road about what we talked about.
5
6 VOLPICELLI. Okay. Alright.
7
8 THOMAS. So if there's a problem at all and you got an issue with anything that was talked
9 about here today, it's on tape. So it protects you, it protects me. Okay?
10
11 VOLPICELLI. I guess that understandable.
12
13 THOMAS. Okay? I got this ah, "kite."
14
15 VOLPICELLI. Did I see you, did I see you at the police station?
16
17 THOMAS. We've never met.
18
19 VOLPICELLI. Never met. But you're the one that's been on the charge of my case?
20
21 THOMAS. I'm the detective in charge of your case, yes.
22

Mary Kessler - Transcriber

10


1

V6.1351

EXHIBIT

1 down there and she's a very accomplished attorney and very capable. She's the
2 chief of her division for a reason. She's not gonna have anybody, you know,
3 come in and snow her, as far as, you know, taking twenty (20) felonies and
4 you know, reducing em down to one or two or whatever it is.

5
6 VOLPICELLI. I understand.

7
8 THOMAS. So her feeling right now is, fuck you. You know? You want to play hard 
9 ball? Fine, we'll play hard ball. Okay? So she's told me, "We're gonna start
10 filing the Intent to file the "big bitch," every time we bind him over on another
11 case. Every case that he gets bound over on I'm gonna file the "big bitch" on
12 each one."

13
14 VOLPICELLI. So you get a "big bitch" on top of it?

15
16 THOMAS. You, what you get is, you know, say case number one, the Walmart case down
17 there we arrested you on, the very first case. Okay? (You go to prelim, you get
18 bound over on those charges. Okay? Which means now you got a trial date.
19 Right. After that prelim she's gonna file her intent to file the "big bitch"
20 against you, which is basically ten (10) to twenty five (25) years. Okay?

21
22 VOLPICELLI. Okay.

23
24 THOMAS. And then we go to the next prelim and the next case and you get bound over on
25 that one. Here it comes again, "I'm filing the big bitch, ten (10) to twenty five
26 (25) years."


27
28 VOLPICELLI. So I have what, five (5), six (6) cases? How many cases do I have?

29
30 THOMAS. Yeah, you've got about six (6) cases.

31
32 VOLPICELLI. I'm gonna be doing life then basically, is that what...

33
34 THOMAS. No, what I'm saying is, is the odds of you doing life are no. You're not gonna
35 do life. Okay? You're not gonna do life.

36
37 VOLPICELLI. I know you've had discussions. What does it look like that she's looking at?
38 What recommendation is she gonna make?

39
40 THOMAS. But that's where this comes back on you. That's what I'm trying to explain to
41 you. She, you know she offered you a fair deal. Your attorney even told us, "I
42 think that's a fair deal and I think you should take it." Okay? You didn't.
43 You came back and you basically insulted her and (she said, "Fine. Fuck him. 

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Mashoe County 1960
EXG ASMITA

EXHIBIT 9

EXHIBIT 9

RENO POLICE DEPARTMENT
TRANSCRIPT

CASE # 01-216321

PERSON GIVING STATEMENT: Brett BOWMAN
SEX/RACE/DOB:

RESIDENCE ADDRESS:

EMPLOYMENT:

TAKEN BY: Detective Reed THOMAS

ON: 01-03-02 FROM: TO:

LOCATION OF INTERVIEW:

IN THE PRESENCE OF:

This is NOT a certified transcript. Although every effort has been made to ensure accuracy, you need to refer to the original or a copy of the source audio/video tape.

1 BOWMAN. Cause he has court date on Monday.
2
3 THOMAS. On one of his prelims. Do you have any, are you scheduled to go there at all?
4
5 BOWMAN. (Inaudible)
6
7 THOMAS. Okay. I don't think you are. I know there's been a problem with transporting you
8 guys again.
9
10 BOWMAN. Like when I have (Inaudible) or (Inaudible)
11
12 THOMAS. Do they?
13
14 BOWMAN. My court last time we were both transferred together.
15
16 THOMAS. Ah huh.
17
18 BOWMAN. And when we were sitting down there, right ah, (Inaudible)
19
20 THOMAS. Okay.
21
22 BOWMAN. (Inaudible) I told him I'm gonna testify.

Mary Kessler - Transcriber

V6.1354

1 BOWMAN. And (sighs) (Inaudible) bad memory man.
2
3 THOMAS. Yeah. Yeah. Okay.
4
5 BOWMAN. I mean I threw away a career, a (Inaudible) career. You know?
6
7 THOMAS. Yeah.
8
9 BOWMAN. I mean I was moving up the ladder.
10
11 THOMAS. Yeah.
12
13 BOWMAN. Hindsight was 20/20. You know?
14
15 THOMAS. Yeah. Yeah. Ah, do you have any questions (Inaudible) Anything for me (Inaudible)
16
17 BOWMAN. And you know, any idea (Inaudible) moved for? Any idea at all?
18 You know what, at this point I'm so tired of seeing the postponements.
19
20 THOMAS. At this point it's contingent upon him. It really is. And I'm hoping that when I talk to
21 him here in a few minutes I'm gonna be talking to him next. Because basically the
22 way our meeting ended last night was he wanted me to take this deal to the D.A. that,
23 the deal that he wants and I told him straight up, the D.A.'s not gonna take it."
24 "Maybe she won't but would you please just take it to her anyway?" I said, "I'll
25 think about it." So, I've spoken to the D.A. and there's no way that she is gonna give
26 him the deal that he's asking for.
27
28 BOWMAN. What is he asking for? He told me ah, "Two (2) "birds" and ah, run the lewd to
29 (Inaudible) "
30
31 THOMAS. He wants to whittle this down to one (1) "bird" basically. He's willing to plead to
32 three (3) "birds" as long as we are willing to suspend two (2) of em, so that basically
33 he'll only serve a sentence for one (1) "bird" and run the lewd concurrent. So
34 basically he's looking to do time for one (1) "bird." And I keep telling him, "Ferrill
35 you got six (6) cases, twenty five (25) charges here, you're not getting a one (1) "bird"
36 but he just, he wouldn't listen to me. So he knows the district attorney is the one that
37 makes the decision. And I said, "Fine, I'll take it to her and we'll see what she has to
38 say." Well she gave me the answer that I knew she would and I could have told him
39 that yesterday but he didn't want to listen to me, so he's gonna get the news today and
40 it's gonna be up to him at this point to decide what he wants to do. (Cause I told him,
41 if he starts screwing with us and he wants to keep dragging this thing out and doing
42 things like that, then we're just gonna start filing the habitual criminal on him and he
43 can start looking at ten (10) to twenty five (25). So that's his choice. You know?

1-3-02

1 BOWMAN. That's the way it'll look, you know, I'm being hit with a burglary and I told her, "I'm
2 being hit with a burglary." And she goes, "I don't believe it. (Inaudible) changing
3 price tags."

4 THOMAS. Um humm.

5 BOWMAN. And you know?

6 THOMAS. Okay. Well as long as you were, you know, honest with her, what you told her.

7 BOWMAN. I told her (Inaudible)

8 THOMAS. I'll tell her the same thing, it won't be any difference.

9 BOWMAN. They offered us a deal right, and, cause I was gonna, I was probably gonna be faced
10 with twenty five (25) to life over this.

11 THOMAS. Yeah.

12 BOWMAN. You know? If I didn't. And ah, (Inaudible)

13 THOMAS. Yeah.

14 BOWMAN. (Inaudible)

15 THOMAS. Yeah. You know it all applied. But like I say, we weren't looking to hammer you.
16 We knew you weren't the brains behind the operation, so we knew that from the get
17 go. From the first time (Inaudible)

18 BOWMAN. Well I came out of prison with my back against the wall.

19 THOMAS. Um humm.

20 BOWMAN. (Inaudible) would of left me alone, long enough to get back on my feet, right, at the
21 half way house, I would have never gone this route.

22 THOMAS. Yeah.

23 BOWMAN. But you know, I'm making only seven forty (740) an hour.

24 THOMAS. Right.

25 BOWMAN. Four hundred dollars (\$400.00) off the top before taxes, right?

Contention
of
Fringe
Habitual
Criminal
Charge

1 THOMAS. Yeah.
2
3 BOWMAN. And my sister in Oregon, (Inaudible) right, but not really. I'm not (Inaudible) this
4 time.
5
6 THOMAS. Okay. Alright. Well I'll call her and (Inaudible)
7
8 BOWMAN. If you do (Inaudible) I've got two (2) paychecks from the Sand's sitting in my
9 property. They're gonna be expired.
10
11 THOMAS. In your property?
12
13 BOWMAN. Um hmm.
14
15 THOMAS. Here?
16
17 BOWMAN. Um hmm (affirmative) I need somebody to get em cashed before they expire.
18
19 THOMAS. How do you do that?
20
21 BOWMAN. I don't have a clue. I've written letters, I've asked people to help get em cashed.
22 That's the only help I really need.
23
24 THOMAS. You got to endorse em.
25
26 BOWMAN. I know, all they need to do is just let me endorse em. I (Inaudible) deposit em and
27 the money put back on my books or whatever.
28
29 THOMAS. So did you put a "kite" in to say, "Hey I want to endorse these checks and have the
30 County cash em and put em on my books."
31
32 BOWMAN. Yeah and ah, they said ah, the jail doesn't get a service for paychecks. They'll do it
33 for, if it was a money order but they wouldn't do it, not for paychecks.
34
35 THOMAS. What about this guy that went and cleaned up your apartment?
36
37 BOWMAN. I wrote him a letter, right, and all things got mixed up.
38
39 THOMAS. When do the checks expire?
40
41 BOWMAN. The biggest one expires the thirteenth (13th) of this month and the smaller one
42 (Inaudible) One's for two hundred eighty five (285) and one's for seventy seven
43 dollars (\$77.00). The two eighty five (285) one expires the thirteenth (13th) of this

*Answered
Favor
THIS
BOWMAN &
PHOTO FOR
TESTIMONY.*

*Procedural
to
BOWMAN*

1-3-02

Transcript (Con't)

CASE # 01-216321

Facilitation of
to Bowman's
inmate account

↑
Involvement
to
keep
Bowman
talking
about
specifies
he
figured
the
detectives
wanted
to
hear

1 month. The smaller one expires the following week.

2

3 THOMAS. Okay. Well at the very least you're gonna have to get em ah... you know, you're

4 gonna have to endorse em. (So I'll have to arrange to (Inaudible) get em endorsed But

5 let me talk to a deputy and find out exactly if that's the way to go about doing that.

6 And I'll see what we can do.

7

8 BOWMAN. Cause it's everything I own down there.

9

10 THOMAS. Yeah.

11

12 BOWMAN. And that's everything I go. (Inaudible) buy the TV with it and get my appliances

13 while I'm in prison.

14

15 THOMAS. Okay. Alright Let me talk to a county deputy that I know and we'll see if we can try

16 to work on that and figure something out.

17

18 BOWMAN. I appreciate it.

19

20 THOMAS. Yeah, I'll give it a shot.

21

22 BOWMAN. Thank you man.

23

24 THOMAS. Okay?

25

26 BOWMAN. (Inaudible) this has really (Inaudible), just to get em to send it to me.

27

28 THOMAS. Yeah.

29

30 BOWMAN. I've been fighting with the jail, right, some way to get it dealt with before it expired.

31

32 THOMAS. Um hmm.

33

34 BOWMAN. But it's like butting my head against a stone wall.

35

36 THOMAS. Yeah. Okay. Do you have a bank account or anything anywhere?

37

38 BOWMAN. No.

39

40 THOMAS. No? Okay. I'll talk to a deputy and see if there's something we can do. I don't know

41 if there is or not but we'll give it a shot.

42

43 BOWMAN. Okay.

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Washoe County
EX10

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JOSEPH VOL 3 Pages
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1960
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EXHIBIT 10

EXHIBIT 10

RENO POLICE DEPARTMENT
TRANSCRIPT

CASE # 01-216321

PERSON GIVING STATEMENT: Brett BOWMAN
SEX/RACE/DOB:

RESIDENCE ADDRESS:

EMPLOYMENT:

TAKEN BY: Detective Reed THOMAS

ON: 02-19-02

FROM: 1425 Hrs. TO:-----

LOCATION OF INTERVIEW:

IN THE PRESENCE OF:

This is NOT a certified transcript. Although every effort has been made to ensure accuracy, you need to refer to the original or a copy of the source audio/video tape.

1 THOMAS. February nineteenth, two thousand two (02-19-02), at fourteen twenty five (1425)
2 hours. Detective Thomas, Reno P.D., speaking with Brett Bowman, an inmate at the
3 Washoe County Jail. Okay. We're good to go.
4
5 BOWMAN. Ah, where do you want to start? I mean I can give you his working alias, which is
6 Joseph Vim.
7
8 THOMAS. Well he's got lots of aliases.
9
10 BOWMAN. This was his main alias.
11
12 THOMAS. Yeah.
13
14 BOWMAN. Main working alias is Joseph Vim.
15
16 THOMAS. Yeah, that stands for Volpicelli Investment Management, something like that. So he
17 uses that to get cards and order merchandise.
18
19 BOWMAN. And his P.O. Box is underneath that name, right, it's on California Avenue.
20
21 THOMAS. Right. Got that.


Mary Kessler - Transcriber

1

V6.1360

Transcript (Con't)

CASE #01-216321

1 THOMAS. Um hmm.
2
3 BOWMAN. I said, "Well you're a fool not to take it."
4
5 THOMAS. Yeah.
6
7 BOWMAN. Otherwise they will "bitch" you.
8
9 THOMAS. Yeah.
10
11 BOWMAN. (Inaudible)
12
13 THOMAS. Oh yeah, if he wants to play we're gonna play. And he's gonna go away for a lot
14 longer than that. So, you know. 
15
16 BOWMAN. He has abused me, taken advantage of me.
17
18 THOMAS. Yeah.
19
20 BOWMAN. You know? Our original agreement, right, was that he'd go in, right, set it up, all I
21 had to do was the buys.
22
23 THOMAS. Um hmm.
24
25 BOWMAN. And then it came down to where he had me doing everything
26
27 THOMAS. Um hmm.
28
29 BOWMAN. You know? So the more I thought about it, yeah, he left me, I told him, "You left me
30 twisted Poe. Cause I only did this thing to get by."
31
32 THOMAS. Yeah.
33
34 BOWMAN. You know?
35
36 THOMAS. Okay. Alright. Well let me get you back downstairs and I'm gonna go back down and
37 call the prison and I'll follow up with them on that. And I will get ahold of your P.O.
38 also and find out what the deal is with Warm Springs Institute.
39
40 BOWMAN. And you'll get ahold of my sister too?
41
42 THOMAS. Yeah. And I will try and call her again to let her know about the picture. I'll try and
43 find this David guy and see if he's got this picture. I'm guessing that even if I find it

FACT - HE WAS PAID 15 HOURS
TO GET FOR HIS
GIRL'S HAIR

FACT - HE WAS PAID 15 HOURS
TO GET FOR HIS
GIRL'S HAIR

Picture of
SINCE 1900

CR03-1263 DC-9900047177-015
STATE VS FERRILL JOSEPH VOL 2 Pages
District Court 07/01/2013 10 29 AM
Washoe County 1960
EX11 ASMITP

EXHIBIT 11

EXHIBIT 11

3

The Ridge House

Founded 1982

275 Hill Street, Suite 281 • Reno, Nevada 89501-1840
Phone: 775-322-8941 • Fax: 322-1544 • ridgehouse@sbcglobal.net



Dan Drinan
Executive Director

January 7, 2004

Second Letter

Gary Meneley
Interim Director

Mr. Ferril Volpicelli - #79565
NNCC
P.O. Box 7000
Carson City, NV 89702

DIRECTORS

Nancy Erends Bahr
President

Dear Mr. Volpicelli:

Neal Cobb
Vice President

This letter is in response to your correspondence dated, December 8, 2003. As I stated via telephone, due to Federal Confidentiality, 42 CFR, part 2, and 45 CFR parts 160-165, Ridge House can not confirm or deny whether individuals reside at our facility.

Gloria DePratti-Romero, M.A.
Secretary

However, I can give you general information about the program. From 1998 to mid 2002, Ridge House expanded the career enhancement component by adding desktop computers at each facility. Clients had access to JobLink and attended computer class once per week. Basic curriculum was taught, along with how to access the internet and how to setup an email account. The computer facilitator was responsible for maintenance and upkeep of the equipment at each facility.

Vanessa Davis, CPA
Treasurer

James Barnes, ESQ.

Jim Faehling

Kay Elliott

Terrance P. Hubert

Mary Price

In July of 2002, the computer classes and client access to computers at each of the facilities was dropped. It became too costly for the upkeep of the equipment.

As far as questions a, c, d and e, as indicated in your letter, please refer to the first paragraph of this letter. Hopefully, this letter has been of some help to you. Ridge House wishes you success in your future endeavors.

Sincerely,

Dani Doehring, L.A.D.C.
Program Administrator
The Ridge House, Inc.

CR03-1263 FERRILL JOSEPH VOL 3 Pages
STATE VS FERRILL JOSEPH VOL 3 Pages
District Court 07/01/2013 10 29 AM
Washoe County 1960
EX12 ASMT

EXHIBIT 12

EXHIBIT 12

Affidavit and Claim

- 1) I, Travis Volpicelli, hereby aver the following: that regrettably, and due to my transience during
- 2) the summer of 2003, my father, Ferrill Volpicelli, was unable to contact me so that I could appear
- 3) as a witness at his trial (#03-1263).
- 4) That as far as Brett Bowman is concerned, he initially and mysteriously appeared one morning in
- 5) an elevator at the Comstock Apartments during the summer of 2001 when my father was en route
- 6) to driving my brother, Logan, and I to summer school.
- 7) That thereafter, I sporadically observed e-mail communication between my father and Bowman
- 8) on my computer.
- 9) That I distinctly recall Bowman's unique domain name as being listed at Yahoo and included his
- 10) year of birth. That on one occasion in particular, I observed Bowman accessing the Aussie
- 11) storage unit belonging to my sister- in which my father was not present and Bowman was
- 12) accompanied by another gentleman in a pick-up.
- 13) That I also overheard telephone conversations between Bowman and my father whereby
- 14) Bowman was requesting my father to transport him to work, RPD and P and P. That in
- 15) exchange for such, I know Bowman was providing my father with prescriptions for Zanax. That
- 16) on the night of the carjacking incident involving my ex-girlfriend and the 1997 explorer, I
- 17) accessed some of the Zanax to self-medicate my anxiety. That outside of the initial introduction
- 18) to Bowman in the elevator sometime in July of 2001, my brother and I were never together with
- 19) my father and Bowman. Nor were we ever involved in any suspicious or illegal activities.
- 20) That on only one occasion did I ever see my father in possession of a labeler and it was
- 21) expressly for making printed labels for organizing my father's files. That I was also aware that
- 22) Bowman was storing his property at my sister's storage unit so that his probation officer would
- 23) not see all of his property.
- 24) That my brother and I were compelled to store our property at my sister's storage unit due to
- 25) space constraints in the studio apartment where my father, brother and I resided.
- 26) That during the summer of 2001, my father specifically reserved Saturdays, both day and
- 27) evening, for quality time for Logan and I.
- 28) That Saturday evenings involved skating, bowling, movies or Reno's special events.

29) That in October of 2001, I specifically recall hearing a conversation on the telephone between
30) Bowman and my father- whereby my father insisted Bowman to remove his belongings from
31) my sister's storage unit and, instead of gambling away his pay checks, to save for a motorcycle.
33) Where to fore, I hereby request a prompt release of my property from our residence and my
34) sister's storage unit.

35)

36) Travis Volpicelli

4/21/2004

37) Travis Volpicelli

Date

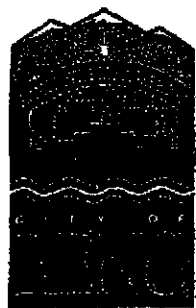


CR03-1263 DC-9900047177-017
STATE VS. FERRILL, JOSEPH VOL 8 Pages
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EX13 ASMIT

EXHIBIT 13

EXHIBIT 13

DO NOT SHOW
TO TENANT RP



Dave Della
Detective Sergeant -
Repeat Offender Program
Reno Police Department
P.O. Box 1900 Reno, NV 89505
(775) 334-3877

Detective SAID He IS UNDER COVER AND
would like to STAY THAT way!

INQUIRED ON UNIT AND SHOWED Badge + I.D.

He took A Copy of Contract AND INFO Sheet.
1st Page

9:32 AM

ARRIVED

9:40 AM

~~LEFT~~ LEFT

B-114

I P

RECEIVED
SEP 26 2001

RECEIVED
SEP 6 2 2001

IP

Dave Della
232-2080

AUSSIE SELF STORAGE
30 E. VICTORIAN AVENUE
SPARKS, NEVADA 89431-5167

Tenant Notes

Site: AS

Date: 10/17/01

Page: 1

SPACE : B114

Size : 10X20
Deposit: \$0.00
Rent : \$100.00

Entry : 08/06/01
Insurance: \$0.00
Premium : \$0.00

ASHLEY SCHILLING
1060 VASSAR STREET
RENO, NV 89502

Balance: \$0.00
Remarks: BXI ACOUNT

Paid-To : 11/01/01

NOTES

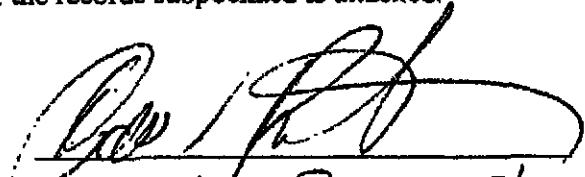
- 1 09/06/01 TENANT PAYED BXI 100.00 ON THE 31ST OF AUGUST IP GAVE CREDIT AND WAVED LATE FEE IP
- 2 10/17/01 PAROLE&PROBATION OFFICER CAME AT 6:38PM ON THUR. EVE., FOR VOLPICELLI'S. ASHLEY SCHILLING HAS A UNIT WHERE THEY ARE AUTHORIZED FOR ACCESS. OFFICER ASKED TO PARK CAR NEAR UNIT, GETTING A WARRANT.
KP AUTHORIZED

END

DECLARATION

I hereby declare under penalty of perjury that the following statements are true to the best of my knowledge and belief.

1. I am one of the principal owners of Aussie Self Storage, LLC,
2. That on the 11th day of September, 2205, I received a Subpoena Duces Tecum demanding the production of the all records related to the rental of storage unit B-114 to Ferill J. Volpicelli.
3. That I have examined the original of the records referred to in the Subpoena Duces Tecum, and have made a true and exact copy of them.
4. That the true and complete copy of the records subpoenaed is attached.

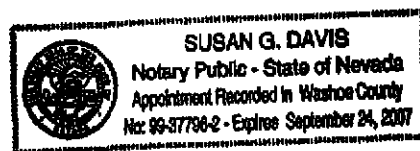

DALE PREVOST

SUBSCRIBED AND SWORN to before me

this 23rd day of September 2005.



NOTARY PUBLIC



AUSSIE SELF STORAGE, LLC
30 E VICTORIAN AVE SPARKS, NV 89431

OCCUPANT INFORMATION SHEET
(Occupant to fill out - PLEASE PRINT)

Name: Ashley Schilling

Space No. B114

Address: 1060 WASSAR ST.

Contract No. 2787

City: RENO

State: NV Zip: 89502

Home ph.: (m) 329-0389

Cel. Pager No. () _____

Drivers License No: 4609555052

Social Security No. _____

Drivers License expiration date: 5/03

Birth Date: 5/19/79

EMPLOYMENT INFORMATION

Employers Name: _____

Work ph.: 321-8339

Address: _____

City: _____ State: _____ Zip: _____

EMERGENCY CONTACT - ALTERNATE (Friend or relative at different address)

Name: CHANEL COE

Address: 1060 WASSAR ST City: RENO

State: NV Zip: 89502 Home Ph. 3290389 Work ph. _____

PERSONS AUTHORIZED FOR ACCESS: YES _____ NO _____

Name Ferrill Joseph Volpicevi Name CHANEL Volpicevi

Name TRAVIS Volpicevi Name _____

I understand it is **MY SOLE RESPONSIBILITY** to keep all the above information current with Aussie Self Storage, LLC. I understand any changes with the above information are to be submitted in writing within (15) fifteen days, signed by the Occupant.

Ashley Schilling
OCCUPANT SIGNATURE

8/7/01
DATE

HOW DID YOU HERE ABOUT AUSSIE SELF STORAGE:

1. Drive by / Saw sign _____ 2. Live in neighborhood _____ 3. Yellow pages _____ 4. Newspaper Ad _____
5. Word of Mouth / 6. Referral-Company or business _____ 7. Other: _____

AUSSIE SELF STORAGE, L.L.C. RENTAL AGREEMENT

☒ INDIVIDUAL

This agreement is executed on this 8th day of Aug, 2001, ("Commencement Date") by and between Aussie Self Storage, hereinafter called "Owner", and "Occupant", for the purpose of leasing or renting space as specified above and with the express understanding that no bailment or deposit of goods for safekeeping is intended or created hereunder. OCCUPANT whose name is:

Ashley Schilling
NAME

SPACE NO./APPROX. SIZE: B114 10x20

MONTHLY RENT: 100.00

NEXT RENT DUE/AMT: 9/1 100.00

BUSINESS NAME

1000 Vassar St.
STREET ADDRESS

4600555052
DL. NO./D. NO.

329 0389
RESIDENCE PHONE

SOCIAL SECURITY NO.

321 8339
BUSINESS PHONE

CITY ADDRESS

Reno NV 89502
CITY STATE ZIP CODE

DATE OF BIRTH 5/19/79

RENT SCHEDULE

PARTIAL MONTH \$ 0
MONTHLY RENT \$ 86.67
ADMINISTRATIVE FEE \$ 15.00
SECURITY DEPOSIT \$ 0
PAID RENT \$ 0
INSURANCE (\$) \$ 0
OTHER (SPECIFY) \$ 0
SALES TAX \$ 0
TOTAL DUE \$ 101.67

LATE FEE (5 days past due) \$10.00
PRE-LIEN FEE (min. 14 days past due) \$18.00
RETURN CHECK CHARGE \$25.00
LIEN FEE (min. 28 days past due) \$25.00
LIEN SALE FEE (min. 45 days + any auction fees) \$25.00
NOT LEAVING UNIT BROOM CLEAN \$50.00
LOCK-OUT FEE \$10.00
(MAKE CHECKS PAYABLE TO: AUSSIE SELF STORAGE)
Method: Cash Check BXI Credit Card

Receipt of the first monthly rent is hereby acknowledged Each succeeding month's rent is due and payable on the 1ST day of each succeeding month until terminated by either OWNER or OCCUPANT in writing.

1. PREMISES: Owner hereby rents to Occupant, and Occupant rents from Owner, on the terms and conditions herein set forth, the self storage space described above, herein called the "Premises". The Premises shall be used solely for the purpose of storage pursuant to the terms and conditions of this Rental Agreement and for no other purposes whatsoever.
2. TERM: The term of this tenancy shall commence as of the Commencement Date and continue until Sept 1st 2001. In the event that Occupant holds over the Premises beyond said term, such holdover shall be deemed a month-to-month tenancy subject to all the terms and conditions of this Rental Agreement.
3. RENT: Occupant agrees to pay to Owner at 30 Victorian Avenue, Sparks, NV 99431, without deduction, prior notice, demand or billing statement, the sum of money set forth in the Rent Schedule above per month beginning on the 8th day of Aug, 2001, and continuing on the 1st day of each and every month thereafter until this Rental Agreement terminates. If the terms of this Rental Agreement shall commence other than on the first of the month, Occupant shall owe a prorated portion of the first month's rent. Occupant shall pay, in advance, at least one full month's rent. With respect to any month-to-month tenancy, the monthly rent may be adjusted by Owner effective the month following Owner's thirty (30) day written notice to Occupant specifying such adjustment. Upon vacating the premises, Occupant agrees to give Aussie Self Storage (7) seven days notice prior to actual vacate date and leave the premises clean without waste or damage. NO REFUNDS! Owner also reserves the right to give Occupant (7) seven days notice to vacate upon non-compliance and/or breach of any provision of the Rental Agreement or Rules and Regulations other than non-payment of rent (Nevada Self Storage Lien Laws Apply).
4. LATE FEES, SERVICE CHARGES, DEPOSITS: NO BILLINGS NOTICES ARE SENT!
a. Concurrently with the execution of this Rental Agreement, Occupant shall pay to Owner a fee as specified in Rent Schedule above as a non-refundable new account administration fee.
b. All rent shall be paid in advance on the first day of each month and in the event Occupant shall fail to pay the rent by the 5th day of the month, Occupant shall pay, in addition to any of the amounts

by sign for the insurance plan described in the insurance brochure made by Owner, which insurance does not cover goods stored in the storage space. Owner agrees that Occupant does not have coverage for the full value of Occupant's property stored in the storage space. Occupant agrees that Occupant will personally assume all risk of loss, including damage or loss, by burglary, fire, vandalism or vermin. Owner and its affiliates, authorized representatives and employees shall not be responsible for, and occupant hereby releases and holds Owner's Agents from any responsibility for, any loss, liability, claim, expense, damage to property or injury to persons or property that could have been insured (including without limitation any loss arising from the active or passive acts, omission or negligence of Owner or Owner's Agents) (collectively "Released Claims"). Although Owner and Owner's Agents may be furnished information by Occupant, Occupant understands that Owner and Owner's Agents are not an independent contractor or independent agents. Owner has not provided any coverage or assisted Occupant in making any claim under any insurance policy. The provisions of this paragraph will not limit the rights of Owner and Owner's Agents under any insurance policy.

7. **NEVADA SELF STORAGE FACILITY LIEN LAW:** In the event rent and other charges shall remain due and unpaid for a period of fourteen (14) consecutive days, Occupant's right to possession may be terminated by Owner upon written notice and Occupant's personal property in or on the Premises may be subject to a claim of lien and may even be sold to satisfy the lien if the rent and other charges due remain unpaid for fourteen (14) consecutive days after date of mailing notices.

8. **RELEASE OF OWNER'S LIABILITY, INDEMNIFICATION:** Owner and Owner's agents shall not be liable to Occupant for any damage to, or loss of, any personal property while at the rented Premises arising from any cause whatsoever, including, but not limited to, burglary, fire, water damage, mysterious disappearance, rodents, Acts of God, or the active or passive acts of omissions or negligence of Owner or Owner's agents. Owner, Owner's agents, and employees shall not be liable to Occupant for injury or death as a result of Occupant's use of this storage space or the Premises, even if such injury is caused (in whole or in part) by the active or passive acts, omissions, or negligence of Owner, Owner's agents, or employees. Occupant will indemnify, hold harmless, and defend Owner from all claims, demands, action or causes of action (including attorney's fees and costs) that are hereinafter brought by others arising out of the Occupant's use of the Premises, including (without limitation) claims for Owner's active negligence. Occupant agrees that Owner's and Owner's Agents' total responsibility for any loss from any cause whatsoever will not exceed a total of \$5,000.00.

9. **RIGHT TO ENTER:** Occupant grants Owner, Owner's agents, or representatives of any government authority including police and fire officials, access to the Premises upon THREE (3) days prior written notice to Occupant. In the event of an emergency, Owner, Owner's agents, or representatives of any governmental authority shall have the right to remove Occupant's lock and enter the Premises, without notice to Occupant, and take such action as may be necessary or appropriate to preserve the Premises, to comply with applicable law, or to enforce any of Owner's rights. If any default shall be made in any of the covenants herein contained or if Occupant shall abandon the Premises, Owner may enter the Premises and remove all property therefrom, in which event this Rental Agreement shall terminate without prejudice to Owner's right to recover rent due and unpaid through the date of such entry, damages in respect of any default under this Rental Agreement, and such other amounts as may be recoverable pursuant to law in the event of a breach of this Rental Agreement or abandonment of the Premises by Occupant prior to the expiration of the Rental Agreement. Owner may, at its option, determine not to terminate this Rental Agreement in which event the Rental Agreement shall continue in effect and Owner may enforce all of its rights and remedies under this Rental Agreement.

10. **INSPECTION AND SECURITY:** Occupant has been afforded an opportunity to inspect the Premises and the project property, and acknowledges and agrees that the Premises and the common areas, including the safety and security thereof, are satisfactory to Occupant's intended uses of the Premises or the common areas of the project. All storage unit sizes are approximate. Occupant shall be entitled to access to the Premises and the common areas of the project only during such hours and on such days as are regularly posted at the project. Owner shall not be deemed to, either expressly or implicitly, provide any security or protection to Occupant's property. Any security devices which Owner may maintain are for the protection of Owner's investment, including but not limited to building and equipment. Owner may discontinue that use at any time without notice.

11. **WASTE, QUIET CONDUCT, MAINTENANCE:** Occupant shall take good care of the Premises and repair any damage or waste, whether to the interior and/or exterior of the Premises, necessitated or occasioned by the act or neglect of Occupant or any agent of Occupant or other person for whose acts Occupant is responsible.

12. **LOCKS:** Occupant shall not put more than one lock on his unit at any time. Occupant shall provide, at Occupant's own expense, a lock for the Premises which Occupant, in Occupant's sole discretion, deems sufficient to secure the Premises. Owner may, but is not required to lock the space if it is found open. Owner has the right, as it deems necessary to remove such lock by cutting or other means, to gain entry to the Premises under Paragraph 9 above. Owner shall not be held liable for replacement of any lock that is damaged by forced entry by the Owner under provisions of Paragraph 9 above.

13. **ENFORCEABILITY:** If any part of this Rental Agreement is held to be unenforceable for any reason, all remaining parts of this Rental Agreement will nevertheless be valid and enforceable in all circumstances and Occupant hereby expressly agrees.

14. **ACCEPTANCE OF PAYMENT OF RENT:** In the event of a default by Occupant, Occupant agrees that (a) the tender of the rental by Occupant and the acceptance thereof by Owner, if not the full amount due, or (b) the allowing of Occupant to remove his personal property from the Premises, after the delivery of a preliminary lien notice or during the pendency of an unlawful detainer action, shall not constitute a waiver of the preliminary lien notice, the notice of termination nor shall it reinstate the terms and provisions of this Rental Agreement.

15. **WAIVER:** The waiver by either party of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition upon any subsequent breach of the same term, covenant or condition. Any subsequent acceptance of performance shall not be deemed to be a waiver of any preceding breach of any term, covenant or condition of this Rental Agreement, other than the failure to perform the particular duties subsequently accepted, regardless of knowledge of such preceding breach at the time of acceptance of such performance.

16. **ATTORNEYS FEES AND COSTS:** In the event any action be instituted, or other proceedings taken to enforce any covenant herein contained or to recover any rent due or to recover possession of the Premises for any default or breach of this Rental Agreement, the prevailing party shall be entitled to recover from the other party reasonable attorneys' fees, costs and expenses at trial or on appeal.

17. **RULES:** Owner shall have the right to establish or change hours of operation and access or to promulgate rules and amendments, or additional rules and regulations for the safety, care and cleanliness of the Premises, or the preservation of good order of the facility. Occupant agrees to follow all of Owner's rules now in effect, or that may be put into effect from time to time. A current list of all rules and regulations will be posted in the facility office. Rules and regulations are made a part of this Rental Agreement and Occupant shall comply at all times with such rules and regulations. Copies of the list are available to all Occupants.

18. **NOTICES:** All notices required by law, or by this Rental Agreement may be sent to Occupant at any of the addresses given by Occupant above, by first class mail, postage prepaid and shall be deemed given when deposited in the U.S. Mail. Occupant agrees that any such notice is conclusively presumed to have been received by Occupant FIVE (5) days after mailing, unless returned to Owner by the Postal Service. Any of the terms of this Rental Agreement may be changed by Owner by giving written notice by mail, as provided in this paragraph, FIVE (5) days prior to the expiration of any month of this tenancy.

19. **NO ORAL RENTAL AGREEMENTS:** This Rental Agreement contains the entire Rental Agreement between Owner and Occupant and no oral Rental Agreements shall be of any effect whatsoever. Occupant agrees that he is not relying, and will not rely, upon any oral representations made by Owner, or by any of Owner's agents or employees purporting to modify or add to this Rental Agreement in any way whatsoever. Occupant agrees that this Rental Agreement may be modified only in writing, by Owner, in order for such modification to have any effect whatsoever.

20. **CHANGE OF OCCUPANT'S ADDRESS:** Occupant is responsible for notifying Owner in writing of the change of any of the addresses given by Occupant. Owner shall not be presumed to have received notice of any change of address unless given in writing by Occupant, and sent to Owner at Owner's address given above, first class mail, postage prepaid. In the event Occupant shall change Occupant's place of residence or business or alternate name and address as set forth in this Rental Agreement, Occupant shall give Owner written notice of any such change within ten (10) days of the change, specifying Occupant's current residence and alternate name, address and telephone number.

V6.1373

15. **WAIVER:** The waiver by either party of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition upon any subsequent breach of the same term, covenant or condition. Any subsequent acceptance of performance shall not be deemed to be a waiver of any preceding breach of any term, covenant or condition of this Rental Agreement, other than the failure to perform the particular duties subsequently accepted, regardless of knowledge of such preceding breach at the time of acceptance of such performance.

16. **ATTORNEYS FEES AND COSTS:** In the event any action be instituted, or other proceedings taken to enforce any covenant herein contained or to recover any rent due or to recover possession of the Premises for any default or breach of this Rental Agreement, the prevailing party shall be entitled to recover from the other party reasonable attorneys' fees, costs and expenses at trial or on appeal.

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21. **ASSIGNMENT:** Occupant shall not assign or sublease the Premises or any portion thereof. Owner has the right to assign this contract.

22. **WARRANTIES:** Owner hereby disclaims any implied or express warranties, guarantees or representations of the nature, condition, safety, or security of the Premises. The Premises are not protected by cold weather or by heat.

23. **HOLD HARMLESS AGREEMENT:** Occupant agrees that he or an authorized person for access borrows or uses my equipment such as dollies, carts or hand trucks or keys for elevator(s). he holds harmless Aussie Self Storage, its Owner's and agents responsible for any injury or damage caused by such use. Any such equipment is considered property of Aussie Self Storage and may only be used with permission Aussie Self Storage and a deposit may be required upon request for use of said equipment.

24. **INCORPORATION OF PROVISIONS:** Occupant acknowledges that he has read, is familiar with and agrees to all of the provisions of this Rental Agreement, all pages and numbered items, and Owner and Occupant agree that all such provisions constitute a material part of this Rental Agreement and are hereby incorporated by reference. Occupant agrees that he has received a copy of this Rental Agreement and the Rules and Regulations.

IN WITNESS WHEREOF, the parties hereto have executed this Rental Agreement the day and year first above written.

Ashley Schilling
Occupant, Print Name

Ashley Schilling
Occupant Signature

Owner, AUSSIE Self Storage, L.L.C.

8/7/01
Date

Received by Agent for Owner

END OF RENTAL AGREEMENT (pg 2 of 2)

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EX14 ASMIT

EXHIBIT 14

EXHIBIT 14

ST# 2838 OP# 00000814 TE# 26 TR# 01774

NOKIA CHARGE	0043168404515	9.96 J
COUNTER CARD	0610290020755	1.99 J
15 MONITOR	0769940305009	394.44 J ←
	SUBTOTAL	406.39
SALES TAX 1		29.46
	TOTAL	435.85
	CASH TEND	436.00
	CHANGE DUE	0.15
TC# 0000 2855 5464 9612 9341 9		
10/01/01	13:03:01	

SORRY

This was the only
ONE we could find

3-19-04

Cash Office

WAL★MART

ALWAYS LOW PRICES. ALWAYS WAL-MART.

Always

WE SELL FOR LESS
MANAGER MATTHEW CARTER
(775) 359 - 8200
ST# 2106 OP# 00002821 TE# 66 TR# 07826
LUGG CART 003905281895K 9.88 J
SUBTOTAL 9.88
TAX 1 7.250 % 0.72
TOTAL 10.60
CASH TEND 20.00
CHANGE DUE 9.40

ITEMS SOLD 1

TC# 1289 7625 6311 8771 1678
CASH YOUR TAX REBATE CHECKS HERE!
09/01/01 18:38:54

WAL★MART

ALWAYS LOW PRICES. ALWAYS WAL-MART.

Always

WE SELL FOR LESS
MANAGER GERALD LALONDE
(714) 491 - 0744
ST# 2242 OP# 00002941 TE# 04 TR# 06236
HOMINGVAC 007350202288K 288.00 J
SERGER 009861293254K 263.83 J
900MHZ PHONE 073507809116 29.97 J
SUBTOTAL 581.80
TAX 1 7.500 % 43.64
TOTAL 625.44
HCARD TEND 625.44

ACCOUNT #7541-09/03
APPROVAL #025104
TRANS ID -
VALIDATION -
PAYMENT SERVICE - N
CHANGE DUE 0.00

ITEMS SOLD 3

TC# 7713 1233 1172 1055 5519.1
CASH YOUR TAX REBATE CHECK
08/20/01 13:24:1

WAL★MART

ALWAYS LOW PRICES. ALWAYS WAL-MART.

Always

WE SELL FOR LESS
MANAGER SAMUEL KUPFER
(775) 829 - 8088
ST# 2189 OP# 00002377 TE# 92 TR# 036
MICROWAVE 007400063950 99.96
REFRIGERATR 068805710122 169.84
FREEZER 068805711048 156.83
SUBTOTAL 426.63
JAW CLIPS 004319413991 2.47
SKIN CARE 038137003475 4.77
SUBTOTAL 433.87
TAX 1 7.250 % 31.46
TOTAL 465.33
HCARD TEND 465.33

ACCOUNT #7541-09/03
APPROVAL #045166
TRANS ID -
VALIDATION -
PAYMENT SERVICE - N
CHANGE DUE 0.00

ITEMS SOLD 5

TC# 1289 7625 6311 8771 1678
CASH YOUR TAX REBATE CHECKS HERE!
09/01/01 18:38:54

CUSTOMER COPY

WAL★MART

ALWAYS LOW PRICES. ALWAYS WAL-MART.

Always

WE SELL FOR LESS
MANAGER MATTHEW CARTER
(775) 359 - 8200
ST# 2106 OP# 00002941 TE# 03 TR# 09685
MENS SOCKS 001309618061 3.98 J
900MHZ PHONE 073507809116 29.97 J
SUBTOTAL 33.95
TAX 1 7.250 % 2.46
TOTAL 36.41
CASH TEND 40.00
CHANGE DUE 3.59

ITEMS SOLD 2

TC# 1289 7625 6311 8771 1678
CASH YOUR TAX REBATE CHECK
09/01/01 18:38:54

CR03-1283 DC-9900047177-019
STATE VS. FERRILL JOSEPH VOL 4 Pages
District Court 07/01/2013 10 29 AM
Washoe County 1960
FX15 ASMITI

EXHIBIT 15

EXHIBIT 15

Incident Report

RENO POLICE DEPARTMENT

01-216321

Supplement No
0002

OFFICER 1: ;BROWN, MIKE

Inv	Seq	Type	Name
OFF	1	I	;BROWN, MIKE

Narrative

DETAILS:

On Wednesday, October 17, 2001, I was assisting other Detectives in the Repeat Offender Program with a surveillance involving Defendant Ferrill VOLPICELLI. He was followed to the Wal-Mart Store at 155 Damonte Ranch Parkway in Reno. I followed him inside the store and witnessed crimes occurring there.

Around 1700 hrs., VOLPICELLI picked up Defendant BOWMAN near the intersection of Washington and Third St. in Reno. They then drove to the area of Vassar and Kietzke where BOWMAN went to the office of Adult Parole and Probation.

They then drove to Damonte Ranch Parkway and entered the parking lot of Wal-Mart. VOLPICELLI then got out of his vehicle and went into the store near the east side of the building (grocery store entrance). Det. ARMITAGE and I followed him into the store. VOLPICELLI went to the bicycle display rack and appeared to be tampering with one of the bicycles. He then went to the electronics section of the store where he selected a cordless telephone and placed into the cart he had obtained when he entered the store. I then lost sight of him when Det. ARMITAGE was following him. ARMITAGE then told me that he had gone out of the store while leaving the phone and cart behind.

I then returned to my vehicle and continued to monitor the activity of VOLPICELLI. He drove his vehicle toward the front of the store and let BOWMAN out of the vehicle. BOWMAN went into the store and was followed by other Detectives.

BOWMAN and VOLPICELLI were arrested a short time later by RPD Officers KULL and YAWN. They were transported to the Reno Police Department and placed into interview rooms.

At 6:30 pm, Det. LODGE and I began an interview with Def. BOWMAN. LODGE gave BOWMAN his Miranda Rights and asked BOWMAN if he understood his rights. BOWMAN stated that he understood and signed a waiver of his rights and agreed to give a statement regarding the incident at Wal-Mart.

