

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

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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 7 OF 13

POST DOCUMENTS

APPELLANT

Ferrill J. Volpicelli #79565  
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Lovelock, Nevada 89419

RESPONDENT

Washoe County District Attorney's  
Office  
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Reno, Nevada 89502-3083

# APPEAL INDEX

Case No. CR03-1263  
STATE OF NEVADA vs FERRILL J VOLPICELLI  
SEPTEMBER 5, 2013

PLEADING	DATE	VOL.	PAGE NO.
AFFIDAVIT IN SUPPORT OF APPLICATION TO PROCEED IN FORMA PAUPERIS	10/11/07	8	378-379
AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS	05/11/04	3	465-467
AFFIDAVIT OF KAREN S. FRALEY	10/11/07	8	372-375
AMENDED JUDGMENT	06/18/13	6	1180-1182
ANSWER TO PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	02/05/07	8	335-337
APPLICATION FOR ORDER TO PRODUCE PRISONER	01/16/04	3	375-376
APPLICATION FOR ORDER TO PRODUCE PRISONER	08/20/07	8	364-366
APPLICATION FOR SETTING	12/12/03	3	360
APPLICATION FOR SETTING	08/09/07	8	363
APPLICATION FOR SETTING	11/05/07	8	386-387
APPLICATION FOR SETTING	01/28/08	9	524
APPLICATION TO PROCEED IN FORMA PAUPERIS	12/06/11	6	1069-1072
APPLICATION TO PROCEED IN FORMA PAUPERIS	10/11/07	8	376-377
BENCH WARRANT	06/11/03	2	3-5
BENCH WARRANT	06/17/03	2	16-18
CASE APPEAL STATEMENT	04/22/04	3	453-454
CASE APPEAL STATEMENT	06/22/12	6	1113-1114
CASE APPEAL STATEMENT	07/09/13	6	1404-1405
CASE APPEAL STATEMENT	05/12/08	9	548-549
CERTIFICATE OF CLERK	04/22/04	3	455
CERTIFICATE OF CLERK	05/12/08	9	547
CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL	06/22/12	6	1115
CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL	07/09/13	6	1406
CERTIFICATE OF CLERK AND TRANSMITTAL – RECORD ON APPEAL	08/30/12	6	1121

# APPEAL INDEX

Case No. CR03-1263  
STATE OF NEVADA vs FERRILL J VOLPICELLI  
SEPTEMBER 5, 2013

PLEADING	DATE	VOL.	PAGE NO.
CERTIFICATE OF TRANSMITTAL	04/22/04	3	456
CERTIFICATE OF TRANSMITTAL	05/12/08	9	546
DEFENDANT'S WRIT OF PROHIBITION CHALLENGING PROCEEDING IN EXCESS OF JURISDICTION AT SENTENCING	12/06/11	6	1053-1068
ERRATA TO OPPOSITION TO MOTION FOR ORDER TO COMPEL	09/13/05	6	1031-1035
ERRATUM NOTICE OF APPEAL ISSUES TO BE RAISED	07/01/13	6	1186-1187
EX PARTE PETITION FOR CLARIFICATION ON ISSUES REGARDING STATE BAIL	07/16/03	2	194-196
EX PARTE PETITION FOR CLARIFICATION ON ISSUES REGARDING STATE BAIL	08/01/03	2	197-207
EXHIBIT LIST 04/01/04	04/01/04	11	1
EXHIBIT LIST 09/20/07	09/20/07	12	1
EXHIBIT LIST 11/10/03	11/12/03	10	1-3
EXHIBITS OF 04/01/04	04/01/04	11	2-99
EXHIBITS OF 09/20/07	09/20/07	12	2-189
EXHIBITS OF 11/12/03	11/12/03	10	4-59
EX-PARTE MOTION FOR APPOINTMENT OF COUNSEL	11/09/05	7	199-203
EXPORTE MOTION FOR APPROVAL OF FEES IN THE APPELLANT'S OPENING BRIEF AND JOINT APPENDIX	07/14/04	13	11-16
EXPORTE ORDER FOR APPROVAL OF FEES IN THE PREPARATION AND COMPLETION OF THE APPELLANT'S OPENING BRIEF AND JOINT APPENDIX	07/22/04	13	17-22
FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT	04/14/08	9	528-532
FORMER COUNSEL'S RESPONSE IN ACCORDANCE WITH ORDER TO RESPOND	01/10/06	6	1044-1052
GENERAL RECEIPT	06/20/03	2	169
GENERAL RECEIPT	07/09/03	2	193
INDICTMENT	06/11/03	2	6-15
INMATE REQUEST FORM – NO DOCUMENT IN FILE TO IMAGE ***	10/07/03	3	249

# APPEAL INDEX

Case No. CR03-1263  
STATE OF NEVADA vs FERRILL J VOLPICELLI  
SEPTEMBER 5, 2013

PLEADING	DATE	VOL.	PAGE NO.
INMATE REQUEST FORM*****	10/07/03	2	241
JUDGMENT	04/01/04	3	383-385
JURY INSTRUCTIONS 1 THROUGH 37	11/14/03	3	275-319
LETTER BRIEF	03/06/06	7	222-225
LETTER FROM DEFENDANT	09/12/03	2	235-240
LETTER FROM DEFENDANT	11/17/03	3	340-343
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NOTICE OF APPEAL	07/01/13	6	1192-1403
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	11/09/05	7	10-198
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	04/23/13	9	672-877
MEMORANDUM TO MOTION TO CORRECT ILLEGAL SENTENCE/MODIFY SENTENCE	06/03/13	6	1162-1175
MINUTES – 02/14/08 HEARING RE: PETITION FOR POST CONVICTION CONTINUATION OF WRIT OF HABEAS CORPUS HEARING	03/05/08	9	527
MINUTES – 04/01/04 ENTRY OF JUDGMENT AND IMPOSITION OF SENTENCE	04/01/04	3	379-382
MINUTES – 09/20/07 PETITION FOR POST CONVICTION/EVIDENTIARY HEARING	09/20/07	8	370
MINUTES – 09/20/07 PETITION FOR POST CONVICTION/EVIDENTIARY HEARING	10/03/07	8	371
MINUTES – 09/24/03 MOTION TO CONFIRM TRIAL	09/24/03	3	245
MINUTES – 11/10/03 HEARING RE: CONFLICT OF COUNSEL	11/10/03	3	267
MINUTES – 11/12/03 JURY TRIAL	11/12/03	3	268-274
MINUTES – ARRAIGNMENT	06/18/03	2	19
MOTION FOR CONTINUANCE OR STAY OF PROCEEDINGS WITH PENDING SUCCESSIVE WRIT	07/01/13	6	1188-1191
MOTION FOR COURT APPOINTED FEES WITH AFFIDAVIT IN SUPPORT	12/21/07	13	31-35
MOTION FOR COURT APPOINTED FEES WITH AFFIDAVIT IN SUPPORT	07/07/08	13	40-42

# APPEAL INDEX

Case No. CR03-1263  
STATE OF NEVADA vs FERRILL J VOLPICELLI  
SEPTEMBER 5, 2013

PLEADING	DATE	VOL.	PAGE NO.
MOTION FOR COURT APPOINTED FEES WITH AFFIDAVIT IN SUPPORT	10/27/09	13	45-49
MOTION FOR COURT APPOINTED FEES WITH AFFIDAVIT IN SUPPORT	04/2/10	13	54-58
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	05/11/04	3	464
MOTION FOR ORDER TO COMPEL	09/12/05	6	1010-1023
MOTION FOR ORDER TO COMPEL	01/31/06	7	204-206
MOTION FOR PARTIAL DISMISSAL OF PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	02/05/07	8	338-346
MOTION FOR RETURN OF PROPERTY AND REQUEST FOR HEARING REGARDING RESTITUTION AMOUNT	08/03/04	5	965-970
MOTION TO CORRECT ILLEGAL SENTENCE/MODIFY SENTENCE	06/03/13	6	1161
MOTION TO CORRECT JUDGMENT TO REMOVE DOUBLE JEOPARDY AND ILLEGAL CHARGES	05/14/13	6	1139-1153
MOTION TO QUASH SUBPOENA DUCES TECUM	05/17/04	3	468-476
MOTION TO STRIKE FUGITIVE DOCUMENT	08/18/04	6	974-983
NOTICE OF ADDRESS CHANGE	06/01/04	3	480
NOTICE OF ADDRESS CHANGE	05/28//04	3	481
NOTICE OF APPEAL	04/22/04	3	451-452
NOTICE OF APPEAL	06/22/12	6	1111-1112
NOTICE OF APPEAL	07/01/13	6	1184-1185
NOTICE OF APPEAL	05/08/08	9	544-545
NOTICE OF CHANGE OF RESPONSIBLE ATTORNEY	02/10/12	6	1077-1079
NOTICE OF ENTRY OF ORDER	06/10/08	9	554-559
NOTICE OF INTENT TO SEEK HABITUAL CRIMINAL STATUS	10/09/03	3	250-251
NOTICE OF WAIVER OF APPEARANCE	12/21/07	9	522-523
NOTICE OF WITHDRAWAL OF ATTORNEY	04/19/04	3	449-450
NOTICE OF WITNESSES PURSUANT TO NRS 174.234	11/07/03	3	257-260
OPPOSITION TO MOTION FOR ORDER TO COMPEL	09/12/05	6	1024-1030

# APPEAL INDEX

Case No. CR03-1263  
STATE OF NEVADA vs FERRILL J VOLPICELLI  
SEPTEMBER 5, 2013

PLEADING	DATE	VOL.	PAGE NO.
OPPOSITION TO MOTION FOR ORDER TO COMPEL AND MOTION TO QUASH SUBPOENA DUCES TECUM	02/17/06	7	211-221
OPPOSITION TO PARTIAL MOTION TO DISMISS/REPLY	02/20/07	8	347-352
OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS	09/04/03	2	229-234
ORDER	08/13/03	2	223-225
ORDER	11/07/03	3	263-266
ORDER	06/01/04	3	484
ORDER	10/14/07	8	380-382
ORDER	12/05/07	13	30
ORDER	05/15/08	13	38
ORDER	05/15/08	13	39
ORDER APPOINTING COUNSEL	06/01/04	3	482-483
ORDER APPOINTING COUNSEL	08/10/06	8	319-321
ORDER APPOINTING COUNSEL	06/09/08	9	552-553
ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF PROHIBITION	05/24/12	6	1107-1109
ORDER DENYING MOTION TO PROCEED IN FORMA PAUPERIS	12/27/11	6	1073-1075
ORDER DENYING MOTION TO RECALL REMITTITUR AND DENYING PERMISSION FOR A LATE PETITION FOR REHEARING	01/28/10	9	584
ORDER DENYING REQUEST FOR APPOINTMENT OF COUNSEL	04/27/04	3	459-460
ORDER GRANTING MOTION FOR COURT APPOINTED FEES	01/30/07	13	29
ORDER GRANTING MOTION FOR COURT APPOINTED FEES	01/08/08	13	37
ORDER GRANTING MOTION FOR COURT APPOINTED FEES	07/17/08	13	44
ORDER GRANTING MOTION TO CORRECT JUDGMENT OF CONVICTION	06/04/13	6	1176-1178
ORDER PATYAILLY DISMISSING PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND ORDER TO SET HEARING	08/02/07	8	355-362

# APPEAL INDEX

Case No. CR03-1263  
STATE OF NEVADA vs FERRILL J VOLPICELLI  
SEPTEMBER 5, 2013

PLEADING	DATE	VOL.	PAGE NO.
ORDER QUASHING SUBPOENA DECUS TECUM AND DENYING MOITON TO COMPEL	08/10/06	8	322-324
ORDER TO PROCEED IN FORMA PAUPERIS	05/27/04	3	477-479
ORDER TO PRODUCE PRISINER	08/20/07	8	367-369
ORDER TO PRODUCE PRISONER	01/22/04	3	377-378
ORDER TO RESPOND	12/12/05	6	1041-1043
ORDER TO RESPOND	12/18/06	8	332-334
ORDER TO STRIKE FUGITIVE DOCUMENTS	09/23/04	6	986-988
ORDER TRANSFERRING CASE	11/07/03	3	261-262
PETITION FOR WRIT OF HABEAS CORPUS	08/08/13	2	208-211
PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	11/09/05	7	1-9
PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	04/23/13	9	586-671
POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	08/08/13	2	212-222
PRESENTENCE INVESTIGATION REPORT	12/19/03	13	1-10
PROOF OF SERVICE OF ELECTRONIC FILING	12/27/11	6	1076
PROOF OF SERVICE OF ELECTRONIC FILING	02/10/12	6	1083
PROOF OF SERVICE OF ELECTRONIC FILING	05/24/12	6	1110
PROOF OF SERVICE OF ELECTRONIC FILING	06/22/12	6	1116
PROOF OF SERVICE OF ELECTRONIC FILING	06/28/12	6	1118
PROOF OF SERVICE OF ELECTRONIC FILING	07/26/12	6	1120
PROOF OF SERVICE OF ELECTRONIC FILING	08/30/12	6	1122
PROOF OF SERVICE OF ELECTRONIC FILING	09/06/12	6	1125
PROOF OF SERVICE OF ELECTRONIC FILING	09/06/12	6	1126
PROOF OF SERVICE OF ELECTRONIC FILING	03/18/13	6	1129
PROOF OF SERVICE OF ELECTRONIC FILING	03/22/13	6	1132
PROOF OF SERVICE OF ELECTRONIC FILING	04/29/13	6	1138

