

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 8 OF 13

POST DOCUMENTS

APPELLANT

Ferrill J. Volpicelli #79565  
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Lovelock, Nevada 89419

RESPONDENT

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



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Storage Unit  
Search Warrant

10/17

FILED

OCT 18 P3:49

IN THE JUSTICE COURT OF RENO  
IN AND FOR THE COUNTY OF WASHOE, STATE

TOWNSHIP  
MARIE LETCHER, CLERK  
BY: [Signature]  
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 Department  
MENT, Washoe County, Nevada, that there is  
probable cause to believe that the crime(s) of BURGLARY  
AND OBTAINING MONEY/PROPERTY BY  
FALSE PRETEXTS AND GRAND LARCENY  
felony violations of NRS 205.220 & 205.380 & 205.390  
has/have been committed by Ferrill Volpicelli  
and that evidence of the crime(s) SEE ATTACHED  
DOCUMENT ENTITLED "ATTACHMENT  
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,

V8.241



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 UNIT # B114 A  
7 STORAGE UNIT  
8 which is/are presently located at 30 East Victorian  
9 Ave SPARKS 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 it, make a  
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 Dannon  
23 JUSTICE OF THE PEACE

24 DATE: 10-17-01  
25 TIME: 2:15 PM

26 PEACE OFFICER [Signature]  
WITNESS [Signature]

FILED  
OCT 18 3 49 PM '01  
MARIE L. ELLIOTT, CLERK  
CLERK OF DISTRICT COURT  
B.N. DEPUTY



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\_\_\_\_.

4 CB.

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6 JUSTICE OF THE PEACE  
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Washoe County, Nevada; that upon said search I seized the following item(s): See attachment.

described in the annexed Search Warrant.

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

Peace Officer

**FILED**

01 OCT 18 P3:49

MAINE, MITCHELL, CLERK  
REID JUSTICE COURT  
BY: [Signature]  
(IN P.M.)



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"

MADE TO ORDER  
RENO JUSTICE FOR  
DEPUTY

ON OCT 18 P3:49

FILED

V8.245



RETURN  
10.17.01

1 of 3

30 E. VICTORIAN # B114

R.P.D. Case # 01-216321

- 1) Rug # 100948 - FOUNTAIN Blue
- 2) Remote Starter
- 3) Play Station Driving Force
- 4) V.3 Racing wheel
- 5) KDS RAD 5 15" Crystal Display
- 6) GE OPTIMA TV ANTENNA
- 7) Portable Closet
- 8) ONE Box - OFFICE max filler Paper
- 9) Hewlett Packer office jet V-40 Print Fax Scan Copy
- 10) Connectivity Value kit
- 11) Queen Size Air Bed - WEIRDO
- 12) Brother ml 100 Type writer
- 13) Empty Box - PANASONIC KX-TG25B3W phone / answer machine  
(Looks Like phone in apt.)
- 14) FOLDER MARKED CREDIT CARDS

FILED  
OCT 18 3 49 PM '01  
DEPUTY  
RECEIVED  
RICHMOND  
COUNTY  
SHERIFF'S  
OFFICE



Return  
10.17.01

2 of 3

30 E. VICTORIAN AVE # B114

RPD CASE # 01-216321

~~15) ~~COLDER~~ ~~MAKERS~~~~

⇒ 16) Empty Sanyo Box for 27" Flat View Television (Looks like one in apt.)

→ 17) Empty STEELHORSE wireless headphones

⇒ 18) <sup>EMPTY</sup> NOKIA cell box # 544-4813

19) SAMSUNG RADIO CHARGER

20) MISC. WORD PROCESS ACCESSORIES in paper bag

21) PANASONIC DVD HOME THEATER SC-H770

21) " " " " " "

22) KODAK EZ 200 DIGITAL CAMERA sets

23) " " " " " "

24) " " " " " "

25) VTECH DIGITAL TALK PHONES # 2430

26) " " " " " # 2430

27) " " " " " # 2430

28) Plastic Bin of misc. files

2 way radios w/ charger  
Braun Synchro System

29) Brother Electronic Labeling System

30) Nozelco Shaver

31) Travel View Minivan Console T.V. w/ Remote

32) Lego Steven Spielberg movie maker set

MAILED  
NOV 18 2001  
FBI - NEW YORK  
RECEIVED

NOV 18 3 50

FILED



RETURN

10.17.01

30 E. VICTORIAN AVE # B114

3 of 3

R.P.D. Case # 01-216321

33) Mopac Facet

34) KDS RND 5 CRYSTAL Display 15"

35) Daxton wildcat Vacuum Cleaner

36) Turbo power bath spa

37) Hoover Vacuum Cleaner

38) Simplicity Sewing Machine

39) KODAK SLIDE Projector

40) Krupps Coffee maker

41) Emerson 19" DVD TV Combo

42) " " " "

43) " " " "

44) PANASONIC SCOKIO DVD Stereo System

45) Compaq Presario 5150 WM

46) KOHLER TOILET

47) Sony HCD-D690 Home Stereo w/ speakers

→ 48) Empty Play station GT3 RACING Pack

49) SHARP VCR/TV Combo

50) Hewlett Packard OfficeJet Printer V40

51) FAX - Brother Genl System MF 9000

52) AERO Air Bed

53) AERO Air Bed

54) Computer monitor

55) CPU

56) Hoover Steam VAC

57) Plastic Box w/ power strips, Keyboard & Mouse

58) ~~Plastic~~ Plastic Box of misc electronic equipment

neckrest Blood pressure monitor

Boxes tooth brushes

MAILED  
DEPT. OF JUSTICE  
OCT 18 1901  
P350  
FILED

V8.248



2955 Lakeside Dr.

Search Warrant

FILED

COURT OF RENO <sup>01</sup> OCT 18 P3:42  
TOWNSHIP,  
COUNTY OF WASHOE, <sup>MARIE EICHEMEYER</sup>  
STATE OF NEVADA  
BY: [Signature]  
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 PREENSES AND Grand Larceny  
felony violations of NRS 205.220 & 205.380 & 205.060  
has/have been committed by Ferrill Volpicelli  
and that evidence of the crime(s) SEE ATTACHED  
DOCUMENT ENTITLED "ATTACHMENT  
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 Unit 214 a condominium  
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 \_\_\_\_\_  
7 \_\_\_\_\_  
8 which is/are presently located at 2955 LAKESIDE  
9 DRIVE, 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 it, make a  
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  
23 DATE: 10-17-01

24  
25 TIME: 8:17 PM

Judge Edward Dennis  
JUSTICE OF THE PEACE

[Signature]  
PEACE OFFICER

[Signature]  
WITNESS



This Search Warrant having been issued based upon an oral statement given under oath, this duplicated original Warrant is hereby endorsed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

JUSTICE OF THE PEACE



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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"

FILED  
OCT 18 1982  
MARIE E. CHAMBERLAIN  
CLERK OF SUPERIOR COURT  
BY: [Signature]  
DEPUTY



Various Speed

- 1) Black & Decker ~~Electric~~ Mill / Patio storage
- 2) Wal Mart receipt 51.37 RPP  
09/21/01 - Jaggi jeans in closet
- 3) Sticker Dental removed / Kitchen sink
- 4) Computer soft case black / closet
- 5) ~~Mini Disk Recorder + Access in Axis box / closet~~
- 6) Camera Paper / labels Kitchen Counter
- 7) External CD-Rom Gateway 2000 5JBV4019601 / Kitchen Counter
- 8) Koss Headset - plugged in laptop - Kitchen counter
- 9) one letter to Travis from Dad in envelope dated May 4, 01
- 10) Gateway 2000 Solo Laptop PBID 0937 / Kitchen Counter
- 11) Deskjet 820CSE Printer / Kitchen counter
- 12) Koss Pen in box / Kitchen counter
- 13) ~~Ariel~~ Philippe Ariel camera / bridge switch / kitchen counter
- 14) Misc. Paperwork: Financial, telephone #'s, receipts etc. <sup>letter</sup>  
1 Animal Squirrel



JANUARY 9, 2004

FERTILL VOLPICELLI  
77055 @ NINE  
BOX 7000  
CARSON CITY, NV 89700CITY  
ATTORNEY  
OF  
REND

RE: 6 JANUARY, 2004 LETTER

DEAR MS. FRAXET,

I AM IN RECEIPT OF YOUR LETTER AND ACCOMPANYING SEARCH WARRANT DOCUMENTATION. ALTHOUGH THE WARRANTS INDICATE PROPERTY SEIZED, TWO ISSUES STILL REMAIN. FIRST, THERE IS NO REFERENCE TO THE SEIZURE AND LOCATION OF THE CELL TELEPHONE REMOVED FROM THE MAZDA VAN ON OR ABOUT 17 OCTOBER, 2001.

AM I TO ASSUME THAT IT IS IN THE NOKIA CELL BOX (775-5444813) WHICH IS DESIGNATED AS #18; AND IN FACT EMPTY? (SEE <sup>AUSSIE</sup> STORAGE ITEMS SECONDLY, AND IN REGARDS TO THE SUBPOENA FOR CASE # 03-3582, I AM REQUESTING COPIES OF ALL RECEIPTS SEIZED WITH THE INVESTIGATIONS; INCLUDING BUT NOT LIMITED TO: THE LAKESIDE CONDO, MAZDA VAN, FORD EXPLORER, & JESS FARGO SAFE BOX.

WITH REGARDS TO PROVIDING YOU WITH A SPECIFIC LIST OF THE PROPERTY CLAIMED BY ME FOR MY CHILDREN, OR THEIR INDIVIDUAL CLAIMS IN THE EVENT I CAN CONTACT THEM, I WILL BE DELAYED UNTIL MIDDLE OF FEBRUARY OR EARLY MARCH. AT THAT TIME, I WILL ALSO INDICATE THE DESIGNEES FOR RETRIEVAL

in case of disaster



ASIDE FROM THIS AND BETWEEN NOW AND THEN,  
I WOULD LIKE TO INDULGE YOUR ASSISTANCE IN  
FACILITATING THE RETURN AND TRANSPORT OF A  
PRISON PURCHASED TYPEWRITER AND ACCOMPANYING  
ACCESSORIES, APPLY DESIGNATED AS ITEMS #12  
AND #20 ON THE STORAGE UNIT INVENTORY. AS  
SAID ITEMS ARE CLEARLY NOT DESIGNATED AS TO  
FRUITS OF, OR INSTRUMENTALITIES OF, ANY CRIMINAL  
MATTERS. THESE ITEMS ARE CRITICAL FOR ME TO  
FURTHER MY LEGAL AFFAIRS AND ARE CONSIDERED  
LEGAL RESOURCES AS INDICATED IN THE COPY OF  
AN AFFIDAVIT ENCLOSED. INASMUCH AS THE  
NDPC IS AUTHORIZED TO TRANSPORT THESE ITEMS  
AND THE FACT THAT I AM APPEARING IN  
COURT ON JANUARY 23, 2004, COULD YOU  
SEE TO IT THAT THE TWO FOREGOING ITEMS  
ARE BROUGHT TO THE COURT BY DEFENSIVE  
COUNSEL? IN THAT WAY, I CAN RETURN TO  
THE NDPC WITH THESE ITEMS IN VIEW OF  
FILING MORE DOCUMENTS TO DRAW THE  
COURT OF THEIR RESOURCES.

PLEASE REPLY TO ME ON THESE MATTERS AT  
YOUR EARLIEST CONVENIENCE SO THAT I CAN  
PROCEED ACCORDINGLY.

THANK YOU.

cc: file  
enclosure  
SINCERE REGARDS,





CR03P1263  
POST: FERRILL J. VOLPICELLI 9 Pages!  
District Court 03/21/2006 04 28 PM  
Washoe County 3680  
FV2

# EXHIBIT 2



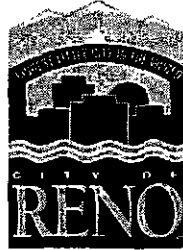
**TRACY L. CHASE**  
*Acting Chief Deputy, Civil Division*

*Civil Division Deputies*  
**MARK F. BRUCE**  
**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**

## OFFICE OF THE CITY ATTORNEY

**PATRICIA A. LYNCH**



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

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

*Victim Advocates*  
**EILENE KANE**  
**SUZANNE RAMOS**  
**LAURA ZIMMERMAN**

October 22, 2004

Ferrill J. Volpicelli #79565  
High Desert State Prison  
Box 650  
Indian Springs, NV 89018

Dear Mr. Volpicelli:

Enclosed please find the inventory list for RPD Case No. 01-216321. You will note that the property is listed, followed by identification of the owner of the property and its disposition. All items identified as belonging to you and "In Evidence" can now be released as you designate. You previously designated Kevin Sigstad to receive your property. Mr. Sigstad has now contacted me and is prepared to act on your behalf. I did ask him to wait until you had received this list before calling to make an appointment to pick up the property.

If you wish to change your designation, please advise me immediately.

Sincerely,

PATRICIA A. LYNCH, CITY ATTORNEY

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

ksf  
Enc.



**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) 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



<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



# EXHIBIT 3

CR03P1263 DC-990025217-037  
POST: FERRILL J VOLPICELLI 2 Pages  
District Court 03/21/2006 04:28 PM  
Washoe County 3880



Professional Indexes & Files, Inc. 800.422.0191 Recycled Paper





1 CODE 4055

2 FERRILL J. VOLPICELLI, NDOC# 79565  
3 c/o Lovelock Correctional Center  
4 Post Office Box 359  
5 1200 Prison Road  
6 Lovelock, NV 89419-0359

7  
8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
9  
10 IN AND FOR THE COUNTY OF WASHOE.

11 FERRILL J. VOLPICELLI,

12 Plaintiff.

13 vs.

Case No. 03-3582

14 LORI INMAN, et al.,

Dept. No. VI

15 Defendant.

16 SUBPOENA

17 To: Detective Thomas, c/o City Attorney Karen Swaney Fraley  
18 (Name)

19 You are commanded to appear before the Second judicial District Court, State of Nevada, Washoe  
20 County, at the courtroom of said court, Department VI at Reno, Nevada, on the 29th day of  
21 September, 2005 at 9:00am, to testify on the part of Plaintiff

22 Any person failing to appear may be deemed in contempt of court, and shall be liable to the party  
23 injured in the sum of \$100.00, and for such damages as may be sustained by him/her on account of such  
24 neglect or refusal. You are further commanded to provide Plaintiff with any  
25 & all documentation rele-Dated this 20th day of September, 2005  
26 vant to property seized from Brett A. Bowman,  
27 by RPD at 695 W. 3rd St., Apt# RONALD A. LONGIN, JR., CLERK OF THE COURT  
28 332, in case # 01-21634.

STATE OF NEVADA  
COUNTY OF WASHOE

by

Deputy Clerk

29 I received the within Subpoena on the 20th day of September, 2005 and  
30 personally ~~received~~ a copy of the same upon Det. Thomas, c/o City Attorney (Reno)  
31 mailed

32 Subscribed and sworn to before me  
33 this \_\_\_\_\_ day of \_\_\_\_\_

34 Pursuant to NRS 208.165,

35 Notary Public  
36 notary not required.

Signature of Person Making Service



CR03P1253 DC-S900025217-038  
POST FERRILL J VOLPICELLI 3 Pages  
District Court 03/21/2006 04 28 PM  
Washoe County 3880  
rva

# EXHIBIT 4



FERRILL J. VOLPICELLI  
NDOC # 79565  
Lovelock Correctional Center  
POB 359 1200 Prison Road  
Lovelock, Nevada 89419

Plaintiff, In Propria Persona

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

FERRILL J. VOLPICELLI,

Plaintiff,

Case no. CV-03-3582

vs.

Dept. no. VI

LORI INMAN, et al.,

Defendant(s).

SUBPOENA "DUCES TECUM" NRCP 45(b)

The State Of Nevada Sends Greetings To:

RENO POLICE DEPARTMENT  
c/o Karen Fraley Swaney  
City Attorney's Office  
POB 1900  
Reno, Nevada 89501

WE COMMAND YOU, that all and singular business and excuses being set aside, you appear and attend on the 29th day of September, 2005, in Department No. VI of the District Court, Washoe County, Nevada.

YOU ARE FURTHER COMMANDED to submit immediately to the above-named Plaintiff, by sending to the above-noted address, any and all evidence, dating back to 2001, including, but not limited to, written/taped statements/correspondence between Defendants and law enforcement, receipts, inventory lists, photographs, and documentation releasing all seized property in RPD case # 01-216321 to individual(s), IRS and retail establishments relevant to the Lakeside condo, Mazda Van, Ford Explorer, Wells Fargo Bank and Aussie Storage facility.

The above referenced documentation is to be sent in a sealed envelope or box addressed and delivered as noted herein, in a sealed envelope or box, marked "legal documents", WITHIN TEN (10) WORKING DAYS OF THE ABOVE FILING DATE.



If you fail to attend, and 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 One Hundred (\$100.00) Dollars.

In WITNESS WHEREOF, I have set my hand and affixed the seal of the above-entitled Court this 25<sup>th</sup> day of Aug, 2005.

RONALD LONGTIN, COUNTY CLERK

By: T. White

DEPUTY CLERK

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ )

ss:

I hereby certify that I received the within Subpoena (Duces Tecum), and I, \_\_\_\_\_, personally served the same upon \_\_\_\_\_, by showing the within to him/her, and delivery to him /her, a copy of the same in the County of \_\_\_\_\_, State of \_\_\_\_\_, on this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

\_\_\_\_\_  
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE  
ME THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2005.

\_\_\_\_\_  
NOTARY PUBLIC

PREPARED AND SUBMITTED

BY: Ferrill J. Volpicelli

FERRILL J. VOLPICELLI  
PLAINTIFF, IN PROPRIA PERSONA



CR03P1263 DC-9900025217-039  
POST: FERRILL J. VOLPICELLI Pages  
District Court 03/21/2006 04 28 PM  
Washoe County 5 C. 10 3880

# EXHIBIT 5



**WILLIAM R. SHERMAN**  
*Chief Deputy, Civil Division*

*Civil Division Deputies*  
**TRACY L. CHASE**  
**DONALD L. CHRISTENSEN**  
**MARILYN CRAIG**  
**KAREN SWANEY FRALEY**  
**MATTHEW JENSEN**  
**SUSAN BALL ROTHE**  
**JONATHAN D. SHIPMAN**  
**CREIG SKAU**

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

## **OFFICE OF THE CITY ATTORNEY**

**PATRICIA A. LYNCH**



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

*Criminal Division Deputies*  
**CAROLYN CRAMER**  
**PAMELA G. ROBERTS**  
**BRIAN M. SOOUDI**  
**HENRY SOTELO**  
**PATRICK SULLIVAN**  
**KIMBERLY PASINI WOOD**

*Victim Advocates*  
**JEANNA BENTO**  
**EILENE KANE**  
**SUZANNE RAMOS**

September 26, 2005

Ferrill J. Volpicelli  
NDOC #79565  
Lovelock Correctional Center  
Post Office Box 359  
1200 Prison Road  
Lovelock, NV 89419-0359

RE: Volpicelli v. Inman, et al

Dear Mr. Volpicelli:

I am in receipt of your Subpoenaes Duces Tecum directed to the Reno Police Department and to Detective Reed Thomas. As you know, and has previously been litigated, Detective Thomas is not a custodian of record for the Reno Police Department and, therefore, the subpoena is not valid. Further, it was not submitted with an appropriate amount of time to respond.

Much of the information you request has already been submitted to you. I will be happy to review my file and send you copies of any information I have not previously forwarded. I have enclosed with this letter a copy of the IRS Levy and the RPD disposition. I have also enclosed a copy of the release signed by Kevin Sigstad. There are several items that are not marked off and that Mr. Sigstad did not receive. RPD is attempting to locate those items, although I believe some were already returned to you. In the event RPD is unable to locate the items and it cannot be shown that they were already returned, I will forward to you a claim form.

As to the subpoena addressed to Detective Thomas, your cover letter contains one case number and the subpoena another. I will have to review the records of RPD to attempt to determine what it is you are seeking.



Ferrill J. Volpicelli  
September 26, 2005

Page 2

I will be out of the office until October 10. I will address your issues as soon as possible after my return.

Sincerely,

PATRICIA A. LYNCH, CITY ATTORNEY

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

ksf  
Enc.



## Notice of Levy

DATE: January 13, 2004

REPLY TO: Internal Revenue Service

Lori Harris

675 W Moana Lane

Reno NV 89509

TELEPHONE NUMBER

OF IRS OFFICE: 775-824-2234 x268

NAME AND ADDRESS OF TAXPAYER:

Ferrill J. Volpicelli

911 Parr Blvd

Reno NV 89512

TO: Reno Police Department

Attn: Karen Fraley, Dep. City Atty

PO Box 1900

Reno NV 89505

IDENTIFYING NUMBER(S): 572-76-7620

THIS ISN'T A BILL FOR TAXES YOU OWE. THIS IS A NOTICE OF LEVY WE ARE USING TO COLLECT MONEY OWED BY THE TAXPAYER NAMED ABOVE.