BOWMAN stated that VOLPICELLI and he have been acquaintances since they met while both were incarcerated at the Warm Springs Correctional Center. BOWMAN said that this was in November of 2000. BOWMAN said he has been in regular contact with VOLPICELLI since he was released in June of 2001.

BOWMAN said VOLPICELLI had called him via cell phone and said they were going to buy some things at area stores. BOWMAN stated that VOLPICELLI would pay him \$100 to \$200 a night for buying things with cash that VOLPICELLI would provide. BOWMAN said that VOLPICELLI would ask him to buy specific items at certain stores. BOWMAN recalled buying a home theater system at Wal-Mart, a rug at Lowe's, and a garbage disposal at Home Depot. I asked about the bicycle that he had purchased at Wal-Mart. BOWMAN said that VOLPICELLI had gone into the store to put a fraudulent bar code sticker on the bicycle. BOWMAN said he

P
Carl's
Wal-Mart

Incident Report

RENO POLICE DEPARTMENT

01-216321

Supplement No
ORIG

At 1610 hours, VOLPICELLI drove his vehicle to 3rd and Washington, where he picked up defendant Brett BOWMAN. They drove around town, and at 1640 hours, they arrived at the Super Wal-Mart at 155 Damonte Ranch Parkway in Reno, Nevada. They parked the vehicle and VOLPICELLI walked towards the entrance of Wal-Mart. (See Detective ARMITAGE'S follow-up reference the vehicle.) While BOWMAN stood at the vehicle smoking a cigarette, VOLPICELLI went inside Wal-Mart through the east entrance. Detectives ARMITAGE and BROWN followed VOLPICELLI in and monitored his activities.

VOLPICELLI got a shopping cart and walked around the store. He went over to the toy department and looked at the bicycles that were on the display rack. VOLPICELLI leaned over a bike and began tampering with the tags on the bike. *THE GUY THEY SAW THE JPC* The detectives could not see exactly what he was doing. Once he finished, VOLPICELLI went to the electronics department and removed a cordless phone from a display. He put the phone in the cart and walked over to the front of the store. He left the cart with the phone in it and went into the bathroom. When he came out of the bathroom, he did not return to the shopping cart and left the store; returning to his vehicle. *BINGO YET HE LIED AT MY REVOCATION HEARING*

Two minutes after VOLPICELLI left the store, BOWMAN went inside through the east entrance at 1700 hours. Detective Sergeant DELLA and Federal P&P Officer HUNT went inside the store through the west entrance to monitor BOWMAN'S activities. Once inside the store, they found BOWMAN at the bike display. BOWMAN was having an employee remove the same bike from the display that VOLPICELLI had been tampering with earlier. BOWMAN took the bike to register #31, where store cashier Julia VOLLOR was working. She asked BOWMAN to put the bike closer to her so she could scan the bar code. BOWMAN said, "I've already done that for you. I took the tag off for you to make it easier." VOLLOR scanned the bar code and the cost of the bike with tax, came to a total of \$74.36. BOWMAN gave her a \$100 bill and she tendered the change. BOWMAN got his receipt and exited the store.

DELLA and HUNT approached VOLLOR and asked how much BOWMAN had paid for the bike. She told them it was \$74.36. DELLA had looked at the price of the bike at the display, and it showed to be \$249.66. (SEE EVIDENCE.)

Outside, while BOWMAN was buying the bike, VOLPICELLI drove his vehicle through the lot and then out onto Virginia St., where he drove north, re-entered the parking lot, and parked the vehicle in a different space. *AGAIN EVIDENCE OF DEPRIVATION*

BOWMAN walked the bike outside to the vehicle, put it in the back and they drove off. We asked dispatch for marked units, to stop the defendants. Officers YAWN and KULL responded and stopped the vehicle in the 9400 block of S. Virginia. The defendants were subsequently arrested for parole violations and transported to the Reno Police Department for interviews. Detectives LODGE and BROWN interviewed BOWMAN post-Miranda. (SEE THEIR FOLLOW-UPS FOR DETAILS.)

During the interview, BOWMAN admitted that VOLPICELLI had changed the barcode on the bike and then asked BOWMAN to go in the store and buy the bike for the fraudulent price. He said that VOLPICELLI was going to pay BOWMAN \$100 to help VOLPICELLI commit several of these crimes during the day. At the conclusion of the interviews, both defendants were booked into the Washoe County Jail by P&P Officers DIEK and ADRIAN for parole violations.

Incident Report

RENO POLICE DEPARTMENT

01-216321

Supplement No
0001

On Wednesday, October 17 2001, I was assisting other Detectives in the Repeat Offender Program with a surveillance involving Defendant Ferrill VOLPICELLI. This involved keeping him and/or his vehicle under surveillance throughout the day, which included crimes committed at the Shopko Store, 5150 Mae Anne Ave, Reno, at about 1425 hours. (Please see case number 01-216452) I followed him inside the store at that time and witnessed crimes occurring there.

Later in the day, near 1700 hours, Detective Mike BROWN and I followed him into the Super Wal-Mart at 155 Damonte Ranch Parkway. By that time he had picked up Defendant BOWMAN. VOLPICELLI entered the store alone, and Detective M. BROWN and I went inside as well. VOLPICELLI entered on the grocery side of the store, retrieved a basket, and walked west through the store at the front along the registers. He went through the toy aisles, then continued west to the bicycles.

Once at the bicycles, he stopped and perused that section for a while. He specifically spent a few minutes at the rack holding bicycles, near the north corner on the east side. He appeared to be reading the label, or price tag posted on the rack for the bicycles. When he was finished in that area, he then walked north through the store into the electronics section. He walked through the electronics section, then exited to the rear main aisle running east and west. He had put a cordless telephone in the basket, and it was the only item in it. He turned south in an aisle that feeds into the registers, and stopped partway and looked at some items in housewares. He then pushed the basket to the registers, and left the basket near one of them with the phone still in the basket. He walked through one of the lines and into the men's restroom. He was in the restroom a few minutes, then came out and exited the store at the merchandise doors.. He did not go back inside, but Defendant BOWMAN did.

At about 1725 hours we had Patrol Officers YAWN and KULL conducted a traffic stop as VOLPICELLI and BOWMAN left the store, and the stop occurred in the parking lot at 9490 S. Virginia St. I was present for the stop, and conducted the inventory of the items in the vehicle. Please see the items listed on the Vehicle Report, and in the Property folder of this report.

For further detail, please refer to Detective TEASLEY's report.

THIS IS AN ACCURATE STATEMENT BUT HE LIED AT MY REVICATION HEARING

MOTHER NATURE CALLED.

CR03-1263 DC-9900047177-020
STATE VS FERRILL JOSEPH VOL 3 Pages
District Court 07/01/2013 10 29 AM
Washoe County 1980
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EXHIBIT 16

EXHIBIT 16

9

STAPLES

Unbeatable Every Day
2061 Lake Tahoe Blvd.
South Lake Tahoe, CA 96150
(530) 544-9817

STAPLES

Unbeatable Every Day
14350 Ocean Gate Ave.
Hawthorne, CA 90250
(310) 219-2572

EXCHANGE

559885 6 006 43282
1148 09/21/01 10:28

SALE

547519 16 002 7350
0101 08/16/01 04:1

QTY SKU

OUR PRICE

***** START RETURN *****
RETURNED WITHOUT RECEIPT
1 EPSON LASER TONER
401331 -172.38
RETURN REASON CODE 2
***** END RETURN *****
1 BROTHER PT-2400 LA
012502525912 159.95
SUBTOTAL -12.43
7.0000% Standard Tax -0.87
TOTAL \$-13.30

Cash Card Issued -13.30
Account No. *****17000060 S>
Card Balance: 13.30

*****STAPLES WILL NOT BE UNDERSOLD!*****

TOTAL ITEMS 2

*****STAPLES WILL NOT BE UNDERSOLD!*****

THANK YOU FOR SHOPPING AT STAPLES !!

QTY SKU

OUR PRICE

1 CENTURY 6P MDL IMP
073228007274 20.98
1 3 PIECE LUGGAGE SE
752717503946 49.98
SUBTOTAL 70.96
8.0000% Standard Tax 5.68
TOTAL \$76.64

Cash 100.00
Cash Change 23.36

*****STAPLES WILL NOT BE UNDERSOLD!*****

TOTAL ITEMS 2

*****STAPLES WILL NOT BE UNDERSOLD!*****

THANK YOU FOR SHOPPING AT STAPLES !!

V6.1383



CR03-1263
STATE VS FERRILL JOSEPH V0 14 Pages
District Court 07/01/2013 10 29 AM
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EXHIBIT 17

EXHIBIT 17

James R. Brooke

Attorney at Law

3392 Lakeside Court • Reno, Nevada 89509

Phone: (702) 826-9110 • Fax: (702) 826-9113 • E-Mail: JBRouyer@aol.com

October 8, 1998

Judge Margaret Springgate
P.O. Box 11130
Reno, NV 89520

RE: State of Nevada vs. Ferrill J. Volpicelli

Dear Judge Springgate:

Having been Ferrill Volpicelli's family law attorney for the past year and a half, I represented him throughout a rather complex, and, at times, bitter divorce. What impressed me most has always been Ferrill's genuine love, affection and concern for his three children. Having met his children personally, I can easily see how strongly they care for him and are in need of his care and attention. Since his incarceration, we have talked at least once a week and his primary concern has always been for his children's welfare. Accordingly, he has made financial arrangements, some through my office, for their support and well-being.

Although I don't represent him in this recent criminal matter, I believe he is sincere in his contrition for past errors. The acts before you now were desperate, but ill-conceived attempts by a father frantic to help his family. I firmly believe he is an excellent candidate for probation, especially after he finishes his current federal sentence. His children need his support, paternal guidance and physical presence. He has learned his lesson and is anxious to start from the bottom to put his life in order and be a caring father for his children. It is my opinion that any further incarceration after completion of his present federal sentence would be counter-productive insofar as the children are concerned.

Thank you for your consideration.

Very truly yours,


James R. Brooke

JRB:bb

Exhibit

V6.1386

James R. Brooke

Attorney at Law

4790 Caughlin Pkwy #408 ♦ Reno, Nevada 89509 ♦ Phone: 775-825-1123
e-Mail: JBLawyer@aol.com Fax: 775-826-9110
Nevada State Bar No. 21

November 28, 2000

Nevada Parole Board
1445 Hot Springs Road, Ste 108B
Carson City, NV 89706

Re: Ferrill Volpicelli #60076 @WSCC/Parole Hearing

Dear Sirs:

I represent Ferrill Volpicelli, inmate #60076. His parole hearing is scheduled for late January, 2001.

I have been Mr. Volpicelli's family law attorney for the past several years. I have been in close touch with Mr. Volpicelli, on a weekly basis, both telephonically and through the mail, since his incarceration. He has kept me aware of his rehabilitation and I am of the firm opinion he has full realization of the consequences of his criminal activity. He is very aware of what poor choices led to his imprisonment.

While in prison, he remained a supporting parent to his children and his child support obligation is presently current. I personally know of his continuing love, affection and concern for his children. I am sure his visitation record is available to you. He would like to return to Reno and continue to support his children. He has held licenses, in good standing, in the real estate and insurance brokerage businesses. He anticipates employment with Sigstad & Company in Reno to reactivate his insurance license and ultimately affiliate with a mortgage broker. In both employments, he is subject to state regulations.

Needless to say, his incarceration has been an eye-opening experience. He has a sound parole plan and has the support of his family and friends. He has been diligent in working towards his objectives. Please give Mr. Volpicelli the utmost consideration regarding parole eligibility for May, 2001.

Very truly yours,


James R. Brooke

JRB:bb

V6.1387

LAW OFFICES OF
ROBERT P. FAHRENDORF

888 CALIFORNIA AVENUE
P.O. BOX 3677
RENO, NV 89505
(702) 848-7775
FAX (702) 848-0540

March 27, 1997

Honorable Howard D. McKibben
400 S. Virginia Street
Reno, NV 89509

RE: FERRILL VOLPICELLI

Honorable Judge McKibben:

I am writing you in regard to Ferrill Volpicelli, who I have know for approximately eight years. During that time, I have had the opportunity to see Ferrill interact with the community and his family, specifically, his wife Lori and their children Ashley, Chanel, Travis and Logan.

I have seen Ferrill donate time to the community, helping out with Little League baseball and youth basketball. He has always been generous with his time in helping the youth of this community. In addition, I have been to his home and know the love he has for his wife and children.

Ferrill has made a mistake and has acknowledged that he was wrong in his actions. He has expressed remorse to me and realizes that he must be punished.

I am hopeful that this letter will help describe Ferrill as the man that I have known. He is a good man who is not making excuses for his offenses. Instead, he is accepting responsibility and apologizing. I believe that there is hope for such a man. Therefore, any consideration in regard to his sentencing would be appreciated by his family and those who know him.

If you have any questions or would like any further information, please feel free to contact me at your convenience.

Sincerely,


ROBERT P. FAHRENDORF, ESQ.

RPF:rlg

V6.1388



F. J. VOLPICELLI, M.D.

INTERNAL MEDICINE

5025 SCOTT STREET
TORRANCE, CA 90503
310-543-1211

October 10, 1998

TO WHOM IT MAY CONCERN:

I write this letter on behalf of my son, Ferrill, who is presently incarcerated. I sincerely hope that consideration will be given to him for all of the changes that have come about since his incarceration.

I have noticed a remarkable change overall in his disposition, attitude and introspection. I believe for the first time that he now realizes the terrible price he is paying for his misdeeds, and how it has affected him, and even more so his family and children.

Fortunately, Ferrill was intelligent enough to realize he needed help, not just incarceration. I would say that he has learned much from the seminars and lectures he attended, and he is now examining himself deeply, and is coming to face the stark reality of the problem and mess that he created. His time in the facility is nothing by comparison to what he must face when he returns home. He will have to surmount great obstacles, because wherever he applies for employment his past will be noted, and this fact alone will make it unduly difficult to cope with. He seems to be thinking of all these factors even now, and is seeking legitimate ideas to build a new future for himself, and he mentions frequently to be with his children again, and to share his life with them.

Ferrill is a very intelligent person and very capable, and now, this time he will build a more secure foundation and join and engage in society the way he should have in the first place.

There is absolutely no doubt that he regrets his past, but it is not too late for him to plan a new and more secure future when he again is allowed to return to society.

It is my sincere hope that due consideration will be accorded him and trust him for a final chance for a new and better future. He needs that chance, and he needs the trust of the officials where he is presently incarcerated.

To do otherwise is to basically condemn him to hopelessness, and that will accomplish little or nothing.

The family acknowledges what he has done (all too well), but we all still feel that he is a good person basically, and can make good in society if only given the chance, and the respect that he needs to finish bringing him back to the fold.

F. J. Volpicelli

Exhibit

V61389

March 25, 1997

To Whom it May Concern:

I have worked for Ferrill Volpicelli since October 1994, when he purchased an espresso cart business called C.C. & Co. I performed the bookkeeping duties from October 1994 through April 1996. I became the manager and continued my bookkeeping from April 1996 to the present.

I have had only a business relationship with Ferrill. But I have worked very closely with him and believe I can speak about his character with some degree of knowledge.

I have found Ferrill to be very compassionate when his first manager was having personal problems both financially and emotionally Ferrill was there to lend a helping hand. He gave him money to assist in his legal battle as well as a truck to get around town. He paid him excessively for the duties he performed but felt that it was the least he could do given the problems this man seemed to have. Unfortunately, this manager took advantage of Ferrill by mismanaging his business and losing money each month. Either because of theft or just poor management it really doesn't matter, Ferrill looked the other way for a long time, but finally had to remove this man from managing. I could never really understand why he would be so generous with someone who was taking advantage of him, but he often tried to explain and as best as I can understand he felt badly for him. He seemed to believe that this man had it so bad and that was what was causing the mismanagement. How could he possibly put this man out of a job when he had a child to support.

This is how Ferrill treated all the people who worked for him. Regardless of the problem they could come to him and he'd always extend a helping financial hand. More than once the money advanced was never returned. But I never heard him complain. He believed that their problems must be the cause of their behavior. At Christmas time even when his business was doing very poorly he bought gift certificates for the employees. He is always there to pick someone up during a snow storm or when their car was broke down.

It appeared to me that he treated his family with this same attitude. Regardless of what problems they might be having he always was there to take care of them. They seemed to have a good relationship, traveling together often, eating out and just doing family things. I have never socialized with them, but often they would stop in at my yogurt shop and visit. All seem quite well and they looked like a happy family.

Approximately three weeks ago everything changed. There seems to be a major family disjunction. This disjunction has hampered the operation at the espresso cart and caused many stressful moments for the employees as well as myself. Do to these problems it has been requested that I give my opinion of Ferrill.

Therefore, to summarize I can only say that it has been a pleasure working for Ferrill. He is extremely kind and generous. I can only speak from my first hand experience and what I have seen.

Sandra Puggiere

March 24, 1997

*Stacy Ballard
2655 Camelot Way
Reno, Nv. 89509
323-7668*

To whom it may concern,

I am writing this letter on the behalf of Ferrill Volpicelli. We have been next door neighbors for over three years. We have had a very friendly relationship with Ferrill and his entire family. Ferrill has always proven himself to be a great neighbor and father, he is constantly doing things for his children as well as other neighborhood kids. He often drives them to various places, special kids events, and movies. Last week he took our six year old and his son to the kids fair at the Convention Center for the afternoon. Ferrill can always be trusted to take care of the children without any worries.

It is difficult to know what to tell you about Ferrill and the type of family man he is. He has many fine characteristics as a neighbor and a family friend. Our whole family is deeply saddened by this situation, since it not only affects Ferrill, but four young children and his wife.

We sincerely hope this letter will in some manner make a difference to the court, and that the court will look favorably on Ferrill and his family.

Sincerely,

Stacy Ballard

The Ballard Family.

2-26-97

To Whom It May Concern;

I am writing this letter on behalf of my brother. I feel it is essential that you are aware of my brother's character. Ferrill is a loving, giving, generous and loyal husband and father. He is extremely devoted to his children and I know of no other father who spends as much time with his children as he does.

He is my oldest brother and he is a loving and caring brother. Whenever I am in a crisis or depressed, Ferrill is always there to listen to me, sometime he is just a sympathetic ear and other times he gives me valuable advice.

Ferrill is always there for me, no matter how busy he is, he always makes time for me. How many brothers will come visit you on your birthday every year even though they live in another state? He does. Ferrill is always there for me on my birthday unless there is a rare hardship on him or his family, like the present time, then he is unable to come. I missed not being able to see him on this past birthday but I understand

it was attributable to all the strain and stress he and his family are now under.

What my brother may have done is wrong. I believe he is aware of that and he deeply regrets his actions. However, my brother is not a malicious, cruel man. He is not a threat to other human beings or even to animals.

I do not understand how so many people can rape, murder, and even maim other individuals, yet they get light

sentences if any at all, when my brother, what he did may have been wrong, but he is by no means a threat to society. There are so many free people who should be behind bars. My brother is not one of them.

Why can he not be punished for his wrong doing by serving under house arrest or 2000 hours of community service? He would be fabulous at community service

because he is a caring individual and he has the wonderful ability to help others and to make them realize that there is a light at the end of the tunnel and for them to never give up on hope.

In conclusion, I would like to say that I love my brother, Ferrill, dearly. He may have done an act that was wrong, but I sincerely believe in comparison to what other people do and then are free to walk, such as murder, rape, mutilation,

Scamming little old ladies out of their life savings,
and other sick actions, what my brother has done
is insignificant in comparison.

I understand that he should be penalized but let
the punishment fit the wrong. I believe house arrest
or extensive community service would be much more
suitable.

I appreciate you taking the time to read my
letter and I believe a more lenient sentence would
be beneficial for his entire family and society.

Sincerely,

Karen Volpielli



652 Forest St., Reno, NV 89509 TELEPHONE (702) 688-4800

March 16, 1997

Re: Ferrill Volpicelli

To Whom It May Concern,

I have been an acquaintance of Ferrill for approximately the past 5 years and a friend for approximately the past 2 years. We met by going to the same gym, the Reno Athletic Club. As far as I am concerned Ferrill has always been a fine upstanding member of our community.

In the past six months, I have become some what aware of his current problems with the IRS. He has employed Keystone Realty Better Homes & Gardens services in order to make sure that the financial institutions, that he has his obligations with, get paid the money they are owed. In the spirit of good will, Ferrill is doing the responsible thing with no monetary gain.

I look forward to continuing both a personal and working relationship with the Volpicelli's for a long time to come.

Sincerely,

A handwritten signature in black ink, appearing to read "Carl Jorgensen".

Carl Jorgensen
Keystone Realty
Better Homes & gardens



**PENINSULA EYE
PHYSICIANS & SURGEONS**

October 10, 1998

To Whom It May Concern,

This letter is written on behalf of my brother, Ferrill J Volpicelli, and of equal importance for his four young children who reside in Reno, Nevada. As you may already know, Ferrill has been incarcerated at the Federal Corrections Institute in Safford, Arizona since January, 1998.

What you might not realize, however, is the total destruction and devastation his internment has caused on his young children. His eldest son, Travis, has had recurrent problems with school truancy, while his sixteen year old daughter, Chanel, stays out until all hours of the night. His two other children are so confused and depressed that they won't interact with their peers and have lost all interest in any type of social interaction.

Ferrill has availed himself of many of the courses and "self-help" classes offered during his confinement. He is very proud and excited about the new parenting and living skills he has learned during his incarceration. I can definitely see and here a change for the positive during my telephone calls and personal correspondence with Ferrill; however, he too is worried and anguished over his children's future.

Although Ferrill's siblings and parents have tried to be give emotional and financial support to their nieces, nephews and grandchildren, his kids have been reluctant and withdrawn and truly need Ferrill at home or nearby to help with their day to day living conditions.

Ferrill has been repentant and remorseful for his ill deeds and should be given any potential leniency and/or early probation options that are available. I would like to make a final humble appeal on Ferrill's behalf and for the future sake of my nephews and nieces. Please do not hesitate to contact me for any additional information I may provide to expedite Ferrill's timely return to society.

Respectfully,

Mark Volpicelli, M.D

Exhibit

DANIEL J. BEERS, M.D. MARK VOLPICELLI, M.D. HENRY F. LEVARTZ, M.D.

BOARD OF PAROLE COMMISSIONERS

CERTIFICATION OF ACTION
PAROLE VIOLATION HEARINGS

Warrant No.: 21441
Date: 10-31-01
Arrest: 10-17-01
CC No. 982160

To: THE WARDEN, NEVADA STATE PRISON

The Nevada Board of Parole Commissioners took the following action:

RE: Volpicelli, Ferrill

AT: UNCC

NSP No.: 60076

ON: Oct. 16, 2002

Request for/for waiver of Preliminary Hearing executed: ☒

New arrest/conviction: ☒

Notice of Rights executed: ☒

Retained counsel: ☐ Yes ☒ No

Waived counsel: ☐ Yes ☒ No

Represented by: Washoe County

Public Defender: Tom Mitchell

Subject appeared in person this date to answer charges as specified:

Conditions

Plea

Board Action

Action Taken

✓ 10. ASSOCIATES

GUILTY/NOT GUILTY

GUILTY/NOT GUILTY

✓ 11. COOPERATION

GUILTY/NOT GUILTY

GUILTY/NOT GUILTY

✓ 12. LAWS AND CONDUCT

GUILTY/NOT GUILTY

GUILTY/NOT GUILTY

13. SPECIAL CONDITIONS:

GUILTY/NOT GUILTY

GUILTY/NOT GUILTY

GUILTY/NOT GUILTY

GUILTY/NOT GUILTY

GUILTY/NOT GUILTY

GUILTY/NOT GUILTY

GUILTY/NOT GUILTY

GUILTY/NOT GUILTY

Return to prison ordered for reasons set forth in the retake warrant of which this order is a part. WARRANT SUSTAINED.

☒ Parole revoked Exp. Review on _____ with no two months advance

☐ Parole reinstated: RUAPP;

☐ Continued on parole with all previous special conditions: _____

Other action: _____

☐ The Board has determined that you have absconded from parole supervision:

☐ Loss of all flat time 0 days.
Time on absconder status not credited on sentence per NRS 213.160, Sec. 4.

☐ Loss of 0 days stat time.
☐ Loss of stat/absc. time 0

☐ Loss of 0 days under MPR.
Previously paroled under Mandatory Release. (Statutes of Nevada, 1987, Chapter 416, Sec. 2.)

Evidence relied on:

✓ Plea of guilty (where applicable)

✓ Report of Parole and Probation Department 10-24-01

Judgment of Conviction

✓ Testimony of Witnesses Det. Officer Armitage City of Reno P.D. Det. Officer Brown, Officer Thomas (City of Reno) Reed

Laboratory Reports

✓ Other RPD# 01-23180, 216452-01, 01-216321, 221241-01, 204619-01

Reason for revocation:

The Board heard substantial evidence which was presented to prove that you violated the above conditions of your parole agreement by:

Failed to follow supervision rules.

This is to certify that the above order is a true and correct copy of the action of the Board of Parole Commissioners.

Staff Representative

Nevada Board of Parole Commissioners

Commissioners present:

Exp.

Stat.

Flat.

V6.1398

CR03-1263 DC-9900047177-022
STATE VS. FERRILL JOSEPH VOL 2 Pages
District Court 07/01/2013 10:29 AM
Washoe County 1960
EX1B ASMIT

EXHIBIT 18

EXHIBIT 18

TESTIMONY OF GOV. BOB MILLER TO ASSEMBLY JUDICIARY
COMMITTEE ON COMPREHENSIVE CRIMINAL CODE REFORM. AB 317
MARCH 28, 1995

Chairman Anderson, Chairman Humke, and members of the Committee. Thank you for this opportunity to address one of the most important issues of the session.

I want to begin this morning by recognizing the diligent and responsible efforts that have been put forth by so many members of the Nevada Legislature in the quest for comprehensive reform of our criminal codes.

Members of the Judiciary Committees of both houses have been hard at work grappling with criminal reform since the first days of the session. I believe the numerous and lengthy hearings that have been held to date were highly productive. Many questions have been raised, and many questions have been answered as you have labored to develop the conceptual framework upon which to build concrete legislation. This effort is most laudable, all the more because it represents a sincere bi-partisan effort to serve the needs of our constituents.

I have looked forward to this day, when hearings would begin on the comprehensive legislation I have proposed to attack the problem of violent crime. I have been involved in dialogue with all of you on this issue. And going back for well over a year, I have gathered the strong opinions of people from throughout our communities...law enforcement professionals...victims of crime... civic leaders... and the general public.

The time has come to take action. As I've emphasized so often, we must take action to be both tough--and smart--on crime. AB 317 is the end product of that philosophy. I commend you for giving this proposed legislation a full and in-depth hearing, beginning today.

First, let me talk about "tough." Before the 1995 session adjourns, I want to sign a bill that sends the strongest message we can to violent criminals. I want them off our streets....locked away for longer terms...in many cases, life without parole--ever--is what justice demands.

That's why AB 317 beefs up Nevada's habitual criminal statute in a very tough way. My proposal--and I'm 100 percent committed to it--~~requires~~ prosecutors to invoke the habitual criminal statute whenever an offender is tried for a third violent crime. That means the prosecution must seek a life sentence. If it's with parole, a conviction means at least 20 years in prison. My proposal eliminates plea bargaining for repeat violent offenders. It means, for example, that a third armed robbery, or a third assault, means a life sentence. Naturally, a violent offender can get a life sentence for a first offense for many crimes, but this reform eliminates the revolving door for all types of violent offenders.

This is getting tough on crime.

EXHIBIT

1075

V6.1400

CR03-1263 DC-9900047177-023
STATE VS FERRILL JOSEPH VOL 3 Pages
District Court 07/01/2013 10:29 AM
Washoe County 1960
FX10 ASMIT'

EXHIBIT 19

EXHIBIT 19

Penalties to stiffen for thefts in stores

BY GEOFF DORNAN

Appeal Capital Bureau Chief ✓

Penalties would be increased for people convicted of repeated petit larceny, or shoplifting, under a bill proposed by Sen. Kathy Augustine, R-Las Vegas.

SB31 would make the crime a gross misdemeanor instead of a misdemeanor for the third or subsequent offense.

Augustine said the bill is aimed at crimes such as shoplifting where a few people are guilty of multiple offenses.

She said some crooks go through a mall "and hit one store after another."

She said she is aware that current law already allows repeat misdemeanor offenders to be finally declared habitual criminals and sentenced as felons. But Augustine said the gross misdemeanor is more realistic since it's unlikely the felony statute would be applied.

The advantage of a gross misdemeanor is that it will be applied to cases automatically on the third offense and become part of a criminal's permanent record.

Petit larceny is defined as taking goods worth less than \$250. Augustine said the damage these criminals do adds up to major losses for stores.

"They're ripping off thousands and thousands of dollars in merchandise," she said, adding that other customers pay for those crimes through higher prices.

But current law treats the third, 10th or 30th offense just like the first — as a misdemeanor.

Augustine said if a shoplifter winds up facing a gross misdemeanor instead on their third offense, "maybe they'll wise up."

The measure was referred to the Judiciary Committee for

EXHIB

Tough penalties sought for habitual shoplifters

By Faith Bremner
RENO GAZETTE-JOURNAL

Petty larceny isn't trivial to businesses such as Reno's Wild West Electronics.

Last year, the store lost several thousand dollars worth of merchandise to sticky-fingered thieves.

In 1993 the electronic store lost \$5,000 to \$6,000, owner Brad Bolotin said.

"Shoplifting is a serious problem. It's not a lot different than burglary," said Bolotin, who installed an expensive video surveillance system at his new store. "It forces us to raise prices."

Until now, most shoplifting cases in Nevada have been treated

The '97 Legislature

SENATE BILL 31

■ What it would do: Increase the penalty for shoplifting from a maximum six months in jail and \$1,000 fine to a year in prison and \$2,000 fine for three or more convictions.

■ Introduced by: Sen. Kathy Augustine, R-Las Vegas, 687-3634 and Sen. Mark James, R-Las Vegas, 687-8132.

■ Budget debate: Prisons struggle to keep up with growing population.

Page 6A

as minor crimes. Those arrested

See SHOPLIFT on page 5A

Shoplift

From page 1A

are charged with a misdemeanor, which carries a punishment of up to six months in jail and a \$1,000 fine. Most shoplifters aren't taken to jail but instead are given a ticket to appear in court.

As a result, shoplifting is on the increase and shoplifters are getting bolder and more dangerous, merchants and police told members of the Senate Judiciary Committee Tuesday. They said the penalties need to be increased and testified in favor of Senate Bill 31, which would make a third and subsequent conviction for shoplifting a gross misdemeanor punishable by up to one year in jail and a \$2,000

bill it will send a message that we're tired of being ripped off by the same people over and over again.

Business owners complained shoplifters come in to the stores with bulky coats and bags and load up but are smart enough to keep their take to under \$250, the cutoff point for being charged with petty larceny. In Clark County, swarming — in which a group of kids hit a store and take everything they can — has become more common.

But Sen. Ernie Adler, D-Carson City, said changing the seriousness of the offense does not guarantee repeat shoplifters will go to jail. Judges could still sentence shoplifters to a \$1 fine and one day in jail and prosecutors could still plea bargain the charge down to a misdemeanor, Adler said. Perhaps the bill should specify a mandatory jail sentence, he said.

"I don't see this bill

County public defender's chief administrative deputy complained that gross misdemeanor shoplifting cases would have to be tried in district court instead of municipal courts, adding to an already overloaded system.

The state's Department of Parole and Probation would have to get involved as it does with all district court cases for presentencing investigations and reports for the judges, he said.

Plus it costs \$60 a day to house convicted shoplifters in the Washoe County jail, Morrow said.

"Are we willing to pay that price to keep these people off the street," Morrow asked. "I'm not sure that's the case."

But Washoe County sheriff's Capt. Jim Nadeau said many of these shoplifters are in and out of jail anyway.

"If you put them in our jail for a year and we

RENO BLOTTER

Armed robber runs with sum of cash

Police said a man jumped over a counter at Winner's Corner, 2169 Prater Way, Sparks, at 12:15 a.m. Thursday, threatened a clerk with a knife and demanded money. He fled with an unspecified amount from a cash register. He was described as white, 28 to 32 years old, 5 feet 6 inches tall and weighing about 130 pounds.

Suspect tries to run down Kmart worker, flees

A thief fleeing from Super Kmart, 4855 Summit Ridge Drive, Wednesday tried to run over an employee, Reno police said.

It occurred at 10:30 a.m. What police initially would have called a petty theft is a robbery now because of the use of force, police said. No one was arrested.

EXHIBIT

V6.1403

1 **Code 1310**

2
3
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5
6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

7 **IN AND FOR THE COUNTY OF WASHOE**

8 **THE STATE OF NEVADA,**

9 **Plaintiff,**

Case No. CR03-1263

10 **vs.**

Dept. No. 10

11 **FERRILL J. VOLPICELLI,**

12 **Defendant.**

13 **/**

14 **CASE APPEAL STATEMENT**

15 This case appeal statement is filed pursuant to NRAP 3(2).

- 16 1. This appeal is from an order entered by the Honorable Elliot Sattler.
- 17 2. Appellant is Ferrill J Volpicelli. Appellant is representing himself in Proper Person
- 18 on appeal:
- 19 3. Appellant's address is:
- 20 Ferrill J Volpicelli #079565
- 21 Lovelock Correctional Center
- 22 1200 Prison Road
- 23 Lovelock, Nevada 89419
- 24 4. Respondent is the State of Nevada. Respondent is represented by the Washoe
- 25 County District Attorney's Office:
- 26 Terrance McCarthy, Esq.
- 27 P.O. Box 11130
- 28 Reno, Nevada 89520
5. Respondent's attorney is licensed to practice law in Nevada.

6. Appellant was represented by appointed counsel in District Court.
7. Appellant is not represented by appointed counsel on appeal.
8. Appellant was granted leave to proceed in forma pauperis filed on October 17, 2007, in the District Court.
9. Proceeding commenced by the filing of an Indictment June 11, 2003.
10. This is a criminal proceeding and the Appellant is appealing Order Granting Motion to Correct Judgment of Conviction filed on June 4, 2013. T
11. The case has been the subject of a previous appeal to the Supreme Court:
Supreme Court No. 43203; 61142; 51622; and 52600
12. This case does not involve child custody or visitation.
13. This is not a civil case involving the possibility of a settlement.

Dated this 9th day of June, 2013.

JOEY ORDUNA HASTINGS
CLERK OF THE COURT

By: /s/ Annie Smith
Annie Smith
Deputy Clerk

1 **Code 1350**
2
3
4
5

6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

7 **IN AND FOR THE COUNTY OF WASHOE**

8 **THE STATE OF NEVADA,**

9 **Plaintiff,**

10 **vs.**

Case No. CR03-1263

11 **FERRILL J. VOLPICELLI,**

Dept. No. 10

12 **Defendant.**
13 _____/

14
15 **CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL**

16 I certify that I am an employee of the Second Judicial District Court of the State of
17 Nevada, County of Washoe; that on the 9th day of July, 2013, I electronically filed the
18 Notice of Appeal in the above entitled matter to the Nevada Supreme Court.

19 I further certify that the transmitted record is a true and correct copy of the original
20 pleadings on file with the Second Judicial District Court.

21 Dated this 9th day of July, 2013
22

23 JOEY ORDUNA HASTINGS
24 CLERK OF THE COURT

25 By /s/ Annie Smith
26 Annie Smith
27 Deputy Clerk
28

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: ELLIOTT SATTLER
Official File Stamp: 07-09-2013:13:26:43
Clerk Accepted: 07-09-2013:13:27:32
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Case Appeal Statement
Certificate of Clerk
Filed By: Deputy Clerk ASmith
You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE & PROBATION
CHRISTIAN WILSON, ESQ. for STATE OF NEVADA
TERRENCE MCCARTHY, ESQ. for STATE OF NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

FILED

Electronically

07-12-2013:11:25:39 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3851223

**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 63554
District Court Case No. CR031263

CR03-1263
D10

RECEIPT FOR DOCUMENTS

TO: Washoe County District Attorney/Terrence P. McCarthy, Deputy District Attorney
Ferrill Joseph Volpicelli
Joey Orduna Hastings, Washoe District Court Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

07/10/2013 Appeal filing fee waived. Criminal.

07/10/2013 Filed Notice of Appeal/Proper Person. Appeal docketed in the Supreme Court this day.

DATE: July 10, 2013

Tracie Lindeman, Clerk of Court
rw

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: ELLIOTT SATTLER
Official File Stamp: 07-12-2013:11:25:39
Clerk Accepted: 07-12-2013:11:28:27
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Supreme Court Receipt for Doc
Filed By: Deputy Clerk ASmith

You may review this filing by clicking on the following link to take you to your cases.

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DIV. OF PAROLE & PROBATION
CHRISTIAN WILSON, ESQ. for STATE OF
NEVADA
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

FILED

Electronically

08-09-2013:10:00:32 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3911654

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63554

FILED

CR03-1263
D10

AUG 07 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER DIRECTING TRANSMISSION OF RECORD

This court has concluded that its review of the complete record is warranted. *See* NRAP 10(a)(1). Accordingly, the clerk of the district court shall have 30 days from the date of this order to transmit to the clerk of this court a certified copy of the complete trial court record of this appeal. *See* NRAP 11(a)(2). The record shall include copies of documentary exhibits submitted in the district court proceedings, but shall not include any physical, non-documentary exhibits or the original documentary exhibits. The record shall also include any presentence investigation reports submitted in a sealed envelope identifying the contents and marked confidential. *See* NRS 176.156(5).

It is so ORDERED.

Pickering, C.J.

cc: Ferrill Joseph Volpicelli
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: ELLIOTT SATTLER
Official File Stamp: 08-09-2013:10:00:32
Clerk Accepted: 08-09-2013:10:01:15
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Supreme Ct Order Directing
Filed By: Deputy Clerk ASmith

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

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NEVADA
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

Electronically Filed
Sep 05 2013 04:57 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

THE STATE OF NEVADA,
Plaintiff,

vs.

FERRILL JOSEPH VOLPICELLI,
Defendant.

Sup. Ct. Case No. 63554
Case No. CR03-1263
Dept. 9

RECORD ON APPEAL

VOLUME 6 OF 13

DOCUMENTS

APPELLANT

Ferrill J. Volpicelli #79565
P O BOX 359
Lovelock, Nevada 89419

RESPONDENT

Washoe County District Attorney's
Office
Terrance McCarthy, Esq.
P O Box 11130
Reno, Nevada 89502-3083

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ORIGINAL

FILED

2004 AUG 18 PM 4:27

RONALD A. LONGTIN, JR.

BY

M. Drulman

1 CODE: 2475
PATRICIA A. LYNCH
2 Reno City Attorney
KAREN S. FRALEY
3 Deputy City Attorney
P. O. Box 1900
Reno, NV 89505
(775) 334-2421
Attorneys for City of Reno
Reno Police Department

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

11 STATE OF NEVADA,)
12)
13 Plaintiff)
14 vs.)
15 FERRILL J. VOLPICELLI,)
16 Defendant.)

CR

Case No. 03-1263
Dept. No. 10

MOTION TO STRIKE FUGITIVE DOCUMENT

COMES NOW the City of Reno, by and through its attorneys, PATRICIA A. LYNCH,
Reno City Attorney, and KAREN S. FRALEY, Deputy City Attorney, pursuant to NRCP 12(f)
and files this Motion to Strike Fugitive Document.

Defendant mailed a Motion for Return of Property and Request for Hearing Regarding
Restitution Amount to the District Attorney's Office and the Reno City Attorney's Office,
purportedly filed in the case referenced above. The Motion is attached hereto as Exhibit A. The
case is closed, with Defendant having been found guilty and sentenced to nine life sentences on

0-10
6-15
CR03-1263
DC-9900025179-040
STATE VS. FERRILL JOSEPH VOL 3 Pages
District Court 08/18/2004 11:35 AM
Washoe County 2475
nmr

1 April 1, 2004. The City is informed that Defendant has filed a notice of appeal with the Nevada
2 Supreme Court.¹

3 The timely filing of a notice of appeal divests the District Court of jurisdiction and vests
4 jurisdiction in the Supreme Court. *See Robertson v. State*, 109 Nev. 1086 (1993) ("A timely
5 notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this
6 court.").

7
8 Defendant's Motion is a fugitive document.

9 The City of Reno respectfully requests the Court strike the Motion in accordance with
10 NRCP 12(f).

11 DATED this 18th day of August, 2004.

13 PATRICIA A. LYNCH
14 Reno City Attorney

15 BY Karen S. Fraley
16 KAREN S. FRALEY
17 Deputy City Attorney
18 Nevada Bar No. 3825
19 P. O. Box 1900
20 Reno, NV 89505
21 (775) 334-2421
22 Attorneys for City of Reno
23 Reno Police Department
24
25
26
27

28 ¹ The City is informed that the appeal was filed with the Nevada Supreme Court on April 22, 2004, Docket #43203.

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of the RENO CITY
3 ATTORNEY'S OFFICE, and that on this date, I am serving the foregoing document(s) on
4 the party(s) set forth below by:

5 X Placing an original or true copy thereof in a sealed envelope placed for collection
6 and mailing in the United States Mail, at Reno, Nevada, postage prepaid,
7 following ordinary business practices.

8 _____ Personal delivery.

9 _____ Facsimile (FAX).

10 _____ Federal Express or other overnight delivery.

11 _____ Reno/Carson Messenger Service.

12
13 addressed as follows:

14
15 Terrence McCarthy
16 Deputy District Attorney
17 50 W. Liberty St., #300
18 P.O. Box 30083
19 Reno, NV 89520

20 Ferrill Volpicelli #79565
21 High Desert State Prison
22 Box 650
23 Indian Springs, NV 89018

24 DATED this 18th day of August, 2004.

25 
26 Jill Zarker
27
28

CR03-1263 DC-9900025179-041
STATE VS FERRILL JOSEPH VOL 7 Pages
District Court 08/16/2004 11:35 AM
Washoe County 2475
FY1 JAMES

EXHIBIT 1

FERRIL VOLPICELLI 7200

Box 650 HOOF

INDIAN SPRINGS, NV 89018

DEFENDANT PRO SE

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,
PLAINTIFF,

CASE: 03-1263

DEPT: 10

MOTION FOR RETURN
OF PROPERTY AND -

FERRIL T. VOLPICELLI,
DEFENDANT,

REQUEST FOR HEARING
REGARDING RESTITUTION AMOUNT

COMES NOW DEFENDANT, FERRIL T. VOLPICELLI, IN
PROPER PERSON AND IN FORMER PAUPER'S MOVING
THE COURT FOR AN ORDER RETURNING ANY AND
ALL PROPERTY SEIZED IN THE 2001 INVESTIGATIONS,
(RELEVANT TO RAP # 01-216321) AND NOT SPECIFICALLY
CITED IN THE CRIMINAL MATTERS OF DISTRICT COURT,
(02-0145, 02-0146 AND 03-1263)

STATEMENT

THAT ON 17 OCTOBER, 2001, DEFENDANT WAS
ARRESTED FOR A PAROLE VIOLATION WITH CHARGES
ADDED THROUGH EARLY DECEMBER OF 2001,

THAT ON OR ABOUT 17 & 18 OCTOBER, 2001,
AUTHORITIES SEIZED PROPERTY BELONGING TO
BRETT A. BOWMAN, FERRIL T. VOLPICELLI, TRAVIS
A. VOLPICELLI, ASHLEY SCHNEIDER, CHAD A. VOLPICELLI
AND LOGAN R. VOLPICELLI.

V6.978

REFER
TO
EXHIBIT
B

THAT SAID PROPERTY WAS SEIZED PURSUANT TO
MULTIPLE SEARCH WARRANTS FROM DEFENDANTS'
RESIDENCE, DEFENDANTS' BROTHERS MARIO VAN,
ASTLEY SCHUENNG'S STORAGE UNIT AND THE
DEFENDANT'S DAUGHTERS' SAFE BOX. (CHANCE VOICED
THAT SAID WARRANTS WERE NEVER RETURNED TO
THE MAGISTRATE FOR ENDORSEMENT PURSUANT TO
N.R.S. 179.085 (4))

REFER
TO
Exhibit
C

THAT INITIALLY, THE AFOREFERENCED RPD CASE
CULMINATED IN DISTRICT COURT CASES 02-0145 &
02-0146 - SPECIFICALLY CITING BURGLARY RELATED
COUNTS INVOLVING: A WALMART BIKE, A SHOPKIN
COMFORTER, A LOWE'S PUCH AND A WALMART
HOME THEATER SYSTEM.