# APPEAL INDEX

Case No. CR03-1263  
STATE OF NEVADA vs FERRILL J VOLPICELLI  
SEPTEMBER 5, 2013

PLEADING	DATE	VOL.	PAGE NO.
PROOF OF SERVICE OF ELECTRONIC FILING	05/17/13	6	1158
PROOF OF SERVICE OF ELECTRONIC FILING	06/04/13	6	1179
PROOF OF SERVICE OF ELECTRONIC FILING	06/18/13	6	1183
PROOF OF SERVICE OF ELECTRONIC FILING	07/09/13	6	1407
PROOF OF SERVICE OF ELECTRONIC FILING	07/12/13	6	1409
PROOF OF SERVICE OF ELECTRONIC FILING	08/09/13	6	1411
PROOF OF SERVICE OF ELECTRONIC FILING	12/04/09	9	571
PROOF OF SERVICE OF ELECTRONIC FILING	12/30/09	9	583
PROOF OF SERVICE OF ELECTRONIC FILING	01/28/10	9	585
RECIPROCAL DISCOVERY AGREEMENT	07/07/03	2	1-2
RECOMMENDATION AND ORDER FOR PAYMENT OF ATTORNEY'S FEES AND EXPENSES	11/06/09	13	51-53
RECOMMENDATION AND ORDER FOR PAYMENT OF INTERIM ATTORNEY'S FEES	05/06/10	13	60-62
REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	09/17/03	2	242-244
REPLY TO RESPONSE TO DEFENDANTS WRIT OF PROHIBITION	03/02/12	6	1084-1104
REPLY TO STATES OPPOSITION TO MOTION FOR ORDER TO COMPEL AND TO VAN RY'S ERRATA TO OPPOSITION TO MOTION FOR ORDER TO COMPEL	09/27/05	6	1036-1039
REQUEST FOR APPOINTMENT OF COUNSEL	04/22/04	3	457-458
REQUEST FOR ORDER TO SHOW CAUSE REGARDING CONTEMPT OF COURT- AND ORDER TO COMPEL	06/21/04	3	487-491
REQUEST FOR ORDER TO SHOW CAUSE REGARDING CONTEMPT OF COURT- AND ORDER TO COMPEL	07/06/04		957-964
REQUEST FOR SUBMISSION	06/14/04	3	486
REQUEST FOR SUBMISSION	08/03/04	5	971
REQUEST FOR SUBMISSION	08/03/04	5	972
REQUEST FOR SUBMISSION	08/03/04	5	973
REQUEST FOR SUBMISSION	08/26/04	6	984
REQUEST FOR SUBMISSION	08/26/04	6	985



# APPEAL INDEX

Case No. CR03-1263  
STATE OF NEVADA vs FERRILL J VOLPICELLI  
SEPTEMBER 5, 2013

PLEADING	DATE	VOL.	PAGE NO.
REQUEST FOR SUBMISSION	09/30/05	6	1040
REQUEST FOR SUBMISSION	01/31/06	7	207
REQUEST FOR SUBMISSION	02/09/06	7	210
REQUEST FOR SUBMISSION	03/21/06	7	226
REQUEST FOR SUBMISSION	03/05/07	8	353-354
REQUEST FOR SUBMISSION	10/25/07	8	383-385
REQUEST FOR SUBMISSION	12/05/07	9	519-521
REQUEST FOR SUBMISSION	01/26/07	13	23-28
REQUEST FOR SUBMISSION	12/21/07	13	36
REQUEST FOR SUBMISSION	07/07/08	13	43
REQUEST FOR SUBMISSION	10/27/09	13	50
REQUEST FOR SUBMISSION	04/22/10	13	59
REQUEST FOR SUBMISSION OF MOTION	04/10/12	6	1105-1106
REQUEST FOR SUBMISSION OF MOTION	05/28/13	6	1159-1160
REQUEST FOR TRANSCRIPTS	05/07/04	3	462
REQUEST, AGREEMENT AND ORDER FOR PRE-TRIAL RECIPROCAL DISCOVERY DEFENDANT'S REQUEST FOR DISCOVERY	07/09/03	2	191-192
RESPONSE TO "DEFENDANT'S WRIT OF PROHIBITION"	02/10/12	6	1080-1082
RESPONSE TO DEFENDANT'S MOTION TO CORRECT JUDGMENT OF CONVICTION	05/17/13	6	1154-1157
RESPONSE TO PETITIONER'S "LETTER BRIEF" FILED IN REPLY TO THE CITY OF RENO'S OPPOSITION TO MOTION FOR ORDER TO COMPEL AND MOTION TO QUASH SUBPOENA DUCES TECUM	03/21/06	7/8	227-303
RETURN	08/18/03	2	226-228
SECOND REQUEST FOR SUBMISSION	01/31/06	7	208-209
SECOND REQUEST FOR SUBMISSION	03/22/06	8	318
STIPULATION FOR CHANGE OF TRIAL DATE	10/07/03	3	246-248

# APPEAL INDEX

Case No. CR03-1263  
STATE OF NEVADA vs FERRILL J VOLPICELLI  
SEPTEMBER 5, 2013

PLEADING	DATE	VOL.	PAGE NO.
STIPULATION FOR CONTINUANCE	01/30/08	9	525-526
STIPULATION TO EXTEND TIME TO FILE SUPPLEMENT TO PETITION	09/15/06	8	325
SUBSTITUTION OF COUNSEL FOR THE STATE	03/22/13	6	1130-1131
SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS POST-CONVICTION	11/21/06	8	326-331
SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	03/22/06	8	304-317
SUPREME COURT CLERK'S CERTIFICATE AND JUDGMENT	04/29/13	6	1134
SUPREME COURT ORDER OF AFFIRMANCE	04/29/13	6	1135-1137
SUPREME COURT - RECEIPT FOR DOCUMENTS	06/28/12	6	1117
SUPREME COURT REMITTITUR	04/29/13	6	1133
SUPREME COURT CLERK'S CERTIFICATE AND JUDGMENT	12/30/09	9	573
SUPREME COURT ORDER DENYING PETITION	11/12/08	9	560-561
SUPREME COURT ORDER DIRECTING TRANSMISSION OF RECORD	08/09/13	6	1410
SUPREME COURT - ORDER DIRECTING TRANSMISSION OF RECORD	07/26/12	6	1119
SUPREME COURT ORDER OF AFFIRMANCE	12/04/09	9	564-570
SUPREME COURT ORDER OF AFFIRMANCE	12/30/09	9	574-582
SUPREME COURT ORDER OF LIMITED REMAND FOR DESIGNATION OF COUNSEL	06/04/08	9	551
SUPREME COURT ORDER TO FILE SUPPLEMENTAL APPENDIX	09/10/09	9	562-563
SUPREME COURT RECEIPT FOR DOCUMENTS	09/06/12	6	1123
SUPREME COURT RECEIPT FOR DOCUMENTS	09/06/12	6	1124
SUPREME COURT RECEIPT FOR DOCUMENTS	05/19/08	9	550
SUPREME COURT REMITTITUR	12/30/09	9	572
SUPREME COURT CLERK'S CERTIFICATE AND JUDGMENT	08/01/05	6	999
SUPREME COURT NOTICE TO APPOINTED COUNSEL	06/14/04	3	485

# APPEAL INDEX

Case No. CR03-1263  
STATE OF NEVADA vs FERRILL J VOLPICELLI  
SEPTEMBER 5, 2013

PLEADING	DATE	VOL.	PAGE NO.
SUPREME COURT ORDER OF AFFIRMANCE	06/30/05	6	989-997
SUPREME COURT ORDER OF AFFIRMANCE	08/01/05	6	1000-1009
SUPREME COURT ORDER OF AFFIRMANCE	03/18/13	6	1127-1128
SUPREME COURT ORDER OF LIMITED REMAND FOR APPOINTMENT OF COUNSEL	05/11/04	3	463
SUPREME COURT RECEIPT FOR DOCUMENTS	04/29/04	3	461
SUPREME COURT RECEIPT FOR DOCUMENTS	07/12/13	6	1408
SUPREME COURT REMITTITUR	08/01/05	6	998
TRANSCRIPT – 02/14/08 PETITION FOR POST CONVICTION	04/24/08	9	533-543
TRANSCRIPT – 04/01/04 SENTENCING	04/13/04	3	386-448
TRANSCRIPT – 06/11/03	06/20/03	2	20-168
TRANSCRIPT – 09/20/07 PETITION FOR POST CONVICTON	11/08/07	8/9	452-515
TRANSCRIPT – 09/20/07 PETITION FOR POST CONVICTION	11/08/07	8	388-451
TRANSCRIPT – 09/24/03 MOTION TO CONFIRM TRIAL	10/13/03	3	252-256
TRANSCRIPT – 10/24/03 MOTION TO CONFIRM TRIAL	11/26/03	3	344-352
TRANSCRIPT – 10/29/03 STATUS HEARING	12/02/03	3	353-359
TRANSCRIPT – 11/10/03 HEARING	12/15/03	3	361-374
TRANSCRIPT – 11/12/03 TRIAL	07/02/04	5	717-956
TRANSCRIPT – 11/13/03 – 11/14/03 JURY TRIAL	07/02/04	4	492-716
TRANSCRIPTS – 06/18/03 ARRAIGNMENT ON INDICTMENT	06/23/03	2	170-190
UNUSED VERDICT FORM	11/14/03	3	320
UNUSED VERDICT FORM	11/14/03	3	321
UNUSED VERDICT FORM	11/14/03	3	322
UNUSED VERDICT FORM	11/14/03	3	323
UNUSED VERDICT FORM	11/14/03	3	324
UNUSED VERDICT FORM	11/14/03	3	325
UNUSED VERDICT FORM	11/14/03	3	326

# APPEAL INDEX

Case No. CR03-1263  
STATE OF NEVADA vs FERRILL J VOLPICELLI  
SEPTEMBER 5, 2013

PLEADING	DATE	VOL.	PAGE NO.
UNUSED VERDICT FORM	11/14/03	3	327
UNUSED VERDICT FORM	11/14/03	3	328
UNUSED VERDICT FORM	11/14/03	3	329
VERDICT	11/14/03	3	330
VERDICT	11/14/03	3	331
VERDICT	11/14/03	3	332
VERDICT	11/14/03	3	333
VERDICT	11/14/03	3	334
VERDICT	11/14/03	3	335
VERDICT	11/14/03	3	336
VERDICT	11/14/03	3	337
VERDICT	11/14/03	3	338
VERDICT	11/14/03	3	339
WAIVER OF APPEARANCE	12/05/07	9	516-518

ORIGINAL

Case No. CR03P1263

Dept. No. 10

FILED

2005 NOV -9 PM 3:17

RONALD A. LONGIN, JR.

BY [Signature]  
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR WASHOE COUNTY

-oOo-

FERRILL J. VOLPICELLI,

Petitioner,

vs.

PETITION FOR WRIT  
OF HABEAS CORPUS  
(POST CONVICTION)

LENARD VARE,

Respondent.

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of prisons, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of prisons.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

CR03P1263  
DC-9900025217-018  
POST: FERRILL J VOLPICELLI 9 Pages  
District Court 11/09/2005 08:17 AM  
Washoe County 3555

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

#### PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Lovelock Correctional Center, Pershing County, Nevada

2. Name and location of court which entered the judgment of conviction under attack: 2ND Jud. Dist. Court, Washoe County, Reno, Nevada

3. Date of judgment of conviction: April 01, 2004

4. Case number: CR03-1263

5. (a) Length of sentence: Multiple Life w/'s

(b) If sentence is death, state any date upon which execution is scheduled: N/A

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

Yes XXX No       

If "yes" list crime, case number and sentence being served at

this time: CR02-0147 - Public Insensibilities - 12 to 48 Months

7. Nature of offense involved in conviction being challenged: Burglary, Conspiracy to Commit Burglary.

8. What was your plea? (check one)

(a) Not Guilty xxx

(b) Guilty     

(c) Guilty but mentally ill     

(d) Nolo Contendere     

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

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

(a) Jury xxx (b) Judge without a jury     

11. Did you testify at the trial? Yes      No xxx

12. Did you appeal from the judgment of conviction?

Yes xx No     

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: 43203

(c) Result: Affirmed

(d) Date of result: JUNE 29, 2005

(Attach copy of order or decision, if available.)

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

N/A

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

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

(a) (1) Name of court: N/A

(2) Nature of proceedings: N/A

(3) Grounds raised: N/A

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

(5) Result: N/A

(6) Date of result: N/A

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

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

(1) Name of court: N/A

(2) Nature of proceedings: N/A



(3) Grounds raised: N/A

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

(5) Result: N/A

(6) Date of result: N/A

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

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

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

(1) First petition, application or motion?

Yes      No     

Citation or date of decision:                                     

(2) Second petition, application or motion?

Yes      No     

Citation or date of decision:                                     

(3) Third or subsequent petitions, applications or motions? Yes      No     

Citation or date of decision:                                     

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not.

(You must relate specific facts in response to this question.

Your response may be included on paper which is 8 1/2 by 11

inches attached to the petition. Your response may not exceed

five handwritten or typewritten pages in length.) \_\_\_\_\_

\_\_\_\_\_  
N/A  
\_\_\_\_\_

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: Grounds 3, 4, 5, & 6

(b) The proceedings in which these grounds were raised:

Direct Appeal to Nevada Supreme Court

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

All four grounds previously raised on direct appeal more  
appropriately contain elements of ineffectiveness of counsel,  
explained in respective grounds, & are appropriately raised on H.C.

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) All remaining grounds are more

appropriately raised on Petition for Post-conviction Writ of Habeas Corpus.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

~~This petition is timely filed per NRS chapter 34.~~

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes      No XXX

If yes, state what court and the case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

~~Jack Alian, Esq. - Court-appointed, pretrial; Bradley Van Ry, Esq. - pretrial/trial/sentencing; Mary Lou Wilson - Direct Appeal.~~

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

Yes XXX No     

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

NDOC, consecutive to instant LIFE sentences, 12-48 months

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

(a) Ground one: see ACCOMPANYING MEMORANDUM  
FOR GROUNDS ONE THROUGH TWENTY TWO

Supporting FACTS (Tell your story briefly without citing cases or law.): \_\_\_\_\_

(b) Ground two: \_\_\_\_\_

Supporting FACTS (Tell your story briefly without citing cases or law.): \_\_\_\_\_

(c) Ground three: \_\_\_\_\_

Supporting FACTS (Tell your story briefly without citing cases or law.): \_\_\_\_\_

(d) Ground four: \_\_\_\_\_

Supporting FACTS (Tell your story briefly without citing cases or law.): \_\_\_\_\_

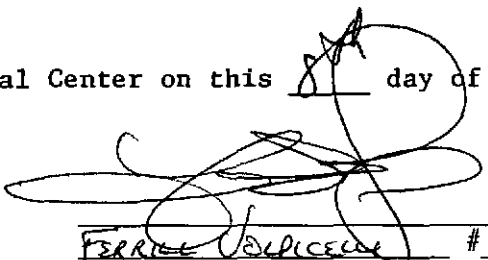
WHEREFORE, petitioner prays that the Court grant him relief to which he may be entitled in this proceeding.