Kind of Tax	Tax Period Ended	Unpaid Balance of Assessment	Statutory Additions	Total
1040	12/31/1989	\$903.41	\$5,687.74	\$6,591.15
1040	12/31/1990	\$35,106.62	\$20,769.04	\$55,875.66
1040	12/31/1991	\$47,728.10	\$28,620.59	\$76,348.69
1040	12/31/1992	\$33,256.26	\$20,168.65	\$53,424.91

THIS LEVY WON'T ATTACH FUNDS IN IRAs, SELF-EMPLOYED INDIVIDUALS' RETIREMENT PLANS, OR ANY OTHER RETIREMENT PLANS IN YOUR POSSESSION OR CONTROL, UNLESS IT IS SIGNED IN THE BLOCK TO THE RIGHT. →

Total  
Amount  
Due

\$192,240.41

We figured the interest and late payment penalty to 02/15/2004

The Internal Revenue Code provides that there is a lien for the amount that is owed. Although we have given the notice and demand required by the Code, the amount owed hasn't been paid. This levy requires you to turn over to us this person's property and rights to property (such as money, credits, and bank deposits) that you have or which you are already obligated to pay this person. However, don't send us more than the "Total Amount Due."

Money in banks, credit unions, savings and loans, and similar institutions described in section 408(n) of the Internal Revenue Code must be held for 21 calendar days from the day you receive this levy before you send us the money. Include any interest the person earns during the 21 days. Turn over any other money, property, credits, etc. that you have or are already obligated to pay the taxpayer, when you would have paid it if this person asked for payment.

Make a reasonable effort to identify all property and rights to property belonging to this person. At a minimum, search your records using the taxpayer's name, address, and identifying numbers(s) shown on this form. Don't offset money this person owes you without contacting us at the telephone number shown above for instructions. You may not subtract a processing fee from the amount you send us.

## To respond to this levy —

1. Make your check or money order payable to **United States Treasury**.
2. Write the taxpayer's name, identifying number(s), kind of tax and tax period shown on this form, and "LEVY PROCEEDS" on your check or money order (not on a detachable stub.).
3. Complete the back of Part 3 of this form and mail it to us with your payment in the enclosed envelope.
4. Keep Part 1 of this form for your records and give the taxpayer Part 2 within 2 days.

If you don't owe any money to the taxpayer, please complete the back of Part 3, and mail that part back to us in the enclosed envelope.

Signature of Service Representative

Lori Harris

Title

Revenue Officer



**SEC. 6331. LEVY AND DISTRRAINT.**

(b) **Seizure and Sale of Property.**—The term “levy” as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) **Successive Seizures.**—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

**SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.**

(a) **Requirement.**—Except as otherwise provided in this section, any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

**(b) Special rule for Life Insurance and Endowment Contracts**

(1) **In general.**—A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

(2) **Satisfaction of levy.**—Such levy shall be deemed to be satisfied if such organization pays over to the Secretary the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323 (1)(X)) of the existence of the lien with respect to which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

(3) **Enforcement proceedings.**—The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.

(c) **Special Rule for Banks.**—Any bank (as defined in section 408(n)) shall surrender (subject to an attachment or execution under judicial process) any deposits (including interest thereon) in such bank only after 21 days after service of levy.

**(d) Enforcement of Levy.**

(1) **Extent of personal liability.**—Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the underpayment rate established under section 6621 from the date of such levy (or, in the case of a levy described in section 6331 (d)(3), from the date such person would otherwise have been obligated to pay over such amounts to the taxpayer). Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) **Penalty for violation.**—In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(e) **Effect of honoring levy.**—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)), shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

**SEC. 6333. PRODUCTION OF BOOKS.**

If a levy has been made or is about to be made on any property, or right to property, any person having custody or control of any books or records, containing evidence or statements relating to the property or right to property subject to levy, shall, upon demand of the Secretary, exhibit such books or records to the Secretary.

**SEC. 6343. AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.**

**(a) Release of Levy and Notice of Release.**—

(1) **In general.**—Under regulations prescribed by the Secretary, the Secretary shall release the levy upon all, or part of, the property or rights to property levied upon and shall promptly notify the person upon whom such levy was made (if any) that such levy has been released if—

(A) the liability for which such levy was made is satisfied or becomes unenforceable by reason of lapse of time,

(B) release of such levy will facilitate the collection of such liability,

(C) the taxpayer has entered into an agreement under section 6159 to satisfy such liability by means of installment payments, unless such agreement provides otherwise,

(D) the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer, or

(E) the fair market value of the property exceeds such liability and release of the levy on a part of such property could be made without hindering the collection of such liability.

For purposes of subparagraph (C), the Secretary is not required to release such levy if such release would jeopardize the secured creditor status of the Secretary.

(2) **Expedited determination on certain business property.**—In the case of any tangible personal property essential in carrying on the trade or business of the taxpayer, the Secretary shall provide for an expedited determination under paragraph (1) if levy on such tangible personal property would prevent the taxpayer from carrying on such trade or business.

(3) **Subsequent levy.**—The release of levy on any property under paragraph (1) shall not prevent any subsequent levy on such property.

(b) **Return of Property.**—If the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return—

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from a sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

**(d) Return of Property in Certain Cases.**—If—

(1) any property has been levied upon, and

(2) the Secretary determines that—

(A) the levy on such property was premature or otherwise not in accordance with administrative procedures of the Secretary,

(B) the taxpayer has entered into an agreement under section 6159 to satisfy the tax liability for which the levy was imposed by means of installment payments, unless such agreement provides otherwise,

(C) the return of such property will facilitate the collection of the tax liability, or

(D) with the consent of the taxpayer or the National Taxpayer Advocate, the return of such property would be in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States, the provisions of subsection (b) shall apply in the same manner as if such property had been wrongfully levied upon, except that no interest shall be allowed under subsection (c).

\* \* \* \* \*

**Applicable Sections of Internal Revenue Code**

6321. LIEN FOR TAXES.

6322. PERIOD OF LIEN.

6325. RELEASE OF LIEN OR DISCHARGE OF PROPERTY.

6331. LEVY AND DISTRRAINT.

6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

6333. PRODUCTION OF BOOKS.

6334. PROPERTY EXEMPT FROM LEVY.

6343. AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.

7426. CIVIL ACTIONS BY PERSONS OTHER THAN TAXPAYERS.

7429. REVIEW OF JEOPARDY LEVY OR ASSESSMENT PROCEDURES.

For more information about this notice, please call the phone number on the front of this form.

Form 668-A(ICS) (Rev. 1-2003)





**RENO POLICE DEPARTMENT  
EVIDENCE DISPOSITION ORDER**

**CASE # 01-216321**

**Date** 8/18/04 **Offense** Burglary

*The Evidence/Property Section, Investigative Services Bureau, is authorized to dispose of the listed items being held as evidence/property by the Reno Police Department as indicated:*

**Release Only** ☒ **Dispose/Auction** ☐ **Both** ☐ **RMC** ☐ **NRS** ☐

*You are authorized to release property as follows:*

<b>Name</b>		<b>Phone</b>
Internal Revenue Service Attn: Lori Harris		824-2234
<b>Address</b>		
675 W. Moana Lane, Reno, NV 89509		
<b>Property to be released:</b>		
A88700 \$886.00 U. S. Currency A90683 \$2,300.00 U. S. Currency		
<b>Photograph Prior to Release</b>	<b>Date</b>	<b>By</b>
<input type="checkbox"/>		

<b>Dispose of and/or auction in accordance with department policy:</b>		
<b>Photograph Prior to Release</b>	<b>Date</b>	<b>By</b>
<input type="checkbox"/>		

**Support data for release of evidence/property:**  
IRS Notice of Levy for any & all funds belonging to Ferrill J. Volpicelli/Case is now closed and Volpicelli convicted.

<b>Date Notification Sent</b>	<b>By</b>
<b>Date Property Released</b>	<b>By</b>
<b>Date Property Destroyed</b>	

<b>Evidence Technician</b>	<b>Date</b>
<b>Investigator</b>	<b>Date</b>
<b>Authorizing Supervisor</b>	<b>Date</b>
<b>Bureau Commander (if required)</b>	<b>Date</b>
<b>Deputy City Attorney (if required)</b>	<b>Date</b>
<i>Karen Swamy Tuley</i>	8-18-04

Printed 10/6/03

V8.276



**SECTION 1.— Levy Acknowledgment**

Signature of person responding

Karen S. Fraley

Printed name of person responding

Karen S. Fraley, Deputy City Attorney

Your telephone number

(775) 334-2421

Date and time this levy received

**SECTION 2.— Levy Results (Check all applicable boxes.)**

☒ Check attached in the amount of \$ 3,186.00

☐ No funds

☐ No account

☐ No record

**SECTION 3.— Other Information (Please complete this section only if you are NOT sending us the total amount the taxpayer owes.)**

Taxpayer's latest address, if different

from the one on this levy Ferrill Volpicelli, #79565, High Desert State Prison,

Box 650, Indian Springs, NV 89018

Taxpayer's telephone number: ( ) Unk

Name and address of taxpayer's

employer, if different from addressee None

Next date you will owe funds to the taxpayer No additional funds in RPD possession

belonging to Ferrill Volpicelli

Other information you believe may help us:



## Notice of Levy

DATE: January 13, 2004

TELEPHONE NUMBER

REPLY TO: Internal Revenue Service

OF IRS OFFICE: 775-824-2234 x268

Lori Harris

675 W Moana Lane

Reno NV 89509

NAME AND ADDRESS OF TAXPAYER:

Ferrill J. Volpicelli

911 Parr Blvd

Reno NV 89512

TO: Reno Police Department

Attn: Karen Fraley, Dep. City Atty

PO Box 1900

Reno NV 89505

IDENTIFYING NUMBER(S): 572-76-7620

THIS ISN'T A BILL FOR TAXES YOU OWE. THIS IS A NOTICE OF LEVY WE ARE USING TO COLLECT MONEY OWED BY THE TAXPAYER NAMED ABOVE.

Kind of Tax	Tax Period Ended	Unpaid Balance of Assessment	Statutory Additions	Total
1040	12/31/1989	\$903.41	\$5,687.74	\$6,591.15
1040	12/31/1990	\$35,106.62	\$20,769.04	\$55,875.66
1040	12/31/1991	\$47,728.10	\$28,620.59	\$76,348.69
1040	12/31/1992	\$33,256.26	\$20,168.65	\$53,424.91
THIS LEVY WON'T ATTACH FUNDS IN IRAs, SELF-EMPLOYED INDIVIDUALS' RETIREMENT PLANS, OR ANY OTHER RETIREMENT PLANS IN YOUR POSSESSION OR CONTROL, UNLESS IT IS SIGNED IN THE BLOCK TO THE RIGHT. =====>			Total Amount Due	\$192,240.41

We figured the interest and late payment penalty to 02/15/2004

The Internal Revenue Code provides that there is a lien for the amount that is owed. Although we have given the notice and demand required by the Code, the amount owed hasn't been paid. This levy requires you to turn over to us this person's property and rights to property (such as money, credits, and bank deposits) that you have or which you are already obligated to pay this person. However, don't send us more than the "Total Amount Due."

Money in banks, credit unions, savings and loans, and similar institutions described in section 408(n) of the Internal Revenue Code must be held for 21 calendar days from the day you receive this levy before you send us the money. Include any interest the person earns during the 21 days. Turn over any other money, property, credits, etc. that you have or are already obligated to pay the taxpayer, when you would have paid it if this person asked for payment.

Make a reasonable effort to identify all property and rights to property belonging to this person. At a minimum, search your records using the taxpayer's name, address, and identifying numbers(s) shown on this form. Don't offset money this person owes you without contacting us at the telephone number shown above for instructions. You may not subtract a processing fee from the amount you send us.

## To respond to this levy —

1. Make your check or money order payable to **United States Treasury**.
2. Write the taxpayer's name, identifying number(s), kind of tax and tax period shown on this form, and "LEVY PROCEEDS" on your check or money order (not on a detachable stub.).
3. Complete the back of Part 3 of this form and mail it to us with your payment in the enclosed envelope.
4. Keep Part 1 of this form for your records and give the taxpayer Part 2 within 2 days.

If you don't owe any money to the taxpayer, please complete the back of Part 3, and mail that part back to us in the enclosed envelope.

Signature of Service Representative

/S/ Lori Harris

Title



Revenue Officer



March 21, 2005

R.P.D. Case Number : 01-216321 (Ferrell VOLPICELLI)

Following items currently located at Elko Warehouse, 440 Elko Avenue, Reno, NV. Will be released to Kevin SIGSTAD.

<u>EVIDENCE #</u>	<u>DESCRIPTION</u>
<del>1.</del> A87914	One (1) Computer
<del>2.</del> A87915	Various Colored Empty Plastic Bags From Several Local Merchants
<del>3.</del> A87915	One (1) Art Explosion Label Factory Deluxe
<del>4.</del> A87915	One (1) Panasonic 2.4 Ghz Cordless Answering System
<del>5.</del> A87915	One (1) Nokia Phone Box - Empty
<del>6.</del> A87915	Two (2) Avery #8165 Labels
<del>7.</del> A87915	One (1) Multi-Tool
<del>8.</del> A87915	One (1) Texas Instrument Connectivity Value Kit
<del>9.</del> A87915	One (1) Texas Instrument TI-89 Calculator
<del>10.</del> A87927	One (1) Panasonic Cordless Answering System Box - Empty
<del>11.</del> A87927	One (1) Computer Keyboard
<del>12.</del> A87927	One (1) Computer Mouse
<del>13.</del> A87927	Two (2) Power Strips
<del>14.</del> A87915	One (1) Samsonite Charger
<del>15.</del> A87936	One (1) Closetmaid Closet
<del>16.</del> A87939	One (1) Optima Amplified TV Antenna
<del>17.</del> A87942	Four (4) Brother Correctable Film Ribbons
<del>18.</del> A87942	Five (5) Gelikan Lift Tabs
<del>19.</del> A87942	One (1) Plastic Knob
<del>20.</del> A87942	One (1) Avery Clear Ink Jet Labels Package
<del>21.</del> A87942	Two (2) Audiovox Handi Talkies - With Chargers
<del>22.</del> A87942	One (1) Norelco Shaver
<del>23.</del> A87942	One (1) Braun Syncro Shaver System
<del>24.</del> A87944	Three (3) Kodak Digital Cameras
<del>25.</del> A87945	One (1) Stereo
<del>26.</del> A87945	Two (2) Stereo Speakers
<del>27.</del> A87947	One (1) Sharp TV/VCR
<del>28.</del> A87948	One (1) Jean Computer Monitor
<del>29.</del> A87949	One (1) Sonya TV Box - Empty - DESTROY 
<del>30.</del> A87950	One (1) Brother Typewriter - No Case
<del>31.</del> A87951	One (1) Steel Horse Wireless Headphones Box - Empty
<del>32.</del> A87953	Several Unopened Packages Of Filler Paper - 200 Count Each
<del>33.</del> A87954	One (1) Empty Box - Playstation 2 Gran Turismo DESTROY 
34. A88174 ✓	Two (2) Key Rings With Keys
35. A88176	One (1) Cigarette Lighter Jumper

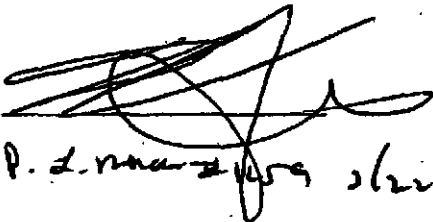


36.	A88176	One (1) Sport Nylon Jacket
<del>37.</del>	A88178	One (1) Panasonic KP-150 Electric Pencil Sharpener
38.	A88179	One (1) Orbital Wallarm VCR-DVD Mount
<del>39.</del>	A88664	One (1) Gateway Laptop Computer - In Case
40. ✓	A90208	One (1) Black & Decker Variable Speed Drill
41.	A90208	Computer Disks
42.	A90208	Laminating Sheets
43.	A90208	CD-ROM
44.	A90208	One (1) Blue Zippered Pocket Organizer
45.	A90208	One (1) Cross Pen In Box
46.	A90208	One (1) Set Koss Earphones
47.	A90208	One (1) Telephone Cord
48.	A90208	One (1) Bottle Sticker & Decal Remover
<del>49.</del>	None	One (1) 6"x9" Brown Envelope With The Following Writing On It: "Reed Thomas - RPD - RE: <u>Volpicelli</u> - Release To Kevin Sigstad - Det. R. Thomas #4042 - 2-15-05"

*SUBJECT TO UNRELEASED ITEMS.*

All of the above items released to: KEVIN SIGSTAD DATE: 3/22/05

BY:

  
 P. J. [unclear] 3/22/05





Printed on Recycled Paper  
20% Post Consumer Waste

CR03P1263 DC-9900025217-040  
POST: FERRILL J VOLPICELL 23 Pages  
District Court 03/21/2006 04 28 PM 3880  
Washoe County Nevada

# EXHIBIT 6



**WILLIAM R. SHERMAN**  
*Chief Deputy, Civil Division*

*Civil Division Deputies*

TRACY L. CHASE  
DONALD L. CHRISTENSEN  
MARILYN CRAIG  
KAREN SWANEY FRALEY  
TIMOTHY HAY  
MATTHEW JENSEN  
SUSAN BALL ROTHE  
CREIG SKAU  
ANN WILKINSON

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

**OFFICE OF THE CITY ATTORNEY**

**PATRICIA A. LYNCH**



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

*Criminal Division Deputies*

CAROLYN CRAMER  
PAMELA G. ROBERTS  
BRIAN M. SOOUDI  
HENRY SOTELO  
PATRICK SULLIVAN  
KIMBERLY PASINI WOOD

*Victim Advocates*  
JEANNE BENTO  
EILENE KANE  
SUZANNE RAMOS

October 19, 2005

Ferrill J. Volpicelli  
NDOC #79565  
Lovelock Correctional Center  
Post Office Box 359  
1200 Prison Road  
Lovelock, NV 89419-0359

RE: Volpicelli v. Inman, et al

Dear Mr. Volpicelli:

Attached to my letter of September 26 was the documentation showing the Internal Revenue Service Notice and Levy in the amount of \$192,240.41 and the City's compliance with the Notice of Levy in forwarding a check in the amount of \$3,186.00, representing cash assets belonging to you in the City's possession. A copy of the check is attached hereto.

Attached hereto are the following documents related to RPD Case No. 216321-00:

1. Evidence Photo Release Certificate reflecting the release of reading glasses to you on January 3, 2002.
2. Evidence Photo Release Certificate reflecting the release of One Mongoose XR350 bicycle to WalMart.
3. Property Return List for WalMart – Northtowne.
4. Property Return List for Home Depot – Northtowne.
5. Property Return List for K-Mart – Summit Ridge.
6. Property Return List for Target – Sierra Center Parkway
7. Property Return List for Lowe's – Kietzke Lane.



Ferrill J. Volpicelli  
October 19, 2005

Page 2

8. Property Return List for Office Depot – Harvard Way.
9. Transaction Receipt for release of loose diamond to Chanel Volpicelli. The diamond was released to Ms. Volpicelli because it was taken from a safe deposit box that was in her name and she specifically requested that it be returned to her.
10. Transaction Receipt, Evidence Disposition Order and related correspondence showing documents released to the undersigned and sent to you on March 31, 2004.
11. Transaction Receipt and related correspondence showing items released to the undersigned and sent to you on April 27, 2004. These items were returned and then forwarded upon your request. The cover letter addressed to Mr. J. A. Volpicelli is also attached.

Attached are the following documents related to RPD Case No. 216452-01:

1. Evidence inventory list for the referenced case. There is no other evidence in that case.

As to the remaining items, the following retailers have not yet retrieved the listed property. We do, however, have written documentation of their intent to do so.

1. Shopko – Mae Anne:
  - a. Hoover Steam Vacuum
  - b. Remote Starter
  - c. Cassiopeia Palm Pilot
2. Office Max – Northtowne:
  - a. Kodak Slide Projector NIB
3. Bed, Bath and Beyond:
  - a. Krups Espresso Machine
4. Toys R Us – Smithridge:
  - a. Lego Spielberg Movie Maker Set

On the list of property to be released to Kevin Sigstad as you requested, there were a number of items not crossed off. RPD Evidence personnel were attempting to locate them when I sent the list to you previously. Number 40, the Black & Decker Variable Speed Drill, has been located

1 East First Street, 3<sup>rd</sup> Floor, Post Office Box 1900, Reno, Nevada 89505-1900  
Telephone: (775) 334-2050; Facsimile: (775) 334-2420  
www.cityofreno.com

V8.283



Ferrill J. Volpicelli  
October 19, 2005

Page 3

and will be picked up by Mr. Sigstad on Monday, October 24. Items Number 41 through 48, identified by inventory number A90208, were checked out by the undersigned (identified on the Transaction Receipt as "miscellaneous papers") and included in the mailing of April 30, 2004, which was refused by the prison and redirected at your request to J. A. Volpicelli. You may, of course, check with Mr. Volpicelli to confirm.