Letter
to
Exterior
D

THAT SUBSEQUENT TO THIS, AND SOME TWENTY MONTHS AFTER THE OCTOBER, 2001 ARREST, THE DEFENDANT WAS INDICTED ON SAME ALLEGED CRIMINAL ACTIVITY OCCURRING IN CASE 03-1263. (11 JUNE, 2003)

THAT CONCOMITANT WITH SAID INDICTMENT, CASES 02-0145 & 02-0146 WERE STAYED, THAT SAID INDICTMENTS BURGLARY RELATED COUNTS INCLUDED THE SAME OFFENSES AND PROPERTY CITED IN 02-0145 & 02-0146, BUT ALSO NEW ALLEGED CHARGES REFERRING TO AN ELECTRIC CHAINSAW, A 15" MONITOR, A HENRIK PAKARD PRINTER, A SENGOR SONGS VCR, AN AMERICAN 19" DVD-TV COMBO, A CABLE BOX AND

THAT ON 14 NOVEMBER, 2003, DEFENDANT WAS
 FOUND GUILTY OF ALL COUNTS IN THE 10 COUNT
 INDICTMENT.

THAT ON 1 APRIL, 2004, DEFENDANT WAS
 SENTENCED IN THE MATTER WITH THE JUDGMENT
 REFLECTING IN EXCESS OF \$10,339.16 AS
 RESTITUTION.

ARGUMENT.

DEFENDANT RESPECTFULLY REQUESTS THAT THE RPD
 EVIDENCE DEPARTMENT RETURN ANY AND ALL
 PROPERTY SEIZED IN THE AFOREMENTIONED CASES,
 NOT SPECIFICALLY CITED IN SAME &/OR FOUND
 TO BE FRUITS OF ALLEGED CRIMINALS WITH
 COUNTS II-IX OF 03-1263. THE TRIAL
 COURT HELD THAT ONLY THOSE ARTICLES WHICH
 WERE PROVEN IN A COURT OF LAW TO BE
 'FRUITS OF THE CRIME(S)' IN WHICH APPELLEES
 WERE INVOLVED COULD BE WITHHELD FROM
 THE APPELLEES 572 P2D 480

FURTHER, THAT IN RECOGNITION OF THE DUE
 PROCESS REQUIREMENT, NEVADA CRIMINAL
 PROCEDURES PROVIDE THAT AN AGGRIEVED PERSON
 MAY MOVE THE DISTRICT COURT FOR THE
 RETURN OF THE SEIZED PROPERTY WHERE
 THE RETENTION IS UNLAWFUL. 572 P2D 48

AND AS FAR AS THE HYPERINFLATED
 RESTITUTION FIGURE REFLECTED IN THE
 JUDGMENT IS CONCERNED, IT

46
ORDINARY CASE A CITIZEN HAS A RIGHT TO
A HEARING TO CONTEST THE FORFEITURE OF
HIS PROPERTY, (INCLUDING THE IMPOSITION OF
RESTRICTIONS); A RIGHT SECURED BY THE DUE
PROCESS CLAUSE. 116 Sct 1777 / 114 Sct 492
92 Sct 1983

FINALLY, THE FIFTH AND FOURTEENTH AMENDMENTS
COMMAND THAT NO PERSON SHALL BE DEPRIVED
OF PROPERTY WITHOUT DUE PROCESS OF LAW.
572 P2d 470. AND, IT HAS ALWAYS BEEN
PUBLIC POLICY THAT FORFEITURES ARE NOT
FAVORED IN THE LAW, AND MAY BE ENFORCED
ONLY WITHIN THE LETTER AND SPIRIT OF THE
LAW. 95 Sct 656.

CONCLUSION
WHEREFORE, DEFENDANT RESPECTFULLY MOVES
THE COURT FOR AN ORDER FOR A
PROMPT RETURN OF ANY AND ALL PROPERTY
TO THE VOLPICELLI FAMILY - NOT SPECIFICALLY
CITED IN THE RESPECTIVE COUNTS OF THE
INDICTMENT - AND ADJUDICATED BY THE COURT
JURY AS BEING INVOLVED IN ANY OFFENSE.
THAT THE COURT ALSO ORDER AN
IMMEDIATE HEARING IN THE MATTER AS TO
THE CONTROVERSED RESTRICTIONS FIGURE
REFERENCED IN THE JUDGMENT OF THIS CASE.

54
DECLARATION

I, FERRIL T. VOLPICELLI, UNDER PENALTY OF PERJURY
DEPOSE AND SAY THAT:

I AM THE AFFIANT IN THIS DECLARATION AND THE
DEFENDANT IN CASES 02-0145, 02-0146 & 03-1263.
I AM CURRENTLY IN CUSTODY AT HDSP WHICH IS
CURRENTLY ON 'LOCK-DOWN' STATUS FOR THE FORESEEABLE
FUTURE. THAT SAID CUSTODY SITUATION PRECLUDES
ANY ACCESS TO TELEPHONE, CANTEEN FOR WRITING
MATERIALS, AND LAW LIBRARY FOR LEGAL RESOURCES.
THAT THIS ALSO INCLUDES MY INABILITY TO DUPLICATE
DOCUMENTS I.E. EXHIBITS FOR THIS PLEADING.

AND FINALLY, THAT SAID EXHIBITS REFERENCED HEREIN
REFER TO: EXHIBIT 'A' - SEARCH WARRANT RETURNS
FOR RPD 01-246324 / AUSSIE STORAGE; LAKESIDE CONDO;
MAZDA VAN AND WELLS FARGO SAFE BOX.

EXHIBIT 'B' - PAGES 3 OF RESPECTIVE
SEARCH WARRANTS FOR THE ABOVE SEIZURE LOCATION

EXHIBIT 'C' - COMPLAINTS AND AMENDED
COMPLAINTS FOR CASES 02-0145 AND 02-0146

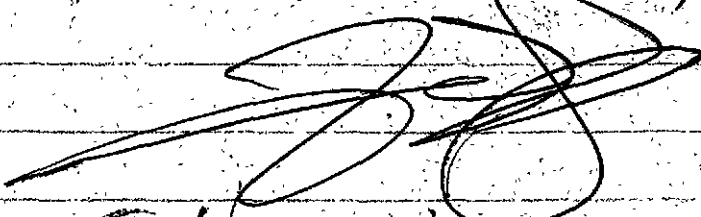
EXHIBIT 'D' - INDICTMENT BY GRAND JURY
DATED 11 JUNE, 2003 FOR CASE 03-1263

EXHIBIT 'E' - JUDGMENT OF CONVICTION
DATED 1 APRIL, 2004.

→ ALL EXHIBITS ALREADY PART OF COURT RECORD.
DATED THIS 22 DAY
OF JULY, 2004

FERRIL T. VOLPICELLI
DEFENDANT
V6982

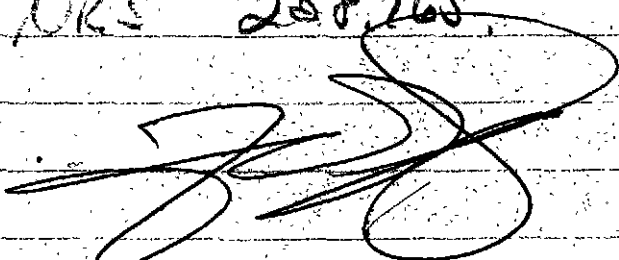
6-6
RESPECTFULLY SUBMITTED AND DATED
THIS 22 DAY OF JULY, 2004



FERRUCCIO VOLPICELLI
DEFENDANT PRO SE

CERTIFICATE OF MAILING

DATED AND COPY MAILED THIS 22
DAY OF JULY, 2004, TO THE
WASHINGTON COUNTY DISTRICT ATTORNEY &
CITY OF NEW ATTORNEY MS. KAREN
FRILEY AS CERTIFIED UNDER THE
PENALTY OF PERJURY PURSUANT
TO URS 200.165.



FERRUCCIO VOLPICELLI
DEFENDANT PRO SE

ORIGINAL

FERRILL VOLPICELLI
70565 HOSP BOX 650
INDIAN SPRINGS, NV 89018
DEFENDANT PRO PER

1 IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA
2 IN AND FOR THE COUNTY OF WASHOE

2004 AUG 26 PM 3:26

RONALD A. LONGTIN, JR.
BY [Signature]
DEPUTY

3 STATE OF NEVADA
PLAINTIFF

CASE: CO-03-1263

DEPT FILED 10

✓
FERRILL T. VOLPICELLI,
DEFENDANT,

REQUEST FOR SUBMISSION
ORDER (BRUCE LINDSAY ESQ)

11 DEFENDANT, HAVING FILED A MOTION FOR REQUEST FOR
12 ORDER TO SHOW CAUSE REGARDING CONTEMPT OF COURT
13 AND ORDER TO COMPLY, ON 21 JUNE, 2004, HEREBY MOVES
14 THE COURT FOR SUBMISSION OF SAID MOTION FOR THE
15 COURT'S REVIEW AND DETERMINATION. THAT TO DATE, MR.
16 LINDSAY ESQ HAS NOT RESPONDED TO THIS MATTER.
17 WHEREFORE, DEFENDANT PRAYS FOR RELIEF IN THIS ACTION
18 WITH AN ORDER FOR BRUCE LINDSAY ESQ TO COMPLY.
19
20

21 DATED THIS 16TH
22 DAY OF AUGUST, 2004

23
24
25
26 FERRILL T. VOLPICELLI
27 DEFENDANT PRO PER
28

CERTIFICATE OF MAILING
DATED AND COPY MAILED
ON THE 16TH DAY OF AUGUST,
2004, TO WCD & LINDSAY
AS CERTIFIED UNDER PENALTY
OF PERJURY PURSUANT TO
NRS 208.165

ORIGINAL

FERRILL VOLPICELLI
79565 HOSP BOX 650
INDIAN SPRINGS NV 89012
DEFENDANT PRO PER

1 IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA
2 IN AND FOR THE COUNTY OF WASHOE
3

FILED

2004 AUG 26 PM 3:26

RONALD A. LONGTIN, JR.

BY [Signature]
DEPUTY

STATE OF NEVADA,
PLAINTIFF,

CASE : CR 03-1263

DEPT 24-04
9-24-10

FERRILL T. VOLPICELLI,
DEFENDANT,

REQUEST FOR SUBMISSION
(BRADLEY VAN RY ESQ)

11 DEFENDANT, HAVING FILED A MOTION FOR REQUEST FOR
12 ORDER TO SHOW CAUSE REGARDING CONTEMPT OF COURT
13 AND ORDER TO COMPEL, ON 6 JULY, 2004, HEREBY MOVES
14 THE COURT FOR SUBMISSION OF SAID MOTION FOR THE
15 COURT'S REVIEW AND DETERMINATION. THAT TO DATE, MR.
16 VAN RY ESQ. HAS NOT RESPONDED TO THIS MATTER,
17 WHEREFORE, DEFENDANT PRAYS FOR RELIEF IN THIS ACTION
18 WENT TO UNDER FOR BRADLEY VAN RY ESQ. TO COMPLY.
19

DATED THIS 16TH
21
22 STATE OF AUGUST, 2004

[Signature]

FERRILL T. VOLPICELLI
26 DEFENDANT PRO PER
27
28

CERTIFICATE OF MAILING
DATED AND COPY MAILED
ON THIS 16TH DAY OF AUGUST,
2004, TO W. C. D. A. VAN RY
AS CERTIFIED UNDER PENALTY
OF PERJURY PURSUANT TO
NRS 208.165

CR03-1263
DC-9900025179-045
STATE VS. FERRILL VOLPICELLI
District Court
08/26/2004 04:24 PM
3860
Washoe County
Doc

ORIGINAL

FILED

SEP 23 2004

RONALD A. LONGTIN, JR., CLERK
By: *[Signature]*
DEPUTY

CODE: 3250

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

FERRILL T. VOLPICELLI,
Appellant,

CASE NO: CR03-1263

vs.

DEPT. NO.: 10

STATE OF NEVADA,

Respondent.

ORDER TO STRIKE FUGITIVE DOCUMENTS

The Appellant in this matter requested legal counsel on May 11, 2004, and legal counsel was assigned at public expense on June 1, 2004. This Court has received numerous documents filed by the Appellant in this matter, but many of these documents do not contain the signature of his appointed counsel. Specifically, these documents not signed by Appellant's attorney include:

1. Request For Submission And Order For Transcripts, filed June 14, 2004.
2. Request For Order To Show Cause Regarding Contempt Of Court – And Order To Compel, filed June 21, 2004.
3. Request For Order To Show Cause Regarding Contempt Of Court – And Order To Compel, filed July 6, 2004.
4. Request For Submission Of Request For Order To Show Cause Regarding Contempt Of Court – And Order To Compel, filed August 3, 2004.
5. Request For Submission Of Motion For Transcripts, filed August 3, 2004.

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STATE VS. FERRILL, JOSEPH VOL 3 Pages
District Court
Washoe County
DC-9900025179-046
09/23/2004 04 49 PM
3250
JAM/c

1 6. Motion For Return Of Property And – Request For Hearing Regarding Restitution
2 Amount, filed August 3, 2004.

3 7. Request For Submission (Bradley Van Ry, Esq.), filed August 26.

4 8. Request For Submission (Bruce Lindsay, Esq.), filed August 26.

5 Rule 11 of the Nevada Rules of Civil Procedure states, in pertinent part,

6 Every pleading, motion, or other paper of a party represented by an attorney
7 shall be signed by at least one attorney of record in his individual name, whose
8 address shall be stated.

9 ...
10 The signature of an attorney or party constitutes a certificate by that attorney
11 or party that he or she has read the pleading, motion, or other paper; that to the
12 best of his or her knowledge, information and belief, formed after reasonable inquiry
13 under the circumstances obtaining at the time of signature, that it is well grounded
14 in fact and is warranted by existing law or a good faith argument for the extension,
15 modification, or reversal of existing law, and that it is not interposed for any
16 improper purpose such as to harass or to cause unnecessary delay or needless
17 increase in the cost of litigation. If a pleading, motion, or other paper is not signed,
18 it shall be stricken unless it is signed promptly after the omission is called to the
19 attention of the pleader or movant. (Emphasis added)

20 The Court wishes to express in the clearest possible terms that the Appellant has
21 requested and been appointed counsel at public expense, and as a result the Court will not
22 entertain documents from the Appellant which are not signed by counsel of record.

23 **NOW, THEREFORE, IT IS HEREBY ORDERED** that all above-named submissions
24 filed by the Appellant after June 1, 2004, which do not contain the signature of the
25 Appellant's attorney of record, Mary Lou Wilson, are hereby **STRUCK** from the record for
26 violation of NRCP 11.

27 **DATED** this 22 day of September, 2004.

28 
STEVEN P. ELLIOTT
District Judge

1 **CERTIFICATE OF MAILING**

2 I hereby certify that I am an employee of the Second Judicial District Court of the
3 State of Nevada, in and for the County of Washoe; that on the 23 day of September,
4 2004, I deposited for mailing a copy of the foregoing document addressed to:
5


6 Mary Lou Wilson
7 Law Office Of Mary Lou Wilson
8 33 Marsh Ave.
9 Reno, NV 89509

10 Bradley Van Ry
11 VanRy Law Office
12 1403 E. Fourth Street
13 Reno, NV 89513

14 Bruce Lindsay
15 565 California Ave.
16 Reno, NV 89509

17 Chief Deputy District Attorney
18 Washoe County District Attorney
19 P.O. Box 30083
20 Reno, NV 89520
21 (Interoffice Mail)

22 **DATED** this 23 day of September, 2004.

23 
24 HEIDI HOWDEN
25 Administrative Assistant
26
27
28

ORIGINAL

CR03-1263

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

2005 JUN 30 PM 2:57

RONALD A. LONGTIN, JR.

No. 43203

BY

FILED

JUN 29 2005

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

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of eight counts of burglary, one count of conspiracy, and one count of possession or making of counterfeit pricing labels. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant Ferrill Volpicelli asserts four errors on appeal of his indictment, conviction, and sentencing. First, Volpicelli claims that the district court erred in not quashing his indictment after the grand jury heard inadmissible evidence of his prior burglary conviction. Next, Volpicelli contends that the district court erred in finding him competent to stand trial. Volpicelli also argues that the jury had insufficient corroborating evidence of accomplice testimony to convict him. Finally, Volpicelli claims that the district court abused its discretion in enhancing his sentence after adjudicating him a habitual criminal. We disagree.

DISCUSSION

Grand jury indictment

Volpicelli cites no law, but contends that the district court erred in not quashing his indictment based on the improper admission of his prior conviction, claiming that the jurors were tainted by the prior conviction since they returned a true bill. The State cites State of Nevada

CR03-1263
STATE VS FERRILL JOSEPH VOL 9 Pages
District Court 06/30/2005 03 10 PM
Washoe County 4134
JMEF

v. Logan¹ and contends the applicable standard is whether the evidence presented to the grand jury, without the disputed evidence, was sufficient to sustain the indictment. The State further argues that there was more than sufficient evidence presented to sustain the indictment.

NRS 172.155 calls for grand jury indictment "when all the evidence before them, taken together, establishes probable cause to believe that an offense has been committed and that the defendant committed it." NRS 172.135 mandates that "the grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." But an indictment is not automatically quashed if some of the evidence presented is not legal evidence.²

In Robertson v. State, this court held that although the grand jury may have heard inadmissible hearsay evidence, the indictment could be sustained where there was sufficient legal evidence.³ This court affirmed the dismissal of an indictment in Sheriff v. Frank, a case where

¹1 Nev. 509 (1865) (republished as 1-2 Nev. 427, 431) ("[W]here there is the slightest legal evidence, the court cannot inquire into its sufficiency, or set it aside, because some illegal evidence was received with it.").

²Logan, 1-2 Nev. at 431:

That a grand jury should receive none but legal proof, is an old and well-established rule, but that the admission of evidence not strictly legal will authorize a setting aside of an indictment, is a proposition which seems to have no authority to sanction it, and, if adopted, would only be an impediment to the execution of criminal justice[.]

³84 Nev. 559, 561-62, 445 P.2d 352, 353 (1968).

the grand jury heard inadmissible evidence.⁴ However, contributing to this court's finding that the dismissal was proper was the omission by the prosecutor of important exculpatory evidence;⁵ and this court specifically reiterated adherence "to the general rule announced in Robertson."

Here, there was testimony from many witnesses as to Volpicelli's involvement in the alleged burglary scheme. Additionally, the prosecutor advised the grand jury that the prior burglary conviction was being presented for a limited purpose,⁶ and should not be considered in determining whether there was sufficient probable cause to indict Volpicelli. While the grand jury here heard inadmissible evidence, its effect does not rise to the level of "clearly destroying" the independence, and "irreparably impairing" the function, of the grand jury under Frank. We conclude that there was sufficient legal evidence presented to the grand jury to sustain the indictment; and that the district court did not err in refusing to dismiss the indictment.

Competency

Again citing no law, Volpicelli argues on appeal that he may not have been "competent during the crimes," citing as evidence the

⁴103 Nev. 160, 734 P.2d 1241 (1987).

⁵Id. at 165-66, 734 P.2d at 1245 (finding that the omission of exculpatory evidence, along with the presentation of substantial inadmissible evidence, "clearly destroyed the existence of an independent and informed grand jury and irreparably impaired its function").

⁶We note that the prosecution incorrectly interpreted this court's holding in Lewis v. State, 109 Nev. 1013, 862 P.2d 1194 (1993) as mandating formal notice in the charging documents of the State's intention to seek an enhanced sentence based on prior convictions.

successful treatment of his "mental illness" since his incarceration. The State assumes that since Volpicelli's appeal brief refers to the competency hearing, the competency being appealed was actually Volpicelli's competency to stand trial.

This court will make the same assumption, in light of the fact that the record contains no evidence that the defense of insanity was considered or even mentioned. In Ogden v. State, this court noted that "[c]ompetency at the time of trial is not to be confused with the defense of insanity. Competency to stand trial is a judicial determination, whereas the defendant's sanity at time of commission of the act is a factual question."⁷ The competency determination is based on "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational and factual understanding of the proceedings against him."⁸ In reviewing a district court's determination of competency, this court will sustain such a finding when substantial evidence exists to support it.⁹

Here, the judge reviewed evaluations from two different doctors, and allowed several different attorneys for Volpicelli to be heard on the matter of competency. The two evaluations both concluded that Volpicelli understood his legal situation, and had sufficient ability to consult with his attorneys. We therefore conclude that substantial

⁷96 Nev. 697, 698, 615 P.2d 251, 252 (1980).

⁸Jones v. State, 107 Nev. 632, 637, 817 P.2d 1179, 1182 (1991) (citing Melchor-Gloria v. State, 99 Nev. 174, 178-80, 660 P.2d 109, 113 (1983)).

⁹Tanksley v. State, 113 Nev. 844, 847, 944 P.2d 240, 242 (1997) (citing Ogden v. State, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980)).

evidence existed to support the district court's determination that Volpicelli was competent to stand trial.

Sufficiency of the evidence to corroborate accomplice testimony

Next Volpicelli contends that the jury had insufficient evidence to convict him on some of the charges, although which specific charges were not supported by sufficient evidence is not enumerated in his appeal. Volpicelli bases this contention on the State's failure to provide adequate corroboration of the testimony of Volpicelli's alleged accomplice. Volpicelli argues that with the exception of accomplice Brett Bowman, nobody else testified to seeing Volpicelli commit any crimes.

The State counters that there was ample corroboration to meet the statutory standard of independent evidence connecting the defendant to the crime.¹⁰ The State argues that there was corroborative testimony as to the planning and execution of the crimes, as well as corroborative testimony connecting Volpicelli to physical evidence, including both the instruments of the crimes and the "booty" of the crimes.

This court will not disturb a conviction if it is supported by substantial evidence.¹¹ NRS 175.291 requires that accomplice testimony be corroborated:

1. A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to

¹⁰NRS 175.291.

¹¹Coffman v. State, 93 Nev. 32, 34, 559 P.2d 828, 829 (1977).

connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

"Corroboration evidence need not be found in a single fact or circumstance and can, instead, be taken from the circumstances and evidence as a whole."¹² However, such evidence must "independently connect the defendant with the offense; evidence does not suffice as corroborative if it merely supports the accomplice's testimony."¹³

Here, there was corroborative evidence that connected Volpicelli with both the commission of the crimes and the merchandise that was the object of the crimes. Volpicelli was placed at the scene of the crime the day of the arrest by the testimony of multiple police officers. Further, the State introduced independent testimony that Volpicelli (1) closely inspected the bike that was ultimately found in the van with the two suspects; (2) purchased one of the comforters found in the van; (3) owned both the van and the bag containing the label maker; and (4) was seen in stores where much of the recovered merchandise had been

¹²Cheatham v. State, 104 Nev. 500, 504, 761 P.2d 419, 422 (1988) (citing LaPena v. State, 92 Nev. 1, 544 P.2d 1187 (1976)).

¹³Heglemeier v. State, 111 Nev. 1244, 1250, 903 P.2d 799, 803 (1995).

purchased, recording UPC codes. Additionally, there was ample testimony from various store representatives that supported the testimony of Bowman as to the value of the various merchandise recovered in the storage unit. Finally, there was independent testimony from both a police officer and the owner of the mini-storage business that connected Volpicelli, and not Bowman, to the storage unit where much of the merchandise was found.

We conclude, therefore, that there was sufficient corroboration of accomplice Bowman's testimony under NRS 175.291 to support all the jury's guilty verdicts against Volpicelli.

Habitual criminal status

Volpicelli contends that the district court abused its discretion when it found habitual criminal status and ran two of the enhanced sentences consecutively. Volpicelli's argument is based on the fact that none of his prior convictions were violent, and that he had untreated mental health problems. The State responds that the district court did not abuse its discretion, based on case law that permits such discretion, and the validity of the prior convictions.

NRS 207.010, the statute applied to Volpicelli's sentencing, provides several different levels of sentence enhancement against convicted criminals, depending on the offense committed and the offender's prior convictions. From the use of three prior felony convictions, along with the ten-to-life sentencing, we can make a reasonable assumption that it was NRS 207.010(1)(b)(2) that was used in Volpicelli's case, although the specific subsection is not cited in the record. That subsection reads in pertinent part:

1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this state of:

....

(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 ... is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:

...

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served ...

"The decision to adjudicate a person as a habitual criminal is not an automatic one."¹⁴ It may be an abuse of discretion for a court to adjudicate an offender a habitual criminal using convictions that are remote in time and non-violent.¹⁵ However, the statute "makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court."¹⁶ In exercising its discretion, a trial court considering habitual

¹⁴Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993).

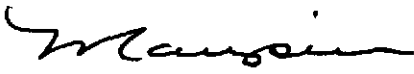
¹⁵Id. (citing Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990)).

¹⁶Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) (citing French v. State, 98 Nev. 235, 645 P.2d 440 (1982)).

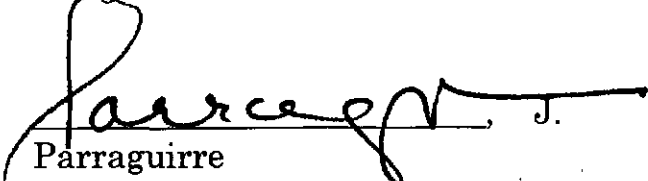
criminal status must make a judgment on the question of "whether it [i]s just and proper" for the offender to be adjudicated as a habitual criminal.¹⁷

Here, it is clear from the record that the district court considered the nature of Volpicelli's prior convictions, and considered the impact of Volpicelli's crimes on both law enforcement and society as a whole. We conclude that this meets the requirements of Clark as to "weigh[ing] the appropriate factors"¹⁸ and making a judgment that Volpicelli "deserved to be declared a habitual criminal."¹⁹ Accordingly we

ORDER the judgment of the district court AFFIRMED.


Maupin, J.


Douglas, J.


Parraguirre, J.

cc: Hon. Steven P. Elliott, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹⁷Clark, 109 Nev. at 428, 851 P.2d at 427.

¹⁸Id.

¹⁹Id. at 427, 851 P.2d at 427.

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 43203 2005 AUG -1 AM 11:00

District Court Case No. CR031263
RONALD A. LONGTIN, JR.
BY C. Kipley
DEPUTY

REMITTITUR

TO: Ronald A. Longtin Jr., Washoe 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: July 26, 2005

Janette M. Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. Steven P. Elliott, District Judge
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Mary Lou Wilson

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 01 2005

Ronald Longtin Jr. by C. Kipley
District Court Clerk

V6 998
05-12992

CR03-1263 DC-9900025179-048
STATE VS. FERRILL JOSEPH VOLPICELLI Page
District Court 08/01/2005 10:53 AM
Washoe County 4145
h/c

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

2005 AUG -1 AM 11:40

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 43203

RONALD A. LONGTIN, JR.

District Court Case No. CR031263

BY C. Kipley
DEPUTY

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

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 29th day of June, 2005.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 26th day of July, 2005.

Janette M. Bloom, Supreme Court Clerk

By: J. Richards
Chief Deputy Clerk

V6.999

CR03-1263 DC-9900025179-049
STATE VS FERRILL JOSEPH VOLP 1 Page
District Court 08/01/2005 10:53 AM
Washoe County 4111
JANET M. BLOOM

ORIGINAL

CR03-1203

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

2005 AUG -1 AM 1:00

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43203

RONALD A. LONGTIN, JR.

FILED BY DEPUTY

JUN 29 2005

ORDER OF AFFIRMANCE

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

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CR03-1203
STATE VS. FERRILL JOSEPH VOLPICELLI
District Court
Washoe County
DC-9900025179-050
08/01/2005 10:53 AM
4194
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evidence existed to support the district court's determination that Volpicelli was competent to stand trial.

Sufficiency of the evidence to corroborate accomplice testimony

Next Volpicelli contends that the jury had insufficient evidence to convict him on some of the charges, although which specific charges were not supported by sufficient evidence is not enumerated in his appeal. Volpicelli bases this contention on the State's failure to provide adequate corroboration of the testimony of Volpicelli's alleged accomplice. Volpicelli argues that with the exception of accomplice Brett Bowman, nobody else testified to seeing Volpicelli commit any crimes.

The State counters that there was ample corroboration to meet the statutory standard of independent evidence connecting the defendant to the crime.¹⁰ The State argues that there was corroborative testimony as to the planning and execution of the crimes, as well as corroborative testimony connecting Volpicelli to physical evidence, including both the instruments of the crimes and the "booty" of the crimes.

This court will not disturb a conviction if it is supported by substantial evidence.¹¹ NRS 175.291 requires that accomplice testimony be corroborated:

1. A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to

¹⁰NRS 175.291.

¹¹Coffman v. State, 93 Nev. 32, 34, 559 P.2d 828, 829 (1977).

connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

“Corroboration evidence need not be found in a single fact or circumstance and can, instead, be taken from the circumstances and evidence as a whole.”¹² However, such evidence must “independently connect the defendant with the offense; evidence does not suffice as corroborative if it merely supports the accomplice’s testimony.”¹³

Here, there was corroborative evidence that connected Volpicelli with both the commission of the crimes and the merchandise that was the object of the crimes. Volpicelli was placed at the scene of the crime the day of the arrest by the testimony of multiple police officers. Further, the State introduced independent testimony that Volpicelli (1) closely inspected the bike that was ultimately found in the van with the two suspects; (2) purchased one of the comforters found in the van; (3) owned both the van and the bag containing the label maker; and (4) was seen in stores where much of the recovered merchandise had been

¹²Cheatham v. State, 104 Nev. 500, 504, 761 P.2d 419, 422 (1988) (citing LaPena v. State, 92 Nev. 1, 544 P.2d 1187 (1976)).

¹³Heglemeier v. State, 111 Nev. 1244, 1250, 903 P.2d 799, 803 (1995).

purchased, recording UPC codes. Additionally, there was ample testimony from various store representatives that supported the testimony of Bowman as to the value of the various merchandise recovered in the storage unit. Finally, there was independent testimony from both a police officer and the owner of the mini-storage business that connected Volpicelli, and not Bowman, to the storage unit where much of the merchandise was found.

We conclude, therefore, that there was sufficient corroboration of accomplice Bowman's testimony under NRS 175.291 to support all the jury's guilty verdicts against Volpicelli.

Habitual criminal status

Volpicelli contends that the district court abused its discretion when it found habitual criminal status and ran two of the enhanced sentences consecutively. Volpicelli's argument is based on the fact that none of his prior convictions were violent, and that he had untreated mental health problems. The State responds that the district court did not abuse its discretion, based on case law that permits such discretion, and the validity of the prior convictions.

NRS 207.010, the statute applied to Volpicelli's sentencing, provides several different levels of sentence enhancement against convicted criminals, depending on the offense committed and the offender's prior convictions. From the use of three prior felony convictions, along with the ten-to-life sentencing, we can make a reasonable assumption that it was NRS 207.010(1)(b)(2) that was used in Volpicelli's case, although the specific subsection is not cited in the record. That subsection reads in pertinent part:

1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this state of:

....

(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 . . . is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:

...

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served . . .

“The decision to adjudicate a person as a habitual criminal is not an automatic one.”¹⁴ It may be an abuse of discretion for a court to adjudicate an offender a habitual criminal using convictions that are remote in time and non-violent.¹⁵ However, the statute “makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court.”¹⁶ In exercising its discretion, a trial court considering habitual

¹⁴Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993).

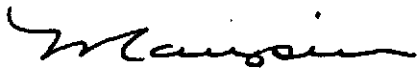
¹⁵Id. (citing Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990)).

¹⁶Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) (citing French v. State, 98 Nev. 235, 645 P.2d 440 (1982)).

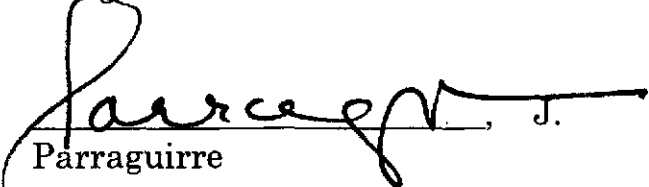
criminal status must make a judgment on the question of "whether it [i]s just and proper" for the offender to be adjudicated as a habitual criminal.¹⁷

Here, it is clear from the record that the district court considered the nature of Volpicelli's prior convictions, and considered the impact of Volpicelli's crimes on both law enforcement and society as a whole. We conclude that this meets the requirements of Clark as to "weigh[ing] the appropriate factors"¹⁸ and making a judgment that Volpicelli "deserved to be declared a habitual criminal."¹⁹ Accordingly we

ORDER the judgment of the district court AFFIRMED.


Maupin, J.


Douglas, J.


Parraguirre, J.

cc: Hon. Steven P. Elliott, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹⁷Clark, 109 Nev. at 428, 851 P.2d at 427.

¹⁸Id.

¹⁹Id. at 427, 851 P.2d at 427.

CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: July 26, 2005
Supreme Court Clerk, State of Nevada

By J. R. R. R. Chief Deputy

V6.1009

FERRILL J. VOLPICELLI, WDOC 79565
c/o Lovelock Correctional Center
Post Office Box 359
1200 Prison Road
Lovelock, NV 89419-0359

ORIGINAL

FILED

Petitioner, In Propria Persona

2005 SEP 12 PM 4:21

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

RONALD A. LONGTIN, JR.

BY [Signature]
DEPUTY

FERRILL J. VOLPICELLI,
Petitioner,

v.

THE STATE OF NEVADA,
Respondent.

Case No.: CR03-1263

Dept No.: 10

MOTION FOR ORDER TO COMPEL

COMES NOW, the Petitioner, Ferrill J. Volpicelli, in his proper person and as countenanced in HAINES v. KERNER, 404 US 519, 92 SCt 594, 596 (1972), (pleadings filed by pro se litigants are to be held to less stringent standards than those filed by practicing attorneys), and respectfully moves this Honorable Court for an ORDER to COMPEL all court-appointed counsel in the above-referenced case to forward to the Petitioner, at his current place of confinement above-noted, ALL papers, documents, pleadings, and items of tangible personal property which belong to, or were prepared for or by the Petitioner in the instant case.

This MOTION is made and predicated upon all papers, documents, and pleadings on file in said case, as well as any argument at any hearing which this Court may deem necessary.

STATEMENT OF JURISDICTION

This Court has JURISDICTION in this matter, as a remittitur has issued in the Supreme Court of Nevada's review of this case on August 1, 2005. See, Supreme Court Case No. 43203.

STATEMENT OF FACTS

At the time of the incident in the above-referenced case, Petitioner was represented by Jack Alian, Esq., as court-appointed counsel. Prior to the in-

V6.1010

CR03-1263
STATE VS FERRILL JOSEPH V0 14 Pages
District Court 09/12/2005 11 04 AM
Washoe County
nmf

cident, Jack Alian, Esq., represented the Petitioner in cases 02-0145 and 02-0146, both of which were eventually 'stayed' concomitant with the indictment of case no. 03-1263.

Following the indictment proceedings, Jack Alian assigned the court-appointed counsel representation to Bradley Van Ry, Esq.. Bradley Van Ry, Esq., represented Petitioner through pre-trial, trial, and sentencing proceedings. Immediately subsequent to sentencing, Bradley Van Ry withdrew as counsel, wherein Defendant/Petitioner was compelled to file pleadings in proper person - specifically, a NOTICE OF APPEAL and REQUEST FOR APPELLATE COUNSEL.

Petitioner then requested the entire case file from Bradley Van Ry; all to no avail. Van Ry purported to Petitioner that he was compelled to forward said file in its entirety to the State of Nevada's Public Defender's Office, where it would await transfer to court-appointed appellate counsel. (See, June 2, 2004 EXHIBIT). Petitioner pursued said file through State Public Defender, Mr. Champaign, again, all to no avail.

Petitioner then commenced with the subpoena process and the filing of pleadings to retrieve his file from Bradley Van Ry. (See, May 4, 2004 and July 6, 2004, letters and pleadings attached hereto). Shortly thereafter, the court appointed Mary Lou Wilson, Esc., as appellate counsel in appealing the judgment of conviction in case no. 03-1263. Petitioner then assumed that Ms. Wilson was in possession of the file. Ms. Wilson never responded to Petitioner's written and telephonic inquiries. (See, July 10, 2005 letter).

On or about July 25, 2005, Petitioner again sent written requests to Attorney Van Ry and Attorney Wilson regarding said file. To date, there have been no responses to either of these letters. (See, letters of July 25, 2005, attached hereto).

ARGUMENT

Petitioner would direct this Court's attention to NRS 7.055, which

states substantially as follows:

NRS 7.055 - Duty of discharged attorney to deliver certain materials to client; enforcement; adjudication of claims to materials; . . .

1) Counsel will immediately deliver to the client all papers, documents, pleadings, and items of tangible personal property which belong to or were prepared for that client.

Nevada Revised Statute 1.210(3) states that the Court has the power to COMPEL OBEDIENCE to its ORDER; and, NRS 22.010(3) provides that refusal to abide by a lawful order issued by the Court is CONTEMPT.' HUMANA, INC. v. EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, 110 Nev 121, 867 P2d 1147.

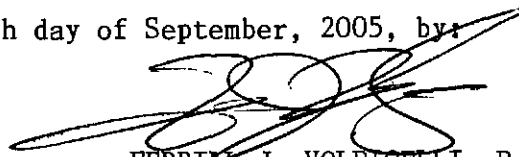
Petitioner has diligently pursued retrieval of his personal property and entire case file in case no. 03-1263, as Ordered in the Subpoena Duces Tecum. This includes, but is not limited to, documents/folders mailed by Petitioner to Bradley Van Ry, Esq., in or around May, 2004, from the Norther Nevada Correctional Center; any and all index cards/notes prepared by Petitioner for trial, in or around November, 2003; as well as, the 'Staples' Office Supply (at South Lake Tahoe) receipt, dated circa September of 2001, (exchange transaction of an ink cartridge for label maker) and all transcripts provided by the prosecution or Jack Alian relevant to taped conversations between Investigations at WCSO, CoDefendant Brett A. Bowman and the Petitioner subsequent to October 17, 2001, and through November 13, 2003. Petitioner is in need of the foregoing items and documentation so as to prepare and file a WRIT OF HABEAS CORPUS (POST-CONVICTION).

CONCLUSION

WHEREFORE, Petitioner respectfully moves this Honorable Court for relief, via an ORDER COMPELLING Bradley Van Ry, Esq., Jack Alian, Esq., and Mary Lou Wilson, Esq., either individually or collectively, to immediately release to Petitioner, his entire case file for case no. 03-1263, including, but not limited

to, the specific items referenced in the SUBPOENA and reiterated in the accompanying ARGUMENT.

RESPECTFULLY SUBMITTED, this 6th day of September, 2005, by:

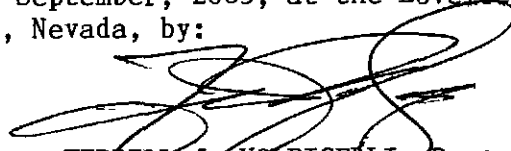


FERRILL J. VOLPICELLI, Petitioner
In Propria Persona

VERIFICATION

I, Ferrill J. Volpicelli, do hereby depose and say, under the pains and penalties of perjury, as pursuant to NRS 208.165, that all statements contained in the foregoing MOTION are true and correct, as to the best of my knowledge, information, and belief.

EXECUTED and DATED, this 6th day of September, 2005, at the Lovelock Correctional Center, Lovelock, Pershing County, Nevada, by:



FERRILL J. VOLPICELLI, Petitioner
In Propria Persona

CERTIFICATE OF SERVICE BY MAIL

I, Ferrill J. Volpicelli do hereby CERTIFY that, on the date last-here-written, I have mailed a true and correct copy of the foregoing MOTION to the parties listed below, by placing the same in sealed envelopes, with sufficient postage affixed, and placing said pleadings in the US Postal Service Mail at the Lovelock Correctional Center, Lovelock, Nevada, addressed as follows:

Dick Gammick, District Attorney
Washoe County Courthouse
195 South Sierra Street
Reno, NV 89520; and

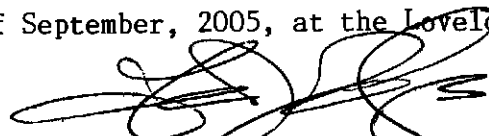
Mary Lou Wilson, Esq.
1030 Holcomb
Reno, NV 89502; and

Jack Alian, Esq.
360 West Liberty
Reno, NV 89509; and

Bradley Van Ry, Esq.
West Liberty, Suite 100
Reno, NV 89501.

Re

EXECUTED and DATED, this 6th day of September, 2005, at the Lovelock Correctional Center, Lovelock, Nevada, by:



FERRILL J. VOLPICELLI, Petitioner
In Propria Persona

FERRILL T. VOLPICELLI
5651 HDSA BOX 650
INDIAN SPRINGS, NV 89018
DEFENDANT PRO PER

FILED

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA
2004 JUL -6 PM 3:51

RONALD A. LONGTIN, JR.

IN AND FROM THE COUNTY OF WASHOE
DEPUTY

STATE OF NEVADA,
PLAINTIFF,

CASE: CR03-1263

DEPT: 10

FERRILL T. VOLPICELLI,
DEFENDANT,

REQUEST FOR ORDER TO
SHOW CAUSE REGARDING
CONTEMPT OF COURT - AND
ORDER TO COMPEL

DEFENDANT, FERRILL T. VOLPICELLI, IN PROPER
PERSON AND FORMA PAUPERIS, MOVES THE COURT
TO ISSUE AN ORDER TO SHOW CAUSE WHY BRADLEY
VAN RY ESQ, DEFENDANT'S COUNSEL OF RECORD
UNTIL NOTICE OF WITHDRAWAL OF ATTORNEY, DATED
16 APRIL, 2004, SHOULD NOT BE HELD IN
CONTEMPT OF COURT FOR DELIBERATELY AND
WILLFULLY VIOLATING THE REQUEST IN A SUBPOENA,
PURSUANT TO NRCP 34 AND 35, DATED 4
MAY, 2004. A COPY OF THE RELEVANT
PORTION OF THE SUBPOENA DUCES TECUM
IS ATTACHED AS EXHIBITS A & B. ACCORDING
TO SAID SUBPOENA, THE FOREGOING INDIVIDUAL

1 OR. BUSINESS WAS REQUIRED TO PROVIDE
2 THE DEFENDANT, WITHIN TEN (10) DAYS OF THE
3 DATED SUBPOENA, WITH ALL PAPERS, EVIDENCE,
4 LETTERS, VINYL FOLDERS AND EXHIBITS RELEVANT TO
5 CASE # 03-1263 RECEIVED FROM FERRILL J
6 VOUPICELLY, OFFICE OF TRICK ALAN ESO, RENO
7 POLICE DEPT. AND THE WASHOE COUNTY DISTRICT
8 ATTORNEYS' OFFICE. SAID COPIES OF SAME ARE
9 TO BE ORGANIZED AND DESIGNATED AS TO THEIR
10 RESPECTIVE SOURCE, AND ACCOMPANIED BY A
11 LETTER OF AFFIDAVIT PURPORTING SUCH. SAID
12 LETTER OF AFFIDAVIT IS ALSO TO INCLUDE
13 WHETHER OR NOT COUNSEL EVER RECEIVED, AS
14 PART OF THE COURT ORDERED DISCOVERY, COPIES
15 OF THE TRANSCRIPTS PERTAINING TO ALL TAPED
16 CONVERSATIONS AT WASHOE COUNTY SHERIFFS
17 OFFICE AND RENO POLICE DEPT. BETWEEN THE
18 DETECTIVES AND DEFENDANTS FERRILL VOUPICELLY
19 AND BRET BOWMAN.

20 THAT TO DATE, AND ALMOST TWO (2) MONTHS
21 SUBSEQUENT TO THE MAILING OF SAID SUBPOENA,
22 AS CERTIFIED UNDER PENALTY OF PERJURY, BRADLEY
23 VAN RY ESO HAS NOT RESPONDED. EXHIBIT 'C'
24 SAID DOCUMENTATION IS CRITICAL FOR THE
25 DEFENDANTS' PURSUIT OF POST CONVICTION REVIEW.
26
27
28

POINTS AND AUTHORITIES


1 NEVADA REVISED STATUTE 1.210(3) STATES THAT
2 THE COURT HAS THE POWER TO COMPEL OBEDIENCE
3 TO ITS ORDER AND NEVADA REVISED STATUTE
4 22.010(3) PROVIDES THAT "REFUSAL TO OBEY
5 BY A LAWFUL ORDER ISSUED BY THE COURT IN
6 CONTEMPT".