Executed at Lovelock Correctional Center on this 11 day of

NOVEMBER, 2005.

N/A  
Signature of Attorney (if any)

Attorney & Address of Attorney

  
Ferrel, Volicene # 72565  
Lovelock Correctional Center  
P.O. Box 359  
Lovelock, Nevada 89419

Petitioner

VERIFICATION

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

  
\_\_\_\_\_  
Petitioner - Ferrill J. Volpicelli

\_\_\_\_\_  
No Attorney of Record - IPP  
Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS to the below addresses on this 8<sup>th</sup> day of NOVEMBER, 2005, by placing same into the hands of prison law library staff for posting in the U.S. Mail, pursuant to N.R.C.P. 5:

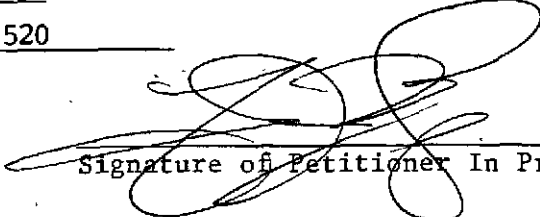
LENARD VARE, Warden  
Lovelock Correctional Center  
[via Interdepartmental Mail]

BRIAN SANDOVAL  
Nevada Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717

Richard Gammick, Esq.  
Washoe County District Attorney

195 South Sierra Street

Reno, Nevada 89520

  
\_\_\_\_\_  
Signature of Petitioner In Pro Se

///

///

///

Ferrill J. Volpicelli, 79565  
Lovelock Correctional Center  
Post Office Box 359  
Lovelock, Nevada 89419

ORIGINAL

FILED

2005 NOV -9 PM 3:17

RONALD A. LONGTIN, JR.

BY [Signature]  
DEPUTY

Petitioner, In Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

FERRILL J. VOLPICELLI,

Petitioner,

Case No. CR 03P1263

vs.

LENARD VARE, (Warden;

Dept. No. 10

Lovelock Correctional Center),

Respondent,

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Petitioner, Ferrill J. Volpicelli, in his proper person and in forma pauperis, and submits this Memorandum Of Points And Authorities In Support Of Petition For Writ Of Habeas Corpus (post-conviction) in the above entitled action.

This memorandum is made and based on the provisions of NRS 34.720 et. seq., all papers and pleadings on file herein, as well as the following argument and points and authorities.

## 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.

Remittitur issued on August 1, 2005.

Petitioner now brings forth the instant petition.

#### 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 district court level in the procedure of a petition for post-conviction 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.

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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.

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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.

...

...

...

### 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.

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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.

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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.

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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 issues." 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. Laing, 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.

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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. 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 office 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.

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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 A - 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 P3d 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) A - 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.

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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:

...

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 17<sup>th</sup>. 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 Cout 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 4<sup>th</sup>.  
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 B- 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.

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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 and the Conspiracy charge.

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 elements of the Conspiracy Offense 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.

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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 E

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 F

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."

..  
17 THOMAS: ...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?

..  
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."

..  
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?

..  
43 THOMAS: ...she said, "Fine. Fuck him.

P.17

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 G

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 H

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.

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.

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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 D  
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: Exhibit E

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: Exhibit G

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: Exhibit D

11 THOMAS: I know you are, I know you are. How many  
12 felony convictions do you have?  
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: **Exhibit G**

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 \* \* \* \* \*  
18

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: **Exhibit D**

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

and  
AFFIDAVIT OF TRAVIS ALEXANDER VOLPICELLI, Page 1, Lines  
10 - 12: **Exhibit K**  
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: I Ridge House Letter, dated 1/7/04  
J Courtyard Center Apts. Subpoena for 1/9/25/05.

and

AFFIDAVIT OF TRAVIS A VOLPICELLI, dated 4/21/04, Lines 7 - 10: Exhibit K

7 That thereafter, I sporadically observed email 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.

\* \* \* \* \*

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 C

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: Exhibit D

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  
24 know, (Inaudible) you're supposed to  
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: Exhibit D

...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 D

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 wasnt 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: Exhibit E  
23 THOMAS: In you 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 P.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  
that ah, you know, you didn't want  
33 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: Exhibit E

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.

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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.

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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 L.), 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.

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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 exculpable 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 AND 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 M, 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 exculpatory evidence is a violation of Due Process, and motive for doing so is immaterial. Brady v. Maryland, 373 US 83, 83 S Ct 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 S Ct 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. Exhibit N

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 I, J, K Ridge House Letter, Courtyard Center Apartment documentation, 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, Exhibit K 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 0, 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."

See, Exhibit 0, 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.

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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 lo 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.

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

\* \* \*

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

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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. Cronic, 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.

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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 Fahrenndorf	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 F.Supp 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 P 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 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.

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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 implication 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 # CR020148), 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 preceeded 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.

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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 Q.

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 R. 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 perimateria, 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.

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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 dilled 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.

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.

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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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## CONCLUSION

Petitioner files this Petition For Writ of Habeas Corpus (Post-Conviction), pursuant to NRS 34.360, et. seq., in which he raises several viable colorable claims of Ineffective Assistance of counsel. The claims arise out of instances from Constitutional violations during pre-trial, preliminary, arraignment, sentencing, and appellate procedures. See Petitioner's PETITION, on file herein.

Nevada Revised Statute 34.770 provides for judicial determination in warranting an evidentiary hearing: (1) upon return and/or answer, and review of all supporting documents on file, a determination shall be made as to whether an evidentiary hearing is required.

Ordinarily, claims like the ones raised in Petitioner's instant PETITION would require that this Court enter an ORDER mandating the need for an evidentiary hearing on the questions of facts regarding Counsels' (both trial and appellate) explanations for why several defenses were omitted, and to inquire into the Constitutional violations. Indeed, this Court is fully aware of the Nevada Supreme Court's jurisprudence regarding the need for an evidentiary hearing when Petitioners raise colorable claims of ineffective assistance of counsel. Bolden v. State, 99 Nev 181 (1983). See also, Gibbons v. State, 97 Nev 520 (1981).

In the instant Petition, a hearing is necessary, because based on a review of the record as a whole, including the charging documents, arraignment, preliminary waiver by counsel, evidence, sentencing, and absence of competent assistance of counsel on direct appeal, the Statute is on point for an evidentiary hearing. Owing to the nature of Petitioner's claims, such hearing is necessary to decide these matters.

Furthermore, Petitioner raises claims outside the scope of the record. Therefore, the claims raised "outside" cannot be relied

on by the record to establish the facts needed to determine counsel's ineffective performance. Bolden, at 659 P2d 886 (1983).

Thus, Petitioner has not simply raised bare or naked allegations. Even without the benefit of a complete record in the preparation of these pleadings, the documentation, and absence of a crucial defense, there are great significances that have been established in misconduct and inadequate representation. Hsrgrove v. State, 100 Nev 498, 502, 686 P2d 222; State v. Runningeagle, 859 P2d 169 (1993), cited by the Nevada Supreme Court in Brown v. State, 113 Nev 305, 933 P2d 187, 190 - 91 (1997).

A colorable claim is one that, if the claims are true, might have changed the outcome of the proceedings. Id., 859 P2d 173. In the instant Petition, Petitioner respectfully draws this Court's attention to the instant Memorandum of Points and Authorities In Support of Petition For Writ of Habeas Corpus (Post-Conviction), incorporated within said Petition.

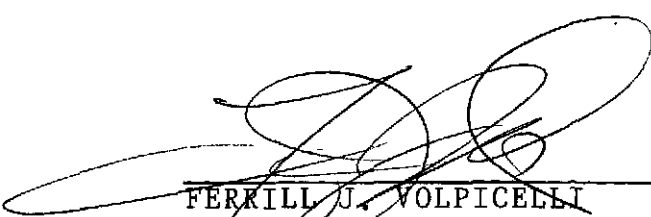
Counsels' performances were severely deficient and prejudiced the defense, violating Petitioner's First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights, secured by the United States Constitution, and equivalent rights under the Constitution of the State of Nevada.

First, Counsels' representation fell below an objective standard of reasonableness. Second, the deficient performance prejudiced Petitioner's defense. There is a reasonable probability that, but for Counsels' ineffectiveness, the results of the proceedings would have been different. Strickland v. Washington, 466 US 668 (1984). Specifically, the applicable law standard for judging the effectiveness of assistance of counsel in accordance with the Sixth Amendment was adopted by the Nevada Supreme Court in Wilson v. State, 105 Nev 110, 771 P2d 583 (1989).

Thus, Petitioner has satisfied the burden of the two-prong examination. Counsels' representation fell far below the qualitative normative standards dictated by these Constitutional Amendments. See, Washington v. Estelle, 648 F2d 875 at 879 (1988).

WHEREFORE, Petitioner respectfully requests this Honorable Court to appoint counsel and allow counsel to review the full record of this case. (Petitioner is a layman at law, and is limited to the assistance of other incarcerated inmates, in attempting to bring forth the instant proceedings). Petitioner further requests this Honorable Court GRANT him and evidentiary hearing on the issues herein to support granting the relief as requested herein.

RESPECTFULLY SUBMITTED, this 8th day of November, 2005,  
by:

  
FERRILL J. VOLPICELLI  
Petitioner, In Propria Persona  
c/o Lovelock Correctional  
Center  
Post Office Box 359  
1200 Prison Road  
Lovelock, NV 89419-0359

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 assertions of fact contained in the foregoing PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) are true and correct, as to the best of my knowledge, information, and belief.

EXECUTED and DATED, this 8th day of November, 2005,  
at the Lovelock Correctional Center, Lovelock, Nevada, by:

  
FERRILL J. VOLPICELLI  
Petitioner, In Propria Persona

**CERTIFICATE OF SERVICE BY MAIL**

I, Ferrill J. Volpicelli, do hereby CERTIFY that, I have, on the date last-here-written, served a true and correct copy of the attached PETITION FOR WRIT OF HABEAS CORPUS, and accompanying EXHIBITS, upon all opposing parties, pursuant to NRCP 5B, by placing the same in sealed envelopes, with sufficient postage affixed, addressed to the following individuals at their respective places of business, and placing the same in the United States Postal Service Mail at the Lovelock Correctional Center Law Library Facilities, Lovelock, Pershing County Nevada:

Washoe County District Attorney  
Attorney General of the State of Nevada  
Warden, Lovelock Correctional Center

Wa

EXECUTED and DATED, this 8th day of NOVEMBER, 2005,  
at the Lovelock Correctional Center, Lovelock, Nevada, by:

  
FERRILL J. VOLPICELLI  
Petitioner, In Propria Persona

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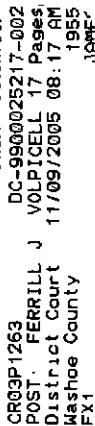
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<u>ITEM</u>	<u>EVID. NO.</u>	<u>OWNER</u>	<u>STATUS</u>
One (1) Radius 15" Liquid Crystal Monitor*	A87919	WalMart	Returned
One (1) Compaq Model 5000 NIB Computer System*	A87920	WalMart	Returned
One (1) HP V-40 Fax-Copier*	A87921	WalMart	Returned
One (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



# EXHIBIT 1

**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
Three (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



DA # 314735

FILED

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

2003 JUN 11 PM 4:45  
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

V7.117

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 a DESIGNATES ONE OF EACH 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 ///

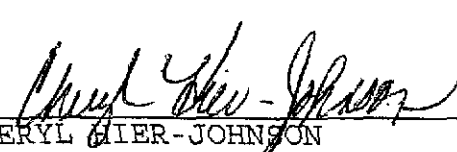
26 ///



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   
10 CHERYL GIER-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 Chas. J. Mc Carthy  
17 FOREMAN

18 "NO TRUE BILL"

19  
20  
21  
22  
23  
24  
25  
26  
FOREMAN

GR03P1263 DC-9900025217-003  
POST: FERRILL J VOLPICELLI 4 Pages  
District Court 11/09/2005 08:17 AM  
Mashoe County 1955  
EVS TOWER

# EXHIBIT 2

5/27/03

FERRILL VOLPICELLI  
03-06479 @ WCSC  
911 PARK BLVD  
RENO, NV 89512

LAW  
OFFICE  
OF  
TACK  
ALAN  
ESQ.

DEAR JACK,

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  
STARKED, MULTIPICIOUS & DUPLICIOUS  
CHARGES. IT INVOLVES A FIDUCIARY  
RELATIONSHIP WITH THE CLIENT TO  
PROFESSIONALLY AND VIABLY CHALLENGE  
THE WELL GROOMED PROSECUTION'S CASE

July 23, 2002

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

Jack Alian, 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.

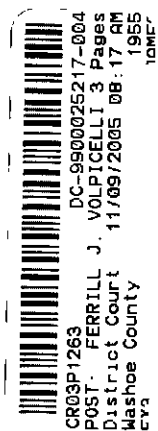
**Again, please respond to the above referenced matters in writing as soon as possible.**

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

Sincerely,

Ferrill Volpicelli

Cc: file



# EXHIBIT 3

**RENO POLICE DEPARTMENT  
TRANSCRIPT**

---

CASE # 01-216321

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

RESIDENCE ADDRESS: 695 W. 3<sup>rd</sup> 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

V7.132



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?   
6  
7 BOWMAN. Hm umm (affirmative)  
8  
9 BROWN. Okay, keep that in mind as you're talking to us. Okay?   
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.   
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

CR03P1253 DC-9900025217-005  
POST FERRILL J VOLPICELLI 8 Pages  
District Court 11/09/2005 08:17 AM  
Washoe County 1955  
FY4 .QMF

# EXHIBIT 4

**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.

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 COMPLAIN ABOUT 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 hmm (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.