That leaves five items that Evidence personnel have not been able to locate:

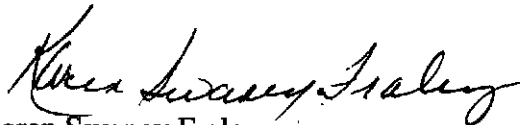
1. One Samsonite Charger (#14)
2. Two Key Rings with Keys (#34)
3. One Cigarette Lighter Jumper (#35)
4. One Sport Nylon Jacket (#36)
5. One Orbital Wallarm VCR-DVD Mount (#38)

Attempts to locate the remaining property are on-going. However, if you would care to submit a claim, I have attached a claim form which you may complete and return to the undersigned.

Finally, as to your request for information related to the criminal case which is concluded; your criminal attorney should be able to provide you with whatever discovery was provided in advance of trial and evidence produced at trial. The subpoenas you have sent to Detective Thomas and I are in a civil case between you and your ex-wife, which actually weren't necessary to receive the information I have provided you. I believe, however, it is inappropriate to use subpoenas in a civil case to attempt to obtain information relative to a criminal case that is concluded. Additionally, as I have previously advised you, the City of Reno holds records of the Repeat Offender Program confidential. If additional surveillance records were introduced at your trial, I suggest again that you contact your criminal attorney for copies.

Sincerely,

PATRICIA A. LYNCH, CITY ATTORNEY



Karen Swaney Fraley  
Deputy City Attorney  
Legal Advisor - Reno Police Department

klb

Encs.



CITY OF RENO  
EVIDENCE IMPOUND ACCOUNT  
P.O. BOX 1900  
RENO, NV 89505

DATE 9-19-84

3499

PAY  
TO THE  
ORDER OF

United States Treasury

Three thousand One hundred Eighty Six dollars even

\$ 3,186.00

DOLLARS

VOID AFTER 90 DAYS

US BANK

FOR IRS LEVY FERRILL J VOLPERILL (872 76 7620)

#01-216321

#003499# 1:1212016941:153790086075#



RENO POLICE DEPARTMENT  
Reno, Nevada

7-13-02 12:00 (12:00) 12:00 (12:00) 12:00 (12:00)

EVIDENCE PHOTO RELEASE CERTIFICATE

Handwritten: *xx Burg*

Case # 216321-01

Crime Burglary

O.A.#

DEFENDANT: VOLPICELLI, Ferrill

VICTIM: State of Nevada / Wash. Co. Dist. Atty.

TO: WASHOE COUNTY DISTRICT ATTORNEY, or other appropriate prosecutor

Pursuant to and in compliance with NRS 52.385, Sections 1, 2 and 3, it is requested that the following property be released to the owner or person entitled to possess said property:

PROPERTY (Describe in detail each item such as color, size, brand, serial number, etc.)

One pair of reading glasses.

Peace Officer/Evidence Custodian: THOMAS, R #4042 Date: 1-3-02

(NOTE: This section to be completed by ISB personnel ONLY)

TO: RENO POLICE DEPT Authorization: Telephonic            Written             
Property (may)(may not) be released pursuant to NRS 52.385.

Deputy District Attorney

Date

PROPERTY PHOTOGRAPHED ON 1-3-02 By: THOMAS #4042  
Date

PROPERTY RELEASED TO: (Name and Address. Explain if other than rightful owner.)

Ferrill Volpicelli

911 Parr Blvd.

Person Receiving Evidence

Date

Under penalty of perjury, I certify that photograph(s) of this property have been taken and the description of the property is accurate.

Peace Officer

Date

White: Records; Yellow: Evidence; Pink: Dets/Comp. Ofcr; Goldenrod: Prosecutor.  
Rev. 1/8/88



RENO POLICE DEPARTMENT  
Reno, Nevada

EVIDENCE PHOTO RELEASE CERTIFICATE

RPD Case # 01-216321

Crime BURGLARY

D.A.# \_\_\_\_\_

DEFENDANT: VOLPICELLI, F. & BOLMAN, B.

VICTIM: WAL MART @ 155 DAMONTE RANCH

TO: WASHOE COUNTY DISTRICT ATTORNEY, or other appropriate prosecutor:

Pursuant to and in compliance with NRS 52.385, Sections 1, 2 and 3, it is requested that the following property be released to the owner or person entitled to possess said property:

PROPERTY (Describe in detail each item such as color, size, brand, serial number, etc.)

One (1), Mongoose XR350 mountain bike. Silver, red, and black in color.

Item # 725983

SERIAL # - C1H0051104

Peace Officer/Evidence Custodian: DETECTIVE TEASLEY Date: 10/17/01

(NOTE: This section to be completed by ISB personnel ONLY)

TO: RENO POLICE DEPT Authorization: Telephonic \_\_\_\_\_ Written \_\_\_\_\_  
Property (may)(may not) be released pursuant to NRS 52.385.

\_\_\_\_\_  
Deputy District Attorney

\_\_\_\_\_  
Date

PROPERTY PHOTOGRAPHED ON \_\_\_\_\_ By: \_\_\_\_\_  
Date

PROPERTY RELEASED TO: (Name and Address. Explain if other than rightful owner.)

BILL MACKLIN / ASST. MGR. WAL MART

155 DAMONTE RANCH PKWY RENO, NV.

Bill Macklin ASST MGR 10-17-01

\_\_\_\_\_  
Person Receiving Evidence

\_\_\_\_\_  
Date

Under penalty of perjury, I certify that photograph(s) of this property have been taken and the description of the property is accurate.

Bob Tinsley #2765 10/17/2001

\_\_\_\_\_  
Peace Officer

\_\_\_\_\_  
Date

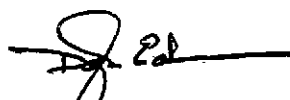
White: Records; Yellow: Evidence; Pink: Dats/Comp. Ofcr; Goldenrod: Prosecutor.  
Rev. 1/8/88



Volpicelli Case - Property Return List

Wal - Mart Northtowne

A87909	Emerson TV Set
A87910	Emerson TV Set
A87911	Emerson TV Set
A37912	Panasonic DVD Stereo System
A87918	Radius KDS -RAD 5 Monitor
A87919	Radius 15 " Liquid Crystal Monitor
A87920	Compaq 500 NIB Computer System
A87921	HP V-40 Fax/Copier
A87922	HP V-40 Fax/Copier
A87925	Hoover Wind Tunnel Vacuum
A87933	Simplicity Sewing Machine
A87937	AERO Air beds (2 boxes taped together)
A87938	Ozark Queen Air Bed

 7-14-04  
DOUGLAS E. SUMMERS

ENTERED  
Q-TEL 7-14-04  
Bar Codes  
Updated 7-14-04



Volpicelli Case – Property Return List

Home Depot – NorthTowne

A87913  
A87932  
A87952

Kohler Model Toilet  
Deflec Bathroom Fan  
Moen Faucet

*W. J. Alkire*

LPM  
07/14/04

Entered O-TEL  
7-15-04 ph

Bar G. D. ES.

UP DATED

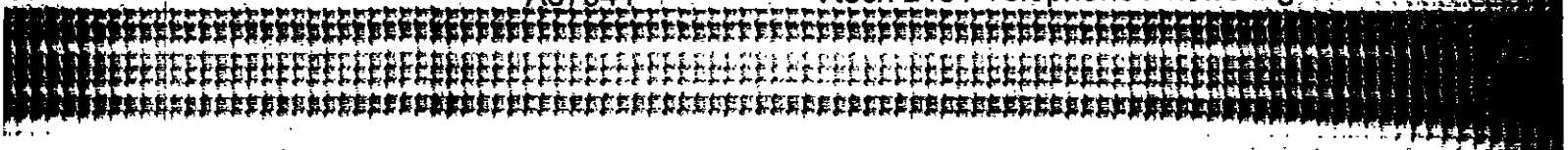
7-15-04 ph



Volpicelli Case - Property Return List

Target Sierra Center Pkwy

A87923	Panasonic Dyna Movie
A87924	Panasonic Dyna Movie
A87929	9" Memorex Mini Travel TV
A87940	Vtech 2430 Telephone Answering Machine
A87941	Vtech 2461 Telephone Answering Machine



Christina Giannotti 7-14-09

Entered Q-TEL/  
BAC Codes Updated  
John #1159 7-15-09



Volpicelli Case - Property Return List

Lowes Kietzke Lane

A87926

100% Wool Handcrafted Rug

*[Handwritten signature]*

7-14-04

*Entered O-Tel/  
Bar Code Updated  
yph 8/13/97-15-04*



01-216321

Volpicelli Case - Property Return List

Office Depot Harvard Way

A87943  
No Bar Code

Brother Labeling System  
Quicken Business Lawyer 2001 Delux

*Justin J. Chapar*  
*JUSTIN CHAPAR*  
*825 OFFICE DEPOT*  
*7/14/04*

*ENTERED D-TCL*  
*Bar Code(s) UPDATED*  
*ph #1159 7-15-04*



01-21632

\*\*\*\*\* TRANSACTION RECEIPT \*\*\*\*\*

Transaction type : XFR

To Location : RTO

Assignee : 001159

Remarks : ONLY ITEM TO CHANTAL VOLPICELLI WAS LOOSE DIAMOND

Date : 12/29/2004 Time : 10:52:30

Bar Code # A90208

Case # 216321-01

Offense

BURGLARY

Location RTO

Evid.Held As MRS  
Officer Name THOMAS

Officer ID 004042

Detective #

Owner Name

OwnerAddress

City/ST/Zip

Other Name

Prop.Type BOX  
Make/Brand

Item Ser #  
Caliber

Item Descr. PLASTIC BOX W/ PHONE CORD/ GATEWAY CDROM DRIVE/ 4 DISKS  
Remarks POWER DRILL/ ROSS HEADSET/ LETTER/ MISC ID'S/ MISC PAPERWORK  
Remarks BLU WEEKLY PLANNER/ WALMART RECEIPT/ DIAMOND W/ APPRAISAL

CurrencyAmt 0.00

Action Date / /

Status RETURN TO OWNER

Create Date 12/10/2001  
Last Changed 12/11/2003

Signed: \_\_\_\_\_

*Chantal Volpicelli*



216321-01

\*\*\*\*\* TRANSACTION RECEIPT \*\*\*\*\*

Transaction type : XFR  
To Location : RTO  
Assignee : 8267  
Remarks : SENT VIA MAIL BY KAREN FRALEY 3/31/04 TO MSP CARSON  
Date : 04/21/2004 Time : 07:24:21  
Bar Code # A88177 Case # 216321-01  
Location RTO  
Officer ID 002765  
Detective #  
Evid.Held As MRS  
Officer Name TEASLEY, BRENT

Offense BURGLARY

Owner Name  
OwnerAddress  
City/ST/Zip  
Other Name

Prop.Type PAPERS  
Make/Brand

Item Ser #  
Caliber

Item Descr. CARDBOARD BOX FILL W/PAPERS FILED INSIDE  
Remarks  
Remarks  
CurrencyAmt 0.00  
Action Date 1 / 1  
Status RETURN TO OWNER

Create Date 10/24/2001  
Last Changed 12/11/2003

Signed: sent by mail to MSP Carson City  
by Karen Fraley





RENO POLICE DEPARTMENT  
EVIDENCE DISPOSITION ORDER

CASE NO: 216321-01

Date 3/31/04 Offense Burglary  
The Evidence/Property Section, Investigative Services Bureau, is authorized to dispose of the listed items  
being held as evidence/property by the Reno Police Department as indicated:  
Release Only ☒ Dispose/Auction ☐ Both ☐ RMC ☐ NFS ☒

You are authorized to release property as follows:

Name			Phone
Address	<u>Volpicelli</u>		
Property to be released:	<u>Sent via us mail by K. Finley 3/31/04 to MSP Carson</u>		
<u>A88177</u>			
Photograph Prior to Release	Date	By	
<input type="checkbox"/>			

Dispose of and/or auction in accordance with department policy:

Photograph Prior to Release	Date	By
<input type="checkbox"/>		

Support data for release of evidence/property:

Date Notification Sent	By
Date Property Released	By

Evidence Technician	Date
<u>Lisa Williams</u>	<u>3/31/04</u>
Investigator	Date
Authorizing Supervisor	Date
Bureau Commander (if required)	Date
Deputy City Attorney (if required)	Date
<u>Anthony T. ...</u>	<u>3-31-04</u>



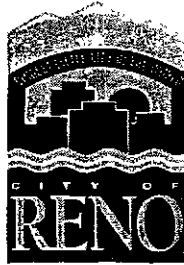
**RANDALL EDWARDS**  
*Chief Deputy, Civil Division*

*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**

March 31, 2004

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

RE: Volpicelli v. Inman, Case No. CV-03-3582

Dear Mr. Volpicelli:

In response to the Subpoena Duces Tecum you served on the Reno Police Department in the referenced case, the District Attorney's Office has released the personal files previously held in evidence in RPD Case No. 01-216321. Accordingly, those records are being mailed to you today in two boxes.

We discussed the possibility of having them transported by prison personnel when you make your court appearance on April 1. The prison officials indicated to us that such arrangements are not possible. That, of course, also applies to your request for the typewriter.

When the District Attorney's Office releases the rest of the property, the Reno Police Department will determine what property is immediately releasable, what property is to be returned to victims and which property will be the subject of additional discussion and perhaps Court action. Please advise where your designees, Kevin Sigstad and Travis Volpicelli, may be reached or have them contact me at the number below, so we can make contact when the property is ready for release.

Sincerely,

PATRICIA A. LYNCH, CITY ATTORNEY

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

ksf  
cc: DDA Kristen Ericksen  
Detective Reed Thomas



216321-01

\*\*\*\*\* KTO

RECEIPT \*\*\*\*\*

Transaction type : XFR  
To Location : KTO  
Assignee : 000190  
Remarks : KTO'D BY CITY ATT FRANKY  
Date : 04/27/2004 Time : 18:43:03

Barcode	Case #	Officer ID	Owner Name	Rec'd By	Date
A87955	216321-01	000811		<u>KLF</u>	<u>4/27/04</u>
A90391	216321-01	004042		<u>KLF</u>	<u>4/27/04</u>

Signed: Franky

PARTIAL : A90208 : MISC. PAPERS

by	Date
<u>KLF</u>	<u>4/27/04</u>



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

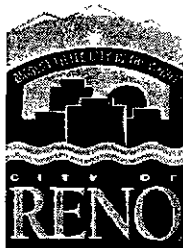
*Civil Division Deputies*

**GABRIELLE CARR**  
**TRACY L. 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*

**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*

**EILENE KANE**  
**SUZANNE RAMOS**  
**LAURA ZIMMERMAN**

June 14, 2004

Mr. J. A. Volpicelli  
5733 Capeswood Drive  
Rancho Palos Verdes, CA 90275

Dear Mr. Volpicelli:

This box of possessions of Ferrill Volpicelli, previously held in evidence by the Reno Police Department, is being sent to you at the request of Ferrill Volpicelli. Please see attached copy of letter dated May 27, 2004.

Feel free to contact me if you have any questions.

Sincerely,

PATRICIA A. LYNCH, CITY ATTORNEY

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

ksf  
Enc.



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

**OFFICE OF THE CITY ATTORNEY**

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

*Civil Division Deputies*  
**GABRIELLE CARR**  
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**KAREN SWANEY FRALEY**  
**MICHAEL K. HALLEY**  
**SUSAN BALL ROTHE**  
**JONATHAN SHIPMAN**  
**CREIG SKAU**

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

**PATRICIA A. LYNCH**



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

*Victim Advocates*  
**EILENE KANE**  
**SUZANNE RAMOS**  
**LAURA ZIMMERMAN**

May 10, 2004

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

RE: Volpicelli v. Inman  
Case No. CV-03-3582

Dear Mr. Volpicelli:

On April 30, I wrote you advising that I was mailing the last of the documents held in evidence by the Reno Police Department in response to the Subpoena Duces Tecum in the referenced case.

This letter is to advise you that, in my absence from my office last week, the box was returned unopened by prison officials, marked "no approval on file".

Please have a local designee call me at the number below to arrange to pick up the box of documents. You, of course, will need to make appropriate arrangements to receive the box.

Sincerely,

PATRICIA A. LYNCH, CITY ATTORNEY

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

ksf  
Enc.

cc: Lewis S. Taitel, Esq.  
Robert R. Jensen, Esq.  
Detective Reed Thomas



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

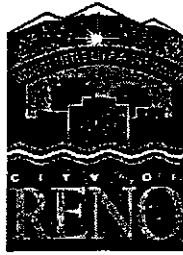
**OFFICE OF THE CITY ATTORNEY**

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

**PATRICIA A. LYNCH**

*Civil Division Deputies*  
**GABRIELLE CARR**  
**TRACY L. CHASE**  
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**CREIG SKAU**

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



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

*Victim Advocates*  
**EILENE KANE**  
**SUZANNE RAMOS**  
**LAURA ZIMMERMAN**

April 30, 2004

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

RE: Volpicelli v. Inman  
Case No. CV-03-3582

Dear Mr. Volpicelli:

I am writing to advise you that I am mailing today, under separate cover, a box containing all remaining paperwork, or anything that could loosely be referred to as paperwork, held in evidence by the Reno Police Department. The items are identified on the inventory sheets as follows:

"One (1) blue plastic zipper file folder containing misc. Paperwork such as bills, titles, statements, invoices, insurance policy paperwork, etc."

"Misc. paperwork to include credit card applications, Great Basin check stubs, label maker advertisement, homeowners insurance application, computer printouts of addresses, photocopies of receipts, Social Security Cards in the names of Logan & Travis Volpicelli, JC Penny [sic] cards bearing Ferrill & Lori Volpicelli, B of A VISA cards bearing Lori & Ferrill Volpicelli, One (1) Chase M/C bearing Ferrill Volpicelli, One (1) Great Basin VISA bearing Ferri Volpocelli, One (1) Wal-Mart receipt, One (1) European Fitness Center card, One(1) Frederick & Nelson card, One (1) Staples Cash Card, Three (3) Petsmart giftcards, One (1) Nordstrom card, Two (2) Wal-Mart cards, One (1) envelope entitled Wells Fargo containing paperwork, One (1) DMV DL renewal, One (1) envelope addressed to Travis Volpicelli & One (1) Federal Bureau of Prisons I.D.card for Volpicelli."



"One (1) grey folder labeled "Credit Cards" filled with numerous statements and correspondence between Volpicelli and Credit Card companies regarding his claim that he has been defrauded and wants the account credited and/or cleared. In several letters he uses the name "Ferrill Colpicelli" "Votlicelli" and other spellings. . ."

"Four (4) Toy's R Us Rainchecks w/receipts. NOTE: Toys R Us Loss Prevention Manager notified me during this investigation in 2001 and stated that due to Volpicelli's fraudulent activity that they were initiating their right to render the rainchecks invalid and cancelled."

"One (1) brown Perry Ellis leather wallet containing the following: 1 NV. DL bearing the name Ferrill Wolpicelli, 2 receipts, 4 blank BXI checks, One (1) Safeway Club Card, One (1) Costco card, One (1) Lowe's Merchandise Credit card, One (1) Smart & Final card, One (1) Sprint Prepaid Phonecard, One (1) Smith's Fresh Values card, One (1) K-Mart cash gift card & 1 US bank VISA bearing the name Ferrill Volpicelli expiring 07/03."

"One (1) Capital One Mastercard bearing the names Ferrill and Lori "Colpicelli".

"One (1) Gottschalks card #801 088 542 bearing the name Ferrill Volpicelli."

"BXI paperwork, misc. Advertisements, blank notepad & Budget Rental Car rental agreement."

"Two (2) Toys R Us Merchandise Cards, Two (2) Nevada Care Kids I.D.cards for Logan and Travis Volpicelli & One (1) Petsmart gift card."

"Great Basin checkbook & Duplicate DL paperwork."

"3 Red & 1 black plastic folder containing misc. Papers."



Ferrill Volpicelli  
April 30, 2004

Page 3

The above listing, in addition to the files and documents already submitted to you, constitutes all financial records, documents, etc. believed to have been in the possession of the Reno Police Department. Again, everything listed above is being shipped separately.

Sincerely,

PATRICIA A. LYNCH, CITY ATTORNEY

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

ksf  
Enc.

cc: Lewis S. Taitel, Esq.  
DDA Tami Riggs  
Detective Reed Thomas



RENO APP

Filter: Case # begins with "216452-01"

BarCode Number	Location	Item Description
A87986	AUCTION	COMFORTER
A87987	AUCTION	COMFORTER
A87988	COURT	RECEIPTS
A87989	AUCTION	COMFORTER

Total number of records = 4



ORIGINAL

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

2006 MAR 22 PM 3:42

RONALD A. LONGIN, JR.

BY   
DEPUTY

Petitioner, In Proper Person

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.

LENARD VARE,  
(Warden, Lovelock  
Correctional Center),

Dept. No. 10

Respondent. /

**SUPPLEMENTAL 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 submits the instant SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) in the above-entitled action.