7 HUMANA INC. V. ELIZABETH JUDICIAL DISTRICT COURT
8 COUNTY OF CLARK, 110 NV 121, 867 P2d 1147


CONCLUSION

10 DEFENDANT, THEREFORE, RESPECTFULLY REQUESTS
11 THAT BRADLEY VAN RY ESQ BE ORDERED TO
12 APPEAR IN COURT TO SHOW WHY HE SHOULD
13 NOT BE HELD IN CONTEMPT OF COURT.

15 DATED THIS 28 DAY OF JUNE, 2004

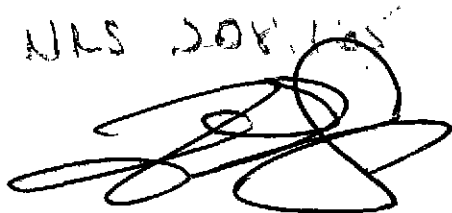
17 
18 FERRILL T. VOLPICELLI
19 DEFENDANT PWS SE

21 AFFIDAVIT
22 DEFENDANT, FERRILL T. VOLPICELLI, HEREBY
23 DECLARES UNDER PENALTY OF PERJURY THAT
24 THE FACTS AND ALLEGATIONS IN THIS PLEADING
25 ARE TRUE AND CORRECT TO THE BEST OF HIS
26 KNOWLEDGE AND BELIEF. (PURSUANT TO NRS 204.110)

27 
28 FERRILL T. VOLPICELLI / DEFENDANT PWS SE

CERTIFICATE OF MAILING

DATED AND CERTIFIED ON THIS 28
DAY OF JUNE, 2004, TO WASHER
COUNTY DISTRICT ATTORNEY AND BRUCE
VAN R. EER, AS CERTIFIED UNDER
PENALTY OF PERJURY PURSUANT TO
NRS 208.125



FERRIS J. VOLPICECI
DEFENDANT FOR SE

1 CODE 4055

FERRIL VOLPICELLI
79565 NVCC
BOX 7000
CARSON CITY, NV 89202
DEFENDANT & APPELLANT
IN PRO PER

2
3
4
5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE

7 STATE OF NEVADA

8 Plaintiff,

9 vs.

10 FERRIL T. VOLPICELLI

11 Defendant.

Case No. CR-03-1263

Dept. No. 10

12
13
14 SUBPOENA

To: BRADLEY VAN RY ESQ

(Name)

15 SEE ACCOMPANYING DOCUMENT ON CARRY LEGAL PAPER

16 ~~You are commanded to appear before the Second Judicial District Court, State of Nevada, Washoe~~
17 ~~County, at the courtroom of said court, Department _____ at Reno, Nevada, on the _____ day of~~
18 ~~_____, at _____ m, to testify on the part of _____~~

19 Any person failing to appear may be deemed in contempt of court, and shall be liable to the party
20 injured in the sum of \$100.00, and for such damages as may be sustained by him/her on account of such
neglect or refusal.

Dated this 4th day of MAY, 2004

21 RONALD A. LONGTIN JR., CLERK OF THE COURT

22 by [Signature]

Deputy Clerk

23 STATE OF NEVADA
24 COUNTY OF WASHOE

25 I received the within Subpoena on the 4th day of MAY, 2004 and
26 personally ~~served~~ MAILED a copy of the same upon BRADLEY VAN RY ESQ

27 Subscribed and sworn to before me
28 this _____ day of _____

Notary Public

UNDER PENALTY OF PERJURY
PURSUANT TO NRS. 208.165

[Signature]
Signature of Person Making Service

FERRILL
VOLPICELLI
79565
X 7000

RENO CITY
NEVADA
89702
DEFENDANT
PAG PER

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,
PLAINTIFF,

CASE # CR-03-1263
DEPT # 10

FERRILL T. VOLPICELLI,
DEFENDANT,

SUBPOENA DUCES
TECUM ADDENDUM

THE STATE OF NEVADA SENDS GREETINGS TO: BRAD VAN RYEN.
WE COMMAND YOU, THAT ALL SINGULAR, BUSINESS AND EXCUSES
BEING SET ASIDE, TO SUBMIT BY SENDING TO THE DEFENDANT ABOVE
NAMED, AT THE ABOVE NOTED ADDRESS: ALL PAPERS, LETTERS, EXHIBITS
& VINYL FOLDERS RELEVANT TO CASE CR03-1263 RECEIVED FROM
FERRILL VOLPICELLI, OFFICE OF JACK ALANESQ, RENO POLICE
DEPT, AND THE WASHOE COUNTY DISTRICT ATTORNEYS OFFICE.
SAID COPIES OF SAME ARE TO BE ORGANIZED AND DESIGNATED
AS TO THEIR RESPECTIVE SOURCE, AND ACCOMPANIED BY A LETTER
OF AFFIDAVIT PURPORTING SUCH. SAID LETTER OF AFFIDAVIT IS
ALSO TO INCLUDE WHETHER OR NOT COUNSEL EVER RECEIVED AND
REVIEWED. AS PART OF THE COURT ORDERED DISCOVERY, COPIES OF
THE TRANSCRIPTS PERTAINING TO ALL TAPED CONVERSATIONS AT THE
WASHOE COUNTY SHERIFFS OFFICE BETWEEN DETECTIVES AND THE
DEFENDANTS, FERRILL VOLPICELLI AND BART BOWMAN.
THE ABOVE REQUESTED DOCUMENTATION IS TO BE IN A SEALED
ENVELOPE OR BOX ADDRESSED AND DELIVERED AS NOTED HEREIN,
IN A SEALED ENVELOPE OR BOX, MARKED 'LEGAL DOCUMENTS',
WITHIN TEN (10) DAYS OF THE ABOVE FILING DATE.
AND FAILURE TO ABIDE BY THIS SUBPOENA, YOU WILL BE
DEEMED GUILTY OF CONTEMPT OF COURT AND LIABLE TO PAY
ALL LOSSES AND DAMAGES SUSTAINED THEREBY TO THE PARTIES
AGGRIEVED AND FORFEIT ONE HUNDRED (\$100) DOLLARS IN ADDITION
THEREON.

N. WITNESS WHEREOF, I HEREBY SET MY HAND AND AFFIXED SEAL OF
SAY COURT THIS DAY OF APRIL, 2004.

A-7

SEE COVER PAGE

DEPUTY CLERK OF THE COURT

FERRILL J. VOLPICELLI

79565 @ NM

BOX 7000

CARSON CITY, NV 89702

APPELLANT PRO PER

1 MAY, 2004

(43203) (03-1263)

RE: CASE FILE AND ACCOMPANYING VINYL FOLDERS

DEAR MR. VAN RY,

THE ACCOMPANYING VINYL LEGAL FOLDERS ARE PART OF THE EVIDENCE BEING RELEASED BY THE RENO POLICE DEPT. THROUGH THE CITY ATTORNEY'S OFFICE IN RENO. I AM REQUESTING THAT YOU INCLUDE THESE LABELED LEGAL FOLDERS WITH MY CASE FILE.

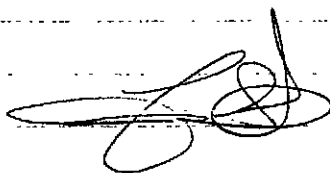
YOU WILL ALSO NOTE FROM THE ENCLOSURE(S) THAT I AM BELEFT OF COUNSEL, AND THAT I AM CURRENTLY FURTHERING MY APPEAL ~~with~~ IN PROPER PERSON.

CONSEQUENTLY, YOUR UNAUTHORIZED PLOY TO DELIVER MY CASE FILE TO THE WASHOE COUNTY PUBLIC DEFENDERS' OFFICE WAS PREMATURE. IN VIEW OF THIS, I MUST INSIST THAT YOU REMOVE MY CASE FILE IN ITS ENTIRETY AND FORWARD SAME, ALONG WITH THE VINYL FOLDERS TO MY PLACE OF INCARCERATION WHEN I TRANSFER TO NSP.

INCIDENTALLY, I REVIEWED NEVADA SUPREME COURT Rule 46, AND I AM LED TO BELIEVE THAT YOU MISREPRESENTED ME REGARDING THE NECESSITY OF YOUR WITHDRAWAL FROM MY CASE BASED ON THE NATURE OF MY JUDGMENT AND CONVICTION. ACCORDINGLY, IT MERELY DEMONSTRATES ANOTHER BREACH OF THE CLIENT-ATTORNEY FIDELITY; WHICH I WAS TO BE AFFORDED UNDER THE SIXTH AMENDMENT.

HENCE, IN VIEW OF THE FOREGOING, YOUR FAILURE TO COOPERATE WITH THIS REQUEST WILL ONLY COMPEL ME TO PURSUE THIS MATTER THROUGH THE SUBPOENA PROCESS. I ANTICIPATE THAT THIS LETTER WILL PROMPT YOUR COOPERATION IN THIS MATTER.

G-
GOVERN YOURSELF ACCORDINGLY,



FERRIN VOLPICELLI
79565 HOSP
BOX 650

INDIAN SPRINGS, NV 89070

2 JUNE, 2004

REG CASE # CWS-1263 / SUBROENA

AW
office
of
BRAD
AN RY
ESQ

DEAR MR. VAN RY,

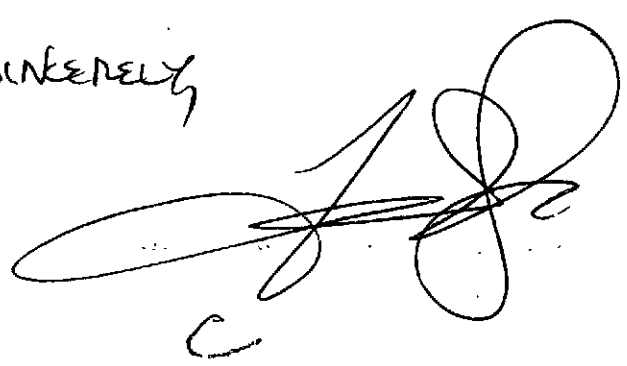
BY NOW, YOU ARE LIKELY IN RECEIPT OF
THE SUBROENA DUCES TECUM FILED LAST
MONTH.

AS A FOLLOW UP, I PLACED A CALL TO THE
STATE PUBLIC DEFENDERS OFFICE. MR. CHAMBERNE
PURPORTED TO ME THAT THE CASE FILE HAS
BEEN RETRIEVED BY YOUR OFFICE, AND, YOUR
RECEPTIONIST IS SUPPOSEDLY FORWARDING
THE ITEMS REFERENCED IN THE SUBROENA TO ME.
IN VIEW OF THIS, I ANTICIPATE RECEIPT OF
THE CASE FILE BY NO LATER THAN 6/11/04,
AT WHICH TIME I WILL BE COMPELLED TO
FILE A REQUEST FOR ORDER TO SHOW CAUSE
REGARDING CONTEMPT AND ORDER TO COMPEL.
SO AS TO AVOID THIS ACTION, PLEASE PROVIDE
ME WITH THE ITEMS REFERENCED IN THE
SUBROENA BY 6/11/04.

THANK YOU FOR YOUR CONCERNS AND
COOPERATION WITH THIS MATTER.

cc: fuc

Sincerely,



FERRILL VOLPICELLI
78565 HOSP BOX 650
JUNCTION SPRINGS, NV 89701
DEFENDANT PRO SE

IN THE SECOND JUDICIAL DISTRICT OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

RONALD A. LONGTIN, JR.
T. White

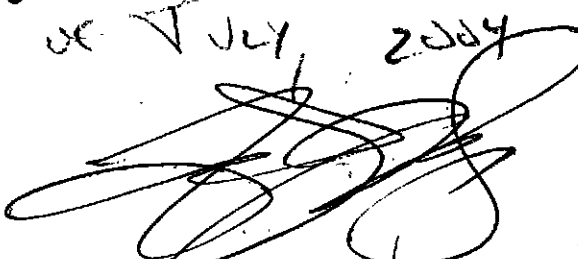
CASE NO. 03-1243
DEPT. 13

STATE OF NEVADA,
PLAINTIFF,

FERRILL V. VOLPICELLI
DEFENDANT,

Request for
Submission of Request
for Order to Show Cause
Regarding Contempt of
Court - and Order to Compel

DEFENDANT HAVING FILED A REQUEST FOR ORDER TO
SHOW CAUSE REGARDING CONTEMPT OF COURT - AND
ORDER TO COMPEL ON 6 JULY 2004, HEREBY
MOVES THE COURT FOR SUBMISSION OF SAID
MOTION FOR THE COURT'S REVIEW & DETERMINATION.
WHEREFORE, BRADLEY VAN ESSE HAS NOT
RESPONDED TO THIS ACTION AS OF THIS DATE, AND
DEFENDANT REQUESTS IMMEDIATE RELIEF BY AN ORDER.

DATED this 26th DAY
OF JULY, 2004

FERRILL V. VOLPICELLI
DEFENDANT: PRO SE

CERTIFICATE OF MAILING
DATED & COPY MAILED
ON 7/24/04 TO VAN ESSE &
WODA AS CERTIFIED
UNDER PENALTY OF
PERJURY PURSUANT TO
NRS. 205.165

10 JULY, 2004

FERRILL VOLPICELLI

79565 HOSP BOX 650

INDIAN SPRINGS, NV 89018.

REC CR 031263/ 43203

LAW
OFFICE
of
MARY
LOU
WILSON
ESQ.

Dear Ms. Wilson, THIS IS MY 3RD LETTER OF INQUIRY REGARDING ISSUES AND CONCERNS WITH MY CASE.

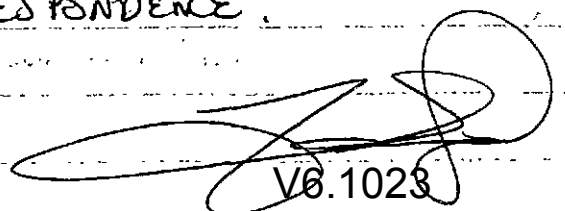
INASMUCH AS COMMUNICATION WITH YOUR OFFICE, TELEPHONICALLY, HAS REVEALED AN IMPASSE, COULD I REQUEST THAT YOU PLACE AN INQUIRY WITH THE DIRECTOR'S OFFICE AT THE NDOC IN CARSON CITY REGARDING A TRANSFER OF CUSTODY BACK TO NORTHERN NEVADA? IN THAT WAY, VISITATION MAY BE FACILITATED TO DISCUSS PERSONAL MATTERS WITH MY CASE.

NEXT, IT IS MY ASSUMPTION THAT YOU ARE LIKELY IN RECEIPT OF THE CASE FILE WHICH TRANSFERRED FROM EITHER THE OFFICE OF BRAD VAN RY OR THE PUBLIC DEFENDER. IF SO, COULD I TROUBLE YOU FOR A COPY OF THE SOUTH LAKE TATTOO, CALIFORNIA 'STAPLES' RECEIPT INVOLVING AN EXCHANGE TRANSACTION? IT IS IMPERATIVE THAT I GLEAN INFORMATION FROM IT FOR REASONS RELEVANT TO POST CONVICTION RELIEF ISSUES WHICH I INTEND TO ELABORATE ON IN FUTURE LETTERS TO YOU. ALSO, COULD YOU PERUSE THE FILE TO ASCERTAIN WHETHER OR NOT THERE ARE COMPLETE TRANSCRIPTS IN THE DISCOVERY FILE PERTAINING TO TAPED CONVERSATIONS, AT WCSO AND RPD, BETWEEN INVESTIGATORS, MYSELF & CODEFENDANT BOWMAN?

I ANXIOUSLY ANTICIPATE YOUR RESPONSE TO THE FOREGOING MATTERS, AS WELL AS OTHER ITEMS REFERENCED IN PRIOR CORRESPONDENCE.

THANK YOU.

Sincerely,



VB.1028

cc
File

ORIGINAL

FILED

2645
Bradley O. Van Ry
Nevada Bar No. 7198
201 West Liberty Street, Suite 100
Reno, NV 89501
(775) 333-9000

2005 SEP 12 PH 4: 12

RONALD A. LONGTIN, JR.

BY *K. Williams*
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

Case No. CR03-1263

v.

Dept. No. 10

FERRILL JOSEPH VOLPICELLI,

Defendant.

OPPOSITION TO MOTION FOR ORDER TO COMPEL

The undersigned, Bradley O. Van Ry, hereby opposes the Motion For Order To Compel filed by Defendant FERRILL JOSEPH VOLPICELLI and served on Bradley Van Ry on September 6, 2005, as follows:

Counsel Bradley O. Van Ry represented Defendant FERRILL JOSEPH VOLPICELLI in the above-referenced matter up and to the filing of his Notice of Withdrawal on April 19, 2004.

1 Counsel Mary Lou Wilson began representing Defendant FERRILL JOSEPH
2 VOLPICELLI on June 1, 2004, upon the filing of an Order Appointing Counsel filed in
3 the above-referenced case.
4

5 On April 23, 2004, Bradley O. Van Ry informed Defendant FERRILL JOSEPH
6 VOLPICELLI via correspondence sent U.S. Mail that his file in its entirety was hand-
7 delivered to the Washoe County Public Defender's office. See attached Exhibit "1."
8

9 On June 22, 2005, Bradley O. Van Ry received correspondence from John
10 Reese Petty, Chief Deputy, Washoe County Public Defender's office, asking for
11 arrangements to be made to pick up two boxes containing trial materials relating to
12 FERRILL JOSEPH VOLPICELLI's case. See attached Exhibit "2." Bradley O. Van
13 Ry did not make arrangements to pick up the files, as he no longer was counsel to
14 the Defendant.
15

16 WHEREFORE, Bradley O. Van Ry respectfully moves this Honorable Court
17 for relief from an Order compelling release to Defendant of his trial files. Bradley O.
18 Van Ry does not have possession of the files referenced in Defendant's Motion For
19 Order To Compel.
20

21 DATED this 12th day of September 2005.
22

23 VAN RY LAW OFFICES, LLP

24 
25 BRADLEY O. VAN RY
26
27
28

CR03-1263 DC-9900025179-053
STATE VS. FERRILL, JOSEPH VOL 2 Pages
District Court 09/12/2005 04 23 PM
Washoe County 2645
FY1 10ME7

EXHIBIT 1

**BRADLEY O. VAN RY
VAN RY LAW OFFICE**

1403 E. Fourth St.
RENO, NEVADA 89512
TELEPHONE: (775) 324-3681
FACSIMILE: (775) 324-6281
E-MAIL: bvanry@sdi.net

***LIKE FREEDOM, THE PURSUIT OF JUSTICE IS BORN
OF VIGILANCE AND COURAGE.***

April 23, 2004


Ferrill Volpicelli
Inmate #79565
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702

Re: *Volpicelli adv. State of Nevada*
Case No.: CR03-1263

Dear Mr. Volpicelli:

This letter will serve to advise you that your file in its entirety was hand-delivered to the Washoe County Public Defender's Office today. I cannot release the entire file to you prior to delivering it to your new counsel. Thus, you will have to contact your new counsel to obtain a copy as you requested. The address and phone number is as follows: 350 South Center Street, 6th Floor, P.O. Box 30083, Reno, Nevada 89520; telephone: (775) 332-4800.

Very truly yours,



Bradley O. Van Ry

BVR/kjr

cc: Washoe County Public Defender's Office

CR03-1263 DC-9900025179-054
STATE VS FERRILL JOSEPH VOL 3 Pages
District Court 09/12/2005 04:23 PM
Washoe County 2645
FV2 10MF

EXHIBIT 2

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Van Ry Law Office, 201 W. Liberty Street, Suite 100, Reno, Nevada 89501, and that on the date below, a true and correct copy of the foregoing, **OPPOSITION TO MOTION FOR ORDER TO COMPEL**, was deposited for mailing with the United States Post Office, Regular First Class Mail at Reno, Nevada, in a sealed envelope, addressed to the following:

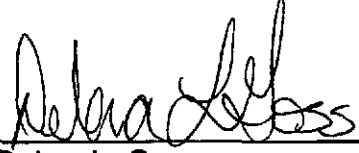
Tammy Riggs
Washoe County Deputy District Attorney
Criminal Division
75 Court Street
P.O. Box 30083
Reno, NV 89520

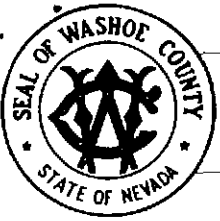
Ferrill Joseph Volpicelli
Inmate #79565
Lovelock Correctional Center
1200 Prison Road
P.O. Box 359
Lovelock, NV 89419-0359

Mary Lou Wilson
333 Marsh Avenue
Reno, NV 89509

Jack A. Alian
360 W. Liberty Street
Reno, NV 89501

DATED this 12th day of September, 2005.


Debra L. Goss



Washoe County Public Defender

Michael R. Specchio / Public Defender

Standard of Excellence Since 1969

June 22, 2005

Mr. Bradley Van Ry, Esq.
Mr. Kevin Van Ry, Esq.
1403 East Fourth Street
Reno, Nevada 8912

Re: Ferrill Joseph Volpicelli v. The State of Nevada
District Court Case Number CR03-1263, Dept. 10

Dear Sirs:

Please make arrangements to come pick up two boxes containing trial materials relating to the above entitled case. Mary Lou Wilson is handling the direct appeal in that matter and has indicated to me that she does not want these materials. Since we, at the Public Defender's Office have no involvement in this case, we do not want them either.

If you have any questions please feel free to call me at (775) 337-4827.

Sincerely,

JEREMY T. BOSLER
WASHOE COUNTY PUBLIC DEFENDER

by: 
John Reese Petty
Chief Deputy

ORIGINAL
FILED

2005 SEP 13 AM 11:55
RONALD A. LONGTIN, JR.
BY *[Signature]*
DEPUTY

1650
Bradley O. Van Ry
Nevada Bar No. 7198
201 West Liberty Street, Suite 100
Reno, NV 89501
(775) 333-9000

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

Case No. CR03-1263

v.

Dept. No. 10

FERRILL JOSEPH VOLPICELLI,

Defendant.

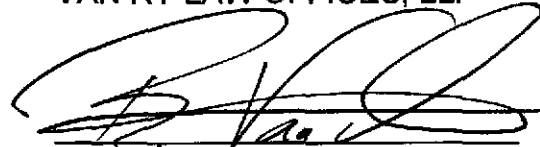
ERRATA TO OPPOSITION TO MOTION FOR ORDER TO COMPEL

The undersigned, Bradley O. Van Ry, hereby files this Errata to his
Opposition To Motion For Order to Compel filed on September 12, 2005. This
Errata is being filed as counsel stated in his Opposition that he was not in
possession of the files referenced in the Motion For Order To Compel filed by
Defendant FERRILL JOSEPH VOLPICELLI.

1 However, Mr. Van Ry's staff has located the trial files of FERRILL JOSEPH
2
3 VOLPICELLI and the same were forwarded to the Defendant on September 13,
4 2005. See attached Exhibit "1."

5 DATED this 13th day of September 2005.

6
7 VAN RY LAW OFFICES, LLP

8 

9 BRADLEY O. VAN RY
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CR03-1263 DC-990025179-056
STATE VS FERRILL JOSEPH VOL 3 Pages
District Court 09/13/2005 04:10 PM
Washoe County 1650
FYI 10ME

Kevin Van Ry
Bradley O. Van Ry
VAN RY LAW OFFICES, LLP

201 West Liberty Street, Suite 100

Reno, Nevada 89501

TELEPHONE: (775) 333-9000

FACSIMILE: (775) 333-9004

E-MAIL: kvanry@sdi.net

E-MAIL: bvanry@sdi.net

***LIKE FREEDOM, THE PURSUIT OF JUSTICE IS BORN
OF VIGILANCE AND COURAGE.***

September 13, 2005

Ferrill Joseph Volpicelli
Inmate #79565
Lovelock Correctional Center
1200 Prison Road
P.O. Box 359
Lovelock, NV 89419-0359

Re: Ferrill Joseph Volpicelli adv. State of Nevada
Case No. CR03-1263

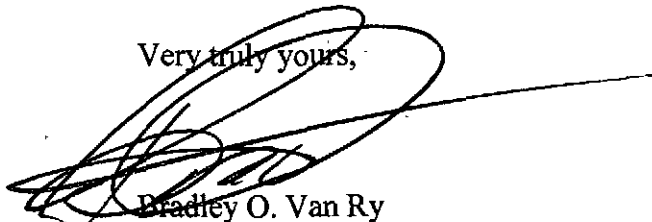
Dear Mr. Volpicelli:

Enclosed please find your entire file from our office. We are forwarding the same to you based upon your Motion For Order To Compel. As you know, we filed an Opposition stating we did not have the files in our possession. We then filed an Errata to our Opposition, as your files were found in our office.

Please be advised that we have forwarded you all original documents, tapes and videos from our file and have not kept a copy of the same. Therefore, you are now in possession of the original file. Once again, we **DID NOT** keep a copy of your file in our office.

Thank you.

Very truly yours,



Bradley O. Van Ry

BVR/dlg
Enc.

V6.1034

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Van Ry Law Office, 201 W. Liberty Street, Suite 100, Reno, Nevada 89501, and that on the date below, a true and correct copy of the foregoing, **ERRATA TO OPPOSITION TO MOTION FOR ORDER TO COMPEL**, was deposited for mailing with the United States Post Office, Regular First Class Mail at Reno, Nevada, in a sealed envelope, addressed to the following:


Tammy Riggs
Washoe County Deputy District Attorney
Criminal Division
75 Court Street
P.O. Box 30083
Reno, NV 89520

Ferrill Joseph Volpicelli
Inmate #79565
Lovelock Correctional Center
1200 Prison Road
P.O. Box 359
Lovelock, NV 89419-0359

Mary Lou Wilson
333 Marsh Avenue
Reno, NV 89509

Jack A. Alian
360 W. Liberty Street
Reno, NV 89501

DATED this 13th day of September, 2005.



Debra L. Goss

ORIGINAL

FILED

FERRILL J. VOLPICELLI, NDOC# 79565
c/o Lovelock Correctional Center
Post Office Box 359
1200 Prison Road
Lovelock, NV 89419-0359

2005 SEP 27 PM 3:25

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

FERRILL J. VOLPICELLI,
Petitioner,

v.

THE STATE OF NEVADA,
Respondent, and

BRADLEY VAN RY,
Real Party In Interest.

Case No. CR03-1263
Dept No. X

REPLY TO STATE'S OPPOSITION
TO MOTION FOR ORDER TO COMPEL

AND

TO VAN RY'S ERRATA TO OPPOSITION
TO MOTION FOR ORDER TO COMPEL

COMES NOW, Ferrill J. Volpicelli, the Petitioner, in his proper person, and as countenanced in Haines v. Kerner, 404 US 519, 92 Sct 594, 596 (1972), (pleadings filed by pro se litigants are to be held to less stringent standards than those filed by practicing attorneys), and files this Reply as above-referenced.

This Reply is based upon the following facts, as well as all papers and pleadings on file herein, and any Exhibits attached hereto.

FACTS IN SUPPORT OF REPLY

On or about May 4, 2004, Petitioner-Defendant served a Subpoena Duces Tecum upon the Real Party in Interest, Bradley Van Ry ("Van Ry"), in which Petitioner requested copies of all case records in relation to the above-referenced case, as well as a Letter of Affidavit stating whether or not Van Ry was provided with copies of the Transcripts pertaining to all taped conversations at the Washoe County Sheriff's Office between the Detectives and Defendants, Ferrill J. Volpicelli, and Brett A. Bowman, and whether counsel had ever had the opportunity to receive or review these as part of reciprocal Discovery in this case. This Affidavit was an item of specifically-documented evidence necessary to Petitioner-Defendant to prove a ground in his forthcoming Petition For Writ of Habeas Corpus, Post-conviction.

V6.1036

DC-9900025217-022
CR03-1263
STATE VS FERRILL JOSEPH VOL 4 Pages
District Court 09/27/2005 08:21 AM
3756
Washoe County

Over the course of the next year, Petitioner-Defendant followed up with numerous letters to Van Ry requesting his case records, including, but not limited to: "all papers, letters, exhibits, index cards, and vinyl folders relevant to case number CR03-1263, received from Ferrill J. Volpicelli, the Office of Jack Alian, Esq., the Reno Police Department, and the Washoe County District Attorney's Office." Van Ry failed to comply with the Subpoena Duces Tecum, or any of the myriads of follow-up letters sent to him in the year following the Service of said Subpoena.

As a result, Petitioner-Defendant was compelled to file a Motion For Order To Compel Van Ry to produce these case records in the instant Court. In his Opposition, Van Ry asserts that he did not have possession of Petitioner's files in his office. One (1) day after the filing of the Opposition, Van Ry then files and Errata to his Opposition, claiming that he has located Defendant's files in his office, and he has forwarded them to Petitioner-Defendant. It is at this point that Petitioner disagrees with Counsel.

After a review of the records received from Van Ry's Office on this date, a number of items were clearly missing from these records, and as such, must still be in Van Ry's possession, or could be obtained by Van Ry through the exercise of due diligence. Had Van Ry exercised due diligence one and a half years ago, it would not have taken Petitioner-Defendant upwards over a year to obtain the bit of case records which he has.

The Petitioner-Defendant has requested, specifically, the following items from his case files, which were not received by him with the rest of his files:

- 1) A set of index cards including questions Defendant wished counsel to establish at trial in this matter. Defendant's parent(s) sent a check to Van Ry to purchase these cards for this specific person, and Defendant did use them, and they should have been included in Petitioner-Defendant's case files; (This item is listed in letters subsequent to trial, circa., January, 2004);
- 2) Vinyl legal folders containing Petitioner-Defendant's legal

materials, seized by the Reno Police Department, returned to Petitioner-Defendant, and provided to Van Ry's office by Petitioner-Defendant to return Petitioner's legal work to him in; (These folders are mentioned in letters subsequent to trial, circa., May, 2004);

- 3) An AFFIDAVIT, mentioned in the Subpoena Duces Tecum, which is to reference the fact that the Prosecutor did not cooperate fully with the July, 2003, Court Order for Full Reciprocity in Discovery; i.e., Prosecutor should have provided a complete set of RPD Interview Transcripts, as follows:

a) 10/17/01	43 pages
b) 12/03/01	67 pages
c) 12/06/01	24 pages
d) 01/03/02	19 pages
e) 02/19/02	30 pages, and in consequence, Van Ry

was unable to review the same in their entirety, thereby precluding his ability to effectively cross-examine/impeach all witnesses; especially, Brett A. Bowman and Detective Thomas.

WHEREBY, Petitioner respectfully represents to this Honorable Court that, although Van Ry attempts to purport to this Court that he has already complied with Petitioner's requests for his case records, Van Ry still has not fully complied with this request, as he has not returned the afore-mentioned index cards, vinyl folders, and Affidavit, as requested on numerous occasions, both formally and informally; and Petitioner therefore respectfully prays this Honorable Court GRANT his Motion For Order To Compel, in the interests of providing the Petitioner-Defendant a full and complete record from which to develop his post-conviction pleadings.

RESPECTFULLY SUBMITTED, September 20, 2005, by:


FERRILL J. VOLPICELLI,
Petitioner-Defendant, In Pro Per

VERIFICATION

I, Ferrill J. Volpicelli, do hereby depose and say, under the pains and penalties of perjury, as pursuant to NRS 208.165, that the foregoing statements are true and correct, as to the best of my knowledge, information, and belief.

EXECUTED and DATED, this 20th day of September, 2005, at the Lovelock, CA

Correctional Center, Lovelock, Nevada, by:



Ferrill J. Volpicelli,
Petitioner-Defendant, In Pro Per

CERTIFICATE OF SERVICE

I, Ferrill J. Volpicelli, do hereby CERTIFY, that on the date last-here written, I have mailed a true and correct copy of the foregoing Reply to the Office of Bradley Van Ry, by placing the same in a sealed envelope, with sufficient postage affixed, and depositing it in the US Postal Service mail, addressed to him at his respective address.

EXECUTED and DATED, this 20th day of September, 2005, at the Lovelock Correctional Center, Lovelock, Nevada, by:



Ferrill J. Volpicelli,
Petitioner-Defendant, In Pro Per

ORIGINAL

FERRILL J. VOLPICE, NDOC# 79565
c/o Lovelock Correctional Center
Post Office Box 359
1200 Prison Road
Lovelock, NV 89419-0359

FILED

2005 SEP 30 PM 3:54

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

RONALD A. LONGTIN, JR.
BY [Signature]
DEPUTY

THE STATE OF NEVADA,
Plaintiff,

v.

FERRILL J. VOLPICELLI,
Defendant.

Case No. CR03-1263

Dept No. 10

REQUEST FOR SUBMISSION OF
PLAINTIFF'S MOTION TO COMPEL, DEFENDANT'S ANSWER,
DEFENDANT'S ERRATA TO OPPOSITION TO MOTION TO COMPEL,
AND
PLAINTIFF'S REPLY TO OPPOSITION AND ERRATA

The above pleadings having been filed in this Court, all within the appropriate time frames, and full briefing having been completed, the Plaintiff hereby requests that this Honorable Court take these pleadings under advisement, and **GRANT** whatever relief, upon review of the pleadings, that this Honorable Court deems equitable law and justice to require.

RESPECTFULLY SUBMITTED, this 27th day of September, 2005, by:

[Signature]
FERRILL J. VOLPICELLI, Defendant
In Propria Persona

CR03-1263 DC-9900025217-021
STATE VS. FERRILL JOSEPH VOLP
District Court 09/30/2005 08:26 AM
Washoe County 3860

1 CODE: 3370

ORIGINAL

FILED

DEC 12 2005

RONALD A. LONGTIN, JR., CLERK
By: *[Signature]*
DEPUTY

CR03-1263 DC-9900025217-023
STATE VS. FERRILL JOSEPH VOL 3 Pages
District Court 12/12/2005 05 24 PM
Washoe County 3370
nmcc

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

CASE NO: CR03-1263

11 vs.

DEPT. NO.: 10

12 FERRILL T. VOLPICELLI,

13 Defendant.

14
15 **ORDER TO RESPOND**

16
17 The Court has read and considered Defendant Ferrill Volpicelli's Motion for Order To
18 Compel filed September 12, 2005, as well as all supporting and opposing documents and
19 memoranda.


20 Defendant asks the Court to compel production of all documents related to his case.
21 In an Errata filed on September 13, 2005, Defendant's former counsel Bradley Van Ry
22 informs the Court that he has forwarded Defendant's trial files to Defendant. On
23 September 30, 2005, Defendant filed a motion indicating that he believes Mr. Van Ry is still
24 in possession of a set of index cards and vinyl folders containing notes that Defendant used
25 during trial. Additionally, Defendant references an affidavit "which is to reference the fact
26 the Prosecutor did not cooperate fully with the July 2003 Court Order for Full Reciprocity in
27 Discovery."

28 The Court has determined that a response from Mr. Van Ry will assist the Court in

1 deciding Defendant's Motion to Compel.

2 **NOW, THEREFORE, IT IS HEREBY ORDERED** that former counsel Bradley Van
3 Ry, Esq. shall file a responsive pleading, regarding the issues raised in Defendant's motion
4 filed September 20, 2005, within 30 days of the issuance of this Order.

5
6 **DATED** this 12 day of December, 2005.

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9 STEVEN P. ELLIOTT
10 District Judge
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CERTIFICATE OF MAILING

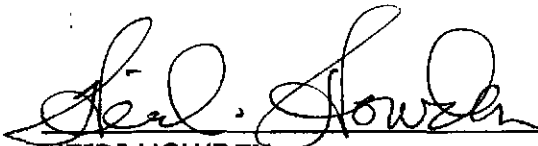
I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 12 day of December, 2005, I deposited for mailing a copy of the foregoing document addressed to:

Mary Lou Wilson
Law Office Of Mary Lou Wilson
33 Marsh Ave.
Reno, NV 89509

Bradley Van Ry
Van Ry Law Office
201 W. Liberty St., #100
Reno, NV 89501

Ferrill J. Volipicelli #79565
Lovelock Correctional Center
P.O. Box 359
Lovelock, NV 89419

DATED this 12 day of December, 2005.


HEIDI HOWDEN
Administrative Assistant

ORIGINAL FILED

4650 3880

Bradley O. Van Ry
Nevada Bar No. 7198
201 West Liberty Street, Suite 100
Reno, NV 89501
(775) 333-9000

2006 JAN 10 PM 12:16
RONALD A. LONGTIN, JR.

BY *ms*
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

Case No. CR03-1263

v.

Dept. No. 10

FERRILL JOSEPH VOLPICELLI,

Defendant.

FORMER COUNSEL'S RESPONSE IN ACCORDANCE WITH
ORDER TO RESPOND

Bradley O. Van Ry, former counsel for Mr. Volpicelli, hereby files this response as ordered by Judge Steven P. Elliot in this matter. This response is made and based upon all papers and pleadings on file herein and any other such evidence as the Court deems necessary.

This office discovered that we had the file in our possession on or about September 13, 2005. See Exhibit "1" (September 13, 2005 letter to Mr. Volpicelli from the Van Ry Law Offices, LLP). This confusion was due to the file being forwarded earlier by this office to the Public Defender's

V6.1044

1 office and a subsequent return of the file to this office. See Exhibit "2"
2
3 (June 22, 2005 letter to the Van Ry Law Offices, LLP from the Public
4 Defender's office). We then forwarded the entire file excepting the index
5 cards to Mr. Volpicelli and subsequently sent the index cards to him. See
6 Exhibit "1", "3" (October 5, 2005 letter to Mr. Volpicelli from the Van Ry
7 Law Offices, LLP). This office cannot find, and we do not believe that we
8 ever possessed, the vinyl folders that Mr. Volpicelli used during trial. It is
9 believed that he took all of his own materials with him.

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11 DATED this 9th day of January, 2006.

12 VAN RY LAW OFFICES, LLP

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15 BRADLEY O. VAN RY
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CR03-1263 DC-9900026217-025
STATE VS. FERRILL JOSEPH VOL 2 Pages
District Court 01/10/2006 05 00 PM
Washoe County 3880

EXHIBIT 1

Kevin Van Ry
Bradley O. Van Ry
VAN RY LAW OFFICES, LLP
201 West Liberty Street, Suite 100
Reno, Nevada 89501
TELEPHONE: (775) 333-9000
FACSIMILE: (775) 333-9004
E-MAIL: kvanry@sdi.net
E-MAIL: bvanry@sdi.net

***LIKE FREEDOM, THE PURSUIT OF JUSTICE IS BORN
OF VIGILANCE AND COURAGE.***

September 13, 2005

Ferrill Joseph Volpicelli
Inmate #79565
Lovelock Correctional Center
1200 Prison Road
P.O. Box 359
Lovelock, NV 89419-0359

Re: Ferrill Joseph Volpicelli adv. State of Nevada
Case No. CR03-1263

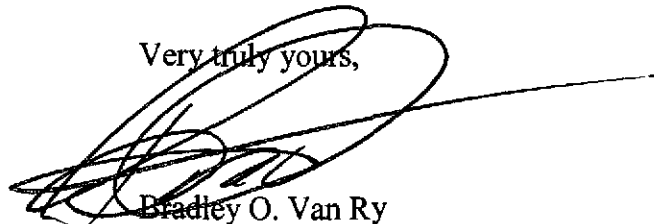
Dear Mr. Volpicelli:

Enclosed please find your entire file from our office. We are forwarding the same to you based upon your Motion For Order To Compel. As you know, we filed an Opposition stating we did not have the files in our possession. We then filed an Errata to our Opposition, as your files were found in our office.

Please be advised that we have forwarded you all original documents, tapes and videos from our file and have not kept a copy of the same. Therefore, you are now in possession of the original file. Once again, we **DID NOT** keep a copy of your file in our office.

Thank you.

Very truly yours,



Bradley O. Van Ry

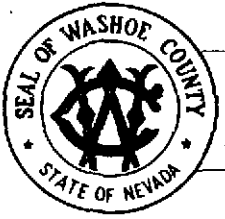
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CR03-1263 DC-9900025217-026
STATE VS. FERRILL JOSEPH VOL 2 Pages
District Court 01/10/2006 05:00 PM 3880
Washoe County

EXHIBIT 2



Washoe County Public Defender

Michael R. Specchio / Public Defender

Standard of Excellence Since 1969

June 22, 2005

Mr. Bradley Van Ry, Esq.
Mr. Kevin Van Ry, Esq.
1403 East Fourth Street
Reno, Nevada 8912

Re: Ferrill Joseph Volpicelli v. The State of Nevada
District Court Case Number CR03-1263, Dept. 10

Dear Sirs:

Please make arrangements to come pick up two boxes containing trial materials relating to the above entitled case. Mary Lou Wilson is handling the direct appeal in that matter and has indicated to me that she does not want these materials. Since we, at the Public Defender's Office have no involvement in this case, we do not want them either.

If you have any questions please feel free to call me at (775) 337-4827.

Sincerely,

JEREMY T. BOSLER
WASHOE COUNTY PUBLIC DEFENDER

by: 

John Reese Petty
Chief Deputy

CR03-1263 DC-990025217-027
STATE VS. FERRILL JOSEPH VOL 3 Pages
District Court 01/10/2006 05 00 PM
Washoe County 3880
10/10/2006

EXHIBIT 3

**Kevin Van Ry
Bradley O. Van Ry
VAN RY LAW OFFICES, LLP**

201 West Liberty Street, Suite 100

Reno, Nevada 89501

TELEPHONE: (775) 333-9000

FACSIMILE: (775) 333-9004

E-MAIL: kvanry@sdi.net

E-MAIL: bvanry@sdi.net

***LIKE FREEDOM, THE PURSUIT OF JUSTICE IS BORN
OF VIGILANCE AND COURAGE.***

October 5, 2005

Ferrill Joseph Volpicelli
Inmate #79565
Lovelock Correctional Center
1200 Prison Road
P.O. Box 359
Lovelock, NV 89419-0359

Re: Ferrill Joseph Volpicelli adv. State of Nevada
Case No. CR03-1263

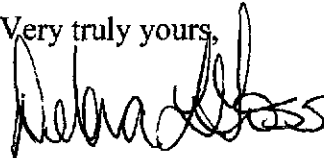
Dear Mr. Volpicelli:

Enclosed please find your requested index cards. I apologize that these were not sent with your file. I assumed they were the attorney's notes, as opposed to the client's notes. Therefore, I did not include them.

Also, with regard to the vinyl legal folders requested, our file did not contain said folders. I have included all research documents from your file. Normally, these research documents are not forwarded to a client with the file, but Mr. Van Ry instructed me to send these to you as well. I am sorry we do not have your vinyl legal folders.

Finally, Mr. Van Ry will not be preparing Affidavits in this case.

Very truly yours,



Debra L. Goss, Legal Assistant to:
Bradley O. Van Ry

/dlg
Enc.

V6.1051

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Van Ry Law Office, 201 W. Liberty Street, Suite 100, Reno, Nevada 89501, and that on the date below, a true and correct copy of the foregoing, **FORMER COUNSEL'S RESPONSE IN ACCORDANCE WITH ORDER TO RESPOND**, was deposited for mailing with the United States Post Office, Regular First Class Mail at Reno, Nevada, in a sealed envelope, addressed to the following:

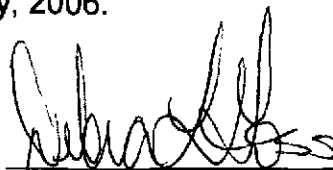
Tammy Riggs
Washoe County Deputy District Attorney
Criminal Division
75 Court Street
P.O. Box 30083
Reno, NV 89520

Ferrill Joseph Volpicelli
Inmate #79565
Lovelock Correctional Center
1200 Prison Road
P.O. Box 359
Lovelock, NV 89419-0359

Mary Lou Wilson
333 Marsh Avenue
Reno, NV 89509

Jack A. Alian
360 W. Liberty Street
Reno, NV 89501

DATED this 10th day of January, 2006.



Debra L. Goss

CR03-1263
STATE VS FERRILL JOSEPH VO 16 Pages
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CODE:
FERRILL J VOLPICELLI #79565
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

FILED

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CRAIG FRANDEN, ACTING CLERK
HOWARD M. CENYERS
BY [Signature]
DEPUTY

Defendant In Pro Se

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,) Case No. CR03-1263
)
Plaintiff,) Dept. No. 9
)
-vs-)
FERRILL J. VOLPICELLI,)
Defendant.)