*HE ALWAYS  
ADDED UPC LABELS*

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.

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.

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.

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.

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.

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

BOWMAN HAD THE  
SAME IF NOT MORE  
PRISON TIME FOR THE  
HARBOR FUGITIVE.

IF NOT  
MORE THAN ME

1 BOWMAN. A hundred, I think it was a hundred and seventy five (175), I think.  
2  
3 THOMAS. Okay.  
4  
5 BOWMAN. I'm not exactly sure.  
6  
7 THOMAS. Okay. Oh let's see here.  
8  
9 BOWMAN. I'm doing the best I can for you.  
10  
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)?  
16  
17 BOWMAN. Utah's dropped two (2) felony holds against (Inaudible) three (3) there, probably  
18 (Inaudible)  
19  
20 THOMAS. What are they all for?  
21  
22 BOWMAN. Ah, one (1) is a Criminal Mischief. A guy stole five hundred (500) bucks from me. I  
23 couldn't find him but I found his car.  
24  
25 THOMAS. Okay.  
26  
27 BOWMAN. And I trashed his car.  
28  
29 THOMAS. Okay.  
30  
31 BOWMAN. Ah, Forgery and Burglary.  
32  
33 THOMAS. Were those in Utah you said?  
34  
35 BOWMAN. Yeah.  
36  
37 THOMAS. How much prison time did you do there?  
38  
39 BOWMAN. None, I was on probation (Inaudible) probation. And then they said the last two (2)  
40 convictions, right, I ah, I guess they dropped em ah, and run em concurrent with the  
41 time I was doing here in Nevada.  
42  
43 THOMAS. Okay.



BOWMAN ADMITS TO THE  
PURCHASE OF  
LABELMAKER AND  
CHANGES HIS STORY  
FOR  
JURY

\* BINGO

STAPLES

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

INCONSISTENCY  
HE JUST SAID THE LABEL MAKER WAS  
A LEGITIMATE BUY.

CR03P1263 DC-9900025217-006  
POST: FERRILL J VOLPICELLI 6 Pages  
District Court 11/09/2005 08 17 AM  
Washoe County 1955  
EYE 10ME

# EXHIBIT 5

**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:

---

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---

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

V7.143

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  
THEIR ILLEGAL ACTIVITIES.  
THE ITEMS IN STUENGE  
MATCH THOSE AT HIS  
APARTMENT.  
CONFIRMATION  
HOME THEATER  
SYSTEM

COURT  
TRANSCRIPT SHOWS  
CONTRADICTIONS  
THAT'S

12-6-01

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.  
cassmaker  
VCR  
home theater  
system

BOWMAN LYING  
ABOUT THE  
ACQUISITIONS IN HIS  
APARTMENT

12-6-9

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

CHANGES HIS

STORY ABOUT THE

HOME

THEATER

MAKING A

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?

CR03P1263  
POST FERRILL J. VOLPICELLI 3 Pages  
District Court 11/09/2005 08:17 AM  
Washoe County 1955  
FIA 10ME7

# EXHIBIT 6



1-2-02  
Conflict/Allegation

RENO POLICE DEPARTMENT  
TRANSCRIPT

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:

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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

EXHIBIT

V7.149

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. ←

CR03P1263 DC-9900025217-008  
POST. FERRILL J VOLPICELLI 6 Pages  
District Court 11/09/2005 08 17 AM  
Washoe County 1955  
FY7 10MFC

# 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:   01-03-02                       FROM:                       TO:

LOCATION OF INTERVIEW:

IN THE PRESENCE OF:

---

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---

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.

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 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  
5 THOMAS. Um hmm.  
6  
7 BOWMAN. And you know?  
8  
9 THOMAS. Okay. Well as long as you were, you know, honest with her, what you told her.  
10  
11 BOWMAN. I told her (Inaudible)  
12  
13 THOMAS. I'll tell her the same thing, it won't be any difference.  
14  
15 BOWMAN. They offered us a deal right, and, cause I was gonna, I was probably gonna be faced  
16 with twenty five (25) to life over this.  
17  
18 THOMAS. Yeah.  
19  
20 BOWMAN. You know? If I didn't. And ah, (Inaudible)  
21  
22 THOMAS. Yeah.  
23  
24 BOWMAN. (Inaudible)  
25  
26 THOMAS. Yeah. You know it all applied. But like I say, we weren't looking to hammer you.  
27 We knew you weren't the brains behind the operation, so we knew that from the get  
28 go. From the first time (Inaudible)  
29  
30 BOWMAN. Well I came out of prison with my back against the wall.  
31  
32 THOMAS. Um hmm.  
33  
34 BOWMAN. (Inaudible) would of left me alone, long enough to get back on my feet, right, at the  
35 half way house, I would have never gone this route.  
36  
37 THOMAS. Yeah.  
38  
39 BOWMAN. But you know, I'm making only seven forty (7.40) an hour.  
40  
41 THOMAS. Right.  
42  
43 BOWMAN. Four hundred dollars (\$400.00) off the top before taxes, right?

THREAT  
of  
FILING  
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 (13<sup>th</sup>) 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 (13<sup>th</sup>) of this

ANOTHER  
FAVOR  
THIS  
BOUGHT &  
PAID FOR  
TESTIMONY.  
RECEIVED  
#10  
BOOKS

Transcript (Con't)

CASE # 01-216321

FACILITATION OF  
TO BOWMAN'S  
INMATE ACCOUNT↑ INVOLVEMENT  
FORWARD  
TO  
KEEP  
BOWMAN  
TALKING  
ABOUT  
SPECIFICS  
HE  
FOUNDED  
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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POST FERRILL J. VOLPICELLI 3 Pages  
District Court 11/09/2005 08:17 AM 1955  
Washoe County JAME  
EXR

# EXHIBIT 8

**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.

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 WKS DOWN IT RARE  
TO PAY FOR HIS  
GAMBING HABIT*

*FACILITATE*

*PULL UP  
SINCE A CERTAIN*

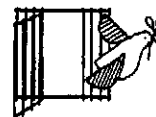
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District Court 11/09/2005 08 17 AM  
Washoe County 1955  
Eyo 10M17

# EXHIBIT 9

x3

# 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. Ferrill 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 6, 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

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.

Terrance P. Hubert

Mary Price

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

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District Court 11/09/2005 08 17 AM  
Washoe County 1955  
FY10 10MF

# EXHIBIT 10

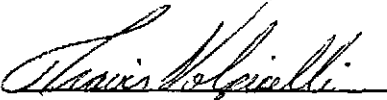
### Affidavit and Claim

- 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)





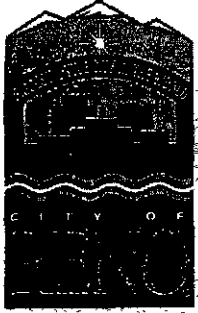
37) Travis Volpicelli

Date



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POST FERRILL J. VOLPICELLI 8 Pages  
District Court 11/09/2005 08:17 AM  
Washoe County 1955  
CV11 10ME

# EXHIBIT 11



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

DO NOT SHOW  
TO TENANT RN

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

RECEIVED  
SEP 26 2001

I D

B-114

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

-----

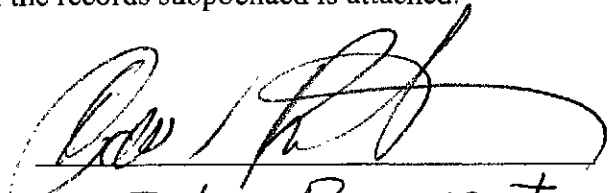
END

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**DECLARATION**

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

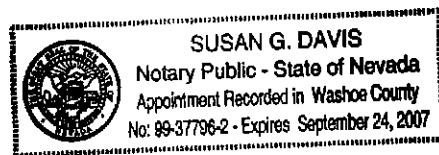
1. I am one of the principal owners of Aussie Self Storage, LLC,
2. That on the 11<sup>th</sup> day of September, 2205, I received a Subpoena Duces Tecum demanding the production of the all records related to the rental of storage unit B-114 to Ferill J. Volpicelli.
3. That I have examined the original 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 23<sup>rd</sup> 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 Vassar St.

Contract No. 2787

City: Reno

State: NV Zip: 89502

Home ph.: (rx) 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 VASSAR ST City: RENO

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

**PERSONS AUTHORIZED FOR ACCESS:** YES \_\_\_\_\_ NO \_\_\_\_\_

Name Ferrill Joseph Volpceui Name CHANEL Volpceui

Name TRAVIS Volpceui 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

30 Victorian Avenue • Sparks, Nevada 89431 • (775) 331-6000

☒ 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

BUSINESS NAME

1060 Vassar St.  
STREET ADDRESS

BILLING ADDRESS

Reno NV 89502  
CITY STATE ZIP CODE

SPACE NO./ APPROX. SIZE: B114 10X20

MONTHLY RENT: 100.00

NEXT RENT DUE/AMT.: 9/1 IS 100.00

DL. NO./I.D. NO. 4600555052

329 0389  
RESIDENCE PHONE

SOCIAL SECURITY NO.

321 8339  
BUSINESS PHONE

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 CUT 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 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 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 3. RENT: Occupant agrees to pay to Owner at 30 Victorian Avenue, Sparks, NV 89431, 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

V7.170

by sign for the insurance plan described in the insurance brochure made by Owner, which insurance does not cover goods stored in the Parking Space, Occupant agrees. 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 ("Owner's Agents") will not be responsible for, and occupant hereby releases Owner and Owner's Agents from any responsibility for, any loss, liability, claim, expense, damage to property or injury to persons ("Loss") 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) (the "Released Claims"). Although Owner and Owner's Agents may give insurance information in Occupant, Occupant understands that Owner and Owner's Agents are not an insurance company or insurance agents. Owner has not explained 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 paragraph 8.

27 **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

28 **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, my 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.

29 **9. RIGHT TO ENTER:** Occupant grants Owner, Owner's agents, or representatives of my 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 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.

30 **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.

31 **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.

32 **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.

33 **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.

34 **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.

35 **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.

36 **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.

37 **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.

38 **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.

39 **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.

40 **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.

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.
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 if 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

8/7/01  
Date

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

Received by, Agent for Owner

END OF RENTAL AGREEMENT (pg 2 of 2)



CR03P1263 DC-9900025217-013  
POST FERRILL J VOLPICELLI 3 Pages  
District Court 11/09/2005 08 17 AM  
Washoe County 1955  
EX12 .JMPF

# EXHIBIT 12

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

NOKIA CHARGR 004316840451S	9.96 J
COUNTER CARD 0610290020758	1.99 J
15 MONITOR 076994030500S	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

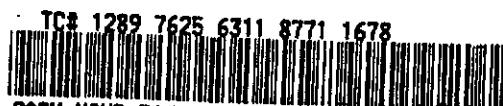
# WAL★MART

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



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  
HOVWINDVAC 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  
MCARD TEND 625.44

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

# ITEMS SOLD 3



CASH YOUR TAX REBATE CHECK  
08/20/01 13:24:1

\*\*\*CUSTOMER COPY\*\*\*

# 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  
MCARD TEND 465.33

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

# ITEMS SOLD 5



CASH YOUR TAX REBATE CHECKS HERE!  
07/31/01 18:46:26

\*\*\*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



CASH YOUR TAX REBATE CHECKS HERE!  
08/23/01

\*\*\*CUSTOMER COPY\*\*\*

CR03P1263 DC-9900025217-014  
POST: FERRILL J. VOLPICELLI 4 Pages  
District Court 11/09/2005 06:17 AM  
Washoe County 1955  
CV12 10ME

# EXHIBIT 13

# Incident Report

RENO POLICE DEPARTMENT

01-216321

Supplement No  
0002

OFFICER 1: ;BROWN, MIKE

Invl	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

# 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 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.

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.

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  
REVOCATION  
HEARING

MOTHER  
NATURE  
CALLED

CR03P1263 DC-9900025217-015  
POST, FERRILL J. VOLPICELL 14 Pages  
District Court 11/09/2005 08:17 AM  
Washoe County 1955  
EX14 JAMES

# EXHIBIT 14



CERTIFICATION OF ACTION  
PAROLE VIOLATION HEARINGS

To: THE WARDEN, NEVADA STATE PRISON

The Nevada Board of Parole Commissioners took the following action:

RE: Volpelli, Ferrill

NSP No.: 60076

AT: UNCC

ON: Oct. 16, 2002

Request for/or 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. <del>ASSOCIATES</del>	GUILTY/NOT GUILTY	GUILTY/NOT GUILTY	
11. <del>COOPERATION</del>	GUILTY/NOT GUILTY	GUILTY/NOT GUILTY	
12. <del>LAWS AND CONDUCT</del>	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.A. Det. Officer Brown Det. Officer Thomas (City of Reno) Reed.**  
☐ Laboratory Reports  
☒ Other **RPD# 01-213180, 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.

Commissioners present:

Exp.

Stat.

Flat.

V7.181

James R. Brooke

Attorney at Law

3392 Lakeside Court • Reno, Nevada 89509

Phone: (702) 826-9110 • Fax: (702) 826-9113 • E-Mail: JBR@lawyer@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

V7.182

**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:

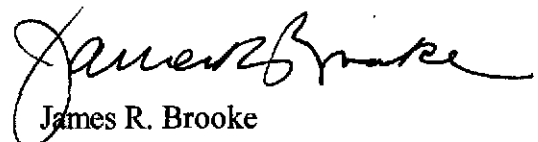
I represent Ferrill Volpicelli, inmate #60076. His parole hearing is scheduled for late January, 2001.