This Supplement is made and based upon all papers and pleadings on file herein, and due to a recent holding in the Ninth Circuit Court of Appeals relevant to Petitioner's instant action, as more fully explained below, herein, in addition to the following Argument and Points and Authorities.

. . .  
. . .  
. . .

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CR03P1263  
DC-9900025217-041  
POST: FERRILL J VOLPICELLI 14 Pages  
District Court 03/22/2006 09:44 AM  
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4105



### BRIEF CASE HISTORY AND FACTS

Petitioner has been convicted, pursuant to a jury trial, of multiple charges of Burglary pursuant to NRS 205.060, Conspiracy to Commit Crimes Against Property pursuant to NRS' 199.480, 205.060, 205.0832, 205.090, 205.110, 205.220, 205.240, 205.380, and 205.965, in addition to a single count of Unlawful Possession, Making, Forgery, or Counterfeiting of Inventory Pricing labels pursuant to NRS 205.965(2)(3).

The Prosecution sought the imposition of Nevada's Habitual Criminal Statute, NRS 207.010.

Ultimately, on April 1, 2004, this Honorable Court sentenced Petitioner to multiple life sentences under the provisions of Nevada's Criminal (Habitual) Statute, NRS 207.010.

Petitioner timely filed a Notice of Appeal to the Nevada Supreme Court. (Docket No. 43203). The Nevada Supreme Court issued an ORDER OF AFFIRMANCE on June 29, 2005. Remittitur issued on August 1, 2005.

On November 9, 2005, Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction), as well as a Memorandum of Points and Authorities in support thereof, in this court. The aforementioned Petition is currently pending in this court. The Court has not entered any Orders relative to the disposition of the Petition, and the Respondents have failed to Answer or otherwise plead.

Petitioner now brings forth the instant Supplement, wherein he presents an additional claim for relief in ADDITION to the claims for relief presented in the aforementioned Petition.



Petitioner's Petition, currently on file herein, contains Twenty-Two (22) claims for relief, numbered consecutively. Petitioner now submits the following claims for relief, continuing sequential numbering, commencing with Ground Twenty-Three (23).

The instant supplement is not prejudicial to the parties herein due to the fact that this Court, nor the Respondent, has responded or entered any Orders relevant to the disposition of the Petition.

**GROUND TWENTY-THREE**

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

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

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

**NRS 207.010 Habitual Criminals: Definition; Punishment.**

1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this State of:

(a) Any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who has previously been two times convicted, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been three times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, is a habitual criminal and shall be punished for a category B felony by imprisonment in the State prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years.



(b) Any felon, who has previously been three times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or the intent to defraud is an element, is a habitual criminal and shall be punished for a Category A felony by imprisonment in the state prison:

1. For life without the possibility of parole;
2. For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served.

3. For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

2. It is within the discretion of the prosecuting attorney whether to include a count under this section if any information or file a Notice of habitual criminality if an indictment is found. The trial judge may, at his discretion, dismiss a count under this section which is included in any indictment or information.

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

NRS 207.016 states, in relevant part:

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

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

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



At the hearing, the prosecution admitted evidence of Petitioner's three (3) prior convictions, one of which is a conviction from February 11, 2004. (Sentencing Transcripts "ST", Page 4, lines 16 - 17).

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

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

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

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

. . . .



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

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

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

A. Yes.

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

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

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

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

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



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

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

A. Oh, yes.

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

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

(ST, Page 21, lines 16 - 25)

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

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

A. That is correct.

(ST, Page 22, lines 20 - 22)

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

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

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

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

(ST, Pages 23 and 24).

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



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

In fact, you are the poster child for habitual criminality

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

(ST, page 58, lines 7 - 21)

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

**A. DUE PROCESS AND FAIR TRIAL VIOLATION**

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

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

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

In the instant action, the court succinctly states it considered "all the evidence" introduced at the sentencing hearing.



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

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

Petitioner asserts in the instant action the court abused its' discretion in considering irrelevant evidence to support its' findings and ultimately imposing multiple life sentences against petitioner in accord with NRS 207.010.

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

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



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

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

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

#### **B. EQUAL PROTECTION VIOLATION**

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



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

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

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

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

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

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

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



This disparity in sentences is nothing less than absurd, unjust and in violation of the Constitution as it guarantees equal protection.

A statute that is not imposed equally to all similarly situated persons is unconstitutional. In Guillory v. County of Orange, 731 F.2d 1379, 1383 (9th Cir. 1984), the Ninth Circuit Court of Appeals has held that:

A law that is administered so as to unjustly discriminate between persons similarly situated may deny equal protection.

Also see Mackenzi v. City of Rockledge, 920 F.2d 1554 (11th Cir. 1991).

A statute that allows the prosecutor to impose sentencing on an individual for no reason other than on a whimsical selection on the part of the prosecutor shall be considered unjust by this court.

It is well settled that statutes are not to be construed to produce absurd, illogical, or unjust or capricious results. Bechtel Construction v. United Brotherhood of Carpenters, 812 F.2d 1220 (9th Cir. 1987). Nor can it be reasonably argued against that when the defendant with more culpability receives far less sentence than the defendant with less culpability, that statutory construction and application is at a minimum absurd, illogical and unjust. Due process means fundamental fairness. Hampton v. United States, 96 S.Ct. 1646, 1652, note 6 (1976).

The equal protection standard cannot be held when NRS 207.010 is applied to select group of defendants, as is the case in the instant action. The United States Constitution



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

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

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

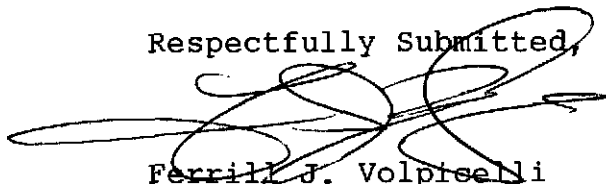
Additionally, by the Nevada legislature enacting this statute that allows a prosecutor to selectively impose this statute arbitrarily as he wishes, clearly violates the Constitutional guarantee of equal protection and a fair sentencing hearing.

#### CONCLUSION

WHEREFORE, for the facts and arguments as set forth herein above, Petitioner respectfully requests this Honorable Court grant the instant WRIT.

DATED THIS 25th DAY OF MARCH, 2006.

Respectfully Submitted,



Ferrill J. Volpicelli  
Petitioner, In Proper Person



CERTIFICATE OF SERVICE BY MAIL

I, Ferrill J. Volpicelli, do hereby certify that on this date I did serve a true and correct copy of the foregoing SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), by placing same in the United States Postal Service, postage being fully prepaid, and addressed as follows:

RICHARD GAMMICK  
WASHOE COUNTY DISTRICT ATTORNEY  
POST OFFICE BOX 30083  
RENO, NEVADA 89520-3083

DATED THIS 20<sup>th</sup> DAY OF MARCH, 2006.

By: 

Ferrill J. Volpicelli  
Petitioner, In Proper Person

///

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FERRILL J. VOLPICELLI  
79565 LCC POB 359  
Lovelock, Nevada 89419

ORIGINAL

FILED

Petitioner, In Propria Persona

2006 MAY 22 PM 3:29

IN THE SECOND JUDICIAL COURT OF THE STATE OF NEVADA, JR.

IN AND FOR THE COUNTY OF WASHOE

DEPUTY

FERRILL J. VOLPICELLI,

Petitioner,

Case No: CR 03-P1263

vs.

Dept. No: 10

THE STATE OF NEVADA,

Respondent,

SECOND REQUEST FOR SUBMISSION

Petitioner, FERRILL J. VOLPICELLI, in his proper person, hereby moves the Court for a prompt submission of the Writ Of Habeas Corpus (post-conviction), filed on 9 November, 2005, regardless of the Court's decision on other pending Motions with this case, so that the Court can ORDER the State of Nevada to respond to Petitioner's Writ Of Habeas Corpus (post-conviction).

Respectfully submitted on this 18<sup>th</sup> day of May, 2006.

FERRILL J. VOLPICELLI

Petitioner, In Propria Persona

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that Ferrill J. Volpicelli, on this 18<sup>th</sup> day of May, 2006, personally deposited for mailing, postage prepaid, a true copy of the Second Request For Submission to WCDA Terrance McCarthy, Esq.

FERRILL J. VOLPICELLI

V8.318

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POST: FERRILL J. VOLPICELLI, Page  
District Court 05/22/2006 09:08 AM  
Washoe County 3860



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Washoe County 3370

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FILED

AUG 10 2006

RONALD A. LONGTIN, JR., CLERK  
By: *[Signature]*  
DEPUTY

2  
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

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10 FERRILL JOSEPH VOLPICELLI,

11 Petitioner,

CASE NO: CR03P1263

12 vs.

DEPT. NO.: 10

13  
14 STATE OF NEVADA,

15 Respondent.  
16 \_\_\_\_\_

17 **ORDER APPOINTING COUNSEL**

18 The Court has received and considered Petitioner's Ex Parte Motion to Appoint  
19 counsel, filed November 9, 2005. Petitioner was granted leave to proceed *in forma*  
20 *pauperis* on May 27, 2004. Petitioner has filed a multiple Petitions for Writ of Habeas  
21 Corpus on November 9, 2005, January 1, 2006, and June 27, 2006. The Court has  
22 determined that Petitioner should be represented by counsel.

23 **IT IS HEREBY ORDERED** that Petitioner's Request for Appointment of Counsel is  
24 **GRANTED.** Attorney Kay Ellen Armstrong, Esq. is appointed to represent Petitioner in his  
25 Writ of Habeas Corpus proceedings. Ms. Armstrong shall have 45 days from the date of

26 //

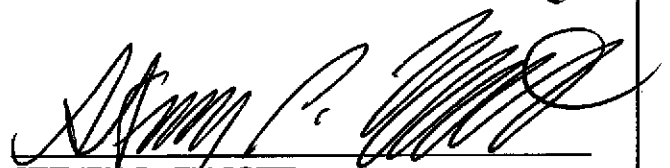
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1 this Order to file a Supplemental Petition of Writ of Habeas Corpus on behalf of Petitioner.  
2

3 **DATED** this 9 day of August, 2006.  
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5   
6 STEVEN P. ELLIOTT  
7 District Judge  
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1 **CERTIFICATE OF MAILING**

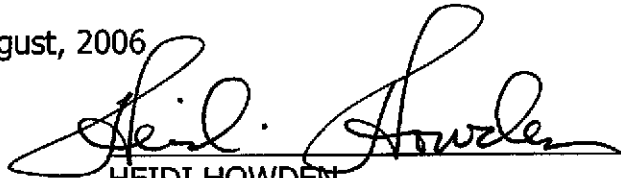
2 I hereby certify that I am an employee of the Second Judicial District Court of the  
3 State of Nevada, in and for the County of Washoe; that on the 10 day of August,  
4 2006, I deposited for mailing a copy of the foregoing document addressed to:  
5

6 Kay Ellen Armstrong  
7 415 West Second St.  
8 Carson City, NV 89703

9 Ferrill J. Volpicelli, #79565  
10 Lovelock Correctional Center  
11 P.O. Box 359  
12 Lovelock, NV 89419

13 Washoe County District Attorney's Office  
14 Appellate Division  
15 P.O. Box 30083  
16 Reno, Nevada. 89520  
17 (Interoffice Mail)

18 **DATED** this 10 day of August, 2006

19 

20 HEIDI HOWDEN  
21 Administrative Assistant  
22  
23  
24  
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1 CODE: 3370

FILED

AUG 10 2006

RONALD A. LONGTIN, JR., CLERK

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

\*\*\*

FERRILL JOSEPH VOLPICELLI,

Petitioner,

CASE NO: CR03P1263

vs.

DEPT. NO.: 10

STATE OF NEVADA,

Respondent.

**ORDER QUASHING SUBPOENA DUCES TECUM AND  
DENYING MOTION TO COMPEL**

The Court has read and considered Petitioner's Motion for Order to Compel, filed January 31, 2006, as well as all supporting and opposing documents and memoranda.

Petitioner requests that this Court order the Reno City Attorney to forward "ALL documentation relevant to the property seized from Co-Defendant Brett A. Bowman by RPD, on or about October 2001."

Petitioner mailed a Subpoena Duces Tecum seeking the aforementioned documentation to the Reno Police Department on December 23, 2005. Respondent informs this Court that "Petitioner has already received all information available regarding search warrants, property in evidence and its disposition." Respondent also moves that the Court quash the subpoena pursuant to NRCP 45(c)(3)(A)(iv).

CR03P1263  
POST: FERRILL J. VOLPICELLI 3 Pages  
District Court  
Washoe County  
08/10/2006 04:03 PM  
3370



1 The City cannot be compelled or subpoenaed to provide Petitioner with search  
2 warrants that were not issued or inventories of property not seized. Accordingly, this Court  
3 finds good cause exists to quash the subpoena, and denies Petitioner's motion to compel.

4 Additionally, the Court notes that Petitioner has been appointed counsel to represent  
5 him in his Petition for Habeas Corpus. Petitioner is therefore notified that the Court will not  
6 accept any additional proper person documents from Petitioner while he is represented by  
7 counsel.

8 **DATED** this 9 day of August, 2006.

  
STEVEN P. ELLIOTT  
District Judge



1 **CERTIFICATE OF MAILING**

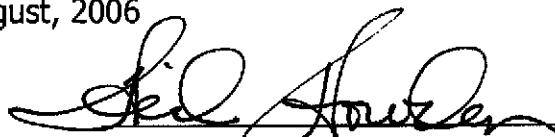
2 I hereby certify that I am an employee of the Second Judicial District Court of the  
3 State of Nevada, in and for the County of Washoe; that on the 10 day of August,  
4 2006, I deposited for mailing a copy of the foregoing document addressed to:  
5

6 Ferrill J. Volpicelli, #79565  
7 Lovelock Correctional Center  
8 P.O. Box 359  
9 Lovelock, NV 89419

10 Washoe County District Attorney's Office  
11 Appellate Division  
12 P.O. Box 30083  
13 Reno, Nevada. 89520  
14 (Interoffice Mail)

15 Kay Ellen Armstrong, Esq.  
16 415 West Second St.  
17 Carson City, NV 89703

18 **DATED** this 10 day of August, 2006

19 

20 HEIDI HOWDEN  
21 Administrative Assistant  
22  
23  
24  
25  
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27  
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FILED

Code 4047  
Kay Ellen Armstrong  
State Bar No. 0715  
415 West Second Street  
Carson City, NV 89703  
775-883-3990

2006 SEP 15 AM 11:42

RONALD C. LONG, JR.

BY *[Signature]*  
DEPUTY

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

\* \* \*

FERRILL JOSEPH VOLPICELLI,

Petitioner,

Case No. CR03P1263

vs.

DEPT. NO. 10

THE STATE OF NEVADA,

Respondent.

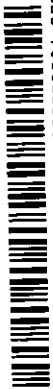
STIPULATION TO EXTEND TIME TO FILE SUPPLEMENT TO PETITION

COMES NOW, petitioner, Ferrill Joseph Volpicelli, by and through his attorney Kay Ellen Armstrong, and Terrance McCarthy, Deputy District Attorney, and hereby stipulate to extend the time, to and including November 20, 2006, within which to file a supplement to the proper person petition for a writ of habeas corpus (post-conviction). The supplement is currently due on September 25, 2006.

Dated: 9-15-06

*[Signature]*  
KAY ELLEN ARMSTRONG  
Attorney for Petitioner

*[Signature]*  
Terrance McCarthy  
Deputy District Attorney





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RONALD A. LONGTIN, JR.  
BY Thely  
DEPUTY

1 Code No. 4100  
2 Kay Ellen Armstrong  
State Bar No. 0715  
415 West Second Street  
Carson City, Nevada 89703  
775-883-3990  
Attorney for Volpicelli

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

\* \* \*

FERRILL JOSEPH VOLPICELLI,

Petitioner,

Case No. CR03P-1263

vs.

Dept. No. 9

THE STATE OF NEVADA,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS POST-CONVICTION

Comes now petitioner, Ferrill Joseph Volpicelli, by and through his attorney, Kay Ellen Armstrong, and hereby supplements the proper person post-conviction petition for writ of habeas corpus previously filed in this matter on November 9, 2005 and supplemented on March 22, 2006.

Petitioner Ferrill J. Volpicelli stands convicted pursuant to a jury verdicts of conspiracy to commit crimes against property, a gross misdemeanor, eight (8) counts of burglary, category B felonies, and unlawful possession, making, forgery or counterfeiting of inventory pricing labels, a category D or E felony. Mr. Volpicelli is serving eight (8) life sentences, with parole eligibility after 10 years, concurrent to each other, and one (1) life sentence, with parole eligibility after

KAY ELLEN ARMSTRONG

ATTORNEY AT LAW

415 WEST SECOND STREET

CARSON CITY, NEVADA 89703

PHONE (775) 883-3990, FAX (775) 882-8835



CR03P1263  
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Washoe County 4100



1 ten (10) years, consecutive to the other eight (8) life  
2 sentences. Mr. Volpicelli was also sentenced to 12 months in  
3 the Washoe County Jail, concurrent with his other sentences. In  
4 his petition Mr. Volpicelli alleges ineffective assistance of  
5 counsel.

6 Mr. Volpicelli was represented by appointed attorneys,  
7 Bradley O. Van Ry at trial and Mary Lou Wilson on appeal. Mr.  
8 Volpicelli was charged by indictment filed June 11, 2003.  
9 Notice of Intent to Seek Habitual Criminal Status was filed on  
10 October 9, 2003. After the denial of a pretrial petition for  
11 writ of habeas corpus on November 7, 2003, the matter proceeded  
12 to trial on November 12, 13, and 14, 2003. The jury found Mr.  
13 Volpicelli guilty of all counts. At sentencing the court found  
14 Mr. Volpicelli to be an habitual criminal and imposed eight (8)  
15 life sentences.

16 ARGUMENT

17 Mr. Volpicelli enumerated twenty-two (22) grounds for  
18 relief in his proper person petition and supplement. Mr.  
19 Volpicelli summarized the first 21 grounds at pages 93-94 on his  
20 petition filed November 9, 2005. The grounds include  
21 allegations of ineffective counsel at both the trial and on  
22 appeal. The trial grounds include:

23 3. Allowing petitioner to be prosecuted using a  
24 flawed grand jury indictment;

25 4. Failure to plead defendant's mental incompetence  
26 at the time of the crimes;

27 5. Allowing guilty verdicts in light of insufficient  
28 evidence;

6. Allowing petitioner to be unconstitutionally  
sentenced as an habitual criminal;



- 1 7. Allowing imposition of excessive restitution at  
2 sentencing;
- 3 8. Allowing petitioner to be subject to  
4 multiplicitous and duplicative counts;
- 5 9. Allowing petitioner to be subject to lesser  
6 included offenses;
- 7 10. Allowing petitioner to be subject to  
8 vindictive/selective prosecution;
- 9 11. Allowing petitioner to be subject to irrelevant  
10 and perjured testimony;
- 11 12. Allowing petitioner to be subject to perjured  
12 testimony and vouching for the witness by the  
13 prosecutor;
- 14 13. Failing to investigate and argue certain witnesses  
15 were agents of the police;
- 16 14. Failing to investigate discovery thereby allowing  
17 petitioner to be subject to prosecutorial misconduct;
- 18 15. Failing to appeal the trial courts decision  
19 allowing the trial to proceed on the indictments;
- 20 16. Representing petitioner in spite of an actual  
21 conflict of interest;
- 22 17. Failing to investigate and proffer mitigating  
23 evidence at sentencing;
- 24 18. Allowing petitioner to be unconstitutionally  
25 sentenced as an habitual criminal because his prior  
26 convictions were not violent;
- 27 19. Failing to protect petitioner from violations of  
28 the Eighth Amendment's prohibition against cruel and  
unusual punishment;
20. Failing to protect petitioner from prosecution for  
exercising his First Amendment right to free speech in  
counts two and five;
21. Allowing petitioner to be prosecuted under  
statutes which are constitutionally vague and violate  
the due process clauses of the Fifth and Fourteenth  
Amendments;
23. (sic) Failing to protect petitioner from erroneous  
implication of the habitual criminal statute, by  
failing to insure the validity of the prior



KAY ELLEN ARMSTRONG  
ATTORNEY AT LAW  
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CARSON CITY, NEVADA 89703  
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convictions and allowing the court to consider improper evidence, among other things.

The grounds for ineffective assistance of appellate counsel include:

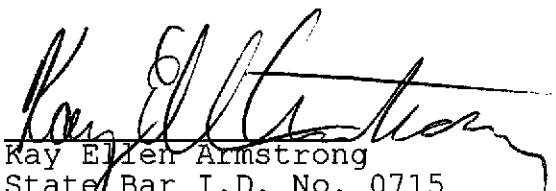
1. Failure to present issues to the Nevada Supreme Court in a proper, Federalized fashion;
2. Allowing the Nevada Supreme Court to conduct an improper appellate review.

Each ground pled by Mr. Volpicelli in his proper person petition is amply supported by citations to the record.