DEFENDANT'S WRIT OF PROHIBITION
CHALLENGING PROCEEDINGS IN EXCESS
OF JURISDICTION AT SENTENCING

COMES NOW DEFENDANT, FERRILL J. VOLPICELLI, (HEREIN-AFTER
"VOLPICELLI"), APPEARING IN PROPER PERSON, AND FILES THIS
WRIT OF PROHIBITION CHALLENGING PROCEEDINGS IN EXCESS
OF JURISDICTION AT SENTENCING, IN THE ABOVE-ENTITLED MATTER.
THIS WRIT IS FILED PURSUANT TO NRS 34.320, RELEVANT
DOCUMENTS ON FILE HEREIN, AND THE FOREGOING LEGAL
MEMORANDUM OF POINTS AND AUTHORITIES, AS WELL AS ANY
FURTHER ARGUMENTS OF EVIDENCE TO BE ADDUCED AT
TIME OF HEARING ON THE MATTER.

/
/

V. BACKGROUND DISCUSSION

IN OCTOBER 2001, VOLPICELLI WAS ARRESTED FOR A
PAROLE VIOLATION IN UNRELATED CASE NO CR98-2160.

SUBSEQUENTLY, VOLPICELLI WAS ARRESTED ON RELATED
BURGLARY COUNTS IN CASE NOS. CR02-0445 AND 0146.

VOLPICELLI WAS RETURNED TO CUSTODY WHERE HE EXPIRED
CR98-2160.

IN MAY 2003, VOLPICELLI WAS RELEASED TO THE WASHER
COUNTY SHERIFF'S OFFICE PENDING AN INDICTMENT RELATIVE
TO CR02-0445, 0146. THESE TWO CASES WERE STAYED
AND SUPPLEMENTED WITH THE INSTANT CASE BEFORE THE COURT.

VOLPICELLI PROCEEDED TO A JURY TRIAL AND WAS CONVICTED
OF ONE COUNT OF CONSPIRACY, ONE COUNT OF POSSESSION
OF RETAIL INSTRUMENTALITIES, AND ~~SIX~~ EIGHT COUNTS OF
BURGLARY. PRIOR TO SENTENCING, THE STATE FILED A NOTICE
TO SEEK HABITUAL STATUS ON THE CONVICTIONS. ON

APRIL 1, 2004, THE COURT SENTENCED VOLPICELLI TO
MULTIPLE LIFE SENTENCES AND PAROLE ELIGIBILITY AFTER
10 YEARS, CONSECUTIVE, PURSUANT TO NRS 207.010(1)(b)(2).

BASED UPON THREE EXHIBITS OF PRIOR CONVICTIONS PRESENTED
BY THE STATE, (SEE DEFENDANT'S EXHIBIT 1) VOLPICELLI
WAS SENTENCED AS A HABITUAL CRIMINAL.

BASED UPON A NOTICE REVIEW OF THE RECORD, THE
COURT WAS WITHOUT JURISDICTION TO IMPOSE THE
SENTENCE STRUCTURE. THE INSTANT PLEADING FOLLOWS

II APPLICABLE STANDARD FOR A
WRIT OF PROHIBITION (NRS 34.320).

NRS 34.320. WRIT OF PROHIBITION DEFINED.
THE WRIT OF PROHIBITION IS THE ENCOUNTER PART
OF THE WRIT OF MANDATE. IT ARRESTS THE
PROCEEDINGS OF ANY TRIBUNAL, CORPORATION, BOARD
OR PERSON EXERCISING JUDICIAL FUNCTIONS WHEN
PROCEEDINGS ARE WITHOUT OR IN EXCESS OF THE
JURISDICTION OF SUCH TRIBUNAL, CORPORATION, BOARD
OR PERSON.

A WRIT OF PROHIBITION IS NOT A WRIT OF RIGHT,
BUT ONE OF SOUND JUDICIAL DISCRETION TO BE
ISSUED OR REFUSED ACCORDING TO FACTS AND THE
CIRCUMSTANCES OF THE CASE. WALCOTT V STATE,
WELLS, 21 NEV 47, 24 PAC. 367 (1890); DIOTALLEV
V. SECOND JUDICIAL DISTRICT COURT, 93 NEV 633,
636, 572 P2D 214 (1977).

THE OBJECT OF THE WRIT OF PROHIBITION IS TO
RESTRAIN THE COURTS FROM ACTING WITHOUT AUTHORITY
OF LAW IN CASES WHERE WRONG, DAMAGE AND
INJUSTICE ARE LIKELY TO FOLLOW FROM SUCH ACTION.
SILVER PEAK MINES V. SECOND JUDICIAL DISTRICT
COURT, 33 NEV. 97, 116, 110 PAC. 503. (1910).

III LEGAL MEMORANDUM / POINTS AND AUTHORITIES

THE DISTRICT COURT WAS BEYOND ITS JURISDICTION WHEN IT SENTENCED A DEFENDANT ILLEGALLY. THE INSTANT PLEADING IS NOT TO BE CONSTRUED WITH THE APPLICATION OF NRS 176.555, WHICH PROVIDES THAT AN ILLEGAL SENTENCE MAY BE CORRECTED AT ANY TIME. EDWARDS V STATE, 918 P2d 321, 324 (1996). SUCH A CHALLENGE IS BASED UPON THE "FACIAL" LEGALITY OF THE IMPOSED SENTENCE, ACCORDING TO LEGAL STANDARDS BY LAW. ROSSANUSI V STATE, 831 P2d 1371, 1372. (1992). VOLPICELLI'S PLEADING SHOULD NOT BE MIS-CONSTRUED AND TREATED UNDER NRS 176.555. THE INSTANT PLEADING IS NOT USED TO ATTACK THE VALIDITY OF THE JUDGMENT OF CONVICTION BASED ON ALLEGED ERRORS OCCURRING AT TRIAL OR SENTENCING. Id., 1372. IN ALL CRIMINAL PROCEEDINGS THE JURISDICTION OF THE COURT IS RETAINED BY AN INDEPENDENT AUTHORITY THROUGHOUT THE EXPIRATION OF THE SENTENCE IMPOSED. A WRIT OF HABEAS CORPUS MAY ISSUE UPON THE MATERIAL UNTRUE ASSUMPTION, OR MISTAKE OF FACT (OR LAW) THAT HAS WORKED TO THE EXTREME DETRIMENT OF THE DEFENDANT. DEMOSTHENES V. WILLIAMS, 637 P2d 1203 (1981).

THAT SAID, VOLPICELLI MUST FIRST GENERALLY CHALLENGE THE JURISDICTION OF THE COURT'S SENTENCE IN THE DISTRICT COURT. PUBLIC SERVICE COMMISSION V.

1 EIGHTH JUDICIAL DISTRICT COURT, 61 Nev. 245, 123
2 P2d 237 (1942). Herein, Volpicelli presents a
3 colorable meritorious issue as to the prima
4 facie legal arguments below. The fact that an
5 appeal was made available from final judgment
6 does not preclude the filing, or issuance, of a
7 writ of prohibition particularly in circumstances
8 where Trial Court is alleged to have exceeded
9 its jurisdiction. G & M Properties v. Second
10 Judicial District Court, 95 Nev. 301, 594 P2d 714 (1974).
11 NRS 176.535 is not an available remedy to
12 Volpicelli where such an application under this
13 statute would be inadequate by law. This is
14 a matter where the Court has usurped or
15 abused its power or discretion, and was without
16 jurisdiction in the manner it imposed sentences.
17 The instant writ would entitle Volpicelli
18 to adequate full relief as a matter of law.
19 INTERNATIONAL LIFE UNDERWRITERS. V. SECOND
20 JUDICIAL DISTRICT COURT, 61 Nev. 42, 113 P2d 616 (1941).

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23
24 A. RESTRAINT IN CRIMINAL PROCEEDINGS.

25 Respectfully, it is a great legal wrong to
26 compel a person charged with criminal offenses
27 to undergo a void procedure without jurisdiction
28

AND IN CASES OF THIS CHARACTER - SUCH AS VOLPICELLI,
REASON AND JUSTICE DICTATE THE RESTRAINING OF
THE COURT'S JURISDICTIONAL ERROR AND GRANT THE
ISSUANCE OF THE WRIT OF PROHIBITION. BELL V
FIRST JUDICIAL DISTRICT COURT, 28 Nev 280, 81
PAC. 875 (1905); BUCKINGHAM V. FIFTH JUDICIAL
DISTRICT COURT, 60 Nev 129, 133, 102 P2d 632 (1940).

B. VOLPICELLI'S JURISDICTIONAL CLAIMS
THIS COURT HAS JURISDICTION AS TO VOLPICELLI'S
INSTANT WRIT. THE NEVADA STATE CONSTITUTION
ARTICLE 6 § 6 GRANTS THE DISTRICT COURTS THE POWERS
TO GRANT THE WRIT, PURSUANT TO NRS 34:320,
AS TO THEIR JURISDICTIONAL ERRORS. STATE V.
JUSTICE COURT, 112 Nev 803, 805, 919 P2d 431 (1996).
VOLPICELLI ASSENTS THAT THE COURT WAS WITHOUT
JURISDICTION, THAT THIS SENTENCE IS ILLEGAL, AND
SIMPLY BECAUSE THE COURT HAD RELIED UPON A
MISAPPREHENSION OF THE DEFENDANT'S CRIMINAL
RECORD. THE COURT ERRED IN ITS RELIANCE UPON
A MISAPPREHENSION THAT WORKED EGREGIOUSLY TO
VOLPICELLI'S EXTREME DETRIMENT. STATE V DISTRICT
COURT, 677 P2d 1044, 1048 (2004); WALD V STATE,
509 P2d 329 (1977).

ARGUMENTS

THE DISTRICT COURT ERRED IN ITS RELIANCE UPON A MISAPPREHENSION AS TO EXHIBIT 1 FOR THE ADJUDICATION OF AN HABITUAL CRIMINAL AS IT WAS NOT A VALID CERTIFIED PRIOR CONVICTION FOR PURPOSES OF NRS 207.010 (1)(b)(2).

DEFENDANT WAS PREJUDICED WITH SUBSTANTIAL RIGHT VIOLATIONS WHEN HE WAS ADJUDICATED AN HABITUAL CRIMINAL, ABSENT PROOF BEYOND A REASONABLE DOUBT OF THE 'THREE-TIMES CONVICTED OF A FELONY' PROVISION OF NRS 207.010(1)(b)(2).

AT THE SENTENCING HEARING ON APRIL 1, 2004, THE STATE SOUGHT THE HABITUAL CRIMINAL ENHANCEMENT SPECIFIC TO NRS 207.010 (1)(b)(2) WITH THREE (3) CORRESPONDING EXHIBITS; (SEE DEFENDANT'S EXHIBIT 1), EACH OF WHICH WERE CORRELATED TO THE REQUISITE 'THREE-TIMES CONVICTED OF A FELONY' CLAUSE OF SAID STATUTE.

WITHIN THE DISTRICT COURT'S TRIAL TRANSCRIPT AT SENTENCING ON APRIL 1, 2004, THE STATE SPECIFICALLY ARGUED:

"THE STATE MOVES TO HAVE MARKED AND ADMITTED INTO EVIDENCE THE STATE CERTIFIED PROOF OF THIS DEFENDANT'S PRIOR FELONY CONVICTIONS THREE OF HIS PRIOR FELONY CONVICTIONS." (SENTENCING TRANSCRIPT, p. 42)

(EMPHASIS ADDED THAT THE STATE PROFFERED THE EXHIBITS AS EACH CORRESPONDING TO THE THREE SEPARATE CASES NECESSARY FOR THE 'THREE-TIMES CONVICTED OF A FELONY' CLAUSE OF NRS 207.010(1)(b)(2).

"THE FIRST WOULD BE HIS CERT. FROM 2004.... THE SECOND WOULD BE HIS 1998 CONVICTION ON TWO COUNTS OF BURGLARY (EMPHASIS ADDED THAT THE STATE PROFFERED THE EXHIBIT AS ONE CONVICTION FOR ADJUDICATION PURPOSES, DESPITE 2 COUNTS IN JUDGMENT OF CONVICTION).... AND THE THIRD PRIOR... IS A CONVICTION OF FOUR COUNTS OF TAX EVIDENCE IN THE UNITED STATES DISTRICT COURT OF NEVADA 1997." (AGAIN, EMPHASIS ADDED THAT DESPITE JUDGMENT OF CONVICTION INCLUDING 4 COUNTS, STATE PROFFERED AND COURT ACCEPTED IT AS ONLY ONE FELONY CONVICTION/PRIOR TOWARDS THE REQUISITE 'THREE-TIMES CONVICTED OF A FELONY' CLAUSE UNDER NRS 207.010(1)(b)(2)) SEE SENTENCING TRANSCRIPT P. 4.

"ACCORDINGLY, THE STATE IS ASKING YOU TO IMPOSE HABITUAL CRIMINAL STATUS TO THIS DEFENDANT, AND WE'RE ASKING FOR A SENTENCE OF LIFE IMPRISONMENT WITH TEN YEARS MINIMUM SERVED IN THE NEVADA STATE PRISON ON EACH FELONY COUNT." SENTENCING TRANSCRIPT P. 4.

HENCE, THE STATE AND COURT WERE ON THE SAME
PAGE INsofar AS PROVIDING AND ACCEPTING THE
~~THREE~~ (3) EXHIBITS IN THEIR ENTIRETY AS THE
REQUISITE 'THREE-TIMES CONVICTED OF A FELONY'
CLAUSE SPECIFIC TO NJS 207.210(1)(b)(2). WITH
THOSE SPECIFIC DOCUMENTS THE SENTENCING JUDGE
STATED FOR THE RECORD; "I HAVE HAD A CHANCE
TO LOOK AT THESE EXHIBITS AND IN EACH CASE MR.
VOLPICELLI WAS ~~AWARDED~~ APPROPRIATE CONSTITUTIONAL
RIGHTS, AND THE RECORD HERE DOES MEET ALL
CONSTITUTIONAL REQUIREMENTS FOR USE TO PROVE
THE PRIOR CONVICTIONS AT THIS TYPE OF HEARING.
SO, EXHIBITS 1, 2 & 3 ARE ADMITTED." SENTENCING
TRANSCRIPT p. 43.

AT THAT POINT IN THE PROCEEDING THE COURT
WAS CONVINCED THAT THERE EXISTED BEYOND A
REASONABLE DOUBT SUFFICIENT EVIDENCE WITH ~~ALL~~
~~THREE EXHIBITS~~ AS SATISFYING THE REQUISITE
'THREE-TIMES CONVICTED OF A FELONY' PROVISION
SPECIFIC TO NJS 207.210(1)(b)(2). THERE WAS
NEVER ANY MENTION OR CONSIDERATION GIVEN
TO THE NOTION THAT THE EXHIBITS DULY NOTED
A TOTAL OF SEVEN PRIOR FELONIES, OR THAT
IF THERE WAS ANY DEFICIENCY WITH ONE OR
MORE OF THE EXHIBITS, THE STATE AND COURT

would rely on the 4 counts in the Federal case as being sufficient to qualify alone so as to satisfy the requisite 'three-times convicted of a felony clause.'

That said, Defendant refers this Court to the Nevada Supreme Court's review of Defendant's claim that Exhibit 1, specifically case C102-0147, was not a valid prior felony conviction for purposes of adjudication under NRS 207.010 (1)(b)(2). Therein, the High Court agreed that said exhibit was erroneously considered by the District Court. See Volpicelli v State, case # 51622, order dated December 3, 2009. Hence, the District Court's reliance on Exhibit 1 translated to a misapprehension of the Defendant's criminal record at sentencing when adjudicating the Defendant an habitual criminal. As such, the Defendant was significantly prejudiced because, had Defendant's counsel or the Court recognized the error, the requisite 'three-times convicted of a felony' clause would not have been satisfied; and the Court would have been compelled to rely on Exhibits 2 & 3 only, which, by themselves, fail to satisfy the requisite criteria for triggering the 'three-times convicted of a felony' clause for NRS 207.010(1)(b)(2).

2) THE DISTRICT COURT ERRED IN ITS RELIANCE UPON
THE MISAPPREHENSION OF DEFENDANT'S IMPRISONMENT
RECORD IN THE AUTODICTION AS AN HABITUAL CRIMINAL
FOR PURPOSES OF NRS 207.010 (1)(b)(2).

DEFENDANT ASSERTS THAT HE WAS PREJUDICED WITH
THE DISTRICT COURT'S ERRONEOUS RELIANCE UPON THE
MISCONCEPTION AS TO THE DEFENDANT'S RECORD OF
IMPRISONMENT WHICH IS INDICATIVE OF HIS CRIMINAL
RECORD.

AT THE APRIL 1, 2004 SENTENCING HEARING,
WHEREIN DEFENDANT WAS DEEMED BY THE DISTRICT
COURT AN HABITUAL CRIMINAL, THE SENTENCING
JUDGE STATED: "AND UNDER ALL THE EVIDENCE
THAT I SEE HERE, I DO IN FACT FIND MR.
VOLPICELLI IS A HABITUAL CRIMINAL. IN FACT,
YOU ARE THE POSTER CHILD FOR HABITUAL CRIMINALITY
IN THAT EVERY TIME YOU'RE RELEASED FROM CUSTODY
IT SEEMS LIKE YOU'RE OUT MAKING A FULL-
TIME LIVING STEALING." SENTENCING TRANSCRIPT, p. 58.
YET, THE DISTRICT COURT GAVE NO HEED TO THE
DEFENDANT'S PROFFERED MITIGATING EVIDENCE IN THE
PRESENTENCE INVESTIGATION REPORT PREPARED BY PAROLE
AND PROBATION AS TO THE FACTS OF DEFENDANT'S ACTUAL
IMPRISONMENT RECORD. SAID RECORD CLEARLY
INDICATED THAT DEFENDANT HAD NEVER SERVED ANY

TAX TIME ~~WHATEVER~~. ANY TIME SPENT IN
COUNTY TAX WAS PART OF HIS INCARCERATION
FOR PRISON TERMS SPECIFIC TO EXHIBIT CASES
2 & 3 FROM JANUARY 1998 CONTINUOUSLY THROUGH
JUNE OF 2001. FURTHERMORE, THAT DEFENDANT
HAD ONLY ONE RELEASE FROM IMPRISONMENT
WHEREIN HE DID INCUR THE CHARGES ON THE
INSTANT CASE WHILE ON PAROLE FROM THE SECOND
EXHIBIT'S CASE. AGAIN, THE DISTRICT COURT WAS
UNDER THE MISGUIDED CONCEPTION THAT THE
DEFENDANT WAS RE-OFFENDING AFTER BEING PUNISHED
WITH IMPRISONMENT WITH ALL THREE OF THE
CASES PROFFERED IN THE EXHIBITS. WHEN, IN
REALITY, THERE HAD ONLY BEEN ONE.

DEFENDANT ASSERTS THAT THIS HAS PARTICULAR
RELEVANCE AS TO THE LETTER AND SPIRIT OF THE
LEGISLATIVE INTENT UNDERLYING THE STATE'S
HABITUAL CRIMINAL ACT. MORE SPECIFICALLY,
IT HAS TO DO WITH THE FACTOR OF REFORMATION
OPPORTUNITY IN BETWEEN THOSE "THREE-TIMES
CONVICTED OF A FELONY" CASES.

CLEARLY, THE NEVADA COURTS HAVE RECOGNIZED
THE OPPORTUNITY FOR REFORMATION FACTOR IN
BETWEEN CONVICTIONS AS EVIDENCED IN REZIN
V. STATE, 996 P2D 298 (1999), AND TANKSLEY V STATE,

946 P2d 148 (1997). But the District Court
Failed to Apply that Standard in Interpreting
the Defendant's Actual Incarceration Record,
Thereby Exceeding its Jurisdiction.

Matter of Fact, within the Nevada Supreme
Court's case, O'Neill v Nevada, 153 P3d 38 (2006)
Lies a Discussion of the Significance of what
Parameters Specifically Trigger the Court's
Ability to Adjudicate under NRS 207.010(1)(b)(2),
as well as the Significance of Time & Punishment
in Between Convictions. The High Court
Compares the Fact-Finding Criteria to Adjudicate
under the Habitual Criminal Statute with
that of the State of New York. Moreover,
Both Nevada's & New York's Highest Courts
Agree that the Only Fact-Finding Necessary
to Trigger the Court's Consideration for the
Imposition of an Enhancement of a Recidivist
is the Recidivist Number of Prior Convictions.

However, it is also clear within Both States
Legislative Intent Concerning such Recidivist
Statutes that Opportunity for Reformation in
Between Convictions is Paramount.

Although Defendant can find No cases
except Rezin & Tanksey in Support of this
Claim, O'Neill Specifically References the

FOOTNOTE 10 TO THE NEW YORK'S FEDERAL
CASE BROWN V GREINER, 459 F3d 523, 525
(2nd CIR. 2005), WHERE THAT STATE'S RECIDIVIST
STATUTE APPLY DEMONSTRATES THE PROMOTION
OF REFORMATION AS A PART OF THE LEGISLATIVE
INTENT. FOR EXAMPLE, UNDER NEW YORK'S
PENAL LAW § 70.10(1)(c), RELATIVE TO SENTENCING
RECIDIVISTS, "FOR PURPOSES OF DETERMINING
WHETHER A PERSON HAS TWO OR MORE CONVICTIONS
THAT WERE COMMITTED PRIOR TO THE TIME
DEFENDANT WAS ACTUALLY IMPRISONED UNDER
SENTENCE, FOR ANY SUCH CONVICTIONS SHALL
BE DEEMED TO BE ONLY ONE CONVICTION." Id. 525.
THUS, SINCE DEFENDANT'S CONVICTIONS FOR
EXHIBIT'S CASES TWO AND THREE OCCURRED
BEFORE HIS INCARCERATION COMMENCEMENT IN
1998, THOSE TWO PRIOR CONVICTIONS UNDER
THE REFORMATION CONSIDERATION IN NEW YORK'S
RECIDIVIST STATUTE WOULD COUNT FOR BUT
ONE "STRIKE" ONLY TOWARDS THE REQUISITE
THREE-TIMES CONVICTED CLAUSE OF NYS 202010
(1)(b)(2). IF SO, AND SINCE THE NEW YORK
SUPREME COURT HAS ALREADY RULED THAT
EXHIBIT 1'S CASE PRIOR WAS AN INVALID
CONSIDERATION FOR NYS 207.010 (1)(b)(2),

1 THEN DEFENDANT, BY WAY OF SOUND LOGIC
2 AND LEGISLATIVE INTENT TO INCULCATE NOT
3 JUST RECIDIVISM BUT REFORMATION OPPORTUNITY
4 IN BETWEEN CONVICTS, FALLS SHORT OF
5 THE QUALIFICATIONS OF EITHER AN HABITUAL
6 CRIMINAL/FELON.
7

8 CONCLUSION

9
10 WHEREFORE, FOR THE REASONS SET FORTH ABOVE,
11 THIS COURT SHOULD REVERSE THE DEFENDANT'S LIFE
12 SENTENCE ENHANCEMENTS UNDER NRS 202.200(1)(b)(2)
13 ON THE DEFENDANT'S UNDERLYING CONVICTIONS,
14 BECAUSE THE DISTRICT COURT EXCEEDED ITS
15 JURISDICTION WHEN IT RELIED ON A MISAPPREHENSION
16 AS TO DEFENDANT'S CRIMINAL AND IMPRISONMENT
17 RECORD, THEREBY EGREGIOUSLY VIOLATING DUE
18 PROCESS WHICH HAS CERTAINLY WORKED TO THE
19 DEFENDANT'S DETRIMENT.
20

21
22 DATED THIS 22ND DAY
23 OF NOVEMBER, 20



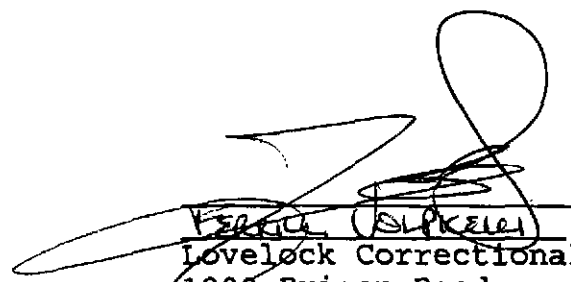
24
25 FERRILL J. VOLPICELLI

26
27 DEFENDANT IN PRO SE
28

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the
foregoing Defendant's Writ of Habeas Corpus
to the below address(es) on this 22 day of November,
2011, by placing same in the U.S. Mail via prison law library
staff, pursuant to NRCP 5(b):

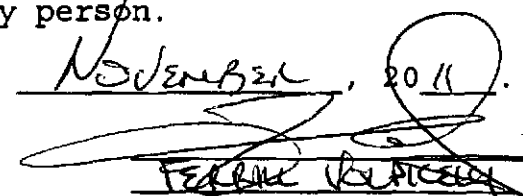
WASHOE COUNTY
DISTRICT ATTORNEY
POB 30083
RENO, NV 89520-3083


FERRIS (SILVERMAN) #29565
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Defendant In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding
Defendant's Writ of Habeas Corpus filed in
District Court Case No. 0203-1263 does not contain the
social security number of any person.

Dated this 22 day of November, 2011.


FERRIS (SILVERMAN)
Defendant In Pro Se

Case No. CR03-1263

Dept. No. 9

FILED

2011 DEC -6 AM 11:31

CRAIG FRANDEN, ACTING CLERK
HOWARD H. CONTERS

BY [Signature]
CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF Washoe

* * * * *

FERRILL T. VOLPICELLI,)

PETITIONER,)

-vs-

STATE OF NEVADA,)

RESPONDENT.)

APPLICATION TO PROCEED
IN FORMA PAUPERIS

COMES NOW PETITIONER, FERRILL T. VOLPICELLI, in

pro se, and moves the Court for an order granting him leave to
proceed in the above-entitled action without paying the costs
and/or security of proceeding herein.

This motion is made and based upon NRS 12.015 and the
attached affidavit and certificate of inmate's institutional
account.

Dated this 22 day of November, 2011.

[Signature]
FERRILL T. VOLPICELLI #79561
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

PETITIONER In Pro Se

State of Nevada

33 :

County of Pershing

In Pro Se

LCC

LCC LL FORM 26.020

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Case No. _____

Dept. No. _____

FILED IN 113 113071

IN THE _____ JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF _____

FERRILL T. VOLPNEY 79565

vs.

CERTIFICATE OF INMATE'S
INSTITUTIONAL ACCOUNT

I, the undersigned, do certify that FERRILL T. VOLPNEY,
NDOC # 79565, above-named, has a balance of \$.62 on account
to his credit in the prisoner's personal property fund for his use at
Lovelock Correctional Center, in Pershing County.

I further certify that said prisoner owes departmental charges in the
amount of \$ 0 and that the solitary security to his credit is a
savings account established pursuant to NRS § 209.247(5) with a balance of
\$ 200.00 which is inaccessible to him.

Dated this 24th day of October, 2011.

AAH
Accounting Technician
Inmate Services Division
Nevada Department of Corrections

Submitted by [Signature] # 79565, on 10/17/11.

This is for a civil habeas X matter.

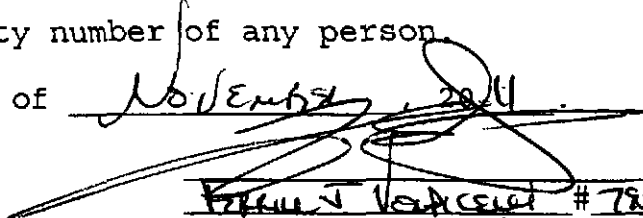
V6.1071

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AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS does not contain the social security number of any person.

Dated this 22 day of November, 2011.


Frank J. Vancise # 785261
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Petitioner In Pro Se

///
///
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///
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2842

IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

Case No. CR03-1263

vs.

Department No.: 4

FERRILL JOSEPH VOLPICELLI,

Defendant.

ORDER DENYING MOTION TO PROCEED IN *FORMA PAUPERIS*

On December 6, 2011, the Defendant filed Defendant's Writ of Prohibition Challenging Proceeding in Excess of Jurisdiction at Sentencing and an Application to Proceed in *Forma Pauperis*, which was submitted to the Chief Judge of the Second Judicial District Court for decision.

The Court having reviewed the pleadings filed herein, finds that there is nothing pending before this Court that requires the Defendant to pay any fees. Further, the action which Defendant attempts to file herein is not appropriate for this Court.

Therefore,

IT IS HEREBY ORDERED that the Motion for Leave to Proceed in *Forma Pauperis* is DENIED at this time.

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///

1 IT IS HEREBY FURTHER ORDERED that the State file a Response to the
2 Defendant's Writ of Prohibition Challenging Proceeding in Excess of Jurisdiction at
3 Sentencing within forty-five (45) days of the date of this order.

4 DATED this 12 day of December, 2011.

5
6 Cecilia I. Steinberg
7 CHIEF DISTRICT JUDGE
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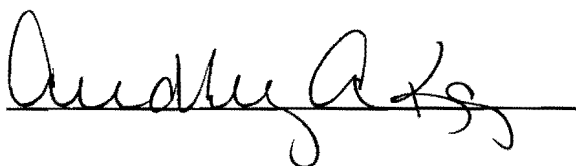
CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 27 day of December, 2011, I electronically filed the attached document with the Clerk of the Court by using the ECF system, which sent a notice of electronic filing to the following:

Gary Hatlestad, Esq.
Chief Deputy District Attorney

I further certify that on the 27 day of December, 2011, I deposited in the county mailing system for postage and mailing with the U.S. Postal Service, a true copy of the same, addressed to:

Ferrill Volpicelli
Inmate no. 79565
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419



******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: STEVEN ELLIOTT
Official File Stamp: 12-27-2011:14:10:05
Clerk Accepted: 12-27-2011:14:10:47
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Ord Deny in Forma Pauperis
Filed By: Audrey Kay

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

TAMMY RIGGS, ESQ. for STATE OF NEVADA
GARY HATLESTAD, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

STATE OF NEVADA
FERRILL VOLPICELLI

1 CODE #2610
2 RICHARD A. GAMMICK
3 #001510
4 P. O. Box 30083
5 Reno, Nevada 89520-3083
6 (775) 328-3200
7 Attorney for Plaintiff

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE

12 * * *

13 THE STATE OF NEVADA,

14 Plaintiff,

15 v.

Case No. CR03-1263

16 FERRILL VOLPICELLI,

Dept. No. 10

17 Defendant.
18 _____/

19 NOTICE OF CHANGE OF RESPONSIBLE ATTORNEY

20 COME NOW, Plaintiff, by and through Terrence P. McCarthy, Appellate Deputy, and
21 hereby provides notice to the court, all parties, and their respective counsel that Terrence P.
22 McCarthy, Appellate Deputy, has replaced Gary H. Hatlestad, retired Chief Appellate Deputy,
23 as the responsible attorney for Plaintiff in all future matters related hereto.

24 Respondent herein requests that the Court and all parties herein update their service list
25 with Terrence P. McCarthy's name and address in order to facilitate timely service of all
26 documents in this matter.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the

///

///

1 social security number of any person.

2 DATED: February 10, 2012.

3 RICHARD A. GAMMICK
4 District Attorney

5 By /s/ TERRENCE P. McCARTHY
6 TERRENCE P. McCARTHY
7 Appellate Deputy
8 Nevada Bar No. 2745
9
10
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1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County
3 District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail
4 Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing
5 document, addressed to:

6 Ferrill Volpicelli #79565
7 Lovelock Correctional Center
8 1200 Prison Road
9 Lovelock, NV 89419

DATED: February 10, 2012.

10 /s/ SHELLY MUCKEL
11 SHELLY MUCKEL
12
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1 CODE No. 3880
2 RICHARD A. GAMMICK
3 #001510
4 P. O. Box 30083
5 Reno, Nevada 89520-3083
6 (775) 328-3200
7 Attorney for Plaintiff

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE

12 * * *

13 THE STATE OF NEVADA,

14 Plaintiff,

15 v.

Case No. CR03-1263

16 FERRILL VOLPICELLI,

Dept. No. 10

17 Defendant.
18 _____/

19 RESPONSE TO "DEFENDANT'S WRIT OF PROHIBITION"

20 Ferrill Volpicelli has filed a pleading styled as "Writ of Prohibition." The Washoe
21 County District Attorney assumes that he meant the pleading to be a "petition" for a writ, as
22 Volpicelli has no authority to issue any sort of writ to anyone. Unfortunately, he does not
23 specify to whom he wishes the writ to be directed, or what should be prohibited by that writ. In
24 fact, it appears that he is asking the Second Judicial District Court to issue a writ to the Second
25 Judicial District Court, commanding itself to do something, but not commanding itself to
26 refrain from doing something.

The nonsensical nature of the writ is reason enough to deny it.

To the claim that Volpicelli is trying to argue that this court lacks jurisdiction to issue a
judgment of conviction for the crimes of burglary and for violations of NRS 205.965, and
199.480, the district court does indeed have jurisdiction over felonies and gross misdemeanors,

1 and those same felonies when committed by a habitual criminal. See Nev. Const. Art 6, Section
2 6; *Walker v. State*, 78 Nev. 463, 472, 376 P.2d 137 (1962).

3 Whatever the argument is, it is barred by principles of *res judicata*. Volpicelli's
4 convictions have been repeatedly reviewed and upheld. Accordingly, if the pleading is a
5 petition, it should be denied. If it is intended to be an actual writ, it should be ignored.

6 AFFIRMATION PURSUANT TO NRS 239B.030

7 The undersigned does hereby affirm that the preceding document does not contain the
8 social security number of any person.

9 DATED: February 10, 2012.

10 RICHARD A. GAMMICK
11 District Attorney

12 By /s/ TERRENCE P. McCARTHY
13 TERRENCE P. McCARTHY
14 Appellate Deputy
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Ferrill Volpicelli #79565
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

DATED: February 10, 2012.

V6.1082

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: STEVEN ELLIOTT
Official File Stamp: 02-10-2012:16:17:45
Clerk Accepted: 02-10-2012:16:33:27
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Notice of Change of Attorney
Response
Filed By: TERRENCE MCCARTHY, ESQ.
You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

TAMMY RIGGS, ESQ. for STATE OF NEVADA
TERRENCE MCCARTHY, ESQ. for STATE OF NEVADA
DIV. OF PAROLE & PROBATION
GARY HATLESTAD, ESQ.

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

STATE OF NEVADA
FERRILL VOLPICELLI

DC-990033149-017
CR03-1263 FERRILL JOSEPH VOL 6 Pages
STATE VS FERRILL JOSEPH VOL 6 Pages
District Court 03/02/2012 02:40 PM
Washoe County 3795
Washoe County
nnc

LCC LL FORM 20.014

CODE:

FERRILL J. Volpicelli # 79565

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

DEFENDANT In Pro Se

FILED

2012 MAR -2 PM 2:40

JOEY HARRINGS

BY M. Chelico
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA ,)

Case No. CR03-1263

PLAINTIFF ,)

Dept. No. 10

-vs-

FERRILL VOLPICELLI ,)

DEFENDANT .)

REPLY TO RESPONSE

TO DEFENDANT'S WRIT

OF PROHIBITION

IN ITS RESPONSE, THE WASHOE COUNTY DISTRICT ATTORNEY ASSERTS THAT DEFENDANT VOLPICELLI'S WRIT OF PROHIBITION IS 'NONSENSICAL', AND THEREFORE SHOULD BE DENIED OR IGNORED (WHILE THE MERITS OF THE WRIT WENT UNDISPUTED.)

SAID RESPONSE IS MERELY INSUFFICIENT AND VAGUE AT BEST. FURTHER, WHILE VOLPICELLI DOES NOT CONCEDE ANY ALLEGED DEFICIENCIES IN THE PLEADING, TO THE EXTENT THAT THE COURT FINDS IT NECESSARY, VOLPICELLI REQUESTS THE OPPORTUNITY TO ANSWER OR SUPPORT THE 'WRIT OF PROHIBITION'. COURTS

V6.1084

1 SHOULD ALLOW AMENDMENTS TO PLEADINGS WITH
2 EXTREME LIBERALITY, PARTICULARLY WHERE A PARTY
3 SEEKS LEAVE TO AMEND IS APPEARING PRO SE.
4 ELDRIDGE V. BLOCK, 832 F.2d 1132 (9th Cir. 1987).

5 IN ADDITION, PRO SE LITIGANTS' PLEADINGS ARE
6 TO BE CONSTRUED LIBERALLY AND HELD TO A LESS
7 STRINGENT STANDARD THAN FORMAL PLEADINGS
8 DRAFTED BY LAWYERS. MOREOVER, IF A COURT CAN
9 REASONABLY READ PLEADINGS TO STATE A VALID CLAIM
10 ON WHICH THE LITIGANT COULD PREVAIL, IT SHOULD
11 DO SO DESPITE FAILURE TO CITE PROPER LEGAL
12 AUTHORITY, CONFUSION OF LEGAL THEORIES, POOR
13 SYNTAX AND SENTENCE CONSTRUCTION, OR
14 LITIGANT'S UNFAMILIARITY WITH PLEADING REQUIREMENTS.
15 HANES V. KERNER, 404 U.S. 519, 92 S.Ct. 594 (1972).

16 IN THE INSTANT CASE, THE COURT PRECEDING
17 LIBERALLY & REASONABLY RECOGNIZED VOLPICELLI'S
18 CLAIM, I.E. THAT THE DISTRICT COURT'S IMPOSITION
19 OF THE HABITUAL CRIMINAL ENHANCEMENT UPON
20 VOLPICELLI'S UNDERLYING BURGLARY RELATED CONVICTION
21 MAY HAVE BEEN ERRONEOUS, ILLEGAL; OR IT
22 LACKED INSUFFICIENT EVIDENCE OF JURISDICTION
23 AT THE TIME OF SENTENCING ON APRIL 4, 2001.
24 AS SUCH, AND IN THE ALTERNATIVE, THE COURT
25 AT VOLPICELLI'S REQUEST, SHOULD GRANT THE
26 WRIT OF PROHIBITION WITH HIS MOTION TO
27
28

1 CORRECT SUEGAL SENTENCE / MODIFY SENTENCE.

2 SEE ATTACHED HERETO AS EXHIBIT ~~X~~ / 297

3 IN THE STATES RESPONSE, THE DISTRICT ATTORNEY
4 ASSERTS THAT THE PRINCIPLES OF RES JUDICATA
5 APPLY HERE AND THAT VOLPICELLI'S CONVICTIONS
6 HAVE BEEN UPHOLD. RESPONSE, at 2.

7 RES JUDICATA HAS NO APPLICATION HERE; RATHER
8 IT IS A DOCTRINE THAT A FINAL JUDGMENT OF A
9 COURT IS CONCLUSIVE AGAINST THE SAME PARTIES
10 IN ANY FURTHER 'IDENTICAL' CAUSE OF ACTION
11 BETWEEN THE PARTIES.

12 SUCH IS NOT THE CASE HERE. THE DISTRICT
13 ATTORNEY DOES NOT AND CANNOT DEMONSTRATE
14 THAT 'CONCLUSIVE' RULINGS HAVE BEEN ENTERED
15 AGAINST VOLPICELLI'S INSTANT CLAIMS, NOR THAT
16 THE CLAIMS ARE 'IDENTICAL' TO ANY PREVIOUS ONES.
17 ALTHOUGH VOLPICELLI HAS SPECIFICALLY ARGUED
18 PREVIOUSLY THAT TRIAL COUNSEL WAS INEFFECTIVE
19 AT SENTENCING IN THE CASE OF HABERT CAMPUS
20 FIRED IN 2005, THE CLAIMS IN THE INSTANT
21 PLEADING AND ACCOMPANYING SUPPORTED DOCUMENT
22 ARGUE THE COURT'S RELIANCE ON INSUFFICIENT
23 EVIDENCE, MISINFORMATION AND LACK OF JURISDICTION
24 TO IMPOSE THE HABITUAL CRIMINAL ENHANCEMENT.
25 THE COURT DID HAVE JURISDICTION TO IMPOSE
26 THE SENTENCES UPON THE UNDERLYING BURGLARY
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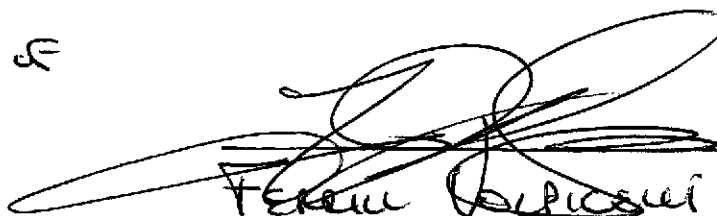
1 Related convictions pursuant to NRS 205.060
2 and NRS 205.960 ONLY; NOT NRS 207.010(1)(b)(2).

3 Additionally, the District Attorney has failed
4 to sufficiently plead Res Judicata. Under
5 NRCP 8(c), Res Judicata is an affirmative
6 defense; in pleading to a preceding pleading,
7 a party shall set forth affirmatively xxx
8 Res Judicata, and any other matter constituting
9 an avoidance or affirmative defense. As an
10 affirmative defense, Res Judicata must be specifically
11 pleaded. Hence, Res Judicata fails as the
12 District Attorney's failure to sufficiently plead
13 Res Judicata is considered a waiver thereof.
14 Schwartz v. Schwartz, 95 Nev. 202, 591 P2d 1137 (1979).

17 Conclusion:

18 Based on the foregoing, the District Attorney's
19 response must be denied. Volpicelli's petition for
20 a writ of prohibition, on the other hand, should
21 be granted. In the alternative, the Court
22 should permit amendment of the petition or support
23 the petition with the attached motion to correct
24 an illegal sentence/modify sentence.

25 DATED this 21st Day of
26 FEBRUARY, 2012

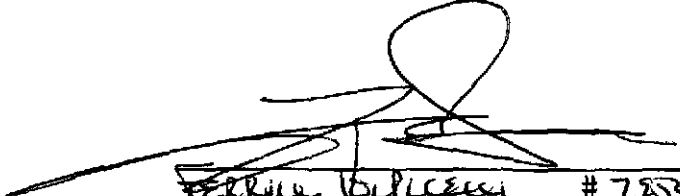
27 
28 Ferrill J. Volpicelli, Pro Se

LCC LL FORM 26.024

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Reply to Response to Defendant's Writ of Habeas Corpus to the below address(es) on this 21st day of FEBRUARY, 2012, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

WASHOE COUNTY DISTRICT ATTORNEY
POB 30003
RENO, NV 89520-3003

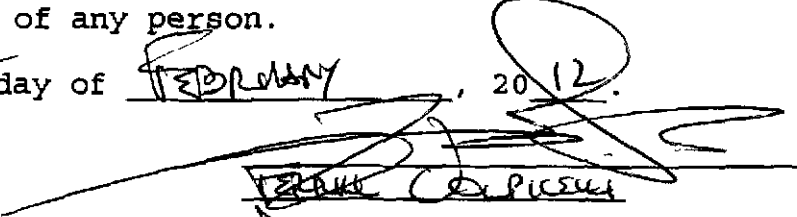

FERRIN BULLOCK # 72525
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

DEFENDANT In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Reply to Response to Defendant's Writ of Habeas Corpus filed in District Court Case No. CR03-1263 does not contain the social security number of any person.

Dated this 21st day of FEBRUARY, 2012.


FERRIN BULLOCK
DEFENDANT In Pro Se

INDEX OF EXHIBITS

Exhibit Number 1 Number of Pages 13

Exhibit Description: MOTION TO CORRECT JUDICIAL SENTENCE /
MODIFY SENTENCE

Exhibit Number _____ Number of Pages _____

Exhibit Description: _____

Exhibit Number _____ Number of Pages _____

Exhibit Description: _____

Exhibit Number _____ Number of Pages _____

Exhibit Description: _____

Exhibit Number _____ Number of Pages _____

Exhibit Description: _____

Exhibit Number _____ Number of Pages _____

Exhibit Description: _____

Exhibit Number _____ Number of Pages _____

Exhibit Description: _____

Exhibit Number _____ Number of Pages _____

Exhibit Description: _____

Exhibit Number _____ Number of Pages _____

Exhibit Description: _____

CR03-1263 DC-9900033149-018
STATE VS. FERRILL JOSEPH VO 15 Pages
District Court 03/02/2012 02:40 PM
Washoe County 3795
FY1 MCHN TCR

EXHIBIT ~~A~~ 1

V6.1090

1 FERRILL VOLPICELLI #79565
2 Lovelock Correctional Center
3 1200 Prison Road
4 Lovelock, Nevada 89419

5
6 Petitioner In Pro Se

7 IN THE SECOND DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF WASHOE

9 *****

10 FERRILL J. VOLPICELLI,
11 Petitioner,

)
) Case No. CR03-1263

12 -vs-

)
) Dept. No. 9

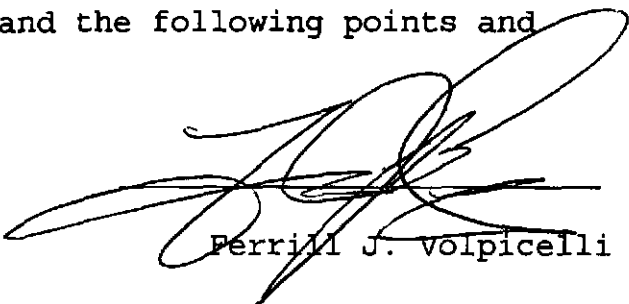
13 STATE OF NEVADA
14 Respondent.