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

V7.183

LAW OFFICES OF  
**ROBERT P. FAHRENDORF**

838 CALIFORNIA AVENUE

P.O. BOX 9677

RENO, NV 89505

(702) 348-7775

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

V7.184



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

V7 185

Exhibit

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 Puggero*

**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 Volpinelli

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 cursive script, 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.

1174 CASTRO STREET SUITE 100 MOUNTAIN VIEW CALIFORNIA 94041 TELEPHONE 650-961-2585 FAX 650-961-6527 WWW.LASIK2020.COM

V7.193

CR03P1263 DC-9900025217-016  
POST FERRILL J VOLPICELLI 2 Pages  
District Court 11/09/2005 08:17 AM  
Washoe County 1955  
AMPC

# EXHIBIT 15

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

1079

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District Court 11/09/2005 08 17 AM  
Washoe County 1955

# EXHIBIT 16



# 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 1995 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

## RENO BLOTTER

### Armed robber runs with sum of cash

1 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

2 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.

## 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

shoplifters) think it's a joke and they don't ever expect to see the inside of a jail," said Pamela Terry, representative of the Southern Nevada Retail Loss Prevention Association.

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 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

Exhibit

V7.198

ORIGINAL

FILED

Ferrill J. Volpicelli, #79565  
Lovelock Correctional Center  
Post Office Box 359  
Lovelock, Nevada 89419

2005 NOV -9 PM 3: 17

Petitioner, In Proper Person

RONALD A. LONGTIN, JR.

BY [Signature]

DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

--ooOoo--

FERRILL J. VOLPICELLI,

Petitioner,

Case NO. CR03P1263

vs.

Dept. No. 10

LENARD VARE, (Warden),

Respondent.

EX-PARTE MOTION FOR APPOINTMENT OF COUNSEL

COMES NOW, Petitioner, Ferrill J. Volpicelli, in his proper person, and submits the instant EX-PARTE MOTION FOR APPOINTMENT OF COUNSEL in the above entitled action on his Petition for Writ of Habeas Corpus (Post-Conviction) on file herein.

This Motion is made and based upon the provisions of NRS 34.750, all papers and pleadings on file herein as well as the following Argument and Points and Authorities.

BRIEF STATEMENT OF THE CASE AND FACTS

Petitioner is incarcerated in the Nevada Department of Corrections ("NDOC") pursuant to a lengthy jury trial wherein Petitioner was adjudicated guilty of multiple felony counts of

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DC-9900025217-019  
POST: FERRILL J VOLPICELLI 5 Pages  
District Court 11/09/2005 08:18 AM

burglary (felonies). Petitioner was eventually sentenced under the provisions of the habitual criminal enhancement statute, wherein Petitioner received in excess of nine (9) life sentences. Petitioner must serve a minimum of twenty (20) years before becoming eligible for parole pursuant to the Judgment of Conviction entered by this court.

Petitioner ultimately filed a timely Notice of Appeal to the Nevada Supreme Court. The Nevada Supreme Court ultimately affirmed Petitioner's conviction.

Petitioner has now submitted a Petition for Writ of Habeas Corpus (Post-Conviction), timely filed, wherein he alleges multiple constitutional errors of trial and appellate counsel.

Due to the complexity of the case, and the voluminous discovery in this action, Petitioner requests this Honorable Court to appoint counsel to assist Petitioner in the instant post-conviction proceedings.

#### POINTS AND AUTHORITIES

Although it is well established that, absent a statutory mandate, a defendant does not have a constitutional right to counsel under the Sixth Amendment in post-conviction proceedings, Coleman v. Thompson, 501 U.S. 722, 725, 111 S.Ct. 2546, 2552 (1991), the Nevada Supreme Court addressed the issue in McKague v. Warden, 112 Nev. 159, 912 P.2d 255, 257-58 (1996). The Nevada Supreme Court held that with the exception of NRS 34.820(1)(a) (appointment of counsel when a defendant is under a death sentence), one does not have ". . . any constitutional or

statutory right to counsel at all . . ." in post-conviction proceedings.

However, in support of the instant pleading, petitioner cites NRS 34.645, which provides a format that petition for counsel must adhere to. The third instruction of this statute requires an Affidavit in support in order to have an attorney appointed. (Petitioner has provided the required affidavit accompanying his Motion for Leave to Proceed in Forma Pauperis, on file herein). NRS 34.650 allows the District Court discretion to appoint counsel if certain criteria are met, which provides in pertinent part:

a petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied with the allegation of indigency as being true, and the petition is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner, and whether

- (a) The Issues are difficult;
- (b) The Petitioner is unable to comprehend the proceedings,  
or
- (c) Counsel is necessary to proceed with discovery.

NRS 34.750 (1) states that the petitioner must first show that his petition will not be summarily dismissed. Petitioner's Petition is right on point, in that he raises several claims of ineffective assistance of trial and appellate counsel.

Counsel's failure to litigate the issues found in this case subjected petitioner to ineffective assistance of counsel throughout the judicial proceedings in this action.

The issues presented before this court are complex, Petitioner is unlettered in the science of law, does not comprehend the

instant proceedings, is being assisted by other incarcerated inmates to research and prepare the instant post-conviction pleadings. Counsel would absolutely be necessary to proceed with discovery, as the case file is very limited. However, a complete review of the entire record may warrant the filing of a supplemental petition by competent counsel.

Ordinarily, claims like the ones presented herein would probably require that this court enter an ORDER mandating an evidentiary hearing on the questions of facts regarding counsels' explanation for why the multiple defenses were omitted. Indeed, this court is fully aware of the Nevada Supreme Court's jurisprudence regarding the need for an evidentiary hearing when petitioners' allege a colorable claim of ineffective assistance of counsel. See e.g. Bolden v. State, 99 Nev. 181 (1983); and Gibbons v. State, 97 Nev. 520 (1981). Petitioner's claims have viable merits.

In visiting United States v. Curtis, 742 F.2d 1070 (1984), the court stated that certain constitutional rights are so fundamental that they are deemed personal to a defendant, and he alone may decide whether these rights will be exercised or waived. Trial counsel failed to put forth evidence as requested by Petitioner that would have affected the outcome of the verdict.

In the instant case, a denial of counsel for this Petitioner would rise to the level of a clear "equal protection violation" of the law. Griffin v. Illinois, 351 U.S. 12 @ 17 (1956). The Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far

to each.

Where the complexities of a case, and a petitioner's ability to comprehend the proceedings, are such that a denial of counsel would amount to a denial of due process, this is especially true when a petitioner has such limited education and is incapable of presenting his cliams in such a way that the court can afford him a fair hearing. See Brown v. United States, 621 F.2d 54 (9th Cir. 1980) and Hawkins v. Bennett, 423 F.2d 948 (1970).

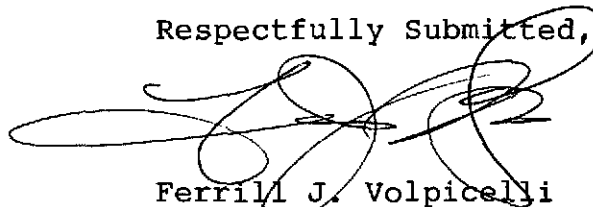
#### CONCLUSION

Based upon the foregoing argument and the accompanying proof of petitioner's indigency, this Honorable Court should find that Petitioner has met his burden in justifying the appointment of counsel to represent him on his Petition for Writ of Habeas Corpus (Post-Conviction) on file herein. Thus, Petitioner respectfully requests that this court issue an ORDER appointing counsel.

WHEREFORE, petitioner prays that this Honorable Court grant the relief sought herein.

DATED THIS 31<sup>st</sup> DAY OF OCTOBER, 2005.

Respectfully Submitted,



Ferrill J. Volpicelli  
I.D. #79565  
Petitioner, In Proper Person  
Lovelock Correctional Center  
Post Office Box 359  
Lovelock, Nevada 89419

FERRILL, J. VOLPICELLI  
79565 @ 1CC  
POB 359  
Lovelock, Nv 89419

ORIGINAL

Petitioner, In Proria Persona

FILED

2006 JAN 31 AM 8:00

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE BY

DEPUTY

FERRILL, J. VOLPICELLI,  
Petitioner,

vs.

Case No: CRP03-1263

THE STATE OF NEVADA,  
Respondent,

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), (Under said case, pleadings filed by pro se litigants are held to less stringent standards than those filed by practicing attorneys), and respectfully moves this Honorable Court for an ORDER to Compel Reno City Attorney, Karen Swaney Fraley Esq., legal advisor to the Reno Police Department, to forward to the Petitioner, at his current place of confinement above-noted, All documentation relevant to the property seized from Co-defendant Brett A. Bowman by RPD, in or about October of 2001, at his #332 apartment/residence (695 W. 3rd St. Reno Nevada 89503) in case RPD# 01-21634.

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 this COURT may deem necessary.



# STATEMENT OF JURISDICTION

This Court has JURISDICTION in this matter, as a remittitur has issued in the Nevada Supreme Court's review of this case on August 1, 2005. See Nevada Supreme Court Case No. 43203.

## ARGUMENT

Petitioner would direct the Court's attention to NRS ~~22.010~~<sup>22.010(3)</sup>, which states substantially as follows:

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 COURT, CLARK COUNTY, 110 Nev 121, 867 P2d 1147.

Petitioner has diligently pursued receipt of the foregoing referenced evidence/documentation; all to no avail. Siad documentation requested in the 15 December, 2005 Subpoena Duces Tecum is critical to the Petitioner's preparation of his Writ of Habeas Corpus (post-conviction).

## CONCLUSION

WHEREFORE, Petitioner respectfully moves this Court for relief, with an ORDER compelling Ms. Fraley to immediately forward copies of the requested evidence in the Subpoena Duces Tecum.

Respectfully submitted this 26<sup>th</sup>  
day of January, 2006.

  
FERRILL J. VOLPICELLI

Petitioner, In Propria Persona

## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that Ferrill J. Volpicelli, on this 26<sup>th</sup> day of January, 2006, personally deposited for mailing, postage prepaid, a true copy of the Motion To Compel to Reno City Attorney Karen Swaney Fraley.

Ferrill J. Volpicelli, NDOC# 79565  
c/o Lovelock Correctional Center  
1200 Prison Road POB 359  
Lovelock, Nevada 89419-0359

Petitioner, In Propria Persona

IN THE SECOND JUDICIAL COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

FERRILL J. VOLPICELLI,  
Petitioner,

v.

STATE OF NEVADA,  
Respondent,

Case No. CR03-1263

Dept. X

SUBPOENA "DUCES TECUM" NRCP 45(b)

The State of Nevada Sends Greetings To:

City Attorney  
Karen Swaney Fraley Esq.

WE COMMAND YOU, that all and singular business aside, you submit immediately, to the inmate above-named (Petitioner), at his respective address, ANY AND ALL documentation relevant to the property seized from Brett A. Bowman (Codefendant) by RPD, in or about October of 2001, at his #332 apartment/residence (695 W. 3rd St., Reno, Nevada 89503, in case # RPD 01-21634.

The above-referenced documentation is to be sent in a sealed envelope or box, addressed and delivered as noted herein, and marked "LEGAL DOCUMENTS," Within ten (10) working days of the date of service of this Supoena.

If you fail to forward the requested documentation, you will be deemed guilty of CONTEMPT OF COURT, and liable to pay all losses and damages caused by your failure, and in addition, forfeit \$100.00 (One Hundred Dollars).

IN WITNESS WHEREOF, I have set my hand and affixed the seal of the above-entitled Court, this 15<sup>th</sup> day of December, 2005.

Ronald Longtin, County Clerk

By: 

Deputy Clerk

V7.206

Ferrilli J. Volpicelli  
79565 @ 1.CC  
POB 359  
Lovelock, Nevada 89419

ORIGINAL

FILED

2006 JAN 31 AM 8:00

Petitioner, In Propria Persona

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE BY

DEPUTY

FERRILLI, J. VOLPICELLI,  
Petitioner,

vs.

THE STATE OF NEVADA,  
Respondent,

Case No: CRP03-1263

Dept No: 10

REQUEST FOR SUBMISSION

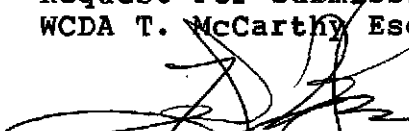
Petitioner, FERRILLI, J. VOLPICELLI, in his proper person,  
hereby moves the Court for a submission of the Writ of Habeas  
Corpus (post-conviction), and accompanying pleadings, filed on  
9 November, 2005; so that the Court can ORDER the State of  
Nevada to respond to Petitioner's pleadings.

Respectfully submitted on this 26<sup>th</sup> day of January, 2006.

  
Ferrilli J. Volpicelli  
Petitioner, In Propria Persona

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I  
certify that Ferrilli J.  
Volpicelli, on this 26<sup>th</sup> day  
of January, 2006, personally  
deposited for mailing, postage  
prepaid, a true copy of the  
Request For Submission to  
WCDA T. McCarthy Esq.

  
Ferrilli J. Volpicelli  
Petitioner, In Propria Persona

V7.207

CR03P1263  
DC-9900025217-028  
VOLPICELLI 1 Page  
POST: FERRILLI J.  
District Court  
Washoe County  
01/31/2006 02:56 PM  
3860

Ferrill J. Volpicelli  
79565 @ 1.CC  
POB 359  
lovelock, Nevada 89419

ORIGINAL

Petitioner, In Propria Persona

FILED

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

2006 JAN 31 AM 8:00

IN AND FOR THE COUNTY OF WASHOE

RONALD A. LONGIN, JR.

FERRILL, J. VOLPICELLI,  
Petitioner,

BY

Case No. CR03-1263

vs.

THE STATE OF NEVADA,  
Respondent,

Dept. No. 10

SECOND REQUEST FOR SUBMISSION

Petitioner, Ferrill J. Volpicelli, in his proper person, moves the Court for a SECOND Request For Submission of the Motion For Order To Compel, filed September 12, 2005.