#### CONCLUSION

It is respectfully requested this court hold an evidentiary hearing in this matter, so that he may demonstrate both his trial and appellate counsel were deficient and that the deficient performance was prejudiced. Petitioner will demonstrate that but for trial counsel's mistakes there is a reasonable probability that the result of the trial would have been different. Petitioner will further demonstrate that issues omitted by appellate counsel would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); Strickland v. Washington, 466 U.S. 668 (1984).

Dated this 20th day of November, 2006.

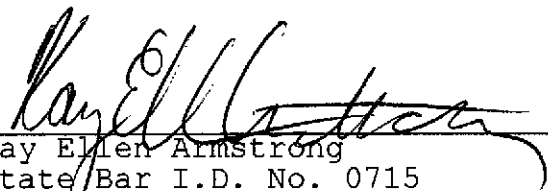
  
Kay Ellen Armstrong  
State Bar I.D. No. 0715  
415 West Second Street  
Carson City, NV 89703  
775-883-3990  
Attorney for Diaz-Cano



1                                    VERIFICATION TO SUPPLEMENT TO PETITION FOR  
2                                    POST-CONVICTION WRIT OF HABEAS CORPUS

3            COMES NOW, petitioner, Ferrill Joseph Volpicelli, by and  
4 through his attorney, Kay Ellen Armstrong, and hereby verifies  
5 the supplement to the petition for writ of habeas corpus  
6 previously filed in this matter on November 9, 2005 and  
7 supplemented on March 22, 2006.

8            DATED this 20<sup>th</sup> day of November, 2006.

9  
10  
11                                      
12 Kay Ellen Armstrong  
13 State Bar I.D. No. 0715  
14 415 West Second Street  
15 Carson City, NV 89703  
16 775-883-3990  
17 Attorney for Volpicelli  
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KAY ELLEN ARMSTRONG  
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ATTORNEY AT LAW  
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CARSON CITY, NEVADA 89703  
PHONE (775) 883-3990, FAX (775) 882-8854

CERTIFICATE OF SERVICE

Pursuant to NRCF 5(b) I certify that I am an employee of  
Kay Ellen Armstrong, Attorney at Law, and that on this date I  
deposited for delivery with Reno/Carson Messenger Service, a  
true copy of the attached supplement addressed to:

Washoe County District Attorney  
75 Court Street  
Reno, NV 89520

And on this date I deposited for delivery with the United States  
Postal Service a true copy of the attached supplement to:

Ferrill J. Volpicelli  
#79565  
P. O. Box 359  
Lovelock, NV 89419

November 20, 2006

Anne Bowen  
Anne Bowen



CR03P1263 DC-9900000392-078  
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Washoe County 3370

CODE: 3370

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DEC 18 2006

RONALD A. LONGTIN, JR. CLERK

By: H. Howde  
DEPUTY

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

\*\*\*

FERRILL JOSEPH VOLPICELLI,

Petitioner,

VS.

CASE NO: CR03P1263

DEPT. NO.: 10

THE STATE OF NEVADA,

Respondent.

**ORDER TO RESPOND**

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) on November 9, 2005, and Supplement March 22, 2006 in pro per.

On August 10, 2006, this Court appointed Kay Ellen Armstrong to represent Petitioner. Ms. Armstrong filed a Supplemental Petition to Petitioner's Petition for Writ of Habeas Corpus on November 21, 2006.

The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his liberty.

///

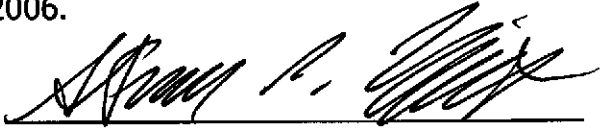
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1       **NOW, THEREFORE, IT IS HEREBY ORDERED** that Respondent shall, within 45  
2 days of entry of this Order, answer or otherwise respond to the Petition and file a return in  
3 accordance with the provisions of NRS 34.360 and 34.830, inclusive.

4       **DATED** this 18 day of December, 2006.

5  
6       

7       STEVEN P. ELLIOTT  
8       District Judge



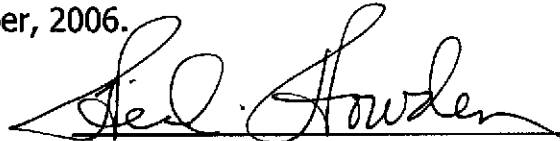
1 **CERTIFICATE OF MAILING**

2 I hereby certify that I am an employee of the Second Judicial District Court of the  
3 State of Nevada, in and for the County of Washoe; and that on this date I deposited for  
4 mailing a copy of the foregoing document addressed to:  
5

6 Kay Ellen Armstrong, Esq.  
7 415 W. Second St.  
8 Carson City, NV 89703

9 Terrance McCarthy, Esq.  
10 Washoe County District Attorney's Office  
11 Appellate Division  
12 P.O. Box 30083  
13 Reno, Nevada. 89520  
14 (Interoffice Mail)

15 **DATED** this 18 day December, 2006.

16 

17 HEIDI HOWDEN  
18 Judicial Assistant  
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RONALD A. LONTE, JR.

BY 

1 CODE #1130  
RICHARD A. GAMMICK  
2 #001510  
P. O. Box 30083  
Reno, Nevada 89520-3083  
(775) 328-3200  
Attorney for Respondent

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

\*\*\*

✓ FERRILL J. VOLPICELLI,

Petitioner,

v.

Case No. CR03P1263

LENARD VARE, WARDEN,

Dept. No. 9

Respondent.

ANSWER TO PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS  
(POST-CONVICTION)

COMES NOW, Respondent, by and through counsel, and answers the petition filed on or about  
November 9, 2005, as follows:

1. That Respondent admits all allegations in paragraphs 1-5, 7-16, 19, 21 and 22 of the petition.
2. That Respondent denies all allegations in paragraphs 17 and 18 of the petition.
3. That Respondent lacks sufficient knowledge to admit or deny and therefore denies parts 6 and 20 of the petition.
4. As to the supplemental petition filed on or about November 21, 2006, due to the narrative nature of the supplement, Respondent denies each and every allegation of fact included therein.
5. That your affiant is informed and does believe that all relevant pleadings and transcripts necessary to resolve the petition are currently available.

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Washoe County




1           6. That Respondent is informed and does believe that aside from an unsuccessful appeal  
2 from his judgment of conviction, Petitioner has not applied for any other relief from this conviction.

3                   AFFIRMATION PURSUANT TO NRS 239B.030

4           The undersigned does hereby affirm that the preceding document does not contain the social  
5 security number of any person.

6                   DATED: February 5, 2007.

7                               RICHARD A. GAMMICK  
8                               District Attorney

9                               By   
10                              TERRENCE P. McCARTHY  
11                              Appellate Deputy



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Kay Ellen Armstrong, Esq.  
415 West Second Street  
Carson City, NV 89703

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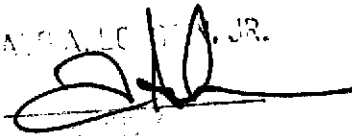
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ROYAL, A. L. C. JR.

BY



1 CODE #2155  
RICHARD A. GAMMICK  
2 #001510  
P. O. Box 30083  
Reno, Nevada 89520-3083  
(775)328-3200  
Attorney for Respondent

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

\*\*\*

7 FERRILL J. VOLPICELLI,

10 Petitioner,

11 v.

Case No. CR03P1263

12 LENARD VARE, WARDEN,

Dept. No. 9

13 Respondent.

14 \_\_\_\_\_/  
15 MOTION FOR PARTIAL DISMISSAL OF PETITION AND  
16 SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS  
(POST-CONVICTION)

17 COMES NOW, the Respondent, by and through counsel, and moves this court for an  
18 order for partial dismissal of the petition for writ of habeas corpus (post-conviction). This motion is  
19 based upon the records of this court and the Supreme Court and the following points and authorities.

20 POINTS AND AUTHORITIES

21 The petition for writ of habeas corpus appears to be timely and verified. Furthermore, some of  
22 the claims warrant a hearing. Others, described below, should be dismissed.

23 Ground 1 is a claim that appellate counsel rendered ineffective assistance in failing to present the  
24 arguments to the Supreme Court in terms of the United States Constitution. According to petitioner, if  
25 counsel had "federalized" the claims, that might one day open the door to the federal courthouse to  
26 Volpicelli. No hearing is warranted because that is the wrong analysis of prejudice.

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1 Prejudice is an element of a claim of ineffective assistance of counsel. *Strickland v. Washington*,  
2 466 U.S. 668, 104 S.Ct. 2052 (1984). In order to demonstrate prejudice, the petitioner must show that  
3 but for the failings of counsel, a different result of the litigation was likely. *Id.* In other words,  
4 Volpicelli would have to show not that the doors of the federal courthouse might someday be open to  
5 him, but that the doors of the prison would now be open to him if only counsel had raised the appellate  
6 arguments in federal terms. Because the proposed prejudice is not the correct kind of prejudice, no  
7 hearing is warranted and ground 1 should be dismissed.

8 Ground 2 seems to be a claim that the Supreme Court erred in deciding the appeal. This court  
9 has no authority to overrule the Supreme Court and so no hearing is warranted on ground 2.

10 Grounds 3, 4, 5 and 6 concern the issues that were decided on appeal. Each was considered and  
11 rejected on direct appeal and the doctrine of the law of the case precludes revisiting them in this  
12 proceeding. The doctrine applies to all proceedings in which the facts are substantially the same and it  
13 cannot be avoided by a more detailed or precisely focused arguments. *State v. District Court*, 121 Nev.  
14 \_\_\_, 112 P.3d 1070, 1075 (2005). Therefore, grounds 3, 4, 5 and 6 should be dismissed.

15 Ground 7 concerns restitution. It includes three separate arguments. Furthermore, one of the  
16 contentions warrants a hearing, although the remedy is not terribly attractive.

17 Unlike much of the petition, it includes a reasonable argument. One argument is fairly clever,  
18 although ultimately incorrect. Petitioner contends that he is entitled to have a jury determine the precise  
19 amount of restitution. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) established the  
20 principle that the right to a trial by jury includes the right to have a jury determine any fact that increases  
21 the range of sentences that is available on the basis of the facts established in the basic jury verdict.  
22 Those courts that have considered the application of that decision to restitution, have concluded that the  
23 basic jury verdict allows restitution and the precise amount of restitution need not be determined by the  
24 jury. *See State v. McMillan*, 111 P.3d 1136 (Ore. App. 2005) and cases cited therein; *State v. Kinneman*,  
25 119 P.3d 350 (Wash. 2005). The State also suggests that a restitution order that merely divests the crook  
26 of the proceeds of his crimes is not punitive because he has no right to the loot anyway. For the



1 moment, however, this court should simply rule that the basic verdict allows for the restitution order and  
2 the precise amount of restitution, like the precise prison sentence to be imposed, does not require an  
3 additional jury decision.

4 Ground 7 also includes the assertion that the court failed to consider the defendant's ability to  
5 pay before ordering restitution. An order for restitution is not dependent upon the defendant's ability to  
6 pay. *See Martinez v. State*, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999). Thus, no hearing is warranted.

7 Within ground 7 is another assertion, that counsel was ineffective in failing to contest the amount  
8 of restitution. That warrants a hearing. The remedy, however, is simply to modify the amount of  
9 restitution that Volpicelli is not going to pay anyway. *See Erickson v. State*, 107 Nev. 864, 821 P.2d  
10 1042 (1991). So, even though there is no reason to believe that Volpicelli is ever going to pay a dime in  
11 restitution, a hearing is warranted to determine if counsel was ineffective in not paying closer attention  
12 to restitution when defending an indigent client facing multiple life sentences.

13 Ground 8 has two claims: that the indictment was duplicitous and that it was multiplicitous. A  
14 duplicitous charging instrument allows the jury to chose between two unrelated allegations and return a  
15 verdict without specifying which crime the defendant committed. For instance, if the charging  
16 instrument alleged the Volpicelli either committed burglary or lewdness, that would be duplicitous. That  
17 argument should be rejected as a matter of law because there are no duplicitous counts in the indictment.

18 A multiplicitous indictment takes a single crime and improperly divides it into multiple counts,  
19 thereby improperly increasing the available sentence for a single crime. The argument in the petition is  
20 flawed. The indictment alleges a single conspiracy and then multiple crimes of burglary, or of aiding  
21 and abetting burglary, each specifying a different victim and date of the crime. If the State had alleged  
22 multiple conspiracies when there was but one continuing conspiracy, that might be multiplicitous. There  
23 are no such allegations. Instead, each crime, both the conspiracy and the completed crimes, are alleged  
24 separately and thus ground 8 should be dismissed.

25 Ground 9 mentions a theory of lesser included charges. Apparently, petitioner contends that trial  
26 counsel or appellate counsel was ineffective in failing to assert that he cannot be convicted of both a



1 single conspiracy and then a series of completed crimes. When two persons conspire to commit crimes,  
2 they are liable for both the conspiracy and the completed crimes. *See generally, Pinkerton v. United*  
3 *States*, 328 U.S. 640, 66 S.Ct. 1180 (1946); *Gordon v. District Court*, 112 Nev. 216, 230, 913 P.2d 240,  
4 249 (1996). Thus, no hearing is warranted on ground 9.

5 Ground 10 is a claim of vindictive prosecution, in the guise of ineffective assistance of counsel.  
6 The burden of pleading such a claim is difficult because the movant must demonstrate something other  
7 than the regular plea bargaining process. *See United States v. Goodwin*, 457 U.S. 368, 380, 102 S.Ct.  
8 2485, 2492 (1982)(“For just as a prosecutor may forgo legitimate charges already brought in an effort to  
9 save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a  
10 defendant would plead guilty to lesser charges proves unfounded.”). Here, Volpicelli presents no facts  
11 that would take this outside the normal realm of aggressive prosecution. Accordingly, the State contends  
12 that petitioner has failed to meet his burden of pleading specific facts and ground 10 should be  
13 dismissed.

14 Grounds 11 and 12 are apparently claims that trial counsel rendered ineffective assistance of  
15 counsel in failing to impeach a witness with every possible prior statement of that witness. Alternatively,  
16 it might be a claim that the State failed to disclose evidence. Either way, a hearing is warranted but the  
17 hearing should be limited to the specific claims advanced in grounds 11 and 12.

18 Ground 13 concerns a hypothetical motion to suppress evidence and is phrased in terms of  
19 ineffective assistance of counsel. According to the petition, stolen goods were stored in a commercial  
20 storage facility known as Aussie Storage. Petitioner’s daughter had rented a space there. Petitioner  
21 characterizes the management as state agents due to two alleged incidents. First, he claims that a police  
22 officer once came to the facility and acquired information identifying the person who rented the unit.  
23 Merely acquiring information is not a seizure and cops do not need a warrant to ask questions of or  
24 obtain information from one who voluntarily gives it. So, that part of the claim would seem to be  
25 meaningless.

26 The other incident, according to the petition, involves a policeman who came to the storage



1 facility and was allowed entry, and parked his car in front of the unit rented by Volpicelli's daughter.  
2 According to the petition, the management breached its contract by not allowing three days notice before  
3 allowing the police to access the unit. There are two problems with this allegation, even if we could  
4 assume that the management acts as a state agent by giving consent to enter. First, Volpicelli alleges that  
5 his daughter rented the space. He has no standing to assert a breach, or a violation of the rights of  
6 another person. *Scott v. State*, 110 Nev. 622, 877 P.2d 503 (1994). Second, when one reads the petition  
7 carefully, it becomes apparent that he is complaining that the police entered into the facility, the common  
8 areas owned by the landlord, not the individual unit rented by the daughter. Police do not need a warrant  
9 or cause or anything else to park a car where the owner allows. Volpicelli had no constitutional or  
10 contractual right to exclude anyone from the common areas of the facility. Now, if Volpicelli had  
11 alleged that he tried to move some of the goods from the unit and the police actually detained him or the  
12 goods, then that would be an entirely different issue, but there is no such claim and so ground 13 should  
13 be dismissed.

14 Ground 14 is a claim that the State withheld exculpatory evidence. The claim is untrue, but it  
15 warrants a hearing.

16 Ground 15 includes a great deal of rambling, but Volpicelli describes it as an assertion that  
17 counsel should have immediately appealed when Judge Hardesty denied his efforts to "quash" or dismiss  
18 the indictment. First, interlocutory orders in criminal cases are not immediately appealable. *See* NRS  
19 177.015 (allowing an appeal only from a final judgment). Second, the Supreme Court addressed the  
20 issue on direct appeal and found it without merit. The doctrine of the Law of the Case precludes  
21 revisiting that issue now.

22 Ground 16 is phrased in terms of a conflict of interest, but Volpicelli does not identify any  
23 competing interests. Instead, he makes it clear that he and his attorney had a conflict of opinion  
24 concerning tactics and strategies (of an unspecified nature). Volpicelli seems to claim that he is charged  
25 with making tactical decisions and that counsel is a mere mouthpiece that must accede to his demands.  
26 He is incorrect. When one elects to be represented by counsel, then certain fundamental decisions are



1 reserved to the client to make with the advice of counsel. Those include the decision of whether to plead  
2 guilty, whether to testify and whether to demand to a jury. The balance of the decisions are reserved to  
3 counsel. *See Rhyne v. State*, 118 Nev. 1, 38 P.3d 163 (2002). The client chooses the desired outcome of  
4 the litigation and counsel deploys his professional skills in deciding how best to achieve that outcome.  
5 *Id.* Thus, no hearing is warranted on ground 16.

6 Ground 17(A) concerns the adjudication of Volpicelli as a habitual criminal. That claim was  
7 rejected on direct appeal and is barred by the Law of the Case. Ground 17(B) asserts that one of the  
8 prior convictions had been appealed and the appeal was pending when this court considered that  
9 conviction in determining that Volpicelli was a habitual criminal. Other courts have recognized that a  
10 judgment of conviction issued by a court of competent jurisdiction is appropriate and admissible until  
11 and unless it is set aside by the appellate court. *State v. Johnson*, 406 P.2d 403 (Ariz. 1965).<sup>1</sup> *See also*  
12 *Berg v. State*, 711 P.2d 553 (Alaska App. 1985); *United States v. Leonard*, 630 F.2d 789 (10<sup>th</sup> Cir.  
13 1980); *United States v. MacGregor*, 617 F.2d 348 (3d Cir. 1980). *United States v. Mackbee*, 894 F.2d  
14 1057 (9<sup>th</sup> Cir. 1990). In *Clawson v. United States*, 52 F.3d 806 (9<sup>th</sup> Cir. 1995), the court held that a  
15 conviction that is being reviewed is sufficient to allow an enhancement unless the statute providing for  
16 the enhancement specifically requires that the prior conviction be "final."). That would seem to be the  
17 rule in Nevada as well, as evidenced by the undeniable fact that one may be committed to the state  
18 prison even while the conviction is appealed. Furthermore, such a rule is consistent with general  
19 principles that a person may be convicted of contempt for refusal to comply with a judgment, even while  
20 the judgment is being appealed, because the conviction is deemed valid until and unless it is set aside.

21 If the contention in ground 17(B) is that counsel was ineffective in failing to raise the argument  
22 concerning the finality of the prior conviction, no hearing is warranted because the general rule seems to  
23 be that one may indeed suffer collateral consequences to a conviction, even while an appeal is pending,  
24 and even if some court eventually rejects that theory, "[t]he failure of counsel to anticipate a change in

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25 <sup>1</sup>The disputed conviction was eventually affirmed. *Volpicelli v. State*, Docket No. 42971, Order  
26 of Affirmance (May 18, 2005).



1 the law does not constitute ineffective assistance.” *Doyle v. State*, 116 Nev. 148, 156, 995 P.2d 465, 470  
2 (2000). Therefore, no hearing is warranted on either variation of ground 17.

3 Ground 18 addresses the habitual criminal enhancement. The propriety of the sentence has  
4 already been determined on appeal and the claim is barred by the Law of the Case.

5 Ground 19 again addresses the sentencing determination. That has been reviewed by the  
6 Supreme Court and the attempt to refine the claim does not alter the conclusion that the claim is barred  
7 by the Law of the Case.

8 Ground 20 seems to be a claim that two of the counts are not supported by sufficient evidence.  
9 That claim could have been raised on direct appeal and is therefore barred by NRS 34.810. Furthermore,  
10 the premise that petitioner cannot be convicted of burglary because the stores were open to the public  
11 and he did not actually complete a larceny while in the store is incorrect. *See State v. Adams*, 94 Nev.  
12 530, 581 P.2d 868 (1978)(burglary of store that is open to the public). Burglary requires only entry with  
13 the requisite felonious intent, not the completion of the felony. Therefore, no hearing is required on  
14 ground 20.

15 Ground 21 seems to be a claim that counsel is ineffective in failing to argue that the statute  
16 defining burglary fails to give fair notice of what conduct is prohibited. It is not. The statute prohibits  
17 entering a store with certain specified intents. If Volpicelli cannot figure out what “enter” means, that  
18 does not mean that a person of ordinary intelligence could not figure it out. Because ground 21 is  
19 incorrect as a matter of law, no hearing is warranted.