)
) MOTION TO CORRECT ILLEGAL
SENTENCE/ MODIFY SENTENCE

15
16 Comes now, Ferrill J. Volpicelli, Petitioner, in Forma Pauperis
17 and in Pro Se, to hereby submit a Motion To Correct Illegal
18 Sentence pursuant to NRS 176.555.

19 This motion is based upon all pleadings, documents and papers on
20 file herein, as well as those within District Court case CR03-
21 1263's progeny cases on appeal, and the following points and
22 authorities.
23

24 Dated this 28th
25 Day of FEBRUARY, 2012.


Ferrill J. Volpicelli

Petitioner in Pro Se

1 FERRILL VOLPICELLI #79565
2 Lovelock Correctional Center
3 1200 Prison Road
4 Lovelock, Nevada 89419

5
6 Petitioner In Pro Se

7 IN THE SECOND DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF WASHOE

9 *****

10 FERRILL J. VOLPICELLI,
11 Petitioner,

)
) Case No. CR03-1263
)

12 -vs-

) Dept. No. 9
)

13 STATE OF NEVADA
14 Respondent.

)
) MEMORANDUM TO MOTION TO CORRECT
) ILLEGAL SENTENCE/ MODIFY
) SENTENCE

15
16
17 The Petitioner, Ferrill J. Volpicelli, in Forma Pauperis and in
18 Pro Se, hereby submits this Memorandum in Support of
19 Petitioner's Motion to Correct Illegal Sentence.

20 As set forth below, the Petitioner is entitled to relief under
21 NRS 176.555 because the District Court relied upon a
22 misapprehension as to the Petitioner's criminal, as well as his
23 imprisonment record at sentencing, all of which acted to
24 Petitioner's extreme detriment.
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3 **Statement of Facts**

4 Petitioner was arrested for a parole violation in or about
5 October of 2001 while on parole from unrelated case CR98-2160.
6 The state subsequently filed Burglary related counts in new
7 cases CR02-0145 & CR02-0146 stemming from alleged activities by
8 the Petitioner while on parole in 2001. Petitioner was returned
9 to custody wherein he expired District Court case CR98-2160's
10 Judgment of Conviction.

11 In or about May of 2003, Petitioner was transferred to Washoe
12 County Jail to face an indictment wherein cases CR02-0145 &
13 CR02-0146 were stayed and supplanted with District Court case
14 CR03-1263. Trial ensued and the Petitioner was convicted of one
15 count of Conspiracy, nine counts of Burglary & one count of
16 Possession of Retail Instrumentalities.

17 At sentencing on April 1, 2004, the State sought the
18 adjudication of the Habitual Criminal enhancement upon the
19 underlying convictions. In support thereof, the State
20 specifically presented exhibits 1, 2 & 3 corresponding to the
21 three separate cases.

22 Based on that evidence, the State requested the Petitioner be
23 deemed an Habitual Criminal, as well as be sentenced specific to
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1 the 'three-times convicted of a felony' clause of NRS 207-
2 010(1)(b)(2); that being ten years to life on each of the
3 underlying convictions.

4 The District Court thereafter resounded with its acceptance and
5 acknowledgment of All the evidence being duly constitutionally
6 sound, and pronounced the Petitioner to multiple life sentences
7 in accordance with the State's request.
8

9
10 Standard of Review

11 A Motion to Correct an Illegal Sentence is an appropriate
12 vehicle for raising the claim that a sentence is facially
13 illegal at any time; such a motion cannot be used as a vehicle
14 for challenging the validity of a judgment of conviction based
15 on alleged errors occurring at trial or sentencing.
16

17 Edwards v State, 918 P2d 321, 324 (1996). The Nevada Supreme
18 Court has the right to correct an illegal sentence at any time.
19
20 Passanisi v State, 831 P2d 1371, 1372 (1992). See also NRS
21 176.555.

22 The grounds in such a Petition to Correct an Illegal Sentence
23 are interpreted narrowly as a defendant is limited to asserting
24 that the sentence is facially illegal. Edwards, Id @ 324. A
25 sentence is illegal where the Court goes beyond its authority by
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1 acting without jurisdiction in imposing it. Edwards, Id @ 324,
2 (citing Allen v U.S. 495 A. 2d 1145, 1149 (D.C. 1985). See also
3 Vasquez v Palmer, 2009 U.S. Dist. Lexis 9422 (D. Nev., Sept. 22,
4 2009) (Quoting N.S.C., "which declared a sentence to be illegal
5 for purposes of NRS 176.555 where the District Court was without
6 jurisdiction to impose a sentence...").

7 The District Court retains inherent authority to correct, vacate
8 or modify a sentence that is based on a materially untrue
9 assumption or mistake of fact that has worked to the extreme
10 detriment of the Defendant, but only if the mistaken sentence
11 "is the result of the sentencing Judge's misapprehension of a
12 Defendant's criminal record." State v District Court, 677 P2d
13 1044, 1048.
14
15

16 Arguments

17
18 Petitioner asserts that his sentence is illegal & that pursuant
19 to NRS 176.555 he is entitled to relief because the District
20 Court relied upon a misapprehension as to the Petitioner's
21 criminal record; inclusive of his imprisonment record.
22
23

24 A. The District Court erred in its reliance upon a
25 misapprehension as to exhibit 1 for the adjudication of an
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1 Habitual Criminal as it was not a valid prior for Purposes of
2 NRS 207.010 (1) (b) (2).

3 Petitioner was prejudiced with substantial right violations when
4 he was adjudicated an Habitual Criminal absent proof beyond a
5 reasonable doubt of the 'three-times convicted of a felony'
6 provision specific to NRS 207.010 (1) (b) (2).

7 At the sentencing hearing on April 1, 2004, the State sought the
8 Habitual Criminal enhancement specific to NRS 207.010 (1) (b) (2)
9 with three corresponding exhibits; each of which were correlated
10 to the requisite 'three-times convicted of a felony' clause of
11 said statute.
12

13 Referring to the District Court's trial transcript on April 1,
14 2004, the prosecutor informed the Court to wit:

15 "The State moves to have marked and admitted into evidence the
16 State certified proof of this Defendant's prior felony
17 convictions three of his prior felony convictions": Sentencing
18 transcript pg. 4. (*Emphasis added that the State proffered the*
19 *exhibits as each corresponding to the three separate cases*
20 *necessary for the 'three-times convicted of a felony' clause of*
21 *NRS 207.010 (1) (b) (2).*) "The first would be his cert. from
22 2004... The second would be his 1998 conviction on two counts
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1 of Burglary (*emphasis added that the State proffered the exhibit*
2 *as one conviction for adjudication purposes-despite 2 counts in*
3 *judgment of conviction)*. ...And the third prior...is a
4 conviction of four counts of Tax Perjury in the United States
5 District Court of Nevada 1997" (*Again, emphasis added that*
6 *despite judgment of conviction including 4 counts, State*
7 *proffered and Court accepted it as only one felony*
8 *conviction/prior towards the requisite 'three-times convicted of*
9 *a felony' clause under NRS 207.010 (1)(b)(2))*: Sentencing
10 transcript pg. 4.

12 "Accordingly, the State is asking you to impose Habitual
13 Offender status to this Defendant, and we're asking for a
14 sentence of life imprisonment with ten years minimum served in
15 the Nevada State Prison on each felony count": Sentencing
16 transcript pg. 4.

18 Hence, the State and the Court were on the same page as
19 providing and accepting the foregoing three exhibits in their
20 entirety towards the requisite 'three-times convicted of a
21 felony' clause specific to NRS 207.010 (1)(b)(2). With those
22 specific parameters in place, the sentencing Judge stated for
23 the record to wit; "I have had a chance to look at these
24 exhibits and in each case Mr. Volpicelli was afforded
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1 appropriate constitutional rights, and the record here does meet
2 all constitutional requirements for use to prove the prior
3 convictions at this type of hearing. So, exhibits 1, 2 & 3 are
4 admitted": Sentencing transcript pg. 43.

5 At that point in the proceeding, the Court was convinced that
6 there existed beyond a reasonable doubt sufficient evidence with
7 all three exhibits as satisfying the requisite 'three-times
8 convicted of a felony' provision specific to NRS 207.010
9

10 (1)(b)(2). There was never any mention or consideration given
11 to the notion that said exhibits duly noted a total of seven
12 felonies, or that if there was any deficiency with one or more
13 of the exhibits, the State and Court would rely on the 4 counts
14 in the Federal case as being sufficient to qualify alone so as
15 to satisfy the requisite 'three-times convicted of a felony'
16 clause.
17

18 That said, Petitioner refers this Court to the Nevada Supreme
19 Court's Review of Petitioner's claim that exhibit 1,
20 specifically case CR02-0148, was not a valid prior for purposes
21 of adjudication under NRS 207.010 (1)(b)(2). Therein, the High
22 Court agreed that said exhibit was considered erroneously by the
23 District Court. (Case# 51622)
24

25 Hence, the District Court's reliance on exhibit 1 translated to
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1 a misapprehension of the Petitioner's criminal record at
2 sentencing when adjudicating the Petitioner an Habitual
3 Criminal. As such, the Petitioner was significantly prejudiced
4 because, had the Petitioner's counsel, or the Court recognized
5 the error, the requisite 'three-times convicted of a felony'
6 clause would not have been met and the Court would have been
7 compelled to rely on exhibits 2 and 3 only which, by themselves,
8 fail to satisfy the requisite criteria for NRS 201.010(1)(b)(2).
9 This would have demonstrated that the State failed to meet its
10 burden beyond a reasonable doubt in the adjudication specific to
11 NRS 201.010 (1)(b)(2).
12

13
14
15 B. The District Court erred in its reliance upon the
16 misapprehension of Petitioner's imprisonment record in the
17 adjudication as an Habitual Criminal for Purposes of NRS 207.010
18 (1)(b)(2).

19 Petitioner asserts that he was prejudiced with the District
20 Court's erroneous reliance upon the misconception as to the
21 Petitioner's record of imprisonment which is indicative of his
22 criminal record.
23

24 At the April 1, 2004 sentencing hearing, wherein Petitioner was
25 deemed by the District Court an Habitual Criminal, the
26
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1 sentencing Judge stated to wit: "And under all the evidence that
2 I see here, I do in fact find Mr. Volpicelli is a habitual
3 criminal. In fact, you are the poster child for habitual
4 criminality in that every time you're released from custody it
5 seems like you're out making a full-time living stealing."

6 Sentencing transcript p.58.

7 Yet, the District Court gave no heed to the Petitioner's
8 proffered mitigating evidence in the PSI's facts of the
9 Petitioner's actual imprisonment record. Said record clearly
10 indicated that Petitioner had never served any jail time
11 whatsoever. Furthermore, that Petitioner's first commitment to
12 prison was at the age of 42, wherein he served a continuous
13 stint of imprisonment from 1/98 through 6/01 for the judgment of
14 convictions aptly cited in Exhibit 2's case and Exhibit 3's
15 case. And, that he had only one release from imprisonment
16 wherein he did incur the charges while on parole from the second
17 exhibit's case. Again, the District Court was under the
18 misguided conception that the Petitioner was re-offending at his
19 release from imprisonment with all 3 of the proffered exhibits.
20 When, in reality, there had only been one.

21 Petitioner asserts that this has particular relevance as to the
22 letter and spirit of the legislative intent underlying the
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1 State's Habitual Criminal Act. More specifically, it has to do
2 with the factor of reformation in between those 'three-times
3 convicted of a felony' cases.
4

5 Clearly, the Nevada Courts have recognized the reformation
6 factor in between felony case priors as evidenced in Rezin v
7 State and Tanksley v Nevada. But the District Court failed to
8 apply that standard in interpreting the Petitioner's actual
9 incarceration record. Matter of fact, the Nevada Supreme Court
10 has recognized the importance of such an opportunity to reform
11 in between episodes of imprisonment in its case O'Neil v Nevada.
12 Therein, the high court's opinion in O'Neil aptly makes
13 reference to its Recidivism Statute with comparison to that of
14 the State of New York. Moreover, both States' highest courts
15 agree that the only fact-finding necessary for the imposition of
16 an enhancement of a recidivist is the requisite number of prior
17 convictions, as well as the promotion of reformation as part of
18 the legislative intent.
19
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22 But, a closer comparison of the similarity of the intent of the
23 two States' recidivist statutory considerations, shows the
24 following: That under New York's Penal Law § 70.10(1)(c) 'For
25 purposes of determining whether a person has two or more
26 convictions of crimes that were committed prior to the time
27
28

1
2 Defendant was actually imprisoned under sentence, for any such
3 convictions shall be deemed to be only one conviction.' see
4 Brown v Greiner 409 F3d 523, 525 (2nd cir 2005).

5 Thus, Petitioner's incarceration and opportunity for reformation
6 involving exhibit cases two & three as priors should count for
7 but one 'strike' only towards the requisite 'three-times
8 convicted clause of NRS 207.010 (1)(b)(2). If so, and since the
9 Nevada Supreme Court has already ruled exhibit 1's case as being
10 an invalid prior for consideration under NRS 207.010 (1)(b)(2),
11 then Petitioner, by way of logic and legislative intent, falls
12 short of the qualifications of either a Habitual Criminal and/or
13 a Habitual Felon.
14

15 After all, its only appropriate to turn to applications of other
16 sister State's legislative intent on such statutes of
17 recidivism, as articulated by The United States Supreme Court
18 case, U.S. V Ron Rair Enterprise, Inc, 109 Sct 1031 (1989),
19 wherein "the intention of the drafters controls rather than the
20 strict language."
21
22

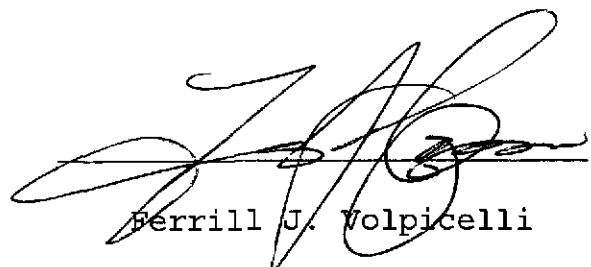
23 24 Conclusion

25 Wherefore, for the reasons set forth above, this court should
26 reverse the Petitioner's life sentence enhancements under NRS
27
28

207.010 (1)(b)(2) on the Petitioner's underlying convictions, because the District Court relied on a misapprehension as to Petitioner's criminal and imprisonment record; thereby egregiously violating due process which has clearly worked to the Petitioner's detriment.

Dated this 21st Day of

FEBRUARY, 20 12.



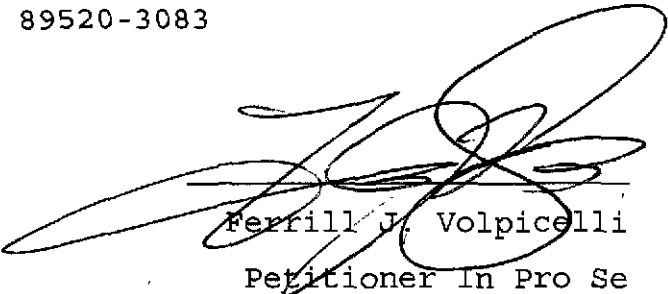
Perrill J. Volpicelli

Petitioner in Pro Se

1 Certificate of Service by Mail

2 I do certify that I mailed a true and correct copy of the
3 foregoing Motion to Correct an Illegal Sentence to the below
4 address on this 21st day of FEBRUARY, 2012, by placing
5 same in the U.S. Mail via Prison Law Library Staff, pursuant
6 to NRCP 5 (b).
7

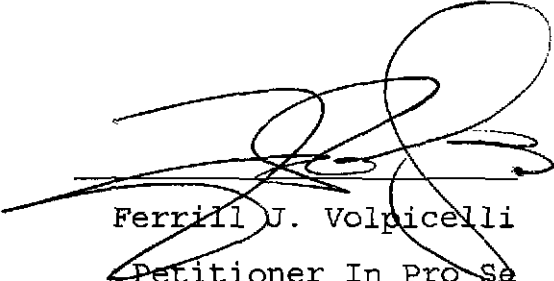
8 Washoe County
9 District Attorney
10 PO Box 30083
11 Reno, NV 89520-3083

12 
13 Ferrill J. Volpicelli
14 Petitioner In Pro Se
15

16 Affirmation Pursuant to NRS 239 B. 630

17 The undersigned does hereby affirm that the preceding Motion
18 to Correct an Illegal Sentence does NOT contain the social
19 security number of any person.
20

21 Dated this 21st
22 Day of FEBRUARY, 2012.
23
24

25 
26 Ferrill J. Volpicelli
27 Petitioner In Pro Se
28

CR03-1263 DC-9900034263-015
STATE VS FERRILL JOSEPH VOL 2 Pages
District Court 04/10/2012 03 21 PM 3860
Washoe County ncc

LCC 11 FORM 26-090

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Case No. CR03-1263
Dept. No. 9

FILED

2012 APR 10 PM 3:21

JOEL HASTINGS
BY M. Chedoke
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

* * * * *

STATE of NEVADA,
PLAINTIFF,
-vs-
FERRILL JOSEPH,
DEFENDANT.

REQUEST FOR SUBMISSION
OF MOTION

It is requested that the What is prohibited and
ACCOMPANYING RESPONSES
which was filed on the 6th day of DECEMBER, 2011, in
the above-entitled matter, be submitted to the Court for
decision.


Dated this 6th day of APRIL, 2012.

FERRILL JOSEPH #78565
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
DEFENDANT In Pro Se

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing REQUEST FOR SUBMISSION OF MOTION to the below address(es) on this 6th day of April, 2012, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

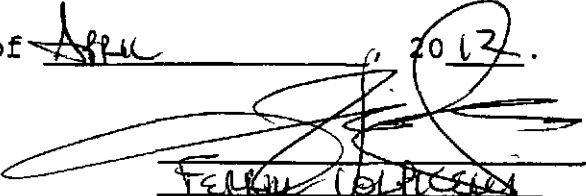
WASHOE COUNTY
DISTRICT ATTORNEY
POB 30083
RENO, NV 89520-3083


FERNAN LOPEZ #78565
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Fernan Lopez In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding REQUEST FOR SUBMISSION OF MOTION does not contain the social security number of any person.

Dated this 6th day of April, 2012.


FERNAN LOPEZ
DEFENDANT In Pro Se

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No.: CR03-1263

vs.

Dept. No.: 10

FERRILL JOSEPH VOLPICELLI,

Defendant.

ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF PROHIBITION

Presently before the Court is a Petition for Writ of Prohibition Challenging Proceeding in Excess of Jurisdiction at Sentencing, filed by Defendant FERRILL JOSEPH VOLPICELLI ("Defendant") on December 6, 2011. Following, on February 10, 2012, Plaintiff THE STATE OF NEVADA ("Plaintiff") filed a Response to Defendant's Writ of Prohibition. Subsequently, on March 2, 2012, Defendant filed a Reply to Response to Defendant's Writ of Prohibition. On April 10, 2012, Defendant filed a Request for Submission, thereby submitting the matter for the Court's consideration.

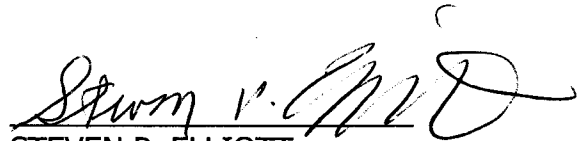
In his Petition, Defendant is asserting that the Court lacks jurisdiction to issue a judgment of conviction for the crimes of burglary and for violations of NRS 205.965, and 199.480. The State argues that the District Court does have jurisdiction over felonies and misdemeanors, and those same felonies when committed by a habitual criminal. See Nev. Const. Art 6, Section 6; *Walker v. State*, 78 Nev. 463, 472, 376 P.2d 137 (1962).

//

1 This Court agrees with Plaintiff that this Court's jurisdiction over Defendant's judgment is
2 proper. Accordingly, Defendant's Petition must be denied.

3 **NOW, THEREFORE, IT IS HEREBY ORDERED** that Defendant's Petition for Writ
4 of Prohibition is **DENIED**.

5
6 **DATED** this 24 day of May 2012.

7 
8 STEVEN P. ELLIOTT
9 District Judge

CERTIFICATE OF MAILING

I hereby certify that I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

TAMMY RIGGS, ESQ. for STATE OF NEVADA

TERRENCE MCCARTHY, ESQ. for STATE OF NEVADA

DIV. OF PAROLE AND PROBATION

I further certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, and that on this date I deposited for mailing a copy of the foregoing document addressed to:

Ferrill Volpicelli #79565
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

DATED this 24 day of May, 2012.


HEIDI HOWDEN
Judicial Assistant

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: STEVEN ELLIOTT
Official File Stamp: 05-24-2012:17:11:43
Clerk Accepted: 05-24-2012:17:12:03
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Ord Denying
Filed By: Heidi Howden

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE & PROBATION
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

CR03-1263
STATE VS FERRILL JOSEPH VOL 2 Pages
District Court 06/22/2012 08:33 AM
Washoe County 2515
MCDONALD

Case No. CR03-1263

Dept. No. 10

FILED

2012 JUN 22 AM 8:33

JOEY GOUNA HASTINGS
CLERK OF THE COURT

BY M. Hernandez
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF Washoe

* * * * *

THE STATE OF NEVADA,

Plaintiff,

-vs-

FERRILL JOSEPH VOLPICKY,

Defendant.

NOTICE OF APPEAL

NOTICE IS GIVEN that Defendant, FERRILL JOSEPH VOLPICKY,
in pro se, hereby appeals to the Nevada Supreme Court the
Denial of the Writ of Habeas Corpus
filed/entered on or about the 24th day of May, 2012,
in the above-entitled Court.

Dated this 18th day of JUNE, 2012

FERRILL JOSEPH VOLPICKY # 78561
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Defendant In Pro Se

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CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL to the below address(es) on this 18th day of JUNE, 2012, by placing same in the U.S. Mail via prison law library staff:

WASHOE COUNTY
DISTRICT ATTORNEY
POB 30083
RENO, NV 89520-3083




Ferris Johnson #78565
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Defendant In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding NOTICE OF APPEAL filed in District Court Case No. CR03-1263 does not contain the social security number of any person.

Dated this 18th day of JUNE, 2012.



Defendant In Pro Se

1 **Code 1310**

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5
6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

7 **IN AND FOR THE COUNTY OF WASHOE**

8 **THE STATE OF NEVADA,**

9 **Plaintiff,**

Case No. CR03-1263

10 **vs.**

Dept. No. 10

11 **FERRILL JOSEPH VOLPICELLI,**

12 **Defendant.**

13 _____ /
14
15 **CASE APPEAL STATEMENT**

16 This case appeal statement is filed pursuant to N.R.A.C.P. 3(2).

- 17 1. This appeal is from an order entered by the Honorable Steven Elliott.
- 18 2. Appellant is Ferrill Jospeh Volpicelli. Appellant is representing himself in Proper
19 Person on appeal:
- 20 3. Appellant's address is:
21 Ferrill Joseph Volpicelli, #79565
22 Lovelock Correctional Center
23 1200 Prison Road
24 Lovelock, NV 89419
- 25 4. Respondent is the State of Nevada. Respondent is represented by the Washoe
26 County District Attorney's Office:
27 Terrance McCarthy, Esq.
28 P.O. Box 30083
Reno, NV 89520
5. Respondent's attorney is licensed to practice law in Nevada.

6. Appellant was not represented by appointed counsel in District Court.
7. Appellant is not represented by appointed counsel on appeal.
8. Appellant was granted leave to proceed in forma pauperis in the District Court on May 27, 2004.
9. Proceeding commenced by the filing of an Grand Jury Indictment on June 11, 2003.
10. This is a criminal proceeding and the Appellant is appealing the Denial of the Writ of Prohibition Order filed on May 24, 2012.
11. The case has been the subject of a previous appeal to the Supreme Court; Supreme Court Case No. 43203
12. This case does not involve child custody or visitation.
13. This is not a civil case involving the possibility of a settlement.

Dated this 22nd day of June, 2012.

JOEY ORDUNA HASTINGS
CLERK OF THE COURT

By: /s/ Mary Fernandez
Mary Fernandez
Deputy Clerk

FILED

Electronically

06-22-2012:09:13:09 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3035933

1 **Code 1350**

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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

7 **IN AND FOR THE COUNTY OF WASHOE**

8 **THE STATE OF NEVADA,**

9 **Plaintiff,**

10 **vs.**

Case No. CR03-1263

11 **FERRILL JOSEPH VOLPICELLI,**

Dept. No. 10

12 **Defendant.**

13 **/**

14 **CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL**

15 I certify that I am an employee of the Second Judicial District Court of the State of
16 Nevada, County of Washoe; that on the 22nd day of June, 2012, I electronically filed the
17 Notice of Appeal in the above entitled matter to the Nevada Supreme Court.

18 I further certify that the transmitted record is a true and correct copy of the original
19 pleadings on file with the Second Judicial District Court.

20 Dated this 22nd day of June, 2012.

21 **JOEY ORDUNA HASTINGS**
22 **CLERK OF THE COURT**

23 By /s/Mary Fernandez
24 Mary Fernandez
25 Deputy Clerk

26
27
28 **V6.1115**

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: STEVEN ELLIOTT
Official File Stamp: 06-22-2012:09:13:09
Clerk Accepted: 06-22-2012:09:13:36
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Case Appeal Statement
Certificate of Clerk
Filed By: Mary Fernandez

You may review this filing by clicking on the following link to take you to your cases.

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-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE & PROBATION
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

FILED

Electronically

06-28-2012:10:32:54 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3049152

**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 61142
District Court Case No. CR031263

CR03-1263
10

RECEIPT FOR DOCUMENTS

TO: Ferrill Joseph Volpicelli
Attorney General/Carson City/Catherine Cortez Masto, Attorney General
Washoe County District Attorney/Terrence P. McCarthy, Deputy District Attorney
Joey Orduna Hastings, District Court Clerk ✓

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

06/26/2012 Appeal Filing fee waived. Criminal.

06/26/2012 Filed Notice of Appeal/Proper Person. Appeal docketed in the
Supreme Court this day.

DATE: June 26, 2012

Tracie Lindeman, Clerk of Court
tm

V6.1117

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: STEVEN ELLIOTT
Official File Stamp: 06-28-2012:10:32:54
Clerk Accepted: 06-28-2012:10:49:23
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Supreme Court Receipt for Doc
Filed By: Lori Matheus

You may review this filing by clicking on the following link to take you to your cases.

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-

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The following people were served electronically:

DIV. OF PAROLE & PROBATION
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

FILED

Electronically

07-26-2012:08:08:51 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3108805

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61142

CR03-1263

10

FILED

JUL 24 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER DIRECTING TRANSMISSION OF RECORD

Having reviewed the documents on file in this proper person appeal, this court has concluded that its review of the complete record is warranted. See NRAP 10(a)(1). Accordingly, the clerk of the district court shall have 60 days from the date of this order within which to transmit to the clerk of this court a certified copy of the complete trial court record of this appeal. See NRAP 11(a)(2). The record shall not include any physical, non-documentary exhibits or the original documentary exhibits filed in the district court, but copies of documentary exhibits submitted in the district court proceedings shall be transmitted as part of the record on appeal. The record shall also include any presentence investigation reports submitted in a sealed envelope identifying the contents and marked confidential. See NRS 176.156(5).

It is so ORDERED.

Cherry, C.J.

cc: Ferrill Joseph Volpicelli
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk ✓

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: STEVEN ELLIOTT
Official File Stamp: 07-26-2012:08:08:51
Clerk Accepted: 07-26-2012:08:09:14
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Supreme Ct Order Directing
Filed By: Lori Matheus

You may review this filing by clicking on the following link to take you to your cases.

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-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE & PROBATION
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

1 **Code 1350**

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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF WASHOE**
8

9 **THE STATE OF NEVADA,**

10 **Plaintiff,**

Case No. CR03-1263

11 **vs.**

Dept. No. 10

12 **FERRILL JOSEPH VOLPICELLI,**

13 **Defendant.**
14 _____/

15 **CERTIFICATE OF CLERK AND TRANSMITTAL – RECORD ON APPEAL**

16 I certify that I am an employee of the Second Judicial District Court of the State of Nevada,
17 County of Washoe; that on the 30th day of August, 2012, I electronically filed Volumes 1 through 5
18 of the Record on Appeal in the above entitled matter to the Nevada Supreme Court and deposited
19 Volume 6 containing sealed documents addressed to the Nevada Supreme Court 201 S. Carson
20 Street, Suite 201, Carson City, Nevada 89701 in the Washoe County mailing system for postage
21 and mailing in the United States Postal Service in Reno, Nevada.

22 I further certify that the transmitted record is a true and correct copy of the original
23 pleadings on file with the Second Judicial District Court in accordance NRAP 11(2)(b).

24 Dated this 30th day of August, 2012.

25 **JOEY ORDUNA HASTINGS**
26 **CLERK OF THE COURT**

27 By /s/Lori Matheus
28 Lori Matheus
Deputy Clerk

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: STEVEN ELLIOTT
Official File Stamp: 08-30-2012:15:31:19
Clerk Accepted: 08-30-2012:15:32:29
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Certificate of Clerk
Filed By: Lori Matheus

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE & PROBATION
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

FILED

Electronically

09-06-2012:08:58:54 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3196973

**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 61142

District Court Case No. CR031263

CR03-1263
10

RECEIPT FOR DOCUMENTS

TO: Ferrill Joseph Volpicelli
Washoe County District Attorney
Joey Orduna Hastings, Washoe District Court Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

08/31/2012 Filed Record on Appeal Volumes 1-5.

DATE: August 31, 2012

Tracie Lindeman, Clerk of Court
nw

FILED

Electronically

09-06-2012:08:59:59 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3196979

**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 61142

District Court Case No. CR031263

CR03-1263
10

RECEIPT FOR DOCUMENTS

TO: Ferrill Joseph Volpicelli
Washoe County District Attorney/Terrence P. McCarthy, Deputy District Attorney
✓Joey Orduna Hastings, Washoe District Court Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed
the following:

09/04/2012 Record on Appeal Vol 6 (SEALED).

DATE: September 04, 2012

Tracie Lindeman, Clerk of Court
lp

V6.1124

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: STEVEN ELLIOTT
Official File Stamp: 09-06-2012:08:58:54
Clerk Accepted: 09-06-2012:08:59:24
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Supreme Court Receipt for Doc
Filed By: Annie Smith

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE & PROBATION
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: STEVEN ELLIOTT
Official File Stamp: 09-06-2012:08:59:59
Clerk Accepted: 09-06-2012:09:00:39
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Supreme Court Receipt for Doc
Filed By: Annie Smith

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE & PROBATION
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61142

FILED

MAR 14 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

CL03-1263
DIO

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a petition for a writ of prohibition.¹ Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

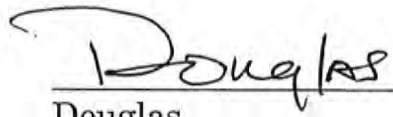
In his petition filed on December 6, 2011, appellant claimed that the district court lacked jurisdiction to adjudicate him as a habitual criminal because he did not have the requisite prior felony convictions. Based upon our review of the record on appeal, we conclude that the district court did not err in denying the petition. A petition for a writ of prohibition is the improper vehicle to challenge the validity of the


¹This 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).

judgment of conviction or sentence. NRS 34.320; NRS 34.330; NRS 34.724(2)(b). Accordingly, we

ORDER the judgment of the district court AFFIRMED.²

 J.
Gibbons

 J.
Douglas

 J.
Saitta

cc: Hon. Steven P. Elliott, District Judge
Ferrill Joseph Volpicelli
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk ✓

²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: ELLIOTT SATTLER
Official File Stamp: 03-18-2013:15:21:07
Clerk Accepted: 03-18-2013:15:21:39
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Supreme Court Order Affirming
Filed By: Deputy Clerk ASmith

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE & PROBATION
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

1 CODE 4075
2 Richard A. Gammick
3 #001510
4 P.O. 30083
5 Reno, NV. 89520
6 (775) 328-3200
7 Attorney for Plaintiff

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE.

12 * * *

13 THE STATE OF NEVADA,

14 Plaintiff,

Case No. CR03-1263

15 v.

Dept. No. 9

16 FERRILL JOSEPH VOLPICELLI,

17 Defendant.

18 _____/
19 SUBSTITUTION OF COUNSEL FOR THE STATE

20 Comes now, CHRISTIAN G. WILSON, Deputy District Attorney,
21 and hereby substitutes in as the Deputy District Attorney handling
22 the above-entitled matter on behalf of the State of Nevada. This
23 substitution of counsel is being made as a matter of courtesy to
24 comply with the requirements of the court's e-filing system and to
25 assure that CHRISTIAN G. WILSON will receive proper e-filing
26 notifications in this case.

///

///

///

///

1 AFFIRMATION PURSUANT TO NRS 239B.030

2 The undersigned does hereby affirm that the preceding
3 document does not contain the social security number of any person.

4
5 Dated this 22nd day of March , 2013.

6
7 RICHARD A. GAMMICK
8 District Attorney
 Washoe County, Nevada

9
10
11 By: /s/ Christian G. Wilson
 CHRISTIAN G. WILSON
 6535
 Deputy District Attorney

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: ELLIOTT SATTLER
Official File Stamp: 03-22-2013:11:39:01
Clerk Accepted: 03-22-2013:12:08:05
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Substitution of Counsel
Filed By: CHRISTIAN WILSON, ESQ.

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE & PROBATION
CHRISTIAN WILSON, ESQ. for STATE OF
NEVADA
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

FILED

Electronically

04-29-2013:08:47:50 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3689938

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 61142
District Court Case No. CR031263

CR03-1263
D10

REMITTITUR

TO: Joey Orduna Hastings, Washoe 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: April 10, 2013

Tracie Lindeman, Clerk of Court

By: Rory Wunsch
Deputy Clerk

cc (without enclosures):

Second Judicial District Court Dept. 10, District Judge
Ferrill Joseph Volpicelli
Washoe County District Attorney
Attorney General/Carson City

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 APR 26 2013


District Court Clerk

RECEIVED

APR 17 2013

CLERK OF THE COURT

FILED

Electronically

04-29-2013:08:47:50 AM

Joey Orduna Hastings

Clerk of the Court

Transaction # 3689938

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 61142
District Court Case No. CR031263

CR03-1243
D10

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:

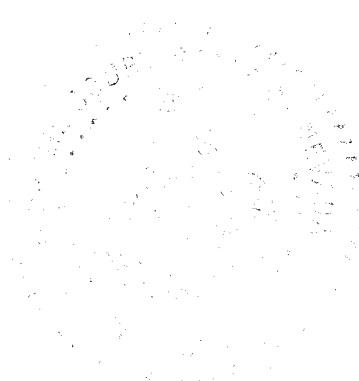
"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 10th day of April, 2013.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
April 10, 2013.

Tracie Lindeman, Supreme Court Clerk

By: Rory Wunsch
Deputy Clerk



IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61142

CR03-1263
DIO **FILED**

MAR 14 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a petition for a writ of prohibition.¹ Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

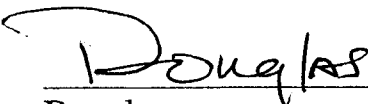
In his petition filed on December 6, 2011, appellant claimed that the district court lacked jurisdiction to adjudicate him as a habitual criminal because he did not have the requisite prior felony convictions. Based upon our review of the record on appeal, we conclude that the district court did not err in denying the petition. A petition for a writ of prohibition is the improper vehicle to challenge the validity of the

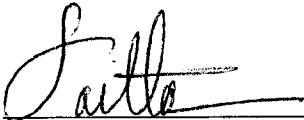
¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

judgment of conviction or sentence. NRS 34.320; NRS 34.330; NRS 34.724(2)(b). Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


Gibbons, J.


Douglas, J.


Saitta, J.

cc: Hon. Steven P. Elliott, District Judge
Ferrill Joseph Volpicelli
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: APRIL 10TH, 2013

Supreme Court Clerk, State of Nevada

By  Deputy

V6.1137

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: ELLIOTT SATTLER
Official File Stamp: 04-29-2013:08:47:50
Clerk Accepted: 04-29-2013:08:49:57
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Supreme Court Remittitur
Supreme Ct Clk's Cert &Judg
Supreme Court Order Affirming
Filed By: Deputy Clerk ASmith
You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE &PROBATION
CHRISTIAN WILSON, ESQ. for STATE OF NEVADA
TERRENCE MCCARTHY, ESQ. for STATE OF NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

CR1616156

Document Complies with NRS 239 B030
No Social Security Numbers

CR03-1263 DC-9900045667-001
STATE VS FERRILL JOSEPH VO 15 Pages
District Court 05/14/2013 10:33 AM
Washoe County 2490
NDC

Case No. CR03-1263 Hearing date FILED
Dept. No. 10 time 2013 MAY 14 AM 10:33

CLERK OF THE COURT
BY [Signature] CLERK

IN THE Second JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF Washoe

Ferrill J Volpicelli,)
Plaintiff,)
-vs-)
WARDEN Robert Lagrand et al,)
State of Nevada,)
Respondent(s).)

Motion to Correct Judgment
to Remove double Jeopardy
And illegal Charges
NRS 176.555 USCAS, 14
FRE 201 NRS 47.130-47.170

Request for Amended Judgment.

Now Comes Ferrill J Volpicelli in Pro-se
Pursuant to the Above Statutes, And Citations to
Respectfully Request An Amended Judgment to Delete
Duplicate DNA fee, entered in this Case, after
Previously Submitting Same in Case* CR98-2160,
Filed November 3rd 1998, NRS 176.0913.

JUDICIAL Notice FRE 201
NRS 47.130-47.170.

The Court will also take Notice of NRS 178.3975(2)
A Defendant Shall not be ordered to Pay Unless the
defendant is or will be Able to do so, (emphasis)
NRS 180.010

The Court will note Petitioner has been imprisoned
Since 1998, And has No financial resources.

This Request made And based on Papers files records
Copies of Attached Judgments, And Affidavit Attached hereto:

Matter Submitted Pursuant to Haines v Kerner 404 US 519(72)
"Pro se litigants Are entitled to be Liberally Constructed."

LCC LL FORM 26.014

(b)

Legal Authorities

Petitioner Ferrill J Volpicelli, in Pro-se submits that DNA Fee, was PAID, AND submitted under the Previous Judgment.

Once submitted it does not have to be repeated AND Constitutes Abuse of discretion to order it AGAIN.

Petitioner Submits he has Paid for it AGAIN, AND Now Requests the Court order his funds returned.

Additionally, Counsel Cost for Representation NRS 178.397.5 Subsection (2) States:

The Court Shall not order a defendant to make such a Payment unless the defendant is or will be able to do so.

In determining the amount and method of Payment, the Court Shall take account of financial resources of the defendant, AND the nature of the burden that the Payment will impose.

Petitioner has been in Continuous Custody Since 1998, AND has No Resources.

The District Court abuses it's discretion, in making error of Law. Carter & Bell v Hartman Corp. 476 US 384, 402 110 S.Ct 2447 (90)

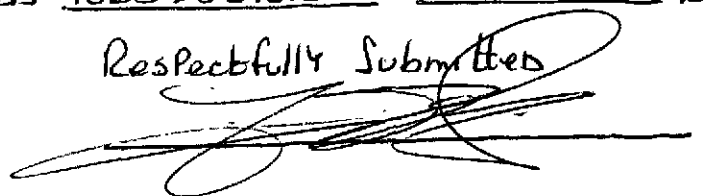
(c)

* Conclusion *

Petitioner Ferrill Volpicelli in Pro se, Requests Arrest of Judgment, in so far as DNA Fee's AND Counsel Fee's NRS 176.0913 NRS 178.397.5 (2) As the DNA Fee's Are Double Jeopardy by documentation Process.

Relief Requested, if Granted is also Requested to be Served on the Nevada Department of Corrections, AND other administrative Agencies, AS needed NRS 233B.030 SUSC et seq. by Amended Judgment.

Respectfully Submitted



AFFIDAVIT OF Ferrill Volpicelli

STATE OF NEVADA)
) SS:
 COUNTY OF Pershing)

I, Ferrill Volpicelli, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Ferrill Volpicelli

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

(1) That, As a result of NDOC Audit, AND interview, I was made aware of fee duplication of DNA Fee. And that Per Nevada Revised Statutes The Judgment in it's current form is illegal And Violation of Double-Teopardy

* Exhibits *

(2) Per NRS 47.130-47.170 I Certify the attached documents As true And Correct Attachments and they Are Unredacted. (See attached 9 Pages)

(3) And that this brief, And Attachment Prepared with Assistance of fellow inmate Steven Bronstein #64697

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this 3RD day of MAY, 2013

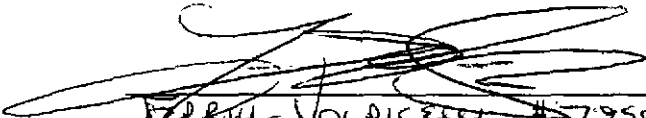
[Signature] #64697

[Signature]

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Motion to Correct Judgment to the below address(es) on this 3rd day of MAY, 2013, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

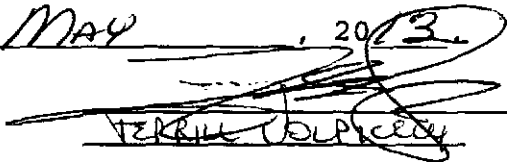
Second Judicial Dist Court DA Robert Gammick
Attn: Dist Court Clerk
75 Court Street P.O. Box 30083 Same.
Reno NV 89502


Terrill Volpica #579565
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Motion to Correct Judgment filed in District Court Case No. CR03-1263 does not contain the social security number of any person.

Dated this 3 day of MAY, 2013.


Plaintiff In Pro Se

ORIGINAL

FILED

APR - 1 2004

RONALD A. LONGTIN, JR., CLERK

By: *[Signature]*
DEPUTY

1 CODE 1850

2
3
4
5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

8 * * *

9 THE STATE OF NEVADA,

10 Plaintiff,

Case No. CR03-1263

11 vs.

Dept. No. 10

12 FERRILL JOSEPH VOLPICELLI,

13 Defendant.
14

15 JUDGMENT

16 The Defendant having been found guilty by a jury, and no sufficient cause
17 being shown by Defendant as to why judgment should not be pronounced against him, the
18 Court rendered judgment as follows:

19 That Ferrill Joseph Volpicelli is guilty of the crimes of Conspiracy to Commit
20 Crimes Against Property, a violation of NRS 199.480, NRS 205.060, NRS 205.0832, NRS
21 205.090, NRS 205.110, NRS 205.220, NRS 205.240, NRS 205.380 and NRS 205.965, a
22 gross misdemeanor, as charged in Count I of the Indictment, Burglary, a violation of NRS
23 205.060, a felony, as charged in Counts II through IX of the Indictment and Unlawful
24 Possession, Making, Forgery or Counterfeiting of Inventory Pricing Labels, a violation of
25 NRS 205.965(2) and (3), a felony, as charged in Count X of the Indictment and the Court
26 having adjudged the Defendant to be an Habitual Criminal as provided under NRS 207.010,
27 the Court hereby sentences the Defendant by imprisonment in the Washoe County Jail for
28 the term of twelve (12) months, as to Count I, to run concurrently with the sentences

V6.1143

1 imposed in Counts II through X. As to Count II, he be punished by imprisonment in the
2 Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years
3 has been served. As to Count III, he be punished by imprisonment in the Nevada State
4 Prison for the term of Life with parole eligibility beginning after ten (10) years has been
5 served, to run concurrently with Count II. As to Count IV, he be punished by imprisonment
6 in the Nevada State Prison for the term of Life with parole eligibility beginning after ten (10)
7 years has been served, to run concurrently with Count III. As to Count V, he be punished
8 by imprisonment in the Nevada State Prison for the term of Life with parole eligibility
9 beginning after ten (10) years has been served, to run concurrently with Count IV. As to
10 Count VI, he be punished by imprisonment in the Nevada State Prison for the term of Life
11 with parole eligibility beginning after ten (10) years has been served, to run concurrently with
12 Count V. As to Count VII, he be punished by imprisonment in the Nevada State Prison for
13 the term of Life with parole eligibility beginning after ten (10) years has been served, to run
14 concurrently with Count VI. As to Count VIII, he be punished by imprisonment in the
15 Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years
16 has been served, to run concurrently with Count VII. As to Count IX, he be punished by
17 imprisonment in the Nevada State Prison for the term of Life with parole eligibility beginning
18 after ten (10) years has been served, to run concurrently with Count VIII. As to Count X, he
19 be punished by imprisonment in the Nevada State Prison for the term of Life with parole
20 eligibility beginning after ten (10) years has been served, to run consecutively to Counts II
21 through IX. The Defendant is further ordered to pay the statutory Twenty-Five Dollar
22 (\$25.00) administrative assessment fee, a One Hundred Fifty Dollar (\$150.00) DNA testing
23 fee, restitution in the amount of Ten Thousand Three Hundred Thirty-Nine Dollars and
24 Sixteen Cents (\$10,339.16) and reimburse the County of Washoe the sum of Five Hundred
25 Dollars (\$500.00) for legal representation by the Washoe County Public Defender's Office.