Inasmuch as Mr. Van Ry Esq. has not responded to the Court's ORDER To Compel, dated 12 December, 2005, Petitioner respectfully requests the Court grant Petitioner relief with an Order compelling Mr. Van Ry to return, or replace, the vinyl folders (valued @ \$20.00) which were sent to his office on 4 May, 2004: as evidenced by the attached receipt.

Petitioner also requests ORDER compell Mr. Van Ry to provide Petitioner with an Affidavit which addresses the matter outlined in #3 of said Motion To Compel.

Dated this 26<sup>th</sup> day of January, 2006

Ferrill J. Volpicelli

Petitioner, In Propria Persona

CERTIFICATE OF Service

Pursuant to NRCF 5(b), I Ferrill J. Volpicelli, on this 26<sup>th</sup> day of January, 2006, personally deposited for mailing, postage prepaid, a true copy of this pleading to WCDA T. McCarthy/Van Ry.

V7.208

CR03P1263  
DC-9900025217-029  
POST: FERRILL J. VOLPICELLI 2 Pages  
District Court 01/31/2006 02:56 PM  
Washoe County 3860  
10000

THIS RECEIPT IS VALID UNTIL THE ARTICLE IS ACCOUNTED FOR.

**COVERAGE** - Postal insurance covers (1) the value of the article(s) at time of mailing, if lost or totally damaged, or (2) the cost of repairs. It does not cover spoilage of perishable items. Coverage may not exceed the limit fixed for the insurance fee paid. Consult postmaster for details of insurance limits and coverage.

**FILING CLAIM** - Indemnity claims must be filed within one year from the date the article was mailed. The original mailing receipt must be presented when filing a claim. Claims for complete or partial loss of contents, damage, or alleged rifling must be filed immediately. The article, container and packaging must be presented to file a claim for damage or loss of contents. Submit sales slips, receipts, bills, or repair estimates to substantiate your claim.

Enter below name and complete address of addressee. Show if addressed in care of person, hotel, etc.

SENT TO Brad Van Parys  
1403 E. 4th St  
 Reno NV 89501 (Zip Code)

(Reverse)

STATE OF NEVADA  
 DEPARTMENT OF CORRECTIONS

INMATE ACCOUNT TRANSACTION  
 REQUEST

Date 5/4/04 N# 980420

To: Inmate Services

I hereby authorize my account to be charged in the amount of \$ 7.15 (Seven & 15/100 Dollars).

Please pay to NDOC Not Legal  
work -

Signature [Signature]

Print name FERRILL VOLPIERI

ID No. 79545 Institution WNCC

Approved by [Signature]

TO VAN PARYS

Transfer	Purchase Order	Postage	Other
		<u>postage</u>	

- White Inmate Services
- Canary Inmate Services
- Pink Institution Copy
- Goldendard Inmate Copy

DOC 509 (Rev. 9/01)

PS Form 3813, January 1991

SENDER - Enter name and address of addressee on the reverse and read information regarding insurance coverage and claims.

POSTMASTER (By) ☐ Fragile ☐ Liquid ☐ Perishable

INSURANCE COVERAGE \$ 50

TOTAL 7.15

SPECIAL HANDLING

SPECIAL DELIVERY

INSURANCE FEE 1.30

POSTAGE 505

POSTMARK OFF

ADDRESSED FOR DELIVERY AT P.O. Box & ZIP Code

MAILING OFFICE CLARK COUNTY NV 89

DATE MAY - 6 - 2004

FERRILL, J. VOLPICELLI  
79565 @ 1CC  
POB 359  
Lovelock, Nevada 89419

ORIGINAL


FILED

Petitioner, In Propria Persona

2006 FEB -9 AM 11:12

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BY   
DEPUTY

FERRILL, J. VOLPICELLI,  
Petitioner,

vs.

Case No CR03-1263

Dept No: 10

THE STATE OF NEVADA,  
Respondent,

REQUEST FOR SUBMISSION

Petitioner, FERRILL, J. VOLPICELLI, in his proper person, hereby moves the Court for a submission of the Motion To Compel NDOC Director Wharton to comply with the Subpoena Duces Tecum; dated and mailed on the 13th day of December, 2005.

Respectfully submitted on this 6<sup>th</sup> day of February, 2006

  
FERRILL, J. VOLPICELLI  
Petitioner, In Propria Persona

CERTIFICATE OF MAILING  
Pursuant to NRCP 5(b), I certify that Ferrill J. Volpicelli, on this 6<sup>th</sup> day of February, 2006, personally deposited for mailing postage prepaid, a true copy of this pleading to the State Attorney General's office.

0-10-23 sub

FILED

2006 FEB 17 PM 4:23

RONALD A. LONGTIN, JR.  
BY *[Signature]*  
DEPUTY

ORIGINAL

2645  
PATRICIA A. LYNCH  
Reno City Attorney  
KAREN S. FRALEY  
Deputy City Attorney  
P.O. Box 1900  
Reno, NV 89505  
(775) 334-2421

CR03P1263  
DC-9900025217-030  
POST: FERRILL J VOLPICELLI 6 Pages  
District Court 02/17/2006 11:14 AM  
Washoe County 2645

IN THE SECOND JUDICIAL 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-P1263  
Dept. No. 10

OPPOSITION TO MOTION FOR ORDER TO COMPEL AND  
MOTION TO QUASH SUBPOENA DUCES TECUM

COMES NOW the City of Reno, by and through its attorneys, PATRICIA A. LYNCH,  
Reno City Attorney, and KAREN S. FRALEY, Deputy City Attorney, in opposition to  
Petitioner's Motion for Order to Compel a response to the Subpoena Duces Tecum mailed to the  
City of Reno Police Department on December 23, 2005. The City of Reno also moves the Court  
to Quash the same Subpoena Duces Tecum under NRCP Rule 45(c)(3)(A)(iv).

This Motion is based upon the Points and Authorities below.

DATED this 17<sup>th</sup> day of February, 2006.

PATRICIA A. LYNCH  
Reno City Attorney

BY: *[Signature]*  
KAREN S. FRALEY  
Deputy City Attorney

1 POINTS AND AUTHORITIES

2  
3 **I. BRIEF STATEMENT OF FACTS**

4 Ferrill Volpicelli was arrested by the Reno Police Department on October 17, 2001 and  
5 ultimately charged with eight counts of burglary, one count of conspiracy to commit crimes  
6 against property, and one count of unlawful possession making, forgery or counterfeiting of  
7 inventory pricing labels. Detectives investigating his crimes obtained and served several search  
8 warrants and a substantial amount of property was seized and placed into Evidence at the Reno  
9 Police Department. Mr. Volpicelli was tried and convicted on November 14, 2003. On April 1,  
10 2004, he was designated a habitual criminal and sentenced to nine life terms, seven to run  
11 concurrently and two to run consecutively.  
12

13 On June 29, 2005, the Nevada Supreme Court affirmed the judgment of conviction and  
14 issued a Remittitur to the District Court on August 1, 2005. The City has been advised that the  
15 Petitioner has filed a Petition for Writ of Habeas Corpus, upon which there has been no ruling.  
16

17 Notwithstanding the absence of any pending case or legal authority, Petitioner saw fit to  
18 mail a Subpoena Duces Tecum to the Deputy City Attorney assigned as Legal Advisor to the  
19 Reno Police Department, received on or about December 27, 2005, demanding production of  
20 "ANY AND ALL documentation relevant to the property seized from Brett A. Bowman  
21 (Codefendant) by RPD, in or about October of 2001, at his #332 apartment/residence (695 W. 3<sup>rd</sup>  
22 St., Reno, Nevada 89503, in case # RPD 01-21634." A copy of the Subpoena Duces Tecum is  
23 attached here to as Exhibit A.  
24

25 Petitioner then filed the instant Motion for Order to Compel.  
26

27 ///

28 ///



1           **II.     THERE IS NO RIGHT TO DISCOVERY AFTER AFFIRMATION OF**  
2           **CONVICTION AND REMITTITUR.**

3           The Petitioner appears to have a misunderstanding as to the procedural rules that attach at  
4 this stage. Having filed a Motion for Order to Compel, received by the City on or about January  
5 30, 2006, he seems to be laboring under the misapprehension that the affirmation of his  
6 convictions and the issuance of the Remittitur to the District Court reopens the criminal case for  
7 purposes of discovery. He argues that this Court has jurisdiction and that "Siad [sic]  
8 documentation requested in the 15 December, 2005 Subpoena Duces Tecum is critical to the  
9 Petitioner's preparation of his Writ of Habeas Corpus (post-conviction)." A copy of the Motion  
10 is attached here to as Exhibit B.

11           In fact, until and unless the Petition for Writ of Habeas Corpus is granted, Petitioner has  
12 no right to discovery. For discovery purposes, NRS 34.780 applies the Nevada Rules of Civil  
13 Procedure to proceedings once the Petition for Writ of Habeas Corpus has been granted. Even  
14 then, there are restrictions placed upon a party to that proceeding. NRS 34.780(2) requires that a  
15 writ must have been granted, a date set for hearing, and leave of court be granted before a party  
16 may seek discovery under the Nevada Rules of Civil Procedure.

17           None of those prerequisites have been met in this case. The Petitioner has no legal  
18 authority to subpoena any records from the Reno Police Department, nor does the City have any  
19 obligation to respond in any fashion. The City respectfully requests the Court quash the  
20 Subpoena Duces Tecum.

21           **III.    A RESPONSE TO AN INVALID SUBPOENA CANNOT BE COMPELLED.**

22           If, as the City argues above, Petitioner has no right to serve a subpoena duces tecum when  
23  
24  
25  
26  
27  
28

1 there is no pending case, then Petitioner's Motion for Order to Compel is also invalid. The City  
2 cannot be compelled to do that which it has no legal obligation to do. The City respectfully  
3 requests the Court deny the Motion for Order to Compel.

4 **IV. THERE ARE NO RENO POLICE DEPARTMENT RECORDS RESPONSIVE TO**  
5 **THE SUBPOENA.**

6 Should the Petition for Writ of Habeas Corpus be granted and the prerequisites of NRS  
7 34.780(2) met, with Petitioner receiving leave of Court to seek discovery, the City wishes to  
8 represent at this time that there are no Reno Police Department records responsive to the  
9 Subpoena Duces Tecum. The RPD case number provided, 01-21634, is a traffic stop not related  
10 to either defendant in this series of cases. Further, the City wishes to represent at this time that,  
11 while a search was made of Mr. Bowman's residence, it was a consensual search and no  
12 evidence or property of any kind was seized. The City will, of course, provide evidentiary  
13 support for each of those representations upon direction from the Court.  
14

15  
16 **V. CONCLUSION**

17 The City's experience with the Petitioner in both the criminal and domestic matters<sup>1</sup> since  
18 November, 2003 has been very extensive, including correspondence, records requests, property  
19 release requests, subpoenas duces tecum, and motions of various types including a Motion for  
20 an Order to Show Cause Why the City Should Not be Held in Contempt in the domestic case,  
21 where the decision was in favor of the City, and the present Motion for Order to Compel in the  
22 criminal case.  
23

24  
25 ///

26 ///

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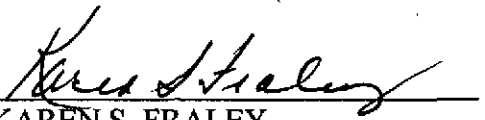
27  
28 <sup>1</sup> Petitioner also has a domestic case, Volpicelli v. Inman, et al, CV03-03582, which was dismissed, a decision under appeal to the Nevada Supreme Court. In several instances, Petitioner has subpoenaed records for that case that he also subpoenaed or requested for the criminal case.

1 The City is in the unfortunate position of having to respond to every document sent to it  
2 by the Petitioner, whether or not there is legal authority for the document. Once again, without  
3 legal authority, the Petitioner has frivolously wasted both the City's and the Court's time.

4 The City respectfully requests the Court deny Petitioner's Motion for Order to Compel  
5 and Quash the Subpoena Duces Tecum.  
6

7 DATED this 17<sup>th</sup> day of February, 2006.

8 PATRICIA A. LYNCH  
9 Reno City Attorney

10  
11 BY   
12 KAREN S. FRALEY  
13 Deputy City Attorney  
14 Nevada Bar #3825  
15 P.O. Box 1900  
16 Reno, NV 89505  
17 (775) 334-2421  
18 Attorneys for the City of Reno  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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 the  
4 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.

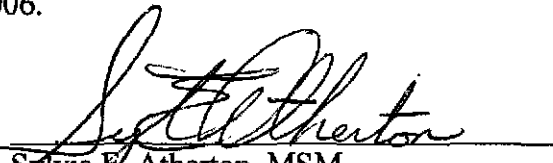
11 \_\_\_\_\_ Reno/Carson Messenger Service.

12 addressed as follows:

13 Ferrill Volipicelli, #79565  
14 Lovelock Correctional Center  
15 P.O. Box Box 359  
16 Lovelock, NV 89419

17 Terrence McCarthy  
18 Deputy District Attorney  
19 P.O. Box 30083  
20 Reno, NV 89520

21 DATED this 17<sup>th</sup> day of February 2006.

22   
23 Sylvia E. Atherton, MSM  
24 An Employee of the Reno City Attorney  
25  
26  
27  
28



CR03P1263 DC-9900025217-031  
POST FERRILL J VOLPIGELLI 2 Pages  
District Court 02/17/2006 11:14 AM  
Washoe County 2645  
FVJ TOME

# EXHIBIT 1

Ferrill J. Volpice, NDOC# 79565  
c/o Lovelock Correctional Center  
1200 Prison Road POB 359  
Lovelock, Nevada 89419-0359

Petitioner, In Propria Persona

IN THE SECOND JUDICIAL COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

FERRILL J. VOLPICELLI,  
Petitioner,

v.

STATE OF NEVADA,  
Respondent,

)  
)  
)  
)  
)  
)  
)

Case No. CR03-1263

Dept. X

SUBPOENA "DUCES TECUM" NRCP 45(b)

The State of Nevada Sends Greetings To:

City Attorney  
Karen Swaney Fraley Esq.