20 Ground 22 is merely a summary of the prior claims, so no hearing is warranted.

### 21 CONCLUSION

22 Most of the claims in the petition should be dismissed. The court should allow a hearing limited  
23 to part of ground 7 and grounds 11, 12 and 14.

24 ///

25 ///

26 ///




1                                    AFFIRMATION PURSUANT TO NRS 239B.030

2                    The undersigned does hereby affirm that the preceding document does not contain the social  
3 security number of any person.

4                    DATED: February 5, 2007.

5                                    RICHARD A. GAMMICK  
6                                    District Attorney

7                                    By   
8                                    TERRENCE P. McCARTHY  
9                                    Appellate Deputy

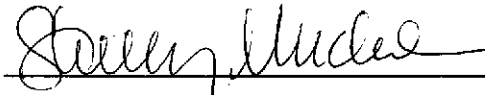


1 **CERTIFICATE OF MAILING**

2  
3 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County  
4 District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at  
5 Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

6 Kay Ellen Armstrong, Esq.  
7 415 West Second Street  
8 Carson City, NV 89703

9 DATED: February 5, 2007.

10 



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1 CODE# 3790

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2 Kay Ellen Armstrong  
State Bar No. 0715  
415 West Second Street  
Carson City, Nevada 89703  
775-883-3990  
Attorney for Volpicelli

RONALD A. LONGTIN, JR.

BY S. Davis  
DEPUTY

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

\* \* \*

FERRILL JOSEPH VOLPICELLI,

Petitioner,

Case No. CR03P-1263

vs.

Dept. No. 9

THE STATE OF NEVADA,

Respondent.

OPPOSITION TO PARTIAL MOTION TO DISMISS/REPLY

Comes now petitioner, Ferrill Joseph Volpicelli, by and through his attorney, Kay Ellen Armstrong, and opposes the partial motion to dismiss and replies to the answer, both filed on February 5, 2007.

This opposition/reply is based on the attached February 13, 2007 letter from petitioner, (See Exhibit A). Further, petitioner requests this court hold a full evidentiary hearing before ruling on any of the petitioner's claim. The state agrees an evidentiary hearing should be held on grounds 7, 11, 12 and

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///

///

KAY ELLEN ARMSTRONG

ATTORNEY AT LAW

415 WEST SECOND STREET

CARSON CITY, NEVADA 89703

PHONE (775) 883-3990, FAX (775) 882-8854

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VOLPICELLI 5 Pages  
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Washoe County



KAY ELLEN ARMSTRONG  
ATTORNEY AT LAW  
415 WEST SECOND STREET  
CARSON CITY, NEVADA 89703  
PHONE (775) 883-3990, FAX (775) 882-8854

1 14. However, this court should make a decision after hearing  
2 all pertinent evidence.

3 Dated this 15<sup>th</sup> day of February, 2007

4  
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7  
8 Kay Ellen Armstrong  
State Bar I.D. No. 0715  
415 West Second Street  
Carson City, NV 89703  
9 775-883-3990  
10 Attorney for Ferrill J.  
Volpicelli  
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February 13, 2007

Ferrill Volpicelli  
79565 @ LCC POB 359  
Lovelock, Nevada 89419

Kay Ellen Armstrong  
Attorney At Law  
415 West Second Street  
Carson City, Nevada 89703

CASE NO: CR03-Pl263

Dear Ms. Armstrong,

I am in receipt of your February 7, 2007 letter along with the accompanying State's Motion to Dismiss certain grounds within my pending Writ. After reviewing the arguments in the State's response, I have noted the following discrepancies which the Court needs to be made aware of.

It would appear that the State concedes to a hearing on those matters which, I believe, the State feels they can easily overcome at an evidentiary hearing. Meanwhile, the district attorney's office has requested the dismissal of many viable grounds after proffering only partial analysis and argument(s). This is done by skirting certain issues on certain grounds within an attempt to persuade the Court to foreclose further review. Now, I do understand how certain issues were federalized and that those issues within the Writ cannot be revisited at this juncture in my quest for post-conviction relief. However, I do have pause and concern as to the State's attempts to have certain grounds dismissed by circuitously avoiding issues which entitle me to relief.

For example, the State makes a convincing argument that the third felony in the habitual criminal enhancement proceedings was later finalized by the Nevada Supreme Court. But, Mr. McCarthy skirts the paramount issue which claims that the very same felony proffered at sentencing was not a valid PRIOR for enhancement purposes. If you recall, the NRS is abundantly clear as to the specific date and order of the prior offenses admitted for enhancement at sentencing. After all, that particular conviction involves a felony related to the incident which occurred while I was in Washoe County Jail; SUBSEQUENT to my arrest for the crimes to which I was later sanctioned with multiple life sentences.

Next, and as far as the stacking of counts and the lesser included offense matters are concerned, the State correctly posits that a conviction for conspiracy can coexist with the burglary convictions without incurring a double jeopardy situation. Yet, there is no reference to the more important relationship between the count involving the possession of instrumentalities (NRS205.965) and the burglary counts (NRS205.060); wherein the judgment of conviction has them running consecutive to one another with life sentence enhancements. A review of the Writ will show that the State's indictment and trial transcripts clearly inform the juries that the possession of the label maker, UPC bar codes, receipts, and any pricing information constitute the intent element of all the burglary

EXHIBIT "A"

V8.349



counts; NRS 205.060. So, the general test for determining the existence of a lesser included offense is whether the offense in question cannot be committed without committing the lesser offense. The State is adamant that the burglary counts are justified by the intent element of possessing the instrumentalities to defraud retailers. Hence, there indeed exists a double jeopardy scenario for the Court's consideration. And again, the State conveniently sidesteps this issue so as to foreclose the Court's proper analysis at review.

I also remain inquisitive as to why the State conveniently circumvented the supplemental ground filed late last summer relevant to the Court's imposition of the habitual criminal enhancement absent a jury's consideration. (Ground 23) This needs to be addressed as well.

There is also the State's attempt to thwart the claims of a due process issue concerning the vindictive prosecution matter. The fact that the prosecution may be entitled to intimidate with threats and later sanction a defendant for compelling the State to endure the pains and costs of going to trial, does not make for the same scenario when the defendant is intimidated, threatened and later sanctioned for merely exercising his right to a preliminary hearing and/or to have counsel present during the investigative process.

Lastly, the State seeks to have the last few grounds dismissed, relative to counts 2 & 5, by claiming that any further consideration at the imminent hearing is barred under the previously heard "insufficient evidence matter". In other words, something to which the Nevada Supreme Court previously heard on direct appeal. Nevertheless, it is my contention that those convictions ensued because of the mutiplicity/duplicity factor, coupled with the authorities apparent problem with interpreting the burglary statute, as evinced by their arbitrary enforcement of said statute absent any evidence whatsoever of criminal conduct.

With that said, I am requesting that you review the foregoing matters and challenge the State's motion to have those respective grounds summarily dismissed. Such a dismissal would indeed be a travesty of justice.

Thank you.

Ferrill Volpicelli  
cc:file



KAY ELLEN ARMSTRONG  
ATTORNEY AT LAW  
415 WEST SECOND STREET  
CARSON CITY, NEVADA 89703  
PHONE (775) 883-3990, FAX (775) 882-8854

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of  
Kay Ellen Armstrong, Attorney at Law, and that on this date I  
deposited for delivery with Reno/Carson Messenger Service, a  
true copy of the attached supplement addressed to:

Washoe County District Attorney  
75 Court Street  
Reno, NV 89520

And on this date I deposited for delivery with the United States  
Postal Service a true copy of the attached supplement to:

Ferrill J. Volpicelli  
#79565  
P. O. Box 359  
Lovelock, NV 89419

February 15, 2007

  
Judy W. Collie



KAY ELLEN ARMSTRONG  
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1 Kay Ellen Armstrrong  
2 Attorney at Law  
3 415 West Second St.  
4 Carson City, NV 89703  
5 (775) 883-3990

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

8 \* \* \*

9 FERRILL JOSEPH VOLPICELLI,  
10 Petitioner,


11 vs.

12 THE STATE OF NEVADA,  
13 Respondent

14 \_\_\_\_\_/  
15 AFFIRMATION  
16 Pursuant to NRS 239B.030

17 The undersigned does hereby affirm that the following  
18 document **DOES NOT** contain the social security number of any  
19 person in case NoCR03P-1263

20 1. **OPPOSITION TO PARTIAL MOTION TO DISMISS/REPLY**

21   
22 Kay Ellen Armstrong, Esq.

23 2-15-07  
24 Dated

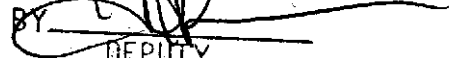


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RONALD A. LONGTIN, JR.

BY   
DEPUTY

1 CODE #3860  
RICHARD A. GAMMICK  
#001510  
P. O. Box 30083  
Reno, Nevada 89520-3083  
(775)328-3200  
Attorney for Respondent

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

\*\*\*

9 FERRILL J. VOLPICELLI,

10 Petitioner,

11 v.

Case No. CR03P1263

12 LENARD VARE, WARDEN,

Dept. No. 8/10

13 Respondent.

14 REQUEST FOR SUBMISSION

15 It is requested that the Motion for Partial Dismissal of Petition and Supplemental Petition, filed  
16 on February 5, 2007, in the above-entitled matter, be submitted to the court for decision.


17 The undersigned attorney certifies that a copy of this request has been mailed to all parties of  
18 record.

19 AFFIRMATION PURSUANT TO NRS 239B.030

20 The undersigned does hereby affirm that the preceding document does not contain the  
21 social security number of any person.

22 DATED: March 7, 2007.

23 RICHARD A. GAMMICK  
District Attorney

24 By   
25 TERRENCE P. MCCARTHY  
Appellate Deputy  
26

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Kay Ellen Armstrong, Esq.  
415 West Second Street  
Carson City, NV 89703

Tracy M. M. M.



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RONALD A. LONGTIN, JR., CLERK

By: *Howe*  
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

\* \* \*

FERRILL J. VOLPICELLI,

Petitioner,

Case No.: CR03P1263

vs.

Dept. No.: 10

LENARD VARE, WARDEN,

Respondent.

**ORDER PARTIALLY DISMISSING PETITION FOR WRIT OF HABEAS CORPUS**  
**(POST-CONVICTION) AND ORDER TO SET HEARING**

On November 14, 2003, this Court convicted Petitioner of one count of conspiracy to commit crimes against property, eight counts of burglary, and one count of unlawful possession, making, forgery or counterfeiting of inventory pricing labels. Petitioner was adjudged to be an habitual criminal, under NRS 207.010, and was sentenced to confinement in the Nevada State Prison for a term of 12 months for the conspiracy conviction, he was given concurrent life sentences for each burglary conviction, and he was given an additional life sentence for the possession/counterfeiting conviction. Petitioner was also ordered to pay restitution in the amount of \$10,339.16. Those convictions were affirmed by the Nevada Supreme Court. Petitioner filed a timely Petition for Writ of Habeas Corpus as well as a Supplemental Petition. Respondent filed a Motion for Partial Dismissal of the Petition and Supplemental Petition, and Petitioner has opposed that motion.



1        Law

2        This Court will dismiss a petition for writ of habeas corpus without a hearing when  
3 the petitioner's conviction was the result of a trial and the grounds for the petition could  
4 have been (1) presented to the trial court, (2) raised in a direct appeal, or (3) raised in any  
5 other proceeding petitioner has taken to secure relief. NRS 34.810(1)(b). Claims of  
6 ineffective assistance of trial or appellate counsel are properly raised for the first time in a  
7 timely post-conviction petition. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107  
8 (1996). Additionally, this Court will dismiss a petition without a hearing if the petitioner  
9 fails to "support any claims with specific factual allegations that if true would entitle him or  
10 her to relief." Pangallo v. State, 112 Nev. 1533, 1536, 930 P.2d 100, 102 (1996).

11        In the event the petitioner does allege specific facts to properly support a claim for  
12 ineffective assistance of counsel, relief will only be granted if petitioner can show (1) his  
13 counsel's performance was deficient, and (2) the deficiency prejudiced the petitioner.  
14 Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish prejudice, the claimant  
15 must show that an omitted issue would have had a reasonable probability of success on  
16 appeal. Kirksey, 112 Nev. At 998, 923 P.2d at 1113. Judicial review of a lawyer's  
17 representation is highly deferential, and a claimant must overcome the presumption that a  
18 challenged action might be considered sound strategy. Strickland, 466 U.S. at 689.

19        Analysis

20        Petitioner alleges twenty-two grounds for habeas relief. Upon review, this Court  
21 finds that only grounds 7, 11, 12, and 14 warrant an evidentiary hearing. The remaining  
22 grounds for relief must be dismissed.

23        *Ground One*

24        Petitioner argues that appellate counsel failed to present issues in constitutional or  
25 "federalized" terms, which, in turn, prevented the Nevada Supreme Court from applying  
26 constitutional standards of review and also prevented petitioner from being able to petition  
27 for relief in a federal district court. The terms appellate counsel used are presumed to be  
28 part of a sound strategy and no amount of federal language used will allow a federal



1 district court to exercise appellate jurisdiction over a decision of the Nevada Supreme  
2 Court. Thus, petitioner was not prejudiced by appellate counsel's choice of language, and  
3 Ground One must be dismissed.

4 *Ground Two*

5 Petitioner's second ground for relief alleges that, on appellate review, the Nevada  
6 Supreme Court applied the wrong law in its decision. This Court has no authority to  
7 overrule the Nevada Supreme Court. Ground two is dismissed.

8 *Grounds Three, Four, Five, and Six*

9 In Grounds Three, Four, Five, and Six, petitioner argues issues that were either  
10 argued and decided on appeal or should have been argued and decided on appeal. These  
11 grounds must therefore be dismissed pursuant to NRS 34.810(b).

12 *Ground Seven*

13 Ground Seven pertains to the restitution order. Specifically, petitioner claims that a  
14 jury should have determined the precise amount of restitution, that the court failed to  
15 consider petitioner's ability to pay, and that counsel was ineffective in failing to contest the  
16 amount of restitution. Only the latter allegation within Ground Seven warrants a hearing.  
17 Courts that have considered the issue have determined that the precise amount of  
18 restitution need not be decided by a jury. State v. Kinneman, 119 P.3d 350, 355 (Wash.  
19 2005). Furthermore, an order for restitution is not dependant upon a defendant's ability to  
20 pay. Martinez v. State, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999).

21 This Court is satisfied that the claim that counsel was ineffective for having failed to  
22 contest the restitution amount does warrant a hearing. A hearing on this issue will be  
23 limited to a determination of the amount of restitution petitioner has been ordered to pay.

24 *Ground Eight*

25 Here, Petitioner claims that the indictment was duplicitous (that he was charged  
26 with either X or Y, and a jury was allowed to choose between crimes) and multiplicitous  
27 (that he was charged more than once for the same crime). The indictment contains no  
28 duplicitous counts, and each count represents a separate crime. Thus, Ground Eight is



1 dismissed.

2 *Ground Nine*

3 Petitioner argues, in Ground Nine, that the conspiracy conviction is a lesser included  
4 offense of his burglary convictions. A charge of conspiracy does not merge into the  
5 completed crime. Gordon v. District Court, 112 Nev. 216, 230, 913 P.2d 240, 249 (1996).  
6 Ground Nine is dismissed.

7 *Ground Ten*

8 Ground Ten is a claim that petitioner's conviction was a result of malicious  
9 prosecution. This is yet another claim that either was or should have been raised on direct  
10 appeal. It therefore must be dismissed pursuant to NRS 34.810(b).

11 *Ground Eleven*

12 Here, petitioner argues that trial counsel was ineffective for failing to impeach a  
13 prosecution witness with prior inconsistent statements. Such a failure on the part of trial  
14 counsel, if true, may constitute a deficient performance that could have prejudiced the  
15 petitioner. A hearing is warranted on Ground Eleven.

16 *Ground Twelve*

17 Ground Twelve alleges that the prosecution withheld exculpatory evidence and that  
18 trial counsel did not put forth sufficient effort to retrieve that evidence. If true, this would  
19 constitute deficient performance that may have prejudiced petitioner. A hearing is  
20 warranted on Ground Twelve.

21 *Ground Thirteen*

22 Here, petitioner argues that trial counsel was ineffective for failing to suppress  
23 certain evidence. Essentially, petitioner argues that physical evidence was improperly  
24 admitted because it was obtained in violation of his Fourth Amendment right against  
25 unreasonable search and seizure. The evidentiary issue, itself, should have been raised on  
26 direct appeal and is therefore barred from consideration under NRS 34.810(b). Petitioner's  
27 argument that trial counsel was ineffective for failing to suppress the evidence is  
28 insufficient to overcome the presumption that trial counsel employed a sound strategy.



1 Ground Thirteen is dismissed.

2 *Ground Fourteen*

3 This is essentially the same allegation as that in Ground Twelve—that the  
4 prosecution withheld exculpatory evidence and that trial counsel put forth insufficient effort  
5 to obtain the evidence. Ground Fourteen warrants a hearing.

6 *Ground Fifteen*

7 Ground Fifteen is an assertion that counsel was ineffective for failing to quash the  
8 indictment and for failing to immediately file an appeal when the indictment was upheld.  
9 Pursuant to NRS 177.015, interlocutory orders in criminal cases are not immediately  
10 appealable. In addition, petitioner's argument in Ground One indicates that the Supreme  
11 Court addressed this issue on direct appeal. This Court has no authority to overrule the  
12 Supreme Court. Ground Fifteen must be dismissed.

13 *Ground Sixteen*

14 This is an assertion that petitioner and trial counsel did not agree when it came to  
15 various tactics and strategies. Such an assertion, if true, does not lead to a conclusion that  
16 counsel was either deficient or that any possible deficiency prejudiced the petitioner.  
17 Therefore, Ground Sixteen does not present sufficient specific factual allegations that if  
18 true would entitle him or her to relief. Ground Sixteen is dismissed.

19 *Ground Seventeen*

20 In Ground Seventeen, petitioner claims that trial counsel was ineffective for failing to  
21 present testimony at sentencing that may have projected petitioner in a more favorable  
22 light. Aside from the issue of whether this constitutes a deficient performance, this Court  
23 is not satisfied that but for such an omission, the result of sentencing would have been  
24 different. Thus, Ground Seventeen is not supported with sufficient factual allegations that,  
25 if true, would entitle petitioner to relief. It must be dismissed.

26 *Ground Eighteen*

27 Here, couched in terms of ineffective assistance of counsel, petitioner argues that  
28 his status as an habitual criminal was improper. This is one of the issues argued and



1 decided on direct appeal to the Nevada Supreme Court. This Court has no authority to  
2 overrule the Supreme Court. Ground Eighteen is dismissed.

3 *Ground Nineteen*

4 Ground Nineteen, again couched in terms of ineffective assistance of counsel, is an  
5 argument that petitioner has received cruel and unusual punishment due to his status as  
6 an habitual criminal. This has been argued and decided on direct appeal to the Nevada  
7 Supreme Court. Ground Nineteen is dismissed.

8 *Ground Twenty*

9 Here, petitioner argues that there was insufficient evidence to convict him of two of  
10 the ten counts. This is an argument that could have been raised in a direct appeal. It is  
11 therefore barred by NRS 34.810(b) and must be dismissed.

12 *Ground Twenty-One*

13 This is an argument that counsel was ineffective in failing to argue that Nevada's  
14 burglary statute is unconstitutionally vague. This Court is not convinced that this omitted  
15 issue would have had a reasonable probability of success on appeal. It is therefore  
16 dismissed.

17 *Ground Twenty-Two*

18 Ground Twenty-Two is a general assertion that the cumulative effect of all the  
19 alleged deficiencies in each of the previous allegations has resulted in a miscarriage of  
20 justice. This argument is not supported by any specific factual allegations that, if true,  
21 would entitle petitioner to relief. No hearing is warranted for Ground Twenty-Two.

22 Having shown sufficient grounds for relief warranting a hearing on Grounds Seven,  
23 Eleven, Twelve, and Fourteen, an evidentiary hearing shall be set pertaining to those  
24 grounds. The remainder of the Petition must be summarily dismissed.


25  
26 **NOW, THEREFORE, IT IS HEREBY ORDERED** that all grounds set forth in the  
27 Petition for Writ of Habeas Corpus other than grounds 7, 11, 12, and 14 are **DISMISSED**.

28 **IT IS FURTHER ORDERED** that the parties shall contact the Judicial Assistant for



1 Department 10 for the purposes of setting a hearing regarding Grounds 7, 11, 12, and 14  
2 within 20 (twenty) days of the issuance of this Order.

3  
4 **DATED** this 2 day of August, 2007.