26 ///

27 ///

28

1 The Defendant is given credit for zero (0) days time served.

2 It is further ordered the above sentence shall run consecutively to any other
3 sentence the Defendant is obligated to serve.

4 DATED this 1st day of April, 2004.

5 
6 _____
7 DISTRICT JUDGE
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21
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23
24
25
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27
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CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE:

4-6-04

RONALD A. LONGTIN, JR., Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By

[Signature]

Deputy

FILED

NOV 3 1998

BETTY J. LEWIS, Clerk

By

Deputy Clerk

No. CR98-2160

Dept. No. 9

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Reporter: D. Vieira

Plaintiff,

vs.

J U D G M E N T

FERRILL JOSEPH VOLPICELLI,

Defendant.

The Defendant, having entered a plea of Guilty, and no sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That Ferrill Joseph Volpicelli is guilty of the crime of Burglary, a violation of NRS 205.060, a felony, as charged in Counts I and II of the Information, and that he be punished by imprisonment in the Nevada State Prison for a minimum term of twenty-four (24) months to a maximum term of seventy-two (72) months and by payment of a fine in the amount of Five Thousand Dollars (\$5,000.00) on Count I, to run consecutively to the Federal prison term he is obligated to serve; a minimum term of sixteen (16) months to a maximum term of seventy-two (72) months Nevada State Prison on Count II, to run consecutively to Count I. The sentence is suspended as to Count II and the Defendant is placed on probation for a period of time not to exceed three (3) years, to run consecutively to Count I and consecutively to the Federal prison term. The Defendant is given credit for eighty-seven (87) days time served. It is further ordered that the Defendant pay the

//

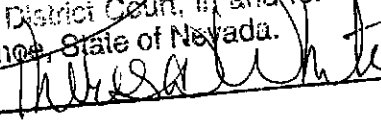
//

V6.1147

1 statutory Twenty-Five Dollar (\$25.00) administrative assessment fee and pay the DNA fees of Two
2 Hundred Fifty Dollars (\$250.00).

3 Dated this 3rd day of November, 1998.

4
5
6 
7 DISTRICT JUDGE
8
9
10

11 CERTIFIED COPY
12 The document to which this certificate is
13 attached is a full, true and correct copy of
14 the original on file and of record in my office.
15 DATE: MAY 9 2002
16 RONALD A. LONGTIN JR., Clerk of the Second
17 Judicial District Court, in and for the County
18 of Washoe, State of Nevada.
19 By  Deputy
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NEVADA STATUTES
TITLE 14.
Procedure In Criminal Cases.
CHAPTER 178.
General Provisions.

Recoupment of Expenses of Defense of Indigents

178.3975. Order for payment by defendant; remission of payment; disposition of amounts recovered; community service.

1. The court may order a defendant to pay all or any part of the expenses incurred by the county, city or state in providing the defendant with an attorney which are not recovered pursuant to NRS 178.398. The order may be made at the time of or after the appointment of an attorney and may direct the defendant to pay the expenses in installments.

2. The court shall not order a defendant to make such a payment unless the defendant is or will be able to do so. In determining the amount and method of payment, the court shall take account of the financial resources of the defendant and the nature of the burden that payment will impose.

3. A defendant who has been ordered to pay expenses of the defendant's defense and who is not willfully or without good cause in default in the payment thereof may at any time petition the court which ordered the payment for remission of the payment or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due or modify the method of payment.

4. The money recovered must in each case be paid over to the city, county or public defender's office which bore the expense and was not reimbursed by another governmental agency.

5. Upon the request of a defendant, if the court finds that the defendant is suitable to perform supervised community service, the court may allow the defendant to pay all or part of any

expenses incurred by the county, city or state in providing the defendant with an attorney by performing supervised community service for a reasonable number of hours, the value of which would be commensurate with such expenses incurred. The community service must be performed for and under the supervising authority of a county, city, town or other political subdivision or agency of the State of Nevada or a charitable organization that renders service to the community or its residents. The court may require a defendant who requests to perform community service to deposit with the court a reasonable sum of money to pay for the cost of policies of insurance against liability for personal injury and damage to property or for industrial insurance, or both, during those periods in which the defendant performs the community service, unless, in the case of industrial insurance, it is provided by the authority for which the defendant performs the community service.

1975, p. 217; 1977, p. 337; 1985, p. 49; 1995, ch. 286, § 1, p. 500; 2001 Sp. Sess., ch. 8, § 16, p. 135.

NEVADA STATUTES
TITLE 14.
Procedure In Criminal Cases.

CHAPTER 176.
Judgment and Execution.

Sentence and Judgment

Preservation of Biological Evidence and Genetic Marker Testing

176.0913. Biological specimen to be obtained from certain defendants; identifying information submitted to Central Repository; costs.

1. If a defendant is convicted of an offense listed in subsection 4:

(a) The name, social security number, date of birth and any other information identifying the defendant must be submitted to the Central Repository for Nevada Records of Criminal History; and

(b) A biological specimen must be obtained from the defendant pursuant to the provisions of this section and the specimen must be used for an analysis to determine the genetic markers of the specimen.

2. If the defendant is committed to the custody of the Department of Corrections, the Department of Corrections shall arrange for the biological specimen to be obtained from the defendant. The Department of Corrections shall provide the specimen to the forensic laboratory that has been designated by the county in which the defendant was convicted to conduct or oversee genetic marker testing for the county pursuant to NRS 176.0917.

3. If the defendant is not committed to the custody of the Department of Corrections, the Division shall arrange for the biological specimen to be obtained from the defendant. The Division shall provide the specimen to the forensic laboratory that has been designated by the

county in which the defendant was convicted to conduct or oversee genetic marker testing for the county pursuant to NRS 176.0917. Any cost that is incurred to obtain a biological specimen from a defendant pursuant to this subsection is a charge against the county in which the defendant was convicted and must be paid as provided in NRS 176.0915.

4. Except as otherwise provided in subsection 5, the provisions of subsection 1 apply to a defendant who is convicted of:

- (a)** A felony;
- (b)** A crime against a child as defined in NRS 179D.0357;
- (c)** A sexual offense as defined in NRS 179D.097;
- (d)** Abuse or neglect of an older person or a vulnerable person pursuant to NRS 200.5099;
- (e)** A second or subsequent offense for stalking pursuant to NRS 200.575;
- (f)** An attempt or conspiracy to commit an offense listed in paragraphs (a) to (e), inclusive;
- (g)** Failing to register with a local law enforcement agency as a convicted person as required pursuant to NRS 179C.100, if the defendant previously was:
 - (1)** Convicted in this State of committing an offense listed in paragraph (a), (d), (e) or (f); or
 - (2)** Convicted in another jurisdiction of committing an offense that would constitute an offense listed in paragraph (a), (d), (e) or (f) if committed in this State;
- (h)** Failing to register with a local law enforcement agency after being convicted of a crime against a child as required pursuant to NRS 179D.450; or
- (i)** Failing to register with a local law enforcement agency after being convicted of a sexual offense as required pursuant to NRS 179D.450.

5. If it is determined that a defendant's biological specimen has previously been submitted for conviction of a prior offense, an additional sample is not required.

6. Except as otherwise authorized by federal law or by specific statute, a biological specimen obtained pursuant to this section, the results of a genetic marker analysis and any information identifying or matching a biological specimen with a person must not be shared with or disclosed

to any person other than the authorized personnel who have possession and control of the biological specimen, results of a genetic marker analysis or information identifying or matching a biological specimen with a person, except pursuant to:

(a) A court order; or

(b) A request from a law enforcement agency during the course of an investigation.

7. A person who violates any provision of subsection 6 is guilty of a misdemeanor.

1989, ch. 168, § 1, p. 376; 1995, ch. 256, § 5, p. 414.; 1997, ch. 451, § 84, p. 1669; 2001, ch. 383, § 1, p. 1852; 2001, ch. 589, §§ 6, 11, pp. 3032, 3037; 2001 Sp. Sess., ch. 14, § 52, p. 215; 2003, ch. 2, § 109, p. 289; 2003, ch. 447, § 1, p. 2684; 2005, ch. 324, § 16, p. 1115; 2007, ch. 225, § 1, p. 749; 2007, ch. 485, § 1, p. 2745; 2009, ch. 39, § 1, p. 80.

1 CODE 3880
2 Richard A. Gammick
3 #001510
4 P.O. Box 30083
5 Reno, NV 89520-3083
6 (775) 328-3200
7 Attorney for Plaintiff

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE.

12 * * *

13 THE STATE OF NEVADA,

14 Plaintiff,

Case No. CR03-1263

15 v.

Dept. No. 10

16 FERRILL J. VOLPICELLI,

17 Defendant.

18 _____/
19 **RESPONSE TO DEFENDANT'S MOTION**
20 **TO CORRECT JUDGMENT OF COVICTION**

21 COMES NOW, RICHARD A. GAMMICK, District Attorney, Washoe
22 County, Nevada, by and through Christian G. Wilson, Deputy District
23 Attorney, and hereby Responds to Defendant Ferrill Joseph
24 Volpicelli's Motion to Correct Judgment of Conviction in CR03-1263.
25 The State has no objection to the Court filing an Amended Judgment of
26 Conviction in CR03-1263 thereby removing from the original Judgment
of Conviction in CR03-1263 the "One Hundred Fifty Dollar (\$150.00)
DNA testing fee", due to such DNA test and fee having already been
ordered in the Judgment of Conviction in CR98-2160; and further, the
State has no objection to the Court removing from said original

1 Judgment of Conviction in CR03-1263 the order that the defendant
2 "reimburse the County of Washoe the sum of Five Hundred Dollars
3 (\$500.00) for legal representation by the Washoe County Public
4 Defender's Office". This is due to the defendant's inability to pay
5 in accordance with NRS 178.3975(2). The State would object to any
6 other alteration or amendment, not listed above, to the Judgment of
7 Conviction in CR03-1263.

8 AFFIRMATION PURSUANT TO NRS 239B.030

9 The undersigned does hereby affirm that the preceding
10 document does not contain the social security number of any person.

11 Dated this 17th day of May, 2013.

12 RICHARD A. GAMMICK
13 District Attorney,
14 Washoe County, Nevada

15 By /s/ Christian G. Wilson
16 CHRISTIAN G. WILSON
17 6535
18 Deputy District Attorney
19
20
21
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26

1 CERTIFICATE OF SERVICE BY E-FILING

2 I certify that I am an employee of the Washoe County
3 District Attorney's Office and that, on this date, I electronically
4 filed the foregoing with the Clerk of the Court by using the ECF
5 system which will send a notice of electronic filing to the
6 following:

7
8 FERRILL J. VOLPICELLI #79565
9 1200 PRISON ROAD
10 LOVELOCK, NV 89419

11
12
13 DATED this 17th day of May, 2013.

14
15 /s/DANIELLE RASMUSSEN
16 DANIELLE RASMUSSEN
17
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Pursuant to NRCP 5(b), I certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing at Reno, Washoe County, Nevada, a true copy of the foregoing document, addressed to:

6 FERRILL J. VOLPICELLI #79565
1200 PRISON ROAD
7 LOVELOCK, NV 89419

9 DATED this 17th day of May, 2013.

1	/s/DANIELLE RASMUSSEN DANIELLE RASMUSSEN
---	---

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: ELLIOTT SATTLER
Official File Stamp: 05-17-2013:10:22:37
Clerk Accepted: 05-17-2013:10:30:03
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Response
Filed By: CHRISTIAN WILSON, ESQ.

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE & PROBATION
CHRISTIAN WILSON, ESQ. for STATE OF
NEVADA
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

CR03-1263 DC-9900046059-004
STATE VS. FERRILL JOSEPH VOL 2 Pages
District Court 05/28/2013 04 12 PM
Washoe County 3860
noc

LCC LL FORM 26.090

3860

Case No. CR03-1263

Dept. No. 10

FILED

2013 MAY 28 PM 4:12

JUDETTE M. MARTINEZ
CLERK OF THE COURT

BY [Signature]
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF Washoe

* * * * *

STATE OF NEVADA,

Plaintiff,

-vs-

FERRILL JOSEPH VOLPICKER,

Defendant.

REQUEST FOR SUBMISSION
OF MOTION

It is requested that the Motion to Convert

JUDGMENT of CONVERSION

which was filed on the 14 day of MAY, 2013, in
the above-entitled matter, be submitted to the Court for
decision.

Dated this 22 day of MAY, 2013.

[Signature]
FERRILL JOSEPH VOLPICKER # 728565
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419


Defendant In Pro Se

V6.1159

1 CERTIFICATE OF SERVICE BY MAIL

2 I do certify that I mailed a true and correct copy of the
3 foregoing REQUEST FOR SUBMISSION OF MOTION to the below
4 address(es) on this 22 day of MAY, 2013, by
5 placing same in the U.S. Mail via prison law library staff,
6 pursuant to NRCP 5(b):

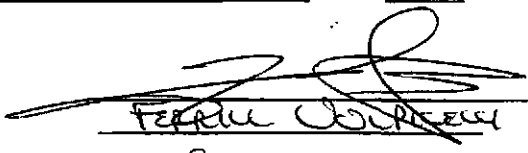
7 WASHOE COUNTY
8 DISTRICT ATTORNEY
9 POB 30083
10 RENO, NV 89520-3083
11
12
13
14

15
16 
17 Fernand Courchesne #79565
18 Lovelock Correctional Center
19 1200 Prison Road
20 Lovelock, Nevada 89419
21 Defendant In Pro Se

22 AFFIRMATION PURSUANT TO NRS 239B.030

23 The undersigned does hereby affirm that the preceding
24 REQUEST FOR SUBMISSION OF MOTION does not contain the social
25 security number of any person.

26 Dated this 22 day of MAY, 2013.

27 
28 Defendant In Pro Se

2490

FERRILL VOLPICELLI #79565
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

FILED
2013 JUN -4 AM 12:06

JAMES L. HARRIS
CLERK OF THE COURT
BY [Signature]
DEPUTY

IN THE SECOND DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

FERRILL J. VOLPICELLI,
Petitioner,

-vs-

STATE OF NEVADA
Respondent.

Case No. CR03-1263

Dept. No. 10

MOTION TO CORRECT ILLEGAL
SENTENCE/ MODIFY SENTENCE

Comes now, Ferrill J. Volpicelli, Petitioner, in Forma Pauperis
and in Pro Se, to hereby submit a Motion To Correct Illegal
Sentence pursuant to NRS 176.555.

This motion is based upon all pleadings, documents and papers on
file herein, as well as those within District Court case CR03-
1263's progeny cases on appeal, and the following points and
authorities.

Dated this 26th

Day of May, 2013.

[Signature]
Ferrill J. Volpicelli

Petitioner in Pro Se

V6.1161

CR03-1263
STATE VS FERRILL JOSEPH VO 14 Pages
District Court 06/03/2013 12 06 PM 1960
Washoe County
NOT

1960

FERRILL VOLPICELLI #79565
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

FILED
2013 JUN -4 AM 12:06
JAMES L. HARRIS
CLERK OF THE COURT
BY *[Signature]*
DEPUTY

IN THE SECOND DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

FERRILL J. VOLPICELLI,)	
Petitioner,)	Case No. CR03-1263
)	
-vs-)	Dept. No. 10
)	
STATE OF NEVADA)	
Respondent.)	MEMORANDUM TO MOTION TO CORRECT ILLEGAL SENTENCE/ MODIFY SENTENCE

The Petitioner, Ferrill J. Volpicelli, in Forma Pauperis and in Pro Se, hereby submits this Memorandum in Support of Petitioner's Motion to Correct Illegal Sentence.

As set forth below, the Petitioner is entitled to relief under NRS 176.555 because the District Court relied upon a misapprehension as to the Petitioner's criminal, as well as his imprisonment record at sentencing, all of which acted to Petitioner's extreme detriment.

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Statement of Facts

Petitioner was arrested for a parole violation in or about October of 2001 while on parole from unrelated case CR98-2160. The state subsequently filed Burglary related counts in new cases CR02-0145 & CR02-0146 stemming from alleged activities by the Petitioner while on parole in 2001. Petitioner was returned to custody wherein he expired District Court case CR98-2160's Judgment of Conviction.

In or about May of 2003, Petitioner was transferred to Washoe County Jail to face an indictment wherein cases CR02-0145 & CR02-0146 were stayed and supplanted with District Court case CR03-1263. Trial ensued and the Petitioner was convicted of one count of Conspiracy, nine counts of Burglary & one count of Possession of Retail Instrumentalities.

At sentencing on April 1, 2004, the State sought the adjudication of the Habitual Criminal enhancement upon the underlying convictions. In support thereof, the State specifically presented exhibits 1, 2 & 3 corresponding to the three separate cases.

Based on that evidence, the State requested the Petitioner be deemed an Habitual Criminal, as well as be sentenced specific to

1 the 'three-times convicted of a felony' clause of NRS 207-
2 010(1)(b)(2); that being ten years to life on each of the
3 underlying convictions.

4 The District Court thereafter resounded with its acceptance and
5 acknowledgment of All the evidence being duly constitutionally
6 sound, and pronounced the Petitioner to multiple life sentences
7 in accordance with the State's request.
8

9
10 Standard of Review

11 A Motion to Correct an Illegal Sentence is an appropriate
12 vehicle for raising the claim that a sentence is facially
13 illegal at any time; such a motion cannot be used as a vehicle
14 for challenging the validity of a judgment of conviction based
15 on alleged errors occurring at trial or sentencing.
16

17 Edwards v State, 918 P2d 321, 324 (1996). The Nevada Supreme
18 Court has the right to correct an illegal sentence at any time.
19 Passanisi v State, 831 P2d 1371, 1372 (1992). See also NRS
20 176.555.
21

22 The grounds in such a Petition to Correct an Illegal Sentence
23 are interpreted narrowly as a defendant is limited to asserting
24 that the sentence is facially illegal. Edwards, Id @ 324. A
25 sentence is illegal where the Court goes beyond its authority by
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1 acting without jurisdiction in imposing it. Edwards, Id @ 324,
2 (citing Allen v U.S. 495 A. 2d 1145, 1149 (D.C. 1985). See also
3 Vasquez v Palmer, 2009 U.S. Dist. Lexis 9422 (D. Nev., Sept. 22,
4 2009) (Quoting N.S.C., "which declared a sentence to be illegal
5 for purposes of NRS 176.555 where the District Court was without
6 jurisdiction to impose a sentence...").

7 The District Court retains inherent authority to correct, vacate
8 or modify a sentence that is based on a materially untrue
9 assumption or mistake of fact that has worked to the extreme
10 detriment of the Defendant, but only if the mistaken sentence
11 "is the result of the sentencing Judge's misapprehension of a
12 Defendant's criminal record." State v District Court, 677 P2d
13 1044, 1048.
14
15

16 Arguments

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19 Petitioner asserts that his sentence is illegal & that pursuant
20 to NRS 176.555 he is entitled to relief because the District
21 Court relied upon a misapprehension as to the Petitioner's
22 criminal record; inclusive of his imprisonment record.
23

24 A. The District Court erred in its reliance upon a
25 misapprehension as to exhibit 1 for the adjudication of an
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1 Habitual Criminal as it was not a valid prior for Purposes of
2 NRS 207.010 (1)(b)(2).

3 Petitioner was prejudiced with substantial right violations when
4 he was adjudicated an Habitual Criminal absent proof beyond a
5 reasonable doubt of the 'three-times convicted of a felony'
6 provision specific to NRS 207.010 (1)(b)(2).

7 At the sentencing hearing on April 1, 2004, the State sought the
8 Habitual Criminal enhancement specific to NRS 207.010 (1)(b)(2)
9 with three corresponding exhibits; each of which were correlated
10 to the requisite 'three-times convicted of a felony' clause of
11 said statute.
12

13 Referring to the District Court's trial transcript on April 1,
14 2004, the prosecutor informed the Court to wit:
15

16 "The State moves to have marked and admitted into evidence the
17 State certified proof of this Defendant's prior felony
18 convictions three of his prior felony convictions": Sentencing
19 transcript pg. 4. (*Emphasis added that the State proffered the*
20 *exhibits as each corresponding to the three separate cases*
21 *necessary for the 'three-times convicted of a felony' clause of*
22 *NRS 207.010 (1)(b)(2).*) "The first would be his cert. from
23 2004... The second would be his 1998 conviction on two counts
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1 of Burglary (emphasis added that the State proffered the exhibit
2 as one conviction for adjudication purposes-despite 2 counts in
3 judgment of conviction). ...And the third prior...is a
4 conviction of four counts of Tax Perjury in the United States
5 District Court of Nevada 1997" (Again, emphasis added that
6 despite judgment of conviction including 4 counts, State
7 proffered and Court accepted it as only one felony
8 conviction/prior towards the requisite 'three-times convicted of
9 a felony' clause under NRS 207.010 (1)(b)(2)): Sentencing
10 transcript pg. 4.
11

12 "Accordingly, the State is asking you to impose Habitual
13 Offender status to this Defendant, and we're asking for a
14 sentence of life imprisonment with ten years minimum served in
15 the Nevada State Prison on each felony count": Sentencing
16 transcript pg. 4.
17

18 Hence, the State and the Court were on the same page as
19 providing and accepting the foregoing three exhibits in their
20 entirety towards the requisite 'three-times convicted of a
21 felony' clause specific to NRS 207.010 (1)(b)(2). With those
22 specific parameters in place, the sentencing Judge stated for
23 the record to wit; "I have had a chance to look at these
24 exhibits and in each case Mr. Volpicelli was afforded
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1 appropriate constitutional rights, and the record here does meet
2 all constitutional requirements for use to prove the prior
3 convictions at this type of hearing. So, exhibits 1, 2 & 3 are
4 admitted": Sentencing transcript pg. 43.

5 At that point in the proceeding, the Court was convinced that
6 there existed beyond a reasonable doubt sufficient evidence with
7 all three exhibits as satisfying the requisite 'three-times
8 convicted of a felony' provision specific to NRS 207.010
9 (1)(b)(2). There was never any mention or consideration given
10 to the notion that said exhibits duly noted a total of seven
11 felonies, or that if there was any deficiency with one or more
12 of the exhibits, the State and Court would rely on the 4 counts
13 in the Federal case as being sufficient to qualify alone so as
14 to satisfy the requisite 'three-times convicted of a felony'
15 clause.

16 That said, Petitioner refers this Court to the Nevada Supreme
17 Court's Review of Petitioner's claim that exhibit 1,
18 specifically case CR02-0148, was not a valid prior for purposes
19 of adjudication under NRS 207.010 (1)(b)(2). Therein, the High
20 Court agreed that said exhibit was considered erroneously by the
21 District Court. (Case# 51622)

22 Hence, the District Court's reliance on exhibit 1 translated to
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1 a misapprehension of the Petitioner's criminal record at
2 sentencing when adjudicating the Petitioner an Habitual
3 Criminal. As such, the Petitioner was significantly prejudiced
4 because, had the Petitioner's counsel, or the Court recognized
5 the error, the requisite 'three-times convicted of a felony'
6 clause would not have been met and the Court would have been
7 compelled to rely on exhibits 2 and 3 only which, by themselves,
8 fail to satisfy the requisite criteria for NRS 201.010(1)(b)(2).
9 This would have demonstrated that the State failed to meet its
10 burden beyond a reasonable doubt in the adjudication specific to
11 NRS 201.010 (1)(b)(2).
12

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15 B. The District Court erred in its reliance upon the
16 misapprehension of Petitioner's imprisonment record in the
17 adjudication as an Habitual Criminal for Purposes of NRS 207.010
18 (1)(b)(2).

19 Petitioner asserts that he was prejudiced with the District
20 Court's erroneous reliance upon the misconception as to the
21 Petitioner's record of imprisonment which is indicative of his
22 criminal record.
23

24 At the April 1, 2004 sentencing hearing, wherein Petitioner was
25 deemed by the District Court an Habitual Criminal, the
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1 sentencing Judge stated to wit: "And under all the evidence that
2 I see here, I do in fact find Mr. Volpicelli is a habitual
3 criminal. In fact, you are the poster child for habitual
4 criminality in that every time you're released from custody it
5 seems like you're out making a full-time living stealing."

6 Sentencing transcript p.58.

7 Yet, the District Court gave no heed to the Petitioner's
8 proffered mitigating evidence in the PSI's facts of the
9 Petitioner's actual imprisonment record. Said record clearly
10 indicated that Petitioner had never served any jail time
11 whatsoever. Furthermore, that Petitioner's first commitment to
12 prison was at the age of 42, wherein he served a continuous
13 stint of imprisonment from 1/98 through 6/01 for the judgment of
14 convictions aptly cited in Exhibit 2's case and Exhibit 3's
15 case. And, that he had only one release from imprisonment
16 wherein he did incur the charges while on parole from the second
17 exhibit's case. Again, the District Court was under the
18 misguided conception that the Petitioner was re-offending at his
19 release from imprisonment with all 3 of the proffered exhibits.
20 When, in reality, there had only been one.

21 Petitioner asserts that this has particular relevance as to the
22 letter and spirit of the legislative intent underlying the
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1 State's Habitual Criminal Act. More specifically, it has to do
2 with the factor of reformation in between those 'three-times
3 convicted of a felony' cases.
4

5 Clearly, the Nevada Courts have recognized the reformation
6 factor in between felony case priors as evidenced in Rezin v
7 State and Tanksley v Nevada. But the District Court failed to
8 apply that standard in interpreting the Petitioner's actual
9 incarceration record. Matter of fact, the Nevada Supreme Court
10 has recognized the importance of such an opportunity to reform
11 in between episodes of imprisonment in its case O'Neil v Nevada.
12 Therein, the high court's opinion in O'Neil aptly makes
13 reference to its Recidivism Statute with comparison to that of
14 the State of New York. Moreover, both States' highest courts
15 agree that the only fact-finding necessary for the imposition of
16 an enhancement of a recidivist is the requisite number of prior
17 convictions, as well as the promotion of reformation as part of
18 the legislative intent.
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22 But, a closer comparison of the similarity of the intent of the
23 two States' recidivist statutory considerations, shows the
24 following: That under New York's Penal Law § 70.10(1)(c) 'For
25 purposes of determining whether a person has two or more
26 convictions of crimes that were committed prior to the time
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1
2 Defendant was actually imprisoned under sentence, for any such
3 convictions shall be deemed to be only one conviction.' see
4 Brown v Greiner 409 F3d 523, 525 (2nd cir 2005).

5 Thus, Petitioner's incarceration and opportunity for reformation
6 involving exhibit cases two & three as priors should count for
7 but one 'strike' only towards the requisite 'three-times
8 convicted clause of NRS 207.010 (1)(b)(2). If so, and since the
9 Nevada Supreme Court has already ruled exhibit 1's case as being
10 an invalid prior for consideration under NRS 207.010 (1)(b)(2),
11 then Petitioner, by way of logic and legislative intent, falls
12 short of the qualifications of either a Habitual Criminal and/or
13 a Habitual Felon.
14

15
16 After all, its only appropriate to turn to applications of other
17 sister State's legislative intent on such statutes of
18 recidivism, as articulated by The United States Supreme Court
19 case, U.S. V Ron Rair Enterprise, Inc, 109 Sct 1031 (1989),
20 wherein "the intention of the drafters controls rather than the
21 strict language."
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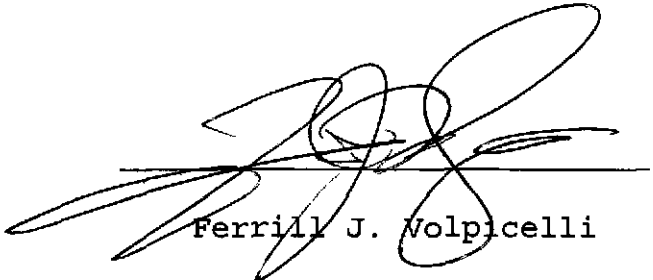
23 24 Conclusion

25
26 Wherefore, for the reasons set forth above, this court should
27 reverse the Petitioner's life sentence enhancements under NRS
28

207.010 (1)(b)(2) on the Petitioner's underlying convictions, because the District Court relied on a misapprehension as to Petitioner's criminal and imprisonment record; thereby egregiously violating due process which has clearly worked to the Petitioner's detriment.

Dated this 28th Day of

May, 20 13.


Ferrill J. Volpicelli
Petitioner in Pro Se

EXHIBITS

PLTF: STATE OF NEVADA
DEFT: FERRILL JOSEPH VOLPICELLI

PATY: T. Riggs
DATY: B. Van Ry

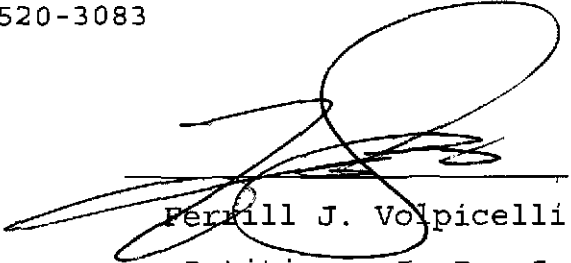
Case No: CR03-1263 Dept. No: 10 Clerk: G. Bartlett Date: 04/01/04

Exhibit No.	Party	Description	Marked	Offered	Admitted
1	State	Certified copy of prior felony conviction	4/1/04	No obj.	4/1/04
2	State	Certified copy of prior felony conviction	4/1/04	No obj.	4/1/04
3	State	Certified copy of prior felony conviction	4/1/04	No obj.	4/1/04
4	State	Picture of Deft.	4/1/04	No obj.	4/1/04
5	State	RPD Financial Impact report	4/1/04	No obj.	4/1/04
6	Deft	Various letters of completion	4/1/04	No obj.	4/1/04
7	Deft.	Various certificates	4/1/04	No obj.	4/1/04

1 Certificate of Service by Mail

2 I do certify that I mailed a true and correct copy of the
3 foregoing Motion to Correct an Illegal Sentence to the below
4 address on this 26th day of MAY, 2012, by placing
5 same in the U.S. Mail via Prison Law Library Staff, pursuant
6 to NRCP 5 (b).
7

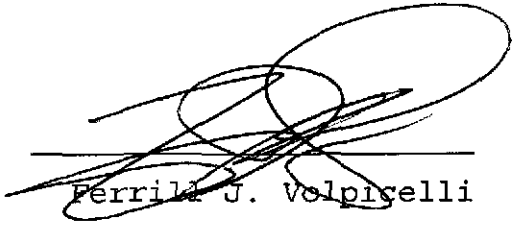
8 Washoe County
9 District Attorney
10 PO Box 30083
11 Reno, NV 89520-3083

12 
13 Ferrill J. Volpicelli
14 Petitioner In Pro Se
15

16 Affirmation Pursuant to NRS 239 B. 630

17 The undersigned does hereby affirm that the preceding Motion
18 to Correct an Illegal Sentence does NOT contain the social
19 security number of any person.
20

21 Dated this 26th
22 Day of MAY, 2012.
23

24 
25 Ferrill J. Volpicelli
26 Petitioner In Pro Se
27
28

1
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5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8 * * *

9 THE STATE OF NEVADA,

10 Plaintiff,

Case No.: CR03-1263

11 vs.

Dept. No.: 10

12 FERRILL J. VOLPICELLI,

13 Defendant.
14 _____ /

15 **ORDER GRANTING MOTION TO CORRECT JUDGMENT OF CONVICTION**

16 Presently before the Court, is a Motion to Correct Judgment of Conviction filed by
17 Defendant FERRILL J. VOLPICELLI (hereinafter "Defendant") on May 14, 2013. On May 17,
18 2013, Plaintiff THE STATE OF NEVADA (hereinafter "The State") filed a Response to
19 Defendant's Motion to Correct Judgment of Conviction. On May 28, 2013, Defendant filed a
20 Request for Submission.

21 The State has no objection to the Court filing an Amended Judgment of Conviction in CR03-
22 1263 thereby removing from the original Judgment of Conviction in CR03-1263:

23 1. "One Hundred Fifty Dollar (\$150.00) DNA testing fee", due to such a DNA test and fee
24 having already been ordered in the Judgment of Conviction in CR98-2160.

25 2. The order that the defendant "reimburse the County of Washoe the sum of Five Hundred
26 Dollars (\$500.00) for legal representation by the Washoe County Public Defender's Office". This is
27 due to defendant's inability to pay pursuant to NRS 178.3975 (2).

28 //

1 **NOW, THEREFORE, IT IS HEREBY ORDERED** that the "One Hundred Fifty Dollar
2 (\$150.00) DNA testing fee" be removed from CR03-1263.

3 **IT IS FURTHER ORDERED** that the order that defendant "reimburse the County of
4 Washoe the sum of Five Hundred Dollars (\$500.00) for legal representation by the Washoe County
5 Public Defender's Office" be removed pursuant to NRS 178.3975 (2) from CR03-1263.

6
7 **DATED** this 31 day of May 2013.

8 
9 ELLIOTT A. SATTLER
10 District Judge
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CERTIFICATE OF MAILING

I hereby certify that I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

CHRISTIAN WILSON, ESQ. for STATE OF NEVADA

TERRENCE MCCARTHY, ESQ. for STATE OF NEVADA

DIV. OF PAROLE & PROBATION

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, and that on this date I deposited for mailing a copy of the foregoing document addressed to:

Ferrill J. Volpicelli #79565
1200 Prison Road
Lovelock, NV 89419

DATED this 4 day of ~~May~~ ^{JUNE}, 2013.


SHEILA MANSFIELD
Judicial Assistant

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: ELLIOTT SATTLER
Official File Stamp: 06-04-2013:13:19:43
Clerk Accepted: 06-04-2013:13:20:39
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Ord Granting
Filed By: Sheila Mansfield

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE & PROBATION
CHRISTIAN WILSON, ESQ. for STATE OF
NEVADA
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

1 **CODE 1850**
2
3
4
5

6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF WASHOE**
8

9 **STATE OF NEVADA,**

10 **Plaintiff,**

Case No. CR03-1263

11 **vs.**

Dept. No. 10

12 **FERRILL JOSEPH VOLPICELLI,**

13 **Defendant.**
14 _____/

15 **AMENDED JUDGMENT**

16 Pursuant to the Order Granting Motion to Correct Judgment of Conviction filed on
17 June 4, 2013, **IT IS HEREBY ORDERED** that the below Judgment is amended:

18 The Defendant having been found guilty by jury, and no sufficient cause being
19 shown as to why judgment should not be pronounced against him, the Court rendered judgment as
20 follows:

21 That Ferrill Joseph Volpicelli is guilty of the crime of Conspiracy to Commit Crimes
22 Against Property, a violation of NRS 199.480, NRS 205.060, NRS 205.0832, NRS 205.090, NRS
23 205.110, NRS 205.220, NRS 205.240, NRS 205.380 and NRS 205.965, a gross misdemeanor, as
24 charged in Count I of the Indictment, Burglary, a violation of NRS 205.060, a felony, as charged in
25 Counts II through IX of the Indictment and Unlawful Possession, Making, Forgery or
26 Counterfeiting of Inventory Pricing Labels, a violation of NRS 205.965(2) and (3), a felony, as
27 charged in Count X of the Indictment and the Court having adjudged the Defendant to be an
28 Habitual Criminal as provided under NRS 207.010, the Court hereby sentences the Defendant by

1 imprisonment in the Washoe County Jail for the term of twelve (12) months, as to Count I, to run
2 concurrently with the sentences imposed in Counts II through X. As to Count II, he be punished by
3 imprisonment in the Nevada State Prison for the term of Life with parole eligibility beginning after
4 ten (10) years has been served. As to Count III, he be punished by imprisonment in the Nevada
5 State Prison for the term of Life with parole eligibility beginning after ten (10) years has been
6 served, to run concurrently with Count II. As to Count IV, he be punished by imprisonment in the
7 Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years has
8 been served, to run concurrently with Count III. As to Count V, he be punished by imprisonment in
9 the Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years has
10 been served, to run concurrently with Count IV. As to Count VI, he be punished by imprisonment
11 in the Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years
12 has been served, to run concurrently with Count V. As to Count VII, he be punished by
13 imprisonment in the Nevada State Prison for the term of Life with parole eligibility beginning after
14 ten (10) years has been served, to run concurrently with Count VI. As to Count VIII, he be
15 punished by imprisonment in the Nevada State Prison for the term of Life with parole eligibility
16 beginning after ten (10) years has been served, to run concurrently with Count VII. As to Count IX,
17 he be punished by imprisonment in the Nevada State Prison for the term of Life with parole
18 eligibility beginning after ten (10) years has been served, to run concurrently with Count VIII. As
19 to Count X, he be punished by imprisonment in the Nevada State Prison for the term of Life with
20 parole eligibility beginning after ten (10) years has been served, to run consecutively to Counts II
21 through IX. The Defendant is further ordered to pay the statutory Twenty-Five Dollar (\$25.00)
22 administrative assessment fee, restitution in the amount of Ten Thousand Three Hundred Thirty-
23 Nine Dollars and Sixteen Cents (\$10,339.16). The Defendant is given zero (0) days time served.

24 ///

25 ///

26 ///

27 ///

28 ///

1 It is further ordered the above sentence shall run consecutively to any other sentence
2 the Defendant is obligated to serve.

3 Dated this 14 day of June, 2013
4 NUNC PRO TUNC to the 1st day of April, 2004.

5
6 
7 DISTRICT JUDGE
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******* IMPORTANT NOTICE - READ THIS INFORMATION *******
PROOF OF SERVICE OF ELECTRONIC FILING

-

A filing has been submitted to the court RE: CR03-1263
Judge: ELLIOTT SATTLER
Official File Stamp: 06-18-2013:08:18:50
Clerk Accepted: 06-18-2013:08:19:19
Court: Second Judicial District Court - State of Nevada
Case Title: STATE VS. FERRILL JOSEPH VOLPICELLI
(D10)
Document(s) Submitted: Judgment of Conviction-Amended
Filed By: Rhianna Cotter

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

-

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

DIV. OF PAROLE & PROBATION
CHRISTIAN WILSON, ESQ. for STATE OF
NEVADA
TERRENCE MCCARTHY, ESQ. for STATE OF
NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

FERRILL VOLPICELLI
STATE OF NEVADA

CR03-1263 DC-9900047177-001
STATE VS. FERRILL JOSEPH VOL. 2 Pages
District Court 07/01/2013 10 25 AM
Washoe County 2515
DOC ASMTT

LCC LL FORM 26.064

Case No. CR03-1263

Dept. No. 10

FILED

JUL - 1 2013

JOEY HASTINGS, CLERK
By: [Signature]
DEPUTY CLERK

IN THE Second JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF Washoe

* * * * *

THE STATE OF NEVADA,

Plaintiff,

-vs-

Ferrill J. Volpicelli,

Defendant.

NOTICE OF APPEAL N RAP 4
with erratum issues for
Presentation FRAPP Proc 28 et seq
FRE 201 NRS 47.1 et seq.
Judicial Notice of Attached

.. Direct Appeal Notice..

NOTICE IS GIVEN that Defendant, FERRILL J. VOLPICELLI,
in pro se, hereby appeals to the Nevada Supreme Court the
MOTION TO CORRECT JUDGMENT OF CONVICTION
filed/entered on or about the 4th day of JUNE, 2013,
in the above-entitled Court.

Dated this 28 day of JUNE, 2013.

[Signature] #79505
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Defendant In Pro Se

V6.1184


CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL to the below address(es) on this 28 day of JUNE, 2013, by placing same in the U.S. Mail via prison law library staff:

NEVADA'S WOODS
COUNTY DISTRICT
ATTORNEY

PBB 30083

RENO, NV 89520-3083


FERRIL VOLPICELLI #72565
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Defendant In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding NOTICE OF APPEAL filed in District Court Case No. CR03-1263 does not contain the social security number of any person.

Dated this 28 day of JUNE, 2013


FERRIL VOLPICELLI

Defendant In Pro Se

CR03-1263
STATE VS FERRILL JOSEPH VOL 2 Pages
District Court 07/01/2013 10 27 AM
Washoe County 1650
DOC ASMITA

LCC LL FORM 26.014

Case No. CR03-1263

Dept. No. 10

FILED

JUL 1 2013

JOEY HASTINGS, CLERK

By: [Signature]
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,)

Plaintiff)

-vs-

FERRILL T. VOLPACCHI,)

Defendant.)

ERRATUM NOTICE OF APPEAL
ISSUES TO BE RAISED

NRAP 3C
FRE 201, NRS 41.130-42.120
FRAP 28 et seq.

CERTIFICATION OF ISSUES

COMES NOW FERRILL T. VOLPACCHI in Pro Se to File this
ERRATUM of ISSUES for Direct Appeal within the
Accompanying Memorandum in Support thereof.

PURSUANT TO HUGHES V. KEEFER, 404 U.S. 519, 520 (1970), Pro Se
LITIGANTS ARE ENTITLED TO BE LIBERALLY CONSIDERED.

PETITIONER FERRILL T. VOLPACCHI HEREBY CERTIFIES THE
FOLLOWING ISSUES FOR APPEAL IN THE INSTANT CASE
FROM THE AMENDED JUDGMENT OF CONVICTION, DATED
ON OR ABOUT 4 JUNE, 2013, RAISING INEFFECTIVE
ASSISTANCE OF COUNSEL ISSUES, THEREBY DENYING PETITIONER
DUE PROCESS AND EQUAL PROTECTION.
ALL ISSUES ARE VERIFIED AND PETITIONER DEEMED
HE KNOWS THE CONTENTS THEREIN.

DATED 6/28/13

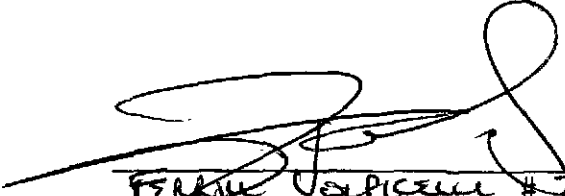
[Signature]
FERRILL T. VOLPACCHI
Defendant in Pro Se

V6.1186

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing ERRAND NOTICE OF APPEAL ISSUES / CERTIFICATION to the below address(es) on this 28 day of JUNE, 20 13, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

WYSCHE COUNTY
DISTRICT COURTNEY
POB 30013
RENO, NV 89520-3000

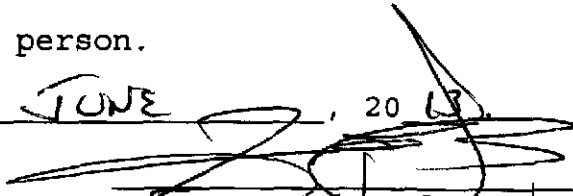

PENELope #7828
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Penelope In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding ERRAND NOTICE OF APPEAL ISSUES / CERTIFICATION filed in District Court Case No. CA03-1263 does not contain the social security number of any person.

Dated this 28 day of JUNE, 20 13


PENELope
Penelope In Pro Se

CR03-1263
STATE VS FERRILL JOSEPH VOL 4 Pages
District Court 07/01/2013 10 29 AM
Washoe County 2490
DOC
ASMITH

LCC11 FORM 20.014

CODE:

FERRILL JOSEPH VOL 4 #79565

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

PETITIONER In Pro Se

FILED

JUL - 1 2013

JOEY HASTINGS, CLERK

By:

DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

FERRILL JOSEPH VOL 4,

Case No. CR03-P1263

PETITIONER,

Dept. No. 10

-vs-

STATE OF NEVADA,

RESPONDENT.