WE COMMAND YOU, that all and singular business aside, you submit immediately, to the inmate above-named (Petitioner), at his respective address, ANY AND ALL documentation relevant to the property seized from Brett A. Bowman (Codefendant) by RPD, in or about October of 2001, at his #332 apartment/residence (695 W. 3rd St., Reno, Nevada 89503, in case # RPD 01-21634.

The above-referenced documentation is to be sent in a sealed envelope or box, addressed and delivered as noted herein, and marked "LEGAL DOCUMENTS," Within ten (10) working days of the date of service of this Supoena.

If you fail to forward the requested documentation, you will be deemed guilty of CONTEMPT OF COURT, and liable to pay all losses and damages caused by your failure, and in addition, forfeit \$100.00 (One Hundred Dollars).

IN WITNESS WHEREOF, I have set my hand and affixed the seal of the above-entitled Court, this 15<sup>th</sup> day of December, 2005.

Ronald Longtin, County Clerk

By: 

Deputy Clerk

V7.218 12/24/05

CR03P1263 DC-9900025217-032  
POST. FERRILL J. VOLPICELLI 3 Pages  
District Court 02/17/2006 11 2645  
Washoe County

# EXHIBIT 2

FERRILL, J. VOLPICELLI, J.J.  
79565 @ ICC  
POB 359  
Lovelock, Nv 89419

Petitioner, In Proria Persona

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

FERRILL, J. VOLPICELLI,  
Petitioner,

vs.

Case No: CRP03-1263

THE STATE OF NEVADA,  
Respondent,

---

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), (Under said case, pleadings filed by pro se litigants are held to less stringent standards than those filed by practicing attorneys), and respectfully moves this Honorable Court for an ORDER to Compel Reno City Attorney, Karen Swaney Fraley Esq., legal advisor to the Reno Police Department, to forward to the Petitioner, at his current place of confinement above-noted, ALL documentation relevant to the property seized from Co-defendant Brett A. Bowman by RPD, in or about October of 2001, at his #332 apartment/residence (695 W. 3rd St. Reno Nevada 89503) in case RPD# 01-21634.

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 this Court may deem necessary.



**STATEMENT OF JURISDICTION**

This Court has JURISDICTION in this matter, as a remittitur has issued in the Nevada Supreme Court's review of this case on August 1, 2005. See Nevada Supreme Court Case No. 43203.

**ARGUMENT**

Petitioner would direct the Court's attention to NRS ~~110.121~~<sup>1, 210(3)</sup>, which states substantially as follows:

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 COURT, CLARK COUNTY, 110 Nev 121, 867 P2d 1147.

Petitioner has diligently pursued receipt of the foregoing referenced evidence/documentation; all to no avail. Said documentation requested in the 15 December, 2005 Subpoena Duces Tecum is critical to the Petitioner's preparation of his Writ of Habeas Corpus (post-conviction).

**CONCLUSION**

WHEREFORE, Petitioner respectfully moves this Court for relief, with an ORDER compelling Ms. Fraley to immediately forward copies of the requested evidence in the Subpoena Duces Tecum.

Respectfully submitted this 26<sup>th</sup>  
day of January, 2006.

  
FERRILL, J. VOLPICELLI

Petitioner, In Propria Persona

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that Ferrill J. Volpicelli, on this 26<sup>th</sup> day of January, 2006, personally deposited for mailing, postage prepaid, a true copy of the Motion To Compel to Reno City Attorney Karen Swaney Fraley.

6  
2-3  
FERRILL J. VOLPICELLI  
79565 LCC POB 359  
Lovelock, Nevada 89419

ORIGINAL

FILED

Petitioner, In Propria Persona

2006 MAR -6 PM 3:29

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
BY                      CLERK, JR.

IN AND FOR THE COUNTY OF WASHOE

DEPUTY

FERRILL J. VOLPICELLI,

Petitioner,

Case No. CR03-P1263

Dept. No. 10

vs.

STATE OF NEVADA,

Respondent,

LETTER BRIEF

Honorable Steve Elliot As Presiding Judge  
POB 30083  
Reno, Nevada 89520-3083

Please accept this letter-brief in lieu of a more formal brief relevant to the pending matters in this case.

Currently, there are three (3) Motions To Compel involving the Petitioner's quest for evidence relative to the recently filed Writ of Habeas Corpus (post-conviction).

Firstly, the issues regarding trial counsel Brad Van Ry involve the Petitioner's request for the return of his vinyl folders.

Said property was commingled with Mr. Van Ry's case file and never returned to Petitioner. In addition, there is the request for an Affidavit from Mr. Van Ry relative to his receipt of the controverted exculpatory evidence (ie. the complete transcribed transcripts involving taped conversations between investigators of the RPD and the Defendants at WCSO circa 10/01-202), from the State and/or his review of the tapes in their entirety prior to trial.

V7.222

Since November of 2005, the Court has been in receipt of said Writ wherein many of the Grounds proffered involve the ineffective assistance of counsel. The aforereferenced RPD transcripts buttress the claims of ineffective assistance of counsel and/or the possibility of the State prosecutors withholding exculpatory evidence. Without Mr. Van Ry's Affidavit as an accompanying exhibit with the Writ, the Court may rule in favor of the State's likely request for a dismissal due to the lack of support.

Next, the issue regarding the Motion To Compel NDOC Director Whorton involves the Petitioner's diligent pursuit of taped telephone conversations between Mr. Kevin Sigstad and the Petitioner. The discussions involve various issues relevant to the seized property and return thereof, as well as evidence in support of Petitioner's employment with Mr. Sigstad while Petitioner was on parole in 2001. Again, this evidence supports many of the claims Petitioner cites in his pending Writ.

The final matter involves a Motion To Compel Reno City Deputy Attorney Ms. Fraley to provide documentation of a search and/or seizure concerning the RPD case which culminated in the prosecution of the instant case. Although the Petitioner mistranscribed the RPD case number, Ms. Fraley is very familiar with RPD case number 01-216321 AS the Petitioner has filed numerous pleadings over the past few years relative to the seizure and confiscation of Petitioner's family's property by the RPD and certain family members at the time of Petitioner's arrest. Although Ms. Fraley refers to the pleadings as frivolous, Petitioner was compelled to file the Motions due to the excessive delays and lack of cooperation by those individuals involved.

The documentation sought from the RPD, via the City of Reno Attorney, is discovery evidence which should have been provided to the defense prior to trial and pursuant to Judge Hardesty's order for reciprocal discovery in 2003. This evidence relates to co-defendant Bowman's

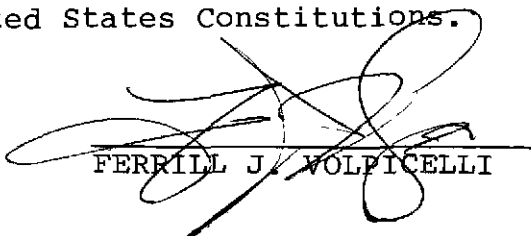
searched property in RPD case 01-216321 at Bowman's apartment. Incidentally, it was harmless error to cite case 01-21634 and Ms. Fraley is well aware of the correct case number as she has received correspondence over the past few years concerning matters pertaining to Petitioner's quest for accountability and return of his family's seized property. The documentation of the property searched and eventually released to Bowman's agent related directly to issues outlined in the now pending Writ. This includes, but is not limited to, the inconsistent and/or perjured relevant testimony at trial as to promises made to Bowman by the prosecution, the nexus between the property at his apartment and the storage unit, as well as the fraud perpetrated to the jury in conveying minimal involvement of Bowman. And again, without such evidence to accompany the Writ which the Court will initially review to determine if an evidentiary hearing is warranted, the Court may dismiss the related Grounds as unsubstantiated.

Now the City Attorney argues in her Opposition to the Motion To Compel that the applicable NRCP and NRS do not allow for such discovery at this juncture of the post conviction proceedings. This may be so, but the Petitioner counters with the fact that this evidence should have been in the possession of the defense years ago. So in this regard, the State should be compelled to immediately release that evidence which is not new discovery. Otherwise, to deny said evidence further only constitutes additional due process violations. Should not the State, County and City be held accountable to the applicable NRCP and NRS in this case?

It is no small wonder why so many incarcerated pro se litigants are compelled to inundate the Courts with such pleadings; thereby consuming Court resources.

The Petitioner trusts that this Court will review all the pleadings pending in this case and render rulings consistent with equitable justice under both the Nevada and United States Constitutions.

Respectfully Submitted,  
on this 22 day of February, 2006

  
FERRILL J. VOLPICELLI

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an incarcerated inmate at LCC, Lovelock, Nevada, and that on this date, I did place this Letter-Brief in the Law Library drop-off. Said copies of the Letter-Brief are true copies and sealed for mailing in the United States Mail, postage pre-paid and addressed to the following individuals:

Karen S. Fraley Esq.

Terrance McCarthy Esq.

Bradley Van Ry Esq.

State of Nevada Attorney General

Dated this 28 day of February, 2006



FERRILL J. VOLPICELLI  
Petitioner, In Propria Persona

ORIGINAL

FILED

2006 MAR 21 PM 4:41

RONALD A. LONGTIN, JR.

BY: *[Signature]*  
DEPUTY

1 CODE: 3860  
PATRICIA A. LYNCH  
2 Reno City Attorney  
KAREN S. FRALEY  
3 Deputy City Attorney  
P.O. Box 1900  
Reno, NV 89505  
(775) 334-2421

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

FERRILL J. VOLIPCELLI,

Petitioner,

vs.

CASE NO.: CR03-P1263

STATE OF NEVADA

DEPT. NO.: 10

Respondent.

**REQUEST FOR SUBMISSION**

It is requested that the City of Reno's RESPONSE TO PETITIONER'S "LETTER  
BRIEF' FILED IN REPLY TO THE CITY OF RENO'S OPPOSITION TO MOTION FOR  
ORDER TO COMPEL AND MOTION TO QUASH SUBPOENA DUCES be submitted to the  
Court for decision. The undersigned attorney signifies that a copy of this request has been  
mailed to all counsel of record.

DATED this 21st day of March, 2006.

PATRICIA A. LYNCH  
Reno City Attorney

By: *[Signature]*  
Karen S. Fraley  
Deputy City Attorney

ORIGINAL

FILED

MAR 21 2006

RONALD A. LONGTIN, JR., CLERK

By: *[Signature]*  
DEPUTY

3880  
PATRICIA A. LYNCH  
Reno City Attorney  
KAREN S. FRALEY  
Deputy City Attorney  
P.O. Box 1900  
Reno, NV 89505  
(775) 334-2421

IN THE SECOND JUDICIAL 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-P1263

Dept. No. 10

**RESPONSE TO PETITIONER'S "LETTER BRIEF" FILED IN REPLY TO THE CITY  
OF RENO'S OPPOSITION TO MOTION FOR ORDER TO COMPEL AND MOTION  
TO QUASH SUBPOENA DUCES TECUM**

COMES NOW the City of Reno, by and through its attorneys, PATRICIA A. LYNCH,  
Reno City Attorney, and KAREN S. FRALEY, Deputy City Attorney, in Response to  
Petitioner's "Letter Brief" Filed in Reply to the City of Reno's Opposition to Motion for Order to  
Compel and Motion to Quash Subpoena Duces Tecum.

The City will not address the first two issues specified by Petitioner in his "Letter Brief",  
as they do not relate to the Subpoena Duces Tecum served upon the Reno Police Department,  
which is the subject of his Motion for Order to Compel.

**I. Petitioner Has Already Received All Records Regarding Search Warrants Served  
and Evidence Seized in RPD Case No. 01-216321.**

In his "Letter Brief", Petitioner states that "Ms. Fraley is very familiar with RPD case

CR03P1263  
POST: FERRILL J. VOLPICELLI 6 Pages  
District Court 03/21/2006 04:28 PM  
3880  
Washoe County

1 number 01-216321 As [sic] the Petitioner has filed numerous pleadings over the **past few years**  
2 [emphasis added] relative to the seizure and confiscation of Petitioner's family's property by the  
3 RPD and certain family members at the time of Petitioner's arrest."<sup>1</sup> Letter Brief, p. 2.

4 Petitioner is correct. He has filed numerous pleadings over the past few years, to the extent that  
5 "pleadings" refers to correspondence requesting records, subpoenas duces tecum, and various  
6 Motions thereto related. He has done so in two different cases: the criminal matter, the  
7 convictions for which were recently affirmed by the Nevada Supreme Court, and a domestic  
8 matter entitled Ferrill Volpicelli vs. Lori Inman et al, Case No. CV-03-03582. Often he has  
9 subpoenaed the same records in each case.

10  
11 On January 6, 2004, the City provided Petitioner with returns for the search warrants  
12 served in RPD Case No. 216321-01, records for which he had mailed a subpoena. See Exhibit  
13 A. In response, Petitioner corresponded with the City on January 9, 2004, indicating he had  
14 received the information subpoenaed. See Exhibit B. He did raise an issue regarding a cell  
15 phone he expected to find listed as seized, as well as some other non-search warrant issues.  
16 However, he did not raise an issue concerning the absence of any information related to his  
17 allegation that the Reno Police Department obtained a search warrant for Co-Defendant  
18 Bowman's residence, searched it and seized property which he appears to allege actually  
19 belonged to him. Letter Brief, pp. 2-3. Certainly, if he believed the City had withheld  
20 documents in response to his subpoena, that would have been the time to raise the issue.

21  
22 On October 22, 2004, the City provided the Petitioner with an inventory list for RPD  
23 Case No. 01-216321 at his request. The list provided the name of the owner of the property and  
24

25  
26  
27  
28 <sup>1</sup> Petitioner characterizes the incorrect case number as "harmless error", as indeed it is, although it was necessary for  
the City to access the case number to ensure it wasn't a related case. It was also necessary to clarify that issue in the  
City's Opposition.



1 its status. See Exhibit C. Again, Petitioner did not inquire as to any property he believed had  
2 been seized from Co-Defendant Bowman's residence pursuant to a Search Warrant.