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6   
7 STEVEN P. ELLIOTT  
8 District Judge  
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1 **CERTIFICATE OF MAILING**

2 I hereby certify that I am an employee of the Second Judicial District Court of the  
3 State of Nevada, in and for the County of Washoe; and on this date I deposited for mailing  
4 a copy of the foregoing document addressed to:  
5

6 Richard A. Gammick  
7 Washoe County District Attorney  
8 P.O. Box 30083  
9 Reno, NV 89520  
(Interoffice Mail)

10 Kay Ellen Armstrong, Esq.  
11 415 West Second Street  
12 Carson City, NV 89703

13 **DATED** this 2 day of August, 2007.

14 

15 HEIDI HOWDEN  
16 Judicial Assistant  
17  
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RONALD A. LONGTIN, JR.

BY

DEPUTY

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

FERRILL J. VOLPICELLI,

Plaintiff,

vs.

Case No. CR03P1263

THE STATE OF NEVADA,

Dept. No. 10

Defendant.

**APPLICATION FOR SETTING**

TYPE OF ACTION: Post-Conviction

MATTER TO BE HEARD: Evidentiary Hearing

Date of Application : August 8, 2007 Made by: Petitioner/Respondent

Plaintiff or Defendant

COUNSEL FOR PLAINTIFF: Kay Ellen Armstrong, 415 W. Second St., Carson City 89703

COUNSEL FOR DEFENDANT: Terrence P. McCarthy, WCDA, POB 33083, Reno 89520

Instructions: Check the appropriate box. Indicate who is requesting the jury. Estimated No. Of Jurors:

☐ Jury Demanded by (Name):

☐ No Jury Demanded by (Name):

Estimated Duration of Trial:

Set telephonically

Set telephonically

Kay Ellen Armstrong

Terrence P. McCarthy

Attorney(s) for Plaintiff

Attorney(s) for Defendant

Motion - No. 1:30 20th  
Setting at on the

September 07  
day of 20

Trial - No. Setting at on the

day of 20



1 CODE #1260  
RICHARD A. GAMMICK  
2 #001510  
P. O. Box 30083  
Reno, Nevada 89520-3083  
(775)328-3200  
Attorney for Respondent

ORIGINAL

FILED

2007 AUG 20 AM 11:39

RONALD A. LONGTIN, JR.

BY *R. Longtin*  
DEPUTY

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

\* \* \*

9 FERRILL VOLPICELLI,

10 Petitioner,

11 v.

Case No. CR03P1263

12 LENARD VARE, WARDEN

Dept. No. 10

13 Respondent.

14 \_\_\_\_\_  
15 APPLICATION FOR ORDER TO PRODUCE PRISONER

16 COMES NOW, the State of Nevada, Respondent herein, by and through RICHARD A.  
17 GAMMICK, District Attorney of Washoe County, by TERRENCE P. MCCARTHY, Appellate Deputy,  
18 and alleges as follows:

19 1. That the above Petitioner, FERRILL VOLPICELLI, is presently incarcerated at the  
20 Nevada State Prison, Carson City, Nevada.

21 2. That the above FERRILL VOLPICELLI is scheduled for a post-conviction hearing  
22 before the Second Judicial District Court on September 20, 2007 at 1:30 p.m.

23 WHEREFORE, Applicant prays that an Order be made ordering the appearance of the  
24 said FERRILL VOLPICELLI before the Second Judicial District Court, and from time to time thereafter  
25 at such times and places as may be ordered and directed by the Court for such proceedings as thereafter  
26 may be necessary and proper in the premises, and directing the execution of said Order by the Sheriff of

CR03P1263  
POST: FERRILL J. VOLPICELLI 3 Pages  
District Court 08/20/2007 11:39 AM  
Washoe County  
1260  
YLLLOYD  
DOC



1 Washoe County, Nevada.

2 AFFIRMATION PURSUANT TO NRS 239B.030

3 The undersigned does hereby affirm that the preceding document does not contain the social  
4 security number of any person.

5 DATED: August 9, 2007.

6 RICHARD A. GAMMICK  
7 DISTRICT ATTORNEY

8 By 

9 TERRENCE P. McCARTHY  
10 Appellate Deputy  
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1 CODE #3340  
RICHARD A. GAMMICK  
#001510  
P. O. Box 30083  
Reno, Nevada 89520-3083  
(775)328-3200  
Attorney for Respondent

ORIGINAL  
FILED

2007 AUG 20 AM 11:40

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.

\*\*\*

8  
9 FERRILL VOLPICELLI,

10 Petitioner,

11 v.

Case No. CR03P1263

12 LEONARD VARE, WARDEN

Dept. No. 10

13 Respondent.  
14 \_\_\_\_\_ /

15 ORDER TO PRODUCE PRISONER

16 IT APPEARING to the satisfaction of the above-entitled Court that it is necessary that the  
17 Petitioner above named, FERRILL VOLPICELLI #79565, presently incarcerated in the Nevada State  
18 Prison, Carson City, Nevada, be brought before the Second Judicial District Court for a post-conviction  
19 hearing in the above-entitled action,

20 NOW, THEREFORE, IT IS HEREBY ORDERED that the Warden of the Nevada State  
21 Prison, Carson City, Nevada, bring the said FERRILL VOLPICELLI before the Second Judicial District  
22 Court on September 20, 2007 at 1:30 for a post-conviction hearing in the above-entitled action, and from  
23 time to time thereafter at such times and places as may be ordered and directed by the Court for such

24 ///

25 ///

26 ///

CR03P1263  
POST: FERRILL J. VOLPICELLI 3 Pages  
District Court 08/20/2007 11:40 AM  
3340  
Washoe County  
DCC  
YLLLOYD



1 proceedings as thereafter may be necessary and proper in the premises.

2 DATED: August 14, 2007.

3  
4   
5 DISTRICT JUDGE

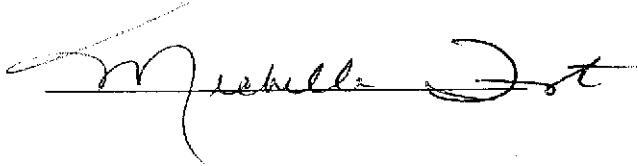


1 CERTIFICATE OF MAILING

2  
3 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County  
4 District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at  
5 Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

6 Kay Ellen Armstrong, Esq.  
7 415 W. Second Street  
8 Carson City, NV 89703

9 DATED: August 20, 2007.

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e-filed

CASE NO. CR03P1263

POST: FERRILL J. VOLPICELLI

DATE, JUDGE  
OFFICERS OF

COURT PRESENT

APPEARANCES-HEARING

CONTINUED TO

09/20/07

PETITION FOR POST CONVICTION/EVIDENTIARY HEARING

HONORABLE

Deputy District Attorney Terrence McCarthy represented the State.

STEVEN P.

Petitioner was present with counsel, Kay Armstrong, Esq.

ELLIOTT

Counsel Armstrong moved to invoke the rule of exclusion; no

DEPT. NO. 10

objection; SO ORDERED.

M. Merkouris

Counsel Armstrong called Bradley Van Ry who was sworn and

(Clerk)

examined; cross examined; re-direct examined and excused.

J. Schonlau

State called Deputy District Attorney Tammy Riggs who was sworn

(Reporter)

and examined; cross examined; re-direct examined; excused.

2:45 p.m. – Court stood in recess.

3:00 p.m. – Court reconvened.

Counsel Armstrong requested time to obtain an affidavit to

supplement Exhibit A; State objected; COURT found that the

Petitioner will be allowed time to attempt to supplement Exhibit A.

COURT further ordered that it will go forward today on items #11, 12

and 14.

Counsel Armstrong argued in support of the petition.

State argued in opposition of the petition.

Counsel Armstrong had no further argument.

COURT presented it's findings of fact and conclusions of law and

ruled in favor of the State. Items #11, 12 and 14 are hereby denied.

COURT further reserved it's ruling as to item #7 upon further review  
of the evidence.

3:15 p.m. – Court stood in recess.

3:20 p.m. – Court reconvened.

**State's exhibit 1 marked and offered; no objection; ordered**

**ADMITTED into evidence.**

3:24 p.m. – Court concluded and stood in recess.

CR03P1263  
DC-9900025217-045  
POST: FERRILL J VOLPICELLI 1 Page  
District Court 09/20/2007 01:09 PM  
Washoe County



CASE NO. CR03P1263

POST: FERRILL J. VOLPICELLI

DATE, JUDGE  
OFFICERS OF

COURT PRESENT

APPEARANCES-HEARING

CONTINUED TO

09/20/07

PETITION FOR POST CONVICTION/EVIDENTIARY HEARINGHONORABLE  
STEVEN P.Deputy District Attorney Terrence McCarthy represented the State.  
Petitioner was present with counsel, Kay Armstrong, Esq.

ELLIOTT

Counsel Armstrong moved to invoke the rule of exclusion; no  
objection; SO ORDERED.

DEPT. NO. 10

M. Merkouris

Counsel Armstrong called Bradley Van Ry who was sworn and  
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(Clerk)

J. Schonlau

State called Deputy District Attorney Tammy Riggs who was sworn  
and examined; cross examined; re-direct examined; excused.

(Reporter)

2:45 p.m. – Court stood in recess.

3:00 p.m. – Court reconvened.

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supplement Exhibit A; State objected; COURT found that the  
Petitioner will be allowed time to attempt to supplement Exhibit A.  
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Counsel Armstrong argued in support of the petition.

State argued in opposition of the petition.

Counsel Armstrong had no further argument.

COURT presented it's findings of fact and conclusions of law and  
ruled in favor of the State. Items #11, 12 and 14 are hereby denied.COURT further reserved it's ruling as to item #7 upon further review  
of the evidence.

3:15 p.m. – Court stood in recess.

3:20 p.m. – Court reconvened.

**State's exhibit 1 marked and offered; no objection; ordered  
ADMITTED into evidence.**

3:24 p.m. – Court concluded and stood in recess.



ORIGINAL

FILED

CODE NO: 1075

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

FERRILL J. VOLPICELLI,

Case No.: CR03P1263

Petitioner,

Dept. No.: 10

vs.

LENARD VARE,

Respondent

AFFIDAVIT OF KAREN S. FRALEY

STATE OF NEVADA )  
 ) ss.  
COUNTY OF WASHOE )

KAREN S. FRALEY, being duly sworn, deposes and states:

1. My name is Karen S. Fraley. I am a Deputy City Attorney with the City of Reno, assigned as Legal Advisor for the Reno Police Department. I am over the age of 18 and I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. As Legal Advisor for the Reno Police Department, I am asked from time to time to deal with issues regarding property retained in the Evidence Division.

3. I was contacted on numerous occasions over a period of two or three years by Petitioner Ferrill J. Volpicelli concerning property retained in Evidence that had been seized in criminal investigations by the Reno Police Department.

CR03P1263  
DC-9900001824-062  
POST: FERRILL J. VOLPICELLI 4 Pages  
District Court 10/11/2007 01:51 PM  
Washoe County 1075  
RMC  
ARMITH

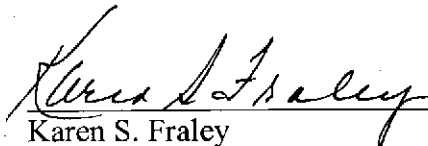


1 4. After a number of inquiries and disputes over the disposition of Mr. Volpicelli's  
2 property and, at his request, I prepared a detailed inventory of property held by the Reno  
3 Police Department in RPD Case No. 01-216321.

4 5. I detailed the property, evidence number, owner of the property and status.

5 6. The inventory was prepared specifically as an accounting to Mr. Volpicelli, not for  
6 any other use.

7 7. The inventory was mailed to Mr. Volpicelli and a copy provided to the Evidence  
8 Division.

9  
10 

11 Karen S. Fraley  
12 Deputy City Attorney  
City of Reno

13 SUBSCRIBED and SWORN to before me this 1st day of October, 2007.

14 

15 NOTARY PUBLIC in and for  
16 said County and State





KAY ELLEN ARMSTRONG  
ATTORNEY AT LAW  
415 WEST SECOND STREET  
CARSON CITY, NEVADA 89703  
PHONE (775) 883-3990, FAX (775) 882-8854

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of  
Kay Ellen Armstrong, Attorney at Law, and that on this date I  
deposited for delivery with Reno/Carson Messenger Service, a  
true copy of the attached supplement addressed to:

Washoe County District Attorney  
75 Court Street  
Reno, NV 89520

And on this date I deposited for delivery with the United States  
Postal Service a true copy of the attached supplement to:

Ferrill J. Volpicelli  
#79565  
P. O. Box 359  
Lovelock, NV 89419

October 8, 2007

  
Judy W. Collie



KAY ELLEN ARMSTRONG  
ATTORNEY AT LAW  
415 WEST SECOND STREET  
CARSON CITY, NEVADA 89703  
PHONE (775) 883-3990, FAX (775) 882-8854

Kay Ellen Armstrrong  
Attorney at Law  
415 West Second St.  
Carson City, NV 89703  
(775)883-3990

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

\* \* \*

FERRILL J. VOLPICELLI.,  
Petitioner,


vs.

LENARD VARE,  
Respondent

**AFFIRMATION**  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the following  
document **DOES NOT** contain the social security number of any  
person in case CR03P-1263

**1. AFFIDAVIT OF KAREN S. FRALEY**

  
Kay Ellen Armstrong, Esq.

10-10-07  
Dated



2385

ORIGINAL

FILED

1 Case No. CR03-P1263

2 Dept. No. 10

2007 OCT 11 PM 2:41

RONALD A. LUSTIN, JR.

BY [Signature]  
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

\*\*\*\*\*

9 FERRILL J. VOLPICELLI, )  
10 PETITIONER, )  
11 -VS- )  
12 STATE OF NEVADA, )  
13 RESPONDENT. )  
14

APPLICATION TO PROCEED  
IN FORMA PAUPERIS

15  
16 COMES NOW PETITIONER, FERRILL VOLPICELLI, in pro se,  
17 and moves this Court for an order granting him leave to proceed in the above-  
18 entitled action without paying the costs and/or security of proceeding herein.

19 This motion is made and based upon NRS 12.015 and the attached affidavit  
20 and certificate of inmate's institutional account.

21 Dated this 8th day of OCTOBER, 2007.

Respectfully submitted,

[Signature]  
FERRILL VOLPICELLI # 79565  
Lovelock Correctional Center  
P.O. Box 359  
Lovelock, Nevada 89419  
PETITIONER In Pro Se



ORIGINAL

LCC

Case No. CR03-P1263

Dept. No. 10

FILED

2007 OCT 11 PM 2:20

RONALD A. MARTIN JR.

FILED IN ERROR

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

INMATE, )  
 )  
Plaintiff, )  
 )  
vs. )  
Ferris Volpicelli, F. # 79565, )  
Defendant. )

CERTIFICATE OF  
INMATE'S INSTITUTIONAL ACCOUNT

I, the undersigned, hereby certify that Ferris Volpicelli, # 79565,  
Defendant above-named, has a balance of \$ .10 on account to  
his credit in the prisoners' personal property fund for his use at Lovelock  
Correctional Center, in the County of Pershing, State of Nevada, where he is  
presently confined.

I further certify that said F. Volpicelli owes departmental charges  
in the amount of \$ 0 and that the solitary security to his credit is  
a savings account established pursuant to NRS 209.247(5) with a balance of  
\$ 200.00 which is inaccessible to him.

DATED THIS 28th day of August, 2007.

Arthur  
Accounting Technician  
Inmate Services Division  
Nevada Department of Corrections

Submitted by: [Signature], # 72325, on 8/22/07

NOV 20 2007 V8.377



ORIGINAL

Case No. CR03-P1263

Dept. No. 10

FILED

2007 OCT 11 PM 2:41

RONALD A. LARSEN, JR.

BY [Signature]

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

\*\*\*\*\*

FERRILL T. VOLPICELLI, )

PETITIONER, )

-VS-

STATE OF NEVADA, )

RESPONDENT. )

**AFFIDAVIT IN SUPPORT OF  
APPLICATION TO PROCEED  
IN FORMA PAUPERIS**

STATE OF NEVADA )

COUNTY OF PERSHING )

ss:

COMES NOW FERRILL VOLPICELLI, who being first duly sworn and

on my own oath, do hereby depose and state the following under the penalty of perjury in support of my foregoing motion:

(1) Because of my poverty I am unable to pay the costs of the proceedings in the foregoing judicial action or to give security therefor; I am entitled to relief. This application is made in good faith.

(2) I ☒ do ☐ do not request an attorney to be appointed to me.

AND WISH TO CONTINUE REPRESENTATION WITH KAY ARMSTRONG, ESQ.

(3) I further swear that the responses which I make to the questions and instructions below are true and correct to the best of my knowledge:

(a) I ☐ am ☒ am not presently employed. I currently earn salary or wages per month in the following amount and the name and address of my employer

V8.378



1 is as follows, OR if I am not presently employed, the date of my last  
2 employment and the amount of salary or wages I earned per month were as  
3 follows: I HAVE NOT BEEN EMPLOYED SINCE PRIOR TO MY  
4 INCARCERATION IN 2001

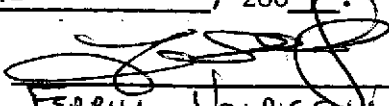
5 (b) I have NOT received any money from any of the following sources  
6 within the past 12 months: business, profession, form of self-employment, rent  
7 payments, interest or dividends, pensions, annuities, life insurance payments,  
8 gifts or inheritances. Money, if any, placed on my prison accounts from  
9 outside sources such as family or friends, is in the amount as indicated on the  
10 attached Certificate of Inmate's Institutional Account, which likewise  
11 reflects the amount of money on my prison account.

12 (c) I do NOT own any real estate, stocks, bonds, notes, automobiles, or  
13 other valuable property, and nor do I have money in a checking account.

14 (d) I ☒ do ☐ do NOT have persons dependent upon me for support. The  
15 persons I support, if any, are as follows, with my relationship to those  
16 persons and the amount of my contribution towards their support being as  
17 follows: LOGAN VOLPICELLI, SON, @ \$150/m - OWED & ARREARS

18 (4) I do swear under the penalty of perjury that the above facts are true  
19 and correct to the best of my personal knowledge, and are rendered without  
20 notary pursuant to the provisions of NRS 208.165, as I am incarcerated.

21 Dated this 8th day of October, 2007.

22   
23 FERRIS VOLPICELLI # 79565  
24 Lovelock Correctional Center  
P.O. Box 359  
Lovelock, Nevada 89419

25 / / /

26 / / /

27 / / /



CR03P1263  
DC-9900001841-220  
FERRILL J. VOLPICELLI 3 Pages  
POST: 10/17/2007 02:29 PM  
District Court 3035  
Washoe County

3035

ORIGINAL

FILED

OCT 17 2007

HOWARD W. CONYERS, CLERK  
By: *[Signature]*  
DEPUTY CLERK

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

FERRILL J. VOLPICELLI,

Case No. CR03p1263

Petitioner,

vs.

Dept. No. 10

STATE OF NEVADA,

Respondent.

ORDER

Having read Petitioner FERRILL J. VOLPICELLI's "Motion for Leave to Proceed in Forma Pauperis," his "Petition for Writ of Habeas Corpus," and his "Certificate of Inmate's Institutional Account," this Court finds that Petitioner has properly filed for propria persona status.

IT IS HEREBY ORDERED, pursuant to NRS 12.015, Petitioner's Motion to Proceed in Forma Pauperis is GRANTED.

IT IS HEREBY ORDERED that the Court allow said FERRILL J. VOLPICELLI to bring such action without costs and file or issue any necessary writ, process, pleading or paper without charge, with the exception of juror fees.


//

IT IS FURTHER ORDERED that the Sheriff or any other appropriate officer



1 within the state make personal service of any necessary writ, process, pleading or paper  
2 without charge for REFFILL J. VOLPICELLI.

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4 Dated this 16th day of October, 2007.

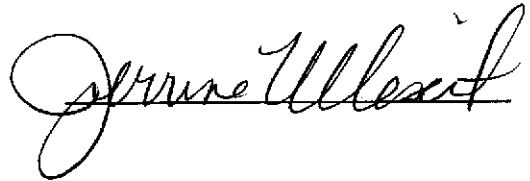
5   
6 JEROME M. POLAHA  
7 CHIEF DISTRICT JUDGE  
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1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second  
3 Judicial District Court, in and for the County of Washoe; and that on this 17 day of  
4 October, 2007, I deposited in the County mailing system for postage and mailing with the  
5 United States Postal Service in Reno, Nevada, a true and correct copy of the attached  
6 document addressed as follows:

7  
8 FERRILL J. VOLPICELLI, #79565  
9 Lovelock Correctional Cent  
10 P.O. Box 359  
11 Lovelock, Nevada 89419  
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ORIGINAL FILED

1 Code No. 3860

2 Kay Ellen Armstrong  
State Bar No. 0715  
415 West Second Street  
Carson City, Nevada 89703  
775-883-3990  
Attorney for Petitioner

2007 OCT 25 PM 12:28

HOWARD W. COVENS

BY DEPUTY

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

\* \* \*

FERRILL JOSEPH VOLPICELLI,

Petitioner,  
vs.

CASE NO. CR03P-1263

DEPT. NO. 10

THE STATE OF NEVADA,  
Respondent.