MOTION FOR CONTINUANCE OR
STAY OF PROCEEDINGS WITH
PENDING SUCCESSIVE WRIT

PETITIONER FERRILL JOSEPH VOL 4, SUBMITS THIS
MOTION FOR CONTINUANCE OR STAY OF PROCEEDINGS
WITH PENDING SUCCESSIVE WRIT FILED APRIL 23
2013, MOVING THIS COURT TO CONTINUE OR
STAY THE INSTANT HABEAS CORPUS PROCEEDINGS
SO AS TO PERMIT THE PETITIONER TO
PURSUE FURTHER AND APPROPRIATE AVENUES
FOR THE PRESENTATION OF HIS CLAIM IN
OTHER NEVADA STATE AND FEDERAL COURTS.
THIS MOTION IS BASED UPON LR 6-1;

V6.1188

1 LR 7-2, THE COURT'S INHERENT AUTHORITY
2 TO GRANT THE MOTION; ALL PAPERS, PLEADINGS
3 AND DOCUMENTS ON FILE, AND THE FOLLOWING
4 POINTS AND AUTHORITIES.
5

6 POINTS AND AUTHORITIES

7
8 PETITIONER ASSERTS THAT A PRESENTATION OF THE
9 INSTANT CLAIMS WITHIN THE PENDING WRIT
10 COULD BE MADE ON DIRECT APPEAL TO THE
11 NEVADA SUPREME COURT BECAUSE OF THE
12 AMENDED JUDGMENT OF CONVICTION DATED
13 JUNE 4TH 2013. FROM THERE, THE EXHAUSTED
14 GROUNDS COULD BE REVIEWED FURTHER VIA
15 FEDERAL REVIEW BY 28 USC 2254. HOWEVER,
16 IN THE EVENT THE NEVADA SUPREME
17 COURT WERE NOT ENTERTAIN THE EXHAUSTIVE
18 REVIEW OF PETITIONER'S GROUNDS, A STAY
19 OR CONTINUANCE OF THE PENDING WRIT
20 OF HABEAS CORPUS (POST-CONVICTION) WOULD
21 AVOID THEM THE OPPORTUNITY FOR AN
22 UNAMBIGUOUS REVIEW BY THIS COURT.
23

24
25 PETITIONER ASKS FOR SAID STAY OR CONTINUANCE
26 SO THAT HE MAY AVAIL HIMSELF OF A STATE
27 REMEDY TO ACHIEVE THE OBJECTIVE OF A
28

1 COMPREHENSIVE REVIEW OF FETTERED CLAIMS,
2 AND NOT FOR THE PURPOSE OF DEATH MATTER.

3 IN FACT, IT WOULD BE TUDICALLY PROBIDENT
4 AS SAID STAY WOULD SAVE THIS COURT'S
5 TIME IN THE EVENT PETITIONER'S GAMBIT
6 OF GROUNDS COULD BE DEALT WITH ON DIRECT
7 APPEAL.

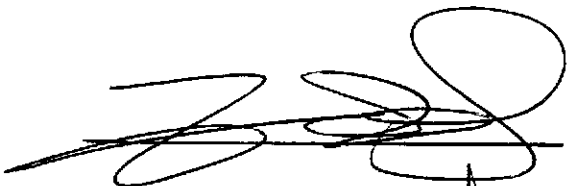
8
9 THIS COURT HAS DISCRETION TO GRANT A STAY
10 OR CONTINUANCE WHERE JUSTICE WOULD BE
11 SEEN WITHOUT BENEFIT TO THE PARTIES.

12 FURTHERMORE, NOTHING INHERENT IN PETITIONER'S
13 MOTION IS INCOMPATIBLE WITH AEDPA'S
14 PURPOSE, OR CONTRARY TO APPLICABLE NRCP, OR
15 NRAL.
16

17 CONCLUSION

18
19 FOR THE REASON(S) SET FORTH ABOVE, THIS COURT
20 SHOULD GRANT THE INSTANT MOTION UNIL SEET
21 THAT PETITIONER HAS THE AN OPPORTUNITY
22 TO HAVE THE APPROPRIATE COURT REVIEW THE
23 GROUNDS IN A PROPERLY CORRECT MANNER.
24
25

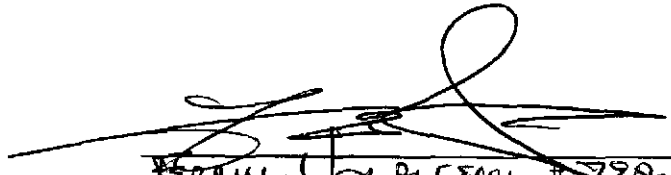
26
27 DATED this 28 DAY
28 OF JUNE, 2013


FERRILL J. VOLPICELLI
PETITIONER IN PRO SE

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Motion For Continuance of Stay of Proceedings to the below address(es) on this 28 day of JUNE, 2013, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

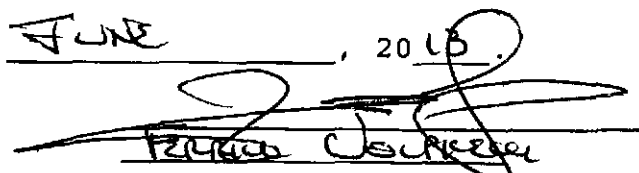
WASHOE COUNTY
DISTRICT ATTORNEY
POB 30083
RENO, NV 89520-3083


Petitioner #728045
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Motion For Continuance of Stay of Proceedings filed in District Court Case No. CR23-11223 does not contain the social security number of any person.

Dated this 28 day of JUNE, 2013.


Petitioner
In Pro Se

1 Case No. CR03-1263

2 Dept. No. 10

FILED

JUL - 1 2013

JOEY HASTINGS, CLERK

By: [Signature]
DEPUTY CLERK

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF Washoe

8 * * * * *

9 STATE OF NEVADA,)

10 PLAINTIFF,)

11 -vs-

12 FERRILL T. VOLICELLI,)

13 DEFENDANT.)

Memorandum of Points
AND AUTHORITIES IN
SUPPORT OF NOTICE OF
APPEAL ISSUES NRS 47 et seq.

14
15 COMES NOW DEFENDANT FERRILL T. VOLICELLI, IN PRO SE
16 AND SUBMITS THIS MEMORANDUM OF POINTS & AUTHORITIES
17 IN SUPPORT OF HIS DIRECT APPEAL IN THE ABOVE ACTION.
18 DEFENDANT RESPECTFULLY REQUESTS THAT THE NEVADA
19 SUPREME COURT REVIEW EACH OF THE TWENTY-THREE
20 GROUNDS CONSTITUTIONALLY FOR DUE PROCESS & EQUAL
21 PROTECTION TRANSGRESSIONS UNDER THE 5TH & 14TH
22 AMENDMENTS; AND THEN SEPARATELY AS INEFFECTIVE
23 ASSISTANCE OF COUNSEL UNDER THE 6TH & 14TH
24 AMENDMENTS. * (SPECIFIC TO GROUNDS 1 THROUGH 23)
25 THIS MEMORANDUM IS BASED ON NRS 3c et seq,
26 ALL PAPERS ON FILE HEREIN, AS WELL AS THE
27 FOLLOWING POINTS & AUTHORITIES.
28

CR03-1263
STATE VS. FERRILL JOSEPH V. 116 Pages
District Court 07/01/2013 10:29 AM
Washoe County 1960
DOC ASMTU

Statement Of The Case

A Grand Jury was convened on June 11, 2003, to determine whether a true bill should be made against Ferrill Joseph Volpicelli, hereinafter called Petitioner. An Indictment was filed against Petitioner on June 11, 2003. An arraignment on the Indictment was heard on June 18, 2003. Trial counsel filed a Petition for Writ of Habeas Corpus on September 4, 2003. An Opposition to Petition for Writ of Habeas Corpus was filed on September 4, 2003. Trial counsel filed a Reply in Support of Petition for Writ of Habeas Corpus on September 17, 2003. The State filed Notice of Intent to Seek Habitual Criminal Status on October 9, 2003. The district court filed an Order granting the Motion to Suppress regarding the presentation of Petitioner's prior bad acts to the grand jury and denied the Motion to Quash the Indictment. Jury trial commenced and Petitioner was found guilty of all charges within the Indictment. A presentence report was done on November 25, 2003. A sentencing hearing was held on April 1, 2004. During sentencing, trial counsel argued that Petitioner had some mental health problems and referred to competency reports that had been requested and received in another recent case. Additional information was provided during the sentencing hearing for district court's consideration. These included exhibits 1-7, certificates of achievement, and letters of completion from trial counsel. The State presented three certificates of judgment of convictions 1997, 1998 and 2004, and a photograph of Petitioner while in custody, which was sent to his family. Judgment was filed on April 1, 2004. Notice of Appeal was filed on April 19, 2004. An Order declaring

Petitioner a Habitual Criminal was filed on June 1, 2004. Counsel for Appellant filed an Opening Brief in the Nevada Supreme Court on or about July 14, 2004. Respondents filed an Answering Brief on or about August 6, 2004. The Nevada Supreme Court issued it's Order of Affirmance on JUNE 29, 2005. Petitioner's June 4th, 2013 amended judgment of conviction compels Nevada Supreme Court's review on appeal under following Constitutionally raised issues.

Statement Of The Facts

Petitioner was on parole and living in Reno, Nevada from approximately June 1, 2001 through October, 17, 2001. Petitioner was being investigated by the Washoe County Repeat Offender Program (ROP). ROP detectives conducted surveillance on Petitioner in a non-continuous fashion. ROP detectives also non-continuously surveilled Petitioner's alleged co-conspirator, Brett Bowman, also on parole at the time of the instant offenses.

The State and detectives allege that Petitioner entered several retail establishments in the Reno area and proceeded to write information on a tablet, allegedly copying pricing information from various items.

Detectives testified that Brett Bowman entered various retail establishments wherein he would affix pricing labels to merchandise, purchase the merchandise at a discounted rate, and leave the retail establishment with the property, thus constituting burglary, larceny, uttering forged instruments and/or obtaining property under false pretense.

The State alleges that the property purchased from the Reno area

stores was then returned to the retail establishments for a correct retail price, thus allowing Petitioner and Brett Bowman to reap a profit. (However, according to police records, detectives located and searched a personal storage unit rented by Petitioner's step-daughter. ROP detectives secured numerous items, new, and in unopened boxes from the storage unit. Detectives or other personnel returned the items to various retail stores in the Reno area, thus eliminating any and all financial impact on the establishments. Additionally, if the State's theory is accurate, the retail establishments reaped a profit by securing their property which was originally purchased at some price.)

On October 17, 2001, Petitioner waited outside a Wal-Mart store in south Reno where Brett Bowman exited the store with a bicycle. Bowman then placed the bicycle in the van with Petitioner, and Brett Bowman sat in the passenger seat of the vehicle while Petitioner drove north on Virginia Street. ROP detectives commenced a traffic stop on Petitioner and Bowman who were then both subsequently arrested. A subsequent search of the van revealed a small black vinyl bag containing a label maker, UPC bar code labels, receipts, the bicycle, and numerous other items.

Brett Bowman and various detectives testified at Petitioner's trial alleging the entire above noted scheme was entirely the result of Petitioner's actions and planning.

Brett Bowman eventually received a sentence of only sixteen to forty two (16-42) months for his actions, while the Petitioner was sentenced to nine (9) life sentences..

Applicable Law-Standard For Effective Assistance Of Counsel

Petitioner has no choice but to raise the questions regarding the effectiveness of his counsel through the forum of a Petition for Writ of Habeas Corpus (Post-Conviction). See Franklin v. State, 110 Nev. 750, 877 P2d 1058 (1994). The question of ineffective assistance of counsel should not be considered in a direct appeal from a judgment of conviction. Instead, the issues should be raised, in the first instance, in the district court in a petition for post-conviction relief so that an evidentiary record regarding counsel's performance can be created. See Wallach v. State, 106 Nev. 470, 796 P2d 224 (1990).

It is possible for Petitioner to go straight to the Nevada Supreme Court on the issues of ineffectiveness of counsel, but the fact setting must be one where the Supreme Court can determine that there was not good reason for counsel's actions that could exist. See Jones v. State, 110 Nev. 730, 877 P2d 1052 (1994).

In the case at hand, the appropriate process is for the Petitioner to raise the claims of ineffective assistance of counsel at the Supreme court level in the procedure of a petition for direct appeal relief and the district court to entertain the matter by conducting an evidentiary hearing.

In State v. Love, 109 Nev. 1136, 865 P2d 322 (1993), the Nevada Supreme Court reviewed the issue of whether or not a Defendant had received ineffective assistance of counsel at trial in violation of the Sixth Amendment. The Nevada Supreme Court held that this question is a mixed question of law in fact and is subject to

independent review. The Supreme Court reiterated the ruling of Strickland v. Washington, 466 U.S. 668 (1984). The Nevada Supreme Court indicated that the test on a claim of ineffective assistance of counsel is that of "reasonably effective assistance" as enunciated by the United States Supreme Court in Strickland. The Nevada Supreme Court revisited this issue in Warden v. Lyons, 100 Nev. 430 (1984) and Dawson v. State, 108 Nev. 112 (1992). The Supreme Court has provided a two-prong test in that the Defendant must show first that counsel's performance was deficient and second, that the Defendant was prejudiced by this deficiency. The court will uphold a presumption that counsel was effective. Petitioner must, therefore, show that his attorney's performance was unreasonable under prevailing professional norms and that he was prejudiced as a result of the deficient performance. In Smithhart v. State, 86 Nev. 925, (1970), the Nevada Supreme Court held that it will presume that an attorney has fully discharged their duties and that such presumption can only be overcome by strong and convincing proof to the contrary. The Court went on in Warden v. Lischko, 90 Nev. 220 (1974) to hold that the standard of review of counsel's performance was whether the representation of counsel was of such low caliber as to reduce the trial to a sham, a farce or a pretense. Thus, Petitioner is properly before the court on issues of ineffective assistance of counsel and would request this court grant him an evidentiary hearing on these issues.

GROUND ONE

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT ISSUES ON DIRECT APPEAL TO THE NEVADA SUPREME COURT IN A PROPER CONSTITUTIONAL MANNER; THEREBY PREJUDICING AND BURDENING PETITIONER. THIS TANTAMOUNTS TO A VIOLATION OF PETITIONER'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND THE DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The court appointed Appellate counsel, Mary Lou Wilson, Esq., to represent Petitioner on direct appeal. However, she failed to present issues to the Nevada Supreme Court in a federalized and constitutional manner. This effectively precluded Petitioner from presenting those issues to a federal court for review at a possible future date.

Appellate counsel presented the following issues to the Nevada Supreme Court in an Opening Brief. (See Supreme Court Case No. 43203)

I. WHETHER THE DISTRICT COURT ERRED IN FINDING THE INDICTMENT LAWFUL WHEN THE PROSECUTOR ADMITTED THE 1998 BURGLARY CONVICTION DURING THE GRAND JURY HEARING.

II. WHETHER APPELLANT WAS COMPETENT DURING THE CRIMES.

III. WHETHER THE JURY FOUND SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF ALL COUNTS IN THE INDICTMENT.

IV. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN FINDING HABITUAL CRIMINAL STATUS FOR TWO COUNTS AND RUNNING THEM CONSECUTIVE.

The issues, as noted above, were not presented as constitutional issues; thereby preventing the Nevada Supreme Court's review of the issues under constitutional (U.S. & Nevada) scrutiny.

As is clear, counsel never pointed to constitutional errors or federal law in the above issues in order to preserve those issues

for federal review. This clearly put Petitioner at a disadvantage, wherein Petitioner could have filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C 2254 in the United States District Court if it were not for the failures of counsel. A federal court will not grant a state prisoner's petition for habeas relief until prisoner has exhausted his available state remedies for all claims raised. See Rose v. Lundy, 455 U.S. 509 (1982). State remedies have not been exhausted unless the claim has been "fairly presented" to the state courts and the highest state court has disposed of the claim on the merits. See Carothers v. Rhay, 594 F2d 225, 228 (9th Cir. 1979). Furthermore, the state remedies are only exhausted where the Petitioner "characterized the claims, he raised in the state proceedings specifically as federal claims." See Lyons v. Crawford, 232 F3d 666, 670 (9th Cir. 2000). The constitutional rights to effective assistance of counsel extend to a direct appeal. See Burke v. State, 110 Nev. 1366, 1368, 887 P2d 267, 268 (1994); and Evitts v. Lucey, Supra. A claim of ineffective assistance of counsel is reviewed under the "reasonable effective assistance" test set forth in Strickland v. Washington, Supra and Kirksey v. State, Supra.

Even the issues counsel did raise in the Opening Brief Statement were not addressed as far as their federal implications are concerned. It was ineffective for counsel to ignore constitutional issues, as failure to raise them on appeal may preclude further remedy in the federal court system. Generally, any exhausted claims must be dismissed without prejudice for failure to exhaust

all state created remedies. "To satisfy the exhaustion requirement, Petitioner must present every claim raised in the federal petition to each level of state courts." See Doctor v. Walters, 96 F3d 675 (3rd Cir. 1996).

Appellate counsel's failure to raise all viable issues on appeal, including all constitutional issues, fell below an objective standard of reasonableness. Because counsel failed to use her expertise and legal training to present all of Petitioner's appellate issues before the court, Petitioner was prejudiced. Pursuant to the standards set forth in Strickland, Supra, counsel denied Petitioner the right to effective assistance of counsel during appeal.

Due to counsel's errors, Petitioner is forced to bring forth Grounds Two, Three, Four, Five and Six which are cited below.

GROUND TWO

PETITIONER WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION WHEN THE NEVADA SUPREME COURT FAILED TO PROVIDE ADEQUATE APPELLATE REVIEW ON DIRECT APPEAL; IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On behalf of Petitioner, appellate counsel, Mary Lou Wilson, submitted an Opening Brief to the Nevada Supreme Court on or about July 14, 2004. Petitioner did not review or sign or authorize the contents of the brief prior to submittal. The pleading contained brief arguments on four (4) grounds for relief outlined in Ground One, above.

The Nevada Supreme Court issued an Order of Affirmance on wherein the court did not apply the controlling precedent(s) of the United States Supreme Court. The court did not apply the just and proper review necessary, under constitutional scrutiny, to protect Petitioner's rights as guaranteed by the U.S. Constitution.

The Nevada Supreme Court has discretion to review issues of a U.S. Constitutional magnitude pursuant to the Nevada Constitution, Article 1 sec. 2, as well as Article 6 sec.(s) 4 & 6.

The Nevada Supreme Court has exercised its power to review U.S. Constitutional issues in the past. see e.g. Natchez v. State, 721 P2d 361.

Article 1, section 2 of the Nevada Constitution gives the Nevada Supreme Court the "power to compel obedience to the U.S. Constitutional Authority."

The Nevada Supreme Court failed to provide the necessary and adequate judicial review as necessary to protect Petitioner's U.S. Constitutional rights of equal protection and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.

Petitioner is now compelled to bring forth the following grounds (Grounds Three, Four, Five & Six) as outlined below, for this Court's review, seeking application of the U.S. Supreme Court and Constitutional precedence.

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GROUND THREE

PETITIONER'S RIGHTS TO DUE PROCESS WERE VIOLATED WHEN THE PROSECUTOR ADMITTED A PRIOR BURGLARY CONVICTION TO THE GRAND JURY IN SUPPORT OF AN INDICTMENT IN VIOLATION OF THE RIGHTS GUARANTEED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The district court erred in finding the Indictment should stand after the prosecutor admitted Petitioner's 1998 burglary conviction. At the conclusion of a nine-witness grand jury hearing on June 11, 2003, the prosecutor admitted Exhibit 16, Petitioner's 1998 burglary conviction, for a limited purpose. The prosecutor explained that the allegation is not relevant as to whether Petitioner committed the offenses charged in the Indictment. However, it was relevant for the sentencing judge if the Petitioner was convicted of any of the burglary charges. Thereafter, trial counsel filed a pretrial petition for writ of habeas corpus. It stated that the prior burglary conviction was improperly presented for the grand jury's consideration. The State filed an Opposition to the writ of habeas corpus on September 4, 2003, indicating that the habeas corpus is an inappropriate vehicle to challenge the State's evidence at a grand jury proceeding; the State appropriately introduced the 1998 burglary conviction for a limited purpose of notice; and the State's evidence at the grand jury was sufficient to indict the Petitioner even if the prior conviction was inadmissible. The proper vehicle to challenge the validity of evidence presented at the grand jury proceedings is a Motion. NRS 174.105(1), Franklin v. State, 89 Nev. 382, 387, 513 P2d 1252, 1256

(1973); Cook v. State, 85 Nev. 692, 462 P2d 523 (1969), and Turpin v. Sheriff, 87 Nev. 236, 484 P2d 1083 (1971). The State relied upon NRS 484.3792 (2), Nevada's DUI sentencing provision, requiring that evidence of prior DUI convictions used to enhance a DUI to a felony be presented to the grand jury. Finally, the State argued that even if the admissibility of the 1998 burglary conviction was improper, there was sufficient evidence to return a true bill. The State relied on the nine witnesses and fifteen exhibits to bolster their argument. Trial counsel replied by asking the district court to consider the writ as a motion, NRS 484.3792(2) inapplicable to the facts, and Petitioner was unfairly prejudiced by the admission of the 1998 burglary conviction. The district court held that the Petitioner's pretrial writ of habeas corpus was considered as a motion to suppress under NRS 174.105(2). After consideration of the arguments submitted, the court granted the Petitioner's motion to suppress finding that the prior burglary conviction, when presented during a seven count burglary grand jury proceeding, was improper bad act evidence and the cases cited by the State relating to DUI law were inapplicable. However, the request to quash the Indictment was denied because the State presented nine witnesses, including an accomplice, who testified to witnessing various acts committed by Petitioner during the ten charged crimes, as well as describing the merchandise obtained.

The district court erred in not quashing the Indictment based upon the improper admission of the 1998 burglary conviction because the grand jurors were tainted by this information and returned a true

bill. Furthermore, even if the nature of the witnesses and exhibits presented during the grand jury hearing made it reasonable to believe that the slight to marginal test for the Indictment was met, the question of whether improper evidence substantially influenced the grand jury's decision to indict, or whether there is grave doubt that the decision to indict was free from substantial influence of improper evidence, thereby justifying a dismissal of said Indictment, requires examination of the state of mind of the reasonable grand juror. U.S. v. Sigma Intern, 244 F3d 841. Evidence is unfairly prejudicial if it tempts the jury to decide the case on an improper basis; especially when there exists a similarity between the charged criminal act(s) and the prior bad act. The more similar the acts, the greater the likelihood that the jury will draw the improper inference that if the defendant did it once, he probably did it again. Williams v. State, 99 F3d 432, 441.

In addition, even if this Court considers that the prosecutorial misconduct was harmless beyond a reasonable doubt given the subsequent jury trial convictions, there is case precedence from the U.S. Supreme Court which redirects the harmless error analysis to the grand jury proceedings; rather than the outcome of the trial. There, it was held that when a defendant raises a constitutional objection prior to the conclusion of trial-the rule set forth in Bank of Nova Scotia controls. That is to say, courts should not hesitate to remedy the violation because the Indictment is NOT, in reality, "of a grand jury" (USCA 5). U.S. v. Bank of

Nova Scotia, 108 Sct 2369, 2374.

In sum, the Ninth Circuit Court of Appeals has held that a prosecutor may not seek a grand jury indictment by proffering tainted, prejudicial evidence to the grand jury. U.S. v. De Rosa, 783 F2d 1401, (9th Cir. 1986). Also, the existence of prosecutorial discretion may not be arbitrary and capricious. U.S. v. Samango, 607 F2d 877, 881 (9th Cir. 1979).

GROUND FOUR

PETITIONER'S CONVICTIONS ARE CONSTITUTIONALLY INVALID DUE TO PETITIONER'S MENTAL INCOMPETENCE AT THE TIME OF THE ALLEGED CRIMES IN VIOLATION OF PETITIONER'S RIGHTS OF EQUAL PROTECTION AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

In an earlier case, Petitioner was evaluated for competency by Dr. Robert Hiller and Dr. Bill Davis. At that time, Dr. Hiller noted that Petitioner presented with numerous characteristics associated with a significant personality disorder and a history of significant polysubstance dependence. Additionally, Dr. Davis opined that Petitioner had an adjustment disorder with mixed anxiety and depressed mood. The Department of Parole and Probation interviewed Petitioner after his conviction, and, at that time, purported that the Petitioner admitted to suffering from asthma, sleep apnea, vertigo, depression, panic anxiety disorder, and drug addiction. During sentencing, trial counsel advised the parties that Petitioner was diagnosed with clinical depression, prescribed Prozac, and felt better than he had ever felt in his whole life. Furthermore, since Petitioner was in custody, October 2001, he was

successfully treated for his mental illness condition and that he had been productive. Thereafter, trial counsel admitted several positive documents showing Petitioner's achievements while in custody awaiting sentencing. Therefore, Petitioner was untreated for his mental illness until he was placed in custody. Thereafter, Petitioner had improved mentally and become productive, completing programs and staying trouble free at jail. Petitioner described his family members as having mental illnesses. For example, Petitioner's sister had been on psychotropic medication for ten to fifteen years, because of a familial chemical imbalance. Petitioner further explained his drug addiction and how that came about because he was self-medicating and attempting to produce some endorphins. Petitioner believed that he needed some psychotherapy to help his mental illness. Therefore, given the nature of Petitioner's mental health problems, and his obvious rehabilitation after receiving medical treatment, he was ostensibly not competent during the crimes.

To this, the courts have long held that a defendant must be competent at the time of the alleged crimes for a valid conviction. Additionally, a person lacks sufficient mens rea if he is mentally incompetent at the time of the alleged crimes. See Santobello v. New York, 404 U.S. 257, 92 Sct 495 (1971); Moran v. Godinez, 57 F3d 690.

Clearly, there exists sufficient evidence in support of Petitioner's mental incompetence during the alleged crimes. Hence, the imposition of sentence on Petitioner is a violation of his constitutional rights and must be vacated.

GROUND FIVE

PETITIONER'S SENTENCES AND CONVICTIONS ARE CONSTITUTIONALLY INVALID DUE TO INSUFFICIENT EVIDENCE BEING PRODUCED AT TRIAL IN VIOLATION OF PETITIONER'S RIGHTS OF EQUAL PROTECTION AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The evidence presented during the jury trial encompassed many witnesses and documents. For example, on November 12, 2003, the prosecutor called Detective Della to testify that he and other detectives surveyed Petitioner over a period of time noticing that he had access to a storage unit in Sparks in which he moved boxes in and out of; picked up Brett Bowman while driving his van; observed Mr. Bowman purchase a mountain bike at a great reduction in price; arrested Petitioner and Mr. Bowman while driving after a fraudulent purchase; and located property and indicia of fraud within the vehicle. Other surveillance officers presented were Detective Scott Armitage, who noticed Petitioner looking at labels and recording information on a small note pad; inventoried Petitioner's van upon arrest; and located comforters, a mountain bike, a label maker, bar code labels, receipts and a transposition sheet inside said vehicle. Detective Lodge also noticed Petitioner looking at items from Home Depot and writing down notes on a note pad. Detective Brown noticed the same alleged suspicious behavior from Petitioner while shopping at WalMart. After arrest, Detective Thomas received a search warrant for the storage unit to which the Petitioner had legal access and located three pick-up truckloads of merchandise. After receiving cooperating information from Accomplice Brett Bowman, the receipts and transposition sheet were

used to match fraudulently purchased items. According to Mr. Bowman, Petitioner would make fictitious labels reflecting lower prices and then Mr. Bowman would affix these UPC bar codes on higher priced merchandise; thereby reflecting savings of several dollars to hundreds of dollars. This included the purchases of one or more home theater systems, computer monitors, sewing machines, rugs, coffee machines, a toilet, a toothbrush, and other miscellaneous items.

The defense requested, but was denied, a Motion to Dismiss the State's case for failure to prove their case based upon a violation of NRS 175.291, opining that there was no independent evidence to show Petitioner's guilt outside of Accomplice Brett Bowman's testimony. The prosecutor then argued that the question was properly for the jury to decide and that the physical evidence found in Petitioner's van and the storage unit supported Accomplice Bowman's testimony. The district court agreed with the state.

As a result, the jury convicted based upon insufficient evidence because not one witness, except Accomplice Brett Bowman, ever testified about any criminal conduct exhibited by Petitioner, and that Mr. Bowman could have achieved all crimes by himself-having access to all indicia of fraud.

Therefore, absent Accomplice Brett Bowman's testimony, nobody viewed Petitioner commit any crime. In addition, mere presence and knowledge of Accomplice Bowman's intentions are insufficient to convict aiding and abetting culpability. 512 P2d 923, and U.S. v Dingle 114 F3d 307 (D.C. Cir. 1997). As such, the jury convicted based upon insufficient evidence since NRS 175.291 provides (1) a

conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

It is abundantly clear that the courts have long recognized not only that the uncorroborated testimony of an accomplice has doubtful worth, but that his incrimination of another is not corroborated simply because he accurately describes the crime or the circumstances thereof. The requirement that a criminal charge must be proven beyond a reasonable doubt is "indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." In re Winship, 397 U.S. 358, 364, 90 Sct 1068, 1072, 25 L.Ed. 2d 368 (1970).

Hence, since a conviction shall not be had based on uncorroborated testimony of an accomplice, as cited at NRS 175.291(1) and in Austin v. State, 491 P2d 714 (Nev. 1971), as well as U.S. v. Lainq, 889 F2d (D.C. Cir. 1989), Petitioner's convictions rest solely on the testimony of an alleged Accomplice and evidence submitted on the basis of the Accomplice's testimony; thereby rendering Petitioner's convictions and sentences constitutionally invalid.

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GROUND SIX

PETITIONER'S CONVICTIONS AND SENTENCES ARE UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION AND DUE PROCESS OF LAW PROTECTIONS OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE COURT IMPOSED THE HABITUAL CRIMINAL STATUTES UPON PETITIONER.

The State filed Notice of Intent to Seek the Habitual Criminal Status on October 9, 2003, under NRS 207.010. Upon review of the prior certificates of judgment of convictions from 1997, 1998, and 2004, and hearing argument and witnesses during sentencing, the district court found Petitioner to be an Habitual Criminal and filed an Order on June 1, 2004. During the sentencing hearing, the State requested that the district court find Petitioner an habitual criminal for a variety of reasons. Initially, the State marked and admitted the three prior certificates of judgment of convictions under exhibits 1, 2, and 3. ^{see exhibit [**1]} The first certificate of conviction was filed February 11, 2004, in CR02-0148, involving the crime of aiding and abetting in the commission of attempting to obtain money by false pretenses. The prior certification showed that Petitioner was represented by counsel, had a sentencing, and judgment of conviction sentencing Petitioner to 12-48 months in prison consecutive to CR03-1263. The second prior certificate of conviction of judgment was filed November 3, 2003, 1998, in CR98-2160, involving two counts of burglary. This prior certification showed an arraignment with the assistance of counsel, a guilty plea memorandum, and sentence of 24-72 and 16-72 months in prison to run consecutive to each other and consecutive to the federal prison term. The third certificate of judgment of

conviction was filed on May 16, 1997, in CR-N-96-46-HDM (RAM), in the United States District Court, involving four counts of tax perjury. Petitioner was represented by counsel and received 22 months for each count to run concurrent with each other. Thereafter, the State requested that the district court impose a sentence of life of imprisonment with 10 years minimum served in prison on each felony count. The State called Officer Scott Hopkins as a sentencing witness. During the surveillance of Petitioner in 1997, he testified that he observed Petitioner committing these crimes after he had been sentenced for his federal case. Allegedly, the Petitioner had commented to the officer that the federal prison time of 22 months was worth a million; insinuating that he had made a million dollars through his various fraud scams. The officer identified a photograph of Petitioner that was allegedly sent by him to Lori, Petitioner's wife at the time, which was inscribed on the back stating, "I'm too sexy for this place. It has been like a vacation. Just missing stores." The State called Officer Reed Thomas to describe the Repeat Offender Program's involvement with the Petitioner, and the officer's contact with Petitioner and Brett Bowman. The officer discussed Petitioner's use of his son to obtain money by false pretenses; advising his daughter to run up their credit cards; putting the storage unit in his step-daughter's name; and describing the contents of the storage unit packed with stolen items. Finally, the officer testified to making a report as to the estimate of value and property located in the storage unit at over ten thousand dollars of merchandise, as well as a speculative idea of

Petitioner's alleged tax-free income per year at somewhere between fifty thousand to ninety three thousand dollars. The State explained the federal conviction for tax perjury to the parties during the sentencing hearing, explaining that from 1989 and 1992, Petitioner allegedly managed to accumulate eight hundred thousand dollars worth of credits on his credit cards which were allegedly used to pay down mortgages, obtain a rental unit, and purchased personal items for himself and his family. Thereafter, trial counsel attempted to bring forward mitigating evidence on behalf of Petitioner. After finally being properly diagnosed and treated for his mental illness, Petitioner was presented as feeling better than he had ever felt in his life. From the evaluations done by Drs. Hiller and Davis, Petitioner received mental health care through psychotropic medication during the last two years of incarceration. Trial counsel then outlined Petitioner's productivity during his jail experience and proffered letters and certificates of achievement. Although not specifically reviewed by trial counsel, these documents included: Street Readiness Program, Parenting Module, Substance Abuse Addiction and Recovery Module, Relapse Prevention Module, Anger Management Module, two classes in computer assisted Chemical Abuse Prevention, and a Domestic Violence Module. Additional credentials included Inmate Achievement Certificates in Survive And Change Programs, two classes for Life Skills And Overcoming Substance Abuse, Literacy/ESL Tutor Training, NSP Gardening Class I, Participation in Bridges to Freedom, the Way To Happiness Course, Self Improvement and Job Search Workshop, and Christian Way In Marriage. Thereafter, trial counsel argued that

Petitioner was ready to lead a lawful life now that he had been treated for mental health conditions; he had honorable discharges from periods of probation; the disparity in treatment between Petitioner and Mr. Bowman was great wherein Accomplice Bowman received a mere 16-42 months; the mature age and intelligence of the Petitioner, all of which contribute to the Petitioner deserving a sentence of 4-40 years in prison and no habitual offender status. Petitioner explained to the district court about his troubled childhood, familial chemical imbalance, self-medication with drugs, and the need for psychotherapy. Thereafter, the district court found that upon review of Petitioner's prior record, including the prior felony convictions; the long pattern of theft, and the fact that he had allegedly made a living for years as a career criminal, he was the poster child for habitual criminality. Therefore, the district court imposed 9 terms of life in prison with the possibility of parole in ten years; two of which would run consecutive to one another and the others to run concurrently. Hence, Petitioner would have to spend at least twenty years in prison before parole eligibility and the sentences would run consecutive to any other sentencing currently being served. This includes initially expiring cases CR 98-2160, CR-N-96-46-HDM (RAM), CR02-0147 and CR02-0148. Thus, this would then bring the aggregate minimum time in custody wherein Petitioner would be eligible for parole when he attains 80 years of age.

NRS 207.010(2) indicates that the trial judge may, at his discretion, dismiss a count under the section, which is included in any indictment or information for purposes of habitual criminal

status. Clark v. State, 109 Nev. 426, 428, 851 P2d 426, 427 (1993). The decision to adjudicate an individual as a habitual criminal is not an automatic one. Sessions v. State, 106 Nev. 186, 190, 789 P2d 1242, 1244 (1990). The district court may dismiss counts brought under the habitual criminal statute when the prior offenses are stale, trivial, or where an adjudication of habitual criminality would not serve the interests of the statute or justice. Some considerations within the discretion of the district court are whether the prior convictions were violent or remote in time. Arajakas v. State, 108 Nev. 976, 983, 843 P2d 800, 805 (1992). The district court should provide reasons for finding an habitual criminal status, however, this Court has stated that there is not a requirement for the district courts to utter talismanic phrases such as "just and proper". Hughes v. State, 116 Nev. 327, 333, 996 P2d 890, 893 (2000).

In Walker v. Deeds, 50 F3d 673 (1995), the district court must weigh the appropriate factors for and against the habitual criminal enhancement. The sentencing judge is required to make an actual judgment on the question of whether it is just and proper for the defendant to be punished and segregated as a habitual criminal. In Hicks v. Oklahoma, 447 U.S. 343, 346, 100 Sct 2227, 2229 (1980), the Supreme Court held that the state laws guaranteeing a defendant procedural rights at sentencing may create liberty interests protected against arbitrary deprivations by the due process clause of the Fourteenth Amendment. Therefore, when a state has provided a specific method for determining whether a certain sentence shall

be imposed, "it is not to say that the defendant's interest in having that method adhered to is merely a matter of state procedural law." Fetterly v. Paskett, 997 F2d 1295, 1300 (9th Cir. 1993) citing Hicks v. Oklahoma, cert. denied, ---U.S.---, 115 Sct. 290, 130 L.Ed.2d 205 (1994). Based on Hicks, this Court found that state law requiring that the Washington Supreme Court review and make particular findings before affirming a death sentence created a constitutionally protected interest. Campbell v. Blodgett, 997 F2d 512, 522 (9th Cir. 1992), cert. denied, ---U.S.---, 114 Sct. 1337, 127 L.Ed2d 685 (1994). Nevada's law requiring a court to review and make particularized findings that it is "just and proper" for a defendant to be adjudged a habitual offender also creates a constitutionally protected liberty interest in a sentencing procedure. In Walker v. Deeds, 50 F3d 673 (9th Cir. 1995), it was held that because the state court did not make the requisite individualized determination that it was "just and proper", Walker be adjudged a habitual offender as mandated by Nevada law, Walker's due process rights were violated.

In the present case, the district court determined habitual status after hearing from all parties. In particular, the finding was the following:

Well, in reviewing Petitioner's record, I have to consider the nature of his prior felony convictions. And the prior felony convictions, in fact, are largely part of a theft scheme that Petitioner developed years ago and persisted in stealing from stores over the course of a long time and perhaps various methods.

Apparently, he starts this activity with getting duplicate

copies of credit card receipts and then using that method to return property for full value that wasn't purchased for the full value, and progressed to more sophisticated crime of using false UPC labels on boxes of merchandise. But that shows a long pattern of this type of theft.

And not only is it theft, but it's a theft that was actually used to support Petitioner, so it's different than you see in most cases. You don't see that many people who actually earn a living from theft or crime. Usually people have other employment, they, you know, live their life generally supporting themselves lawfully but then have a sideline perhaps of criminal activity, but Petitioner in fact, is a career criminal and that's how he has made a living for years while not incarcerated.

And under all the evidence that I see here, I do in fact, find that Petitioner is a habitual criminal. In fact, you are the poster child for habitual criminality in that every time you're released from custody, it seems like you're out making a full-time living stealing. So there really isn't any doubt in my mind that the statutory scheme for habitual criminality applied to you, Petitioner.

And with that, I will sentence you as a habitual criminal. I think society needs to be protected from this level of theft where you're actually making a full good living from stealing. And also our law enforcement authorities need to devote themselves to other people than to constantly monitor you as you pursue this scheme of theft to make a living.

It appears that the district court made a finding of habitual criminal status based upon all of the evidence presented. However, the District Court abused its discretion when finding nine counts satisfied the habitual criminal statute and ran two of them consecutively; with the remaining seven running concurrent to them. When considering Petitioner's untreated mental health problems and the fact that the prior convictions were not violent, the district court abused its discretion.

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GROUND SEVEN

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROTECT PETITIONER FROM THE SENTENCING COURT IMPOSING EXCESSIVE RESTITUTION NOT SUPPORTED BY TRIAL FACTS AND/OR TRIAL EVIDENCE; THEREBY VIOLATING PETITIONER'S RIGHTS OF DUE PROCESS, FAIR TRIAL, AND EQUAL PROTECTION, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At the sentencing hearing held in this action on April 1, 2004, this Court imposed restitution of ten-thousand three-hundred thirty-nine dollars and sixteen cents (\$10,339.16), where no factual basis existed for the imposition of such an inflated amount.

The prosecution's theory of this case was that Petitioner purchased sore items at a reduced price. The Reno Police Department ("RPD") officers testified that they located a storage unit containing items purported to belong to various Reno area retail establishments. The officers claim to have returned the aforementioned merchandise to its original owners. (See Exhibit [**2] Inventory List of Returned Items).

Restitution is a sentencing option, and as such, under Apprendi vs. New Jersey and Blakely vs. Washington, (530 US 466, 130 Sct 2348 (2000); and, 542 US ___, 124 Sct 2531 (2004), respectively), it was this Court's abuse of discretion to sanction Petitioner with restitution beyond that which the indictment specifically cited in the burglary counts, as well as what the trial jury adjudicated of same in their deliberation. Under Victim and Witness Protection Act, the court may not authorize restitution for losses from crimes for which Defendant is not convicted, even if those other crimes are significantly related to crimes of conviction. 18 U.S.C.A. §

3663(a); U.S. v. Young, 953 F2d 1288. Hence, Defendant's sentence with respect to restitution had to be limited to amounts in counts on which the particular Defendant was found guilty. U.S. v. Cronan, 990 F2d 663 (1st Cir. 1993). Additionally, "a Defendant cannot be ordered to pay restitution for criminal activities for which the Defendant did not admit responsibility, was not specifically charged and convicted, or did not agree to pay restitution." State v. Wallace, 100 F3d 273, 274. Moreover, district court erred in ordering restitution amounts greater than that alleged in indictment. 18 U.S.C.A. § 3651, U.S. v. Black, 767 F2d 3651, and restitution order was illegal to the extent it covered losses which were not specifically related to offense counts of conviction. U.S. v. Savely, 814 FSupp 1519. (See Exhibit(s) [**3- Items Specifically Noted in Indictment & adjudicated as such).

Aside from the foregoing issue, and if the State's theory is to be taken as true, then the various retail items were not only paid for in part, but RPD subsequently returned the items to the retail establishments as new, in unopened boxes, and in original condition. Thus, the retail stores retained a profit; as opposed to incurring a loss as a victim. Restitution amounts must be ascertained and delineated with accurate computation. It cannot exceed actual loss incurred and must be clearly set out with specific findings. U.S. v. Boyle, 10 F3d 485 (9th Cir. 1993).

Therefore, it is patently clear from the record that this Court imposed restitution upon the Petitioner; wherein there is no evidence of actual loss to any victim. Restitution is to be based on an actual pecuniary loss to the victims. U.S. v. Harper, 32 F3d 1387,

(9th Cir. 1994).

Additionally, Petitioner is indigent as proven by this Court's Order To Proceed In Forma Pauperis, on file herein. Petitioner was indigent at the time of trial and sentencing, as this Court appointed counsel to represent Petitioner. This Court did not take into consideration Petitioner's ability to pay restitution, as the record is silent as to the Court's basis or reasoning for the imposition of restitution.

The district court may order an indigent defendant to pay restitution provided that there is sufficient evidence in the record demonstrating that he will have a future ability to make restitution. U.S. v. Sarno, 73 F3d 1470, 1503 (9th Cir. 1995); U.S. v. Ramillo, 986 F2d 333, 336, n.5 (9th Cir. 1993). Due to the length of sentences imposed by this Court, the Court cannot justify the Petitioner will eventually be able to pay restitution while incarcerated for the rest of his natural life, with no viable income or employment resources while incarcerated.

This issue is properly before this Court, as the Nevada Supreme Court has held in Martinez v. State, 974 P2d 133 (Nev. 1999), as follows:

Petitioner is entitled to challenge restitution by the State and may obtain and present evidence to support that challenge.

Trial counsel's failure to object or otherwise protect Petitioner from the excessive restitution imposed by this Court was ineffective under the guarantees of the Sixth Amendment and Strickland v. Washington, supra. Petitioner has clearly been prejudiced as a result of counsel's failures.

GROUND EIGHT

TRIAL COUNSEL WAS INEFFECTIVE FOR ALLOWING PETITIONER TO BE SUBJECTED TO AN INDICTMENT/COMPLAINT CONTAINING MULTIPLICITOUS AND DUPLICITOUS CHARGES, THUS DENYING PETITIONER HIS DUE PROCESS, EQUAL PROTECTION, AND FAIR TRIAL RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The ban against duplicitous indictments derives from four (4) concerns: (1) prejudicial evidenciary rulings at trial; (2) the lack of adequate notice of the nature of the charges against a defendant; (3) prejudice in obtaining appellate review and prevention of double jeopardy; and, (4) risk of a jury's non-unanimous verdict. US v. Cooper, 966 F2d 936, 939, n.3 (5th Cir. 1992). Duplicitous indictments may prevent jurors from acquitting on a particular charge by allowing them to convict on another charge that is improperly lumped together with another offense on a single count. A duplicitous indictment precludes assurance of jury unanimity, and may prejudice a subsequent double jeopardy defense. US v. Morse, 785 F2d 771, 774 (9th Cir. 1986) (citing, US v. UCo Oil Co., 546 F2d 833, 835 (9th Cir. 1976)).

It shall be noted that the duplicitous and multiplicitous charges in this case arise due to the fact that the charges relate to acts alleged to have occurred between August 30, 2001, and October 17, 2001; wherein, trial testimony of retail investigators and RPD officers indicate there was no crime committed on the aforementioned dates by Petitioner, as is evidenced by the following quotes from the Trial Transcripts ("TT") in this matter:

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