3 In September 2005, Petitioner again mailed subpoenas duces tecum to the Reno Police  
4 Department in the case of Volpicelli v. Inman, Case No. CV03-3582<sup>2</sup>, one directed to Detective  
5 Reed Thomas, assigned to the Repeat Offender Program, and one directed to the Reno Police  
6 Department. The subpoena addressed to Detective Thomas is virtually identical to the subpoena  
7 at issue in the instant matter, including the incorrect case number. See Exhibit D. The subpoena  
8 directed to the City is attached as Exhibit E. The City's initial response is attached hereto as  
9 Exhibit F. The follow-up response, dated October 19, 2005, is attached as Exhibit G.  
10

11 The preceding narrative and the exhibits show that the Petitioner has already received all  
12 information available regarding search warrants, property in evidence and its disposition. As the  
13 City indicated in its Opposition to Motion for Order to Compel and Motion to Quash Subpoena  
14 Duces Tecum, Mr. Bowman's residence was searched, with his consent, and no property relevant  
15 to the case was located or seized. The City will once again represent that it stands ready to  
16 provide evidentiary support for those representations upon direction from the Court.  
17

18 The Police Department cannot provide Petitioner with search warrants that were not  
19 issued or inventories of property not seized. He has repeatedly been provided with  
20 comprehensive lists of the property that the Reno Police Department did seize and has been  
21 given information regarding the disposition of the property, often confirming his own requests.  
22

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27  
28 <sup>2</sup> The City was unaware at the time that, in Petitioner's case against Ms. Inman, CV03-03582, Summary Judgment had been granted to the defendant, Petitioner's Motion for Reconsideration had been denied, and his appeal to the Nevada Supreme Court had been received and assigned Case No. 45999.

1 **II. Petitioner's Allegations of Prosecutorial or Law Enforcement Misconduct Are**  
2 **Irrelevant to the Issue before the Court.**

3 Petitioner's "Letter Brief" contains allegations regarding the conduct of the prosecutor  
4 and the investigating officer(s) and implies that the City has now joined the "conspiracy" to  
5 deprive him of due process. In the words of the Petitioner, "[n]ow the City Attorney argues in  
6 her Opposition to the Motion to Compel [sic] that the applicable NRCP and NRS do not allow for  
7 such discovery at this juncture of the post conviction proceedings. This may be so, but the  
8 Petitioner counters with the fact that this evidence should have been in the possession of the  
9 defense years ago." Letter Brief, p. 3 [emphasis in original]. His argument appears to be that he  
10 doesn't have to adhere to the applicable law because, he alleges, evidence was improperly  
11 withheld years ago.  
12

13 Even if true, Petitioner's unsubstantiated allegations do not provide license to disregard  
14 the law. Nor do they give him license to misuse process of court, forcing the City into the  
15 position of responding to fugitive documents and inappropriate or frivolous motions in order to  
16 ensure that silence is not interpreted as disrespect toward the Court.  
17

18 **III. Conclusion.**


19 The documentation sought by the Petitioner is to "evidence relat[ing] to co-defendant  
20 Bowman's search property in RPD case 01-216321 at Bowman's apartment." Letter Brief, pp.  
21 2-3. The simple response is that there is no such evidence. What he seeks does not exist and  
22 repeated attempts to subpoena such records, both in the instant matter and the domestic case, will  
23 not make it so.  
24

25 The City respectfully requests the Court Quash the Subpoena Duces Tecum and Deny  
26 Petitioner's Motion for an Order to Compel. The City further respectfully requests that  
27  
28

1 Petitioner be admonished as to the proper procedures to be followed at this juncture. If and when  
2 Petitioner's Petition for Writ of Habeas Corpus is granted, the City will cooperate to the fullest  
3 extent with any requests, direction or orders issuing from the Court.

4 DATED this 21<sup>st</sup> day of March, 2006.

5  
6 PATRICIA A. LYNCH  
7 Reno City Attorney

8  
9 BY   
10 KAREN S. FRALEY  
11 Deputy City Attorney  
12 Nevada Bar #3825  
13 P.O. Box 1900  
14 Reno, NV 89505  
15 (775) 334-2421  
16 Attorneys for the City of Reno  
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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 the  
4 party(s) set forth below by:

5 \_\_\_\_\_ 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 X \_\_\_\_\_ Reno/Carson Messenger Service.

12 addressed as follows:

13 Ferrill Volipicelli, #79565  
14 Lovelock Correctional Center  
15 P.O. Box Box 359  
16 Lovelock, NV 89419

17 Terrence McCarthy  
18 Deputy District Attorney  
19 P.O. Box 30083  
20 Reno, NV 89520

21 DATED this 21st day of March 2006.

22   
23 Sylvia E. Atherton, MSM  
24 An Employee of the Reno City Attorney  
25  
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CR03P1263 DC-9900025217-035  
POST: FERRILL J VOLPICELL 24 Pages  
District Court 03/21/2006 04:28 PM  
Washoe County 3880  
FV4 TOWER

# EXHIBIT 1

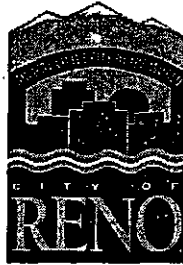
**RANDALL EDWARDS**  
*Chief Deputy, Civil Division*

*Civil Division Deputies*  
**GABRIELLE CARR**  
**TRACY CHASE**  
**DONALD L. CHRISTENSEN**  
**MARILYN CRAIG**  
**KAREN SWANEY FRALEY**  
**MICHAEL K. HALLEY**  
**SUSAN BALL ROTHE**  
**JONATHAN SHIPMAN**  
**CREIG SKAU**

*Legal Researcher, LISA RILEY*  
*Paralegal, LINDA FOX FELKER*

**OFFICE OF THE CITY ATTORNEY**

**PATRICIA A. LYNCH**



**KATHRINE I. BERNING**  
*Chief Deputy, Criminal Division*

*Criminal Division Deputies*  
**ROSALBA I. ARANGO**  
**LYNN BRANZELL**  
**CAROLYN CRAMER**  
**LEANNE KENDALL**  
**PAMELA G. ROBERTS**  
**HENRY SOTELO**

*Victim Advocates*  
**LORI FRALICK**  
**TERI GALVIN**  
**SUZANNE RAMOS**

January 6, 2004

Ferrill Volpicelli  
#79565  
Northern Nevada Correctional Center  
Box 7000  
Carson City, NV 89702

Dear Mr. Volpicelli:

In accordance with the subpoena duces tecum addressed to the Reno Police Department, I have enclosed copies of the Search Warrants issued in October 2001 and the returns for each, indicating the property seized in compliance with the warrants.

In other correspondence you addressed to DDA Riggs and me, you indicated competing claims for the property seized in accordance with those search warrants. Please provide me with a specific list of the property you are claiming is subject to claims by your children.

Finally, you included a copy of a letter from James R. Brooke, Esq. to DDA Kristin Erickson in which Mr. Brooke requested the release of certain property. As that letter was dated June, 2002, we require an updated designation of the appropriate person to whom property should be released in the event that the Reno Police Department determines that some property in its custody should be returned to you. Please confirm Mr. Brooke as your designee or provide me with the identity and telephone number of another designee.

Sincerely,

PATRICIA A. LYNCH, CITY ATTORNEY

Karen Swaney Fraley  
Deputy City Attorney  
Legal Advisor – Reno Police Department  
(775) 334-2421

cc: DDA Tammy Riggs (w/o enclosure)  
Detective Reed Thomas (w/o enclosure)

Wells Fargo  
Safe Deposit Box  
Search Warrant

FILED

JURT OF

RENO

OCT 18 P3:44

IN AND FOR THE COUNTY OF WASHOE,

TOWNSHIP,  
HARVEY L. EICHENBERRY, CLERK  
RENO JUSTICE COURT  
DEPUTY

\*\*\*

IN THE MATTER OF THE APPLICATION  
FOR A SEARCH WARRANT.

DUPLICATE ORIGINAL  
SEARCH WARRANT

THE STATE OF NEVADA, TO ANY PEACE OFFICER IN THE COUNTY OF  
WASHOE:

Proof by Affidavit having been made this date before me  
by Det. Reed Thomas, of the RENO Police Depart-  
ment, Washoe County, Nevada, that there is

probable cause to believe that the crime(s) of Burglary  
AND OBTAINING MONEY / PROPERTY BY  
FALSE PRETENSES AND GRAND LARCENY  
felony violations of NRS 205.060 & 205.220 & 205.380

has/have been committed by Ferrill Volpicelli

and that evidence of the crime(s) SEE ATTACHED  
DOCUMENT ENTITLED "ATTACH-  
MENT A"

is/are presently located, concealed and/or hidden on or within  
( ) a residence and its surrounding premises and curtilage  
including sheds, outbuildings and areas appurtenant thereto,

1 described as \_\_\_\_\_  
2 \_\_\_\_\_ in Washoe County, Nevada;  
3 ( ) a vehicle, described as \_\_\_\_\_  
4 \_\_\_\_\_ which is presently located at  
5 \_\_\_\_\_ in Washoe County, Nevada;  
6 (✓) a container, described as A SAFETY DEPOSIT  
7 BOX BEARING NUMBER 300  
8 which is/are presently located at Wells Fargo Bank,  
9 490 California Ave, Reno in Washoe County, Nevada.

10 YOU ARE THEREFORE DIRECTED to make a complete search within  
11 the exterior boundaries of the location and items described  
12 above, including any containers therein, whether locked or  
13 unlocked, which could reasonably contain the evidence to be  
14 searched for, and if the evidence is found, to seize, make  
15 written inventory of the same, and bring the inventory forthwith  
16 before me at the above Court.

17 ( ) Serve this Warrant between the hours of 7:00 a.m.  
18 and 7:00 p.m.

19 (✓) Good cause appearing, serve this Warrant at any  
20 time.

21 DATED this 17<sup>th</sup> day of October, 2001.

22 Judge Edward Quinn  
23 JUSTICE OF THE PEACE

24 DATE: 10-17-01

25 TIME: 8:16 PM

26 [Signature]  
PEACE OFFICER

WITNESS



1           This Search Warrant having been issued based upon an  
2 oral statement given under oath, this duplicated original Warrant  
3 is hereby endorsed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.  
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JUSTICE OF THE PEACE

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R E T U R N

I HEREBY CERTIFY and return that I received the annexed Search Warrant on the 17<sup>th</sup> day of October, 2001; that I executed the same by making said search of the premises commonly designated as a safety deposit box (#300) located at Wells Fargo - 490 California Ave. in Reno Washoe County, Nevada; that upon said search I seized the following item(s): See Attachment.

FILED

OCT 18 P3:44

MADE E. J. MENDY, CLERK  
RENO JUSTICE COURT  
BY: [Signature]  
DEPUTY

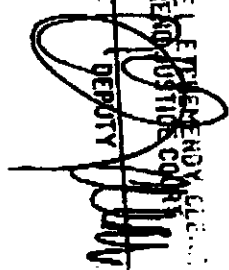
described in the annexed Search Warrant.

DATED this 18<sup>th</sup> day of October, 2001.

[Signature]  
Peace Officer

to wit: cash register receipts, cash register receipt tape, refund slips or other documents or paper reflecting transactions with retail stores, cash, unopened merchandise, label makers, UPC/bar code stickers that are blank or filled out, ad circlers, public and personal telephone directories, computer records, disks, software and/or computer generated records, including, but not limited to: computers, keyboards, central processing units, external drives and/or external storage, tape, and or disk, terminals and/or video display units and/or other receiving devices and peripheral equipment such as, but not limited to, printers, automatic dialers, modems, acoustic couplers, journal diaries, correspondence, memoranda, computer software, programs and source documentation, logs, operating instructions, flow charts, diagrams, historical data, all or of the above whether found on paper, in handwritten, typewritten, photocopied or printed form, or stored on computer printouts, magnetic tapes, cassettes, disks, diskettes, hard drives, or any other medium, lists of computer words or passwords or codes, any bank, financial services or checking account records and identifications in the name of Ferrill Volpicelli or identified aliases including, but not limited to, checkbooks, cancelled checks, checking instruments, credit cards and statements, income tax and property tax records, any utility bills or receipts, rent receipts, or addressed envelopes and keys and other articles of personal property tending to establish the identity of the persons in control of the residence, safety deposit box and storage unit described in this search warrant.

ATTACHMENT "A"

MAIRIE J. FLEMMING  
RECORDS SECTION  
BY:  DEPUTY  
01 DEC 18 P3:44

FILED

V7.239

10-18-01 / 1000 hrs

Case #216321-01

# Safe Deposit Box Inventory of Seizure

One envelope containing \$4300 in \$100 bills;  
one plastic card holder containing NV. drivers license,  
2 Wal Mart cards, prison I.D., 2 B of A VISA  
cards, in the name of Lori & Fernil Volpicelli; one  
Chase Mastercard, one Great Basin VISA, 3 Pets  
Mart giftcards; one Nordstrom card; one Staples  
cash card, one European Fitness I.D.; one diamond  
w/ Appraisal; misc. paperwork; barcodes; labels;  
Foodstamps; 2 Hawthorne Savings C.D. checks,  
Great Basin check stub; catalog page advertising  
label makers; temporary CA. drivers license; credit  
card applications; BXI exchange checks; Label Factory  
Deluxe CD; Office Depot floppy disk; Receipts;  
barcodes & rain checks for Toys R' US; one  
pack of label sheets; 1 pack of cable ties; ~~one~~ Two  
J.C. Penny card (Lori Volpicelli); one CA. drivers  
license (Fernil Volpicelli); one Gottschalk card; one  
Frederick Nelson card; one SS card # 530-63-2551  
(Logan Volpicelli); one SS card # 530-04-7258 <sup>(Annie Volpicelli)</sup>; one  
SS card # 572-76-7620 (Fernil Volpicelli); One  
Accordion Folder containing misc. financial information,  
titles, receipts, credit card info, bank <sup>Bank</sup> account info,  
etc.

Det. Reed Thomas

*[Signature]*

MAILED  
OCT 18 10:44  
FBI  
DEPT OF JUSTICE  
DEPT