REQUEST FOR SUBMISSION

COMES NOW, petitioner, Ferrill Joseph Volpicelli, by and through his attorney, Kay Ellen Armstrong, and hereby requests that the above-entitled matter be submitted for decision. This request is based on the facts that the Court has had an opportunity to review the full transcripts of interviews with prosecution witness Wolf, as well as the affidavit of Karen Fraley authenticating petitioner's proposed exhibit.

///

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KAY ELLEN ARMSTRONG  
ATTORNEY AT LAW  
415 WEST SECOND STREET  
CARSON CITY, NEVADA 89703  
PHONE (775) 883-3990, FAX (775) 882-8854

CR03P-1263  
POST: FERRILL J. VOLPICELLI 3 Pages  
10/25/2007 12:28 PM  
District Court  
Washoe County  
JBERCHER  
3860  
DOC

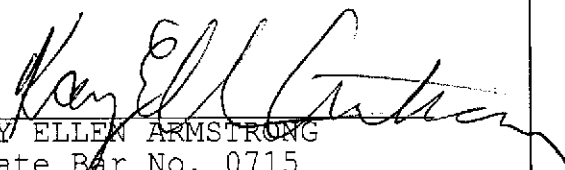
V8.383



KAY ELLEN ARMSTRONG  
ATTORNEY AT LAW  
415 WEST SECOND STREET  
CARSON CITY, NEVADA 89703  
PHONE (775) 883-3990, FAX (775) 882-8854

1 Therefore, it is respectfully requested that this Court  
2 rule on petitioner's post-conviction habeas matter.

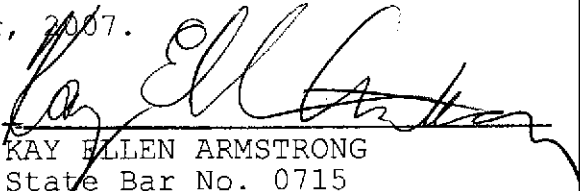
3 DATED this 24<sup>th</sup> day of October, 2007.

4  
5   
6 KAY ELLEN ARMSTRONG  
7 State Bar No. 0715  
8 415 West Second Street  
9 Carson City, NV 89703  
10 (775) 883-3990  
11 Attorney for Petitioner  
12 Ferrill Joseph Volpicelli

13 **AFFIDAVIT PURSUANT TO NRS 239B.030**

14 The undersigned does hereby affirm that the preceding  
15 document does not contain the social security number of any  
16 person.

17 Dated this 24<sup>th</sup> day of October, 2007.

18   
19 KAY ELLEN ARMSTRONG  
20 State Bar No. 0715  
21 415 West Second Street  
22 Carson City, NV 89703  
23 (775) 883-3990  
24 Attorney for Petitioner  
25 Ferrill Joseph Volpicelli  
26  
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KAY ELLEN ARMSTRONG  
ATTORNEY AT LAW  
415 WEST SECOND STREET  
CARSON CITY, NEVADA 89703  
PHONE (775) 883-3990, FAX (775) 882-8854

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of  
Kay Ellen Armstrong, Attorney at Law, and that on this date I  
deposited for delivery with Reno/Carson Messenger Service, a  
true copy of the attached supplement addressed to:

Terrence McCarthy, Deputy  
Washoe County District Attorney  
75 Court Street  
Reno, NV 89520

And on this date I deposited for delivery with the United States  
Postal Service a true copy of the attached supplement to:

Ferrill J. Volpicelli  
#79565  
P. O. Box 359  
Lovelock, NV 89419

October , 2007.

Anne Bowen  
Anne Bowen



ORIGINAL

FILED

NOV - 5 2007

HOWARD M. CONYERS, CLERK  
By: *[Signature]*  
DEPUTY CLERK

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

FERRILL J. VOLPICELLI,

Petitioner,

Case No.: CR03P1263

vs.

Dept. No.: 10

THE STATE OF NEVADA,

Respondent.

**APPLICATION FOR SETTING**

TYPE OF ACTION: CRIMINAL

MATTER TO BE HEARD: EVIDENTIARY HEARING

DATE OF APPLICATION: NOVEMBER 5, 2007, **BY THE COURT**

COUNSEL FOR PETITIONER: KAY ELLEN ARMSTRONG, ESQ.

COUNSEL FOR RESPONDENT: TERRENCE MCCARTHY, D.D.A.

**EVIDENTIARY HEARING SET FOR WEDNESDAY, JANUARY 23, 2008,  
AT 1:30 P.M.**

V8.386



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Terrence McCarthy, DDA  
Washoe County District Attorney  
(Interoffice Mail)

*David L. Howard*

Heidi Howden  
Judicial Assistant



CERTIFIED  
COPY

CR03P1263  
POST: FERRILL J. VOLPICELLI 64 Pages  
District Court 11/08/2007 11:01 AM  
Washoe County  
4185

4185  
JUDITH ANN SCHONLAU  
CCR #18  
75 COURT STREET  
RENO, NEVADA

FILED

NOV - 8 2007

HOWARD W. CONYER, CLERK  
By: *[Signature]*  
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE  
BEFORE THE HONORABLE STEVEN P. ELLIOTT, DISTRICT JUDGE

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FERRILL J. VOLPICELLI, )  
)  
Plaintiff, )  
)  
vs. )  
)  
THE STATE OF NEVADA, )  
)  
Defendant. )  
\_\_\_\_\_ )

*CR03P1263*  
CASE NO. ~~CR03-P12263~~  
DEPARTMENT NO. 10

TRANSCRIPT OF PROCEEDINGS  
PETITION FOR POST CONVICTION  
THURSDAY, SEPTEMBER 20, 2007

1:30 P.M.

Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18  
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A P P E A R A N C E S

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I N D E X

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
BRADLEY OTTO VAN RY	4	31	34	
TAMMY RIGGS	36	38	48	



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RENO, NEVADA; THURSDAY, SEPTEMBER 20; 1:30 P.M.

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THE COURT: This afternoon we are here on a post conviction Petition for Habeas Corpus on behalf of Ferrill Volpicelli. And I see that what we have are grounds 7, 11, 12 and 14 remaining to be heard today.

Ms. Armstrong, do you want to proceed?

MS. ARMSTRONG: Yes, Your Honor. Thank you. Good afternoon. The first thing I would like to do is invoke the rule of exclusion. I don't have any witnesses here other than Mr. Van Ry whom I had asked Mr. McCarthy to make sure to arrange. I don't know if anybody else is going to be testifying who is in the room or not.

THE COURT: Mr. McCarthy?

MR. MCCARTHY: Yes, one other potential witness. She's on her way out.

THE COURT: Okay.

MS. ARMSTRONG: Thank you, Your Honor. I would like to begin by calling Mr. Van Ry.

THE COURT: Please have a seat in the witness chair.

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1 BRADLEY OTTO VAN RY

2 called as a witness, having been first duly sworn,  
3 took the witness stand and testified as follows:  
4

5 DIRECT EXAMINATION

6 BY MS. ARMSTRONG:

7 Q Would you please state your name?

8 A Sure. Bradley Otto Van Ry.

9 Q Would you please state your full name? You just did  
10 that. Spell your last name?

11 A Sure, V-A-N space R-Y.

12 Q What is your current occupation?

13 A I am an attorney.

14 Q Do you work here in Reno, Nevada?

15 A I do.

16 Q What type of practice do you have?

17 A I do primarily civil litigation. I have gotten out  
18 of doing much criminal representation lately. So I'd say it is  
19 primarily criminal--excuse me--primarily civil litigation with  
20 just a small portion of criminal litigation.

21 Q Previously, did you practice more criminal law?

22 A Yes. Yes. Probably when I went on my own four years  
23 ago it was probably fifty percent criminal, fifty percent  
24 civil.



1 Q How long have you been a lawyer, Mr. Van Ry?  
2 A This is going on my tenth year.  
3 Q How many jury trials have you had?  
4 A Over twenty.  
5 Q Over twenty?  
6 A Probably. That is civil and criminal.  
7 Q Can you approximate how many of them were criminal?  
8 A Probably fifteen.  
9 Q All to verdict?  
10 A I'd say probably. There may have been one or two  
11 that pled at a certain point in the trial. But I would say  
12 mostly, yes.  
13 Q Back when you were appointed to represent  
14 Mr. Volpicelli in 2003, would that have been when your practice  
15 was about fifty/fifty civil and criminal?  
16 A Yes, that's true.  
17 Q Do you remember representing Mr. Volpicelli?  
18 A Pretty broad question. Yes.  
19 Q All right. Do you remember being assigned to  
20 represent him on a case that arose from several Indictments?  
21 A Again, generally, yes.  
22 Q As part of your representation of him, would you  
23 normally obtain discovery from the State?  
24 A Of course.



1 Q And how does that work for you? Do you file a motion  
2 or do you just make a request?

3 A With this particular case, I can tell you that I was  
4 appointed I believe through the Jack Alian group as a conflict  
5 counsel, and all discovery would filter from the D.A.'s office,  
6 mostly through the D.A.'s office to Mr. Alian and then to me.

7 Q Because Mr. Alian was appointed before you were?

8 A That's correct.

9 Q And are you still working with the Alian group?

10 A No.

11 Q At the time when you were and you were representing  
12 Mr. Volpicelli, were you paid a flat rate for cases?

13 A That's correct.

14 Q Were you allowed or did you have the ability to use  
15 investigative help?

16 A If Mr. Alian and I discussed it and we thought it was  
17 prudent in a matter, yes, we could expend some cost in terms of  
18 investigative.

19 Q It sounds as though you were trying to be cautious  
20 about costs, though?

21 A Yeah. It would have been the exception in a case that  
22 I was assigned for Mr. Alian for me to use an investigator.

23 Q Do you recall if an investigator was used in helping  
24 Mr. Volpicelli?



1           A     I don't recall specifically, but I have a feeling  
2 there was not an investigator in this case.

3           Q     Specifically, let me ask you if you received, by way  
4 of discovery from Mr. Alian, the prior statements, prior  
5 recorded statements of the co-defendant, Brent Bowman?

6           A     I don't have a specific recollection. I would say  
7 generally, yes. But it has been a long time. I believe I did,  
8 yes.

9           Q     And do you recall in the case when you represented  
10 Mr. Volpicelli at trial the main point of attack for you or  
11 your general trial strategy was to attack Mr. Bowman, wasn't  
12 it?

13          A     You know, honestly, we had a difficult defense case.

14          Q     Do you recall?

15          A     Let me finish, please. Whether the primary defense  
16 strategy was to try to impeach or undercut Mr. Bowman, I am not  
17 sure that was an accurate statement. I think that was a part  
18 of the defense strategy, of course. I don't know if that was  
19 the primary part.

20          Q     Do you remember telling the jury in your opening  
21 statement that this case was a case about reasonable doubt and  
22 reasonable doubt would be shown through Brent Bowman?

23          A     If it is in the transcript, that is what I said. I  
24 am sorry I don't have a specific recollection. As a matter of



1 course in criminal trials that have very little--Honestly, this  
2 was one of those cases where you have very little defense. You  
3 know, reasonable doubt is what you hang your hat on or attempt  
4 to hang your hat on.

5 Q In this case, Mr. Bowman was somewhat attackable  
6 don't you agree? Pardon me?

7 A I am sorry, I didn't answer. I am still thinking. I  
8 don't remember. Maybe at the time, you know, 30 days after  
9 trial I had a better answer, but I just don't remember. I  
10 think I tried to go after him a little bit.

11 Q Do you recall--You have testified I believe that you  
12 think you received the complete discovery including the  
13 statements, the recorded statements of Brent Bowman of which  
14 there are five or six. Do you remember that? He interviewed  
15 with Reno police detectives on five or six occasions and each  
16 of those times it was transcribed. Do you recall that?

17 A Yeah, vaguely.

18 Q All right. When I was reviewing the transcripts in  
19 preparation for today's hearing, it appeared that even up to  
20 the last trial setting or trial confirmation hearing there was  
21 still some difficulties regarding obtaining discovery. Do you  
22 recall that?

23 A I have a recollection of my client at that time,  
24 Mr. Volpicelli, voicing that opinion.



1 Q But it wasn't your opinion?

2 A I don't--Let me just say this: I think prior to the  
3 trial, I received everything I needed to try to defend  
4 Mr. Volpicelli.

5 Q Did you have adequate time to review what you had  
6 received?

7 A Yes. Yes.

8 Q As you sit here today, you feel comfortable  
9 testifying that you adequately reviewed all of Mr. Brent  
10 Bowman's taped statements to the police?

11 A I believe so, yes.

12 Q Okay. And I am going to switch gears a little bit  
13 and ask you about the restitution issue as well. Now were you  
14 provided with I believe it was exhibit, let me see which  
15 exhibit it was at the sentencing, were you provided with  
16 Exhibit 5, a copy of that? It was an exhibit prepared by the  
17 detective, Reid Thomas, who was the head detective on the case  
18 in support of sentencing?

19 A If I might look at it, please.

20 MS. ARMSTRONG: May I approach, Your Honor?

21 THE COURT: Yes, you may.

22 MS. ARMSTRONG: Thank you.

23 THE WITNESS: Your question was was I provided this  
24 at the time of sentencing or prior to sentencing?



1 BY MS. ARMSTRONG:

2 Q Prior to sentencing?

3 A I would say the answer is I believe so, yes. If I  
4 could just magnify that.

5 Q I'd appreciate it?

6 A I have turned over all of my file to Mr. Volpicelli  
7 except for some jury trial Jury Instructions, et cetera, so I  
8 can't go to the file and pull it out and say here it is. But I  
9 believe that I did receive this prior to the sentencing of  
10 Mr. Volpicelli.

11 Q Do you recall if you had an opportunity to discuss it  
12 with Mr. Volpicelli prior to sentencing?

13 A You know, I don't recall specific conversation, but,  
14 again, as a matter of course, I am sure that we had some  
15 discussion over the restitution issues.

16 Q All right. Now I am going to refer to an Exhibit A  
17 that was filed attached to the Proper Person Writ filed by  
18 Mr. Volpicelli on November the 9th, 2005. I am going to have  
19 you look at Exhibit A.

20 MS. ARMSTRONG: If I could approach the witness with  
21 that, Your Honor.

22 THE COURT: Yes, you may approach the witness.

23 MS. ARMSTRONG: I will trade him. Did counsel for  
24 the State want to verify this was Exhibit A? I don't know if



1 it is Exhibit A.

2 MR. McCARTHY: It is.

3 BY MS. ARMSTRONG:

4 Q All right.

5 A This looks like a list of property--excuse me--an  
6 inventory of property in RPD Case Number 01-216321; is that  
7 correct?

8 Q Yes. Have you seen that before?

9 A My answer will be probably. I don't have a specific  
10 recollection of it.

11 Q As you look at that Exhibit A, can you see that, I am  
12 not looking at it now, but I think almost everything on the  
13 right column says, returned or in evidence, or returned  
14 pending. That would be true of every page I believe.

15 MR. McCARTHY: Your Honor, I am willing to stipulate  
16 Mr. Van Ry can in fact read. If it is offered to prove the  
17 truth of any matter asserted in that document, I object to it.

18 THE COURT: You are not objecting to the question  
19 right now; is that right?

20 MR. McCARTHY: I believe the question that was asked  
21 is do you see that it says that. It says things were  
22 returned. If it is offered to prove things were in fact  
23 returned, I object to it.

24 THE COURT: I have to sustain that. But certainly



1 the witness can look at the document to see if it refreshes his  
2 recollection.

3 BY MS. ARMSTRONG:

4 Q Let me try a different question. Mr. Van Ry, do you  
5 recall comparing what has been filed as Exhibit A--what exhibit  
6 did I give him? Did you have an opportunity to compare Exhibit  
7 A from the Writ with Exhibit 5 from the sentencing prior to  
8 sentencing?

9 A Did I have the opportunity, is that the question?

10 Q Did you review them?

11 A Did I review them? Again, I don't have specific  
12 recollection. I would say I probably reviewed both of them,  
13 yes.

14 Q And you recall that at the time of sentencing, the  
15 request was made Mr. Volpicelli be ordered to make in excess of  
16 \$10,000 in restitution, correct?

17 A Yes. Yes.

18 Q The items that total the \$10,339.16 on Exhibit 5 are  
19 many of the same items in the inventory you are looking at now,  
20 aren't they?

21 A It is hard to go off my memory. It would be easier  
22 if I could compare them side by side.

23 Q I would be glad to give you this other one back?

24 A Thank you. It appears that some of Exhibit A are



1 included in Exhibit 5.

2 Q Now that you have had a chance to confirm that, do  
3 you recall objecting to the restitution amount at the  
4 sentencing hearing?

5 A Boy, I'd have to read the transcript. I do not  
6 recall. I just don't remember. I don't.

7 Q Based on what you have just reviewed, do you believe  
8 it would have been prudent at sentencing to inquire into why he  
9 was being charged restitution for items which had been returned  
10 to the rightful owners?

11 A In order to really answer that question, I would ask  
12 that--I don't know if it is feasible to really answer that  
13 question. I would have to compare item by item, line by line  
14 from Exhibit 5 with Exhibit A.

15 MS. ARMSTRONG: If the Court would like to recess to  
16 give him a chance to do that, Your Honor. I have done it. It  
17 took me 15 minutes or so.

18 MR. MCCARTHY: The question is based on assumption  
19 Exhibit A truthfully represents that which was returned and  
20 that which was not. That hasn't been established. The  
21 question is irrelevant. We don't need a recess to have him  
22 look at it.

23 THE COURT: Well, it sounds like all you are asking  
24 the witness to do is compare the document he didn't prepare,



1 doesn't know the truth about anything there. I am not sure it  
2 is that worthwhile in court to look at the document and do  
3 that.

4 MS. ARMSTRONG: True. I would argue, Your Honor,  
5 that the documents are self-authenticating. The one inventory  
6 is prepared by the Reno Police Department in connection with  
7 this particular case, and the other exhibit was filed at  
8 sentencing and accepted by the Court and relied upon by the  
9 Court. So I agree we don't need Mr. Van Ry to go through it  
10 line by line necessarily. Maybe I could rephrase a better  
11 question.

12 THE COURT: Should these be admitted for purposes of  
13 these proceedings?

14 MS. ARMSTRONG: Yes, Your Honor.

15 MR. MCCARTHY: On that I will object. If some police  
16 officer came in and said I prepared this, I would probably  
17 believe it and have no objection. Thus far I haven't heard  
18 that, and I don't know what that document is or where it came  
19 from.

20 THE COURT: I am not sure about A. You are saying  
21 Exhibit 5 was admitted at the sentencing perhaps?

22 MS. ARMSTRONG: Correct, Your Honor.

23 THE COURT: Well, things that were admitted at  
24 sentencing I think I can take judicial notice of. The other



1 matter, Exhibit A, I think you would have to lay some  
2 foundation for that. I don't think that has been admitted.

3 MS. ARMSTRONG: It hasn't, Your Honor. I agree with  
4 that. And I don't know who prepared the document because there  
5 is no author stated, but it does have an RPD case number at the  
6 top and it is titled Inventory of Property. I suppose I could  
7 ask the case agent to authenticate it for me. Is he in the  
8 courtroom? I don't know what detective Thomas looks like.  
9 Then I would suppose he could authenticate it for us if  
10 necessary.

11 THE COURT: Well, at least as to Exhibit 5 is there  
12 any contest to this having been admitted and reviewed by the  
13 Court at the sentencing?

14 MR. MCCARTHY: I believe it was in fact admitted,  
15 considered and I have no objection to it.

16 THE COURT: I will consider Exhibit 5 for purposes of  
17 this proceeding.

18 MS. ARMSTRONG: Thank Your Honor. But you agree with  
19 Mr. McCarthy there is no basis to admit what has already been  
20 filed as Exhibit A with the Pro Per Writ?

21 THE COURT: Well, I don't think I can consider that  
22 to be a document considered by the Court when it is merely  
23 attached to a pleading. It hasn't been admitted in any way or  
24 authenticated in any way.



1 MS. ARMSTRONG: Well let me take a different tact or  
2 try to.

3 BY MS. ARMSTRONG:

4 Q Mr. Van Ry, are you still looking at Exhibit 5?

5 A I have Exhibit A and Exhibit 5.

6 Q If you would look at Exhibit 5 with me, please.

7 On page 2 of the unnumbered pages, if you look at the  
8 second page, what does the bold writing at the top say?

9 A Recovered property.

10 Q All right. And then on the next page which would be  
11 page 3, what do you see the total?

12 A Bottom right total in bold \$10,339.16.

13 Q Do you recall that was the amount of restitution  
14 Mr. Volpicelli was ordered to pay exactly?

15 A I believe so.

16 Q All right. And so at sentencing it didn't occur to  
17 you to say, hey, fellows, if all this property has been  
18 recovered, where is it? Why does Mr. Volpicelli have to pay  
19 for it?

20 A Did it occur to me to ask that question?

21 Q Why didn't you ask that question?

22 A You know, I have two answers. The first answer is I  
23 don't really remember, to be honest. And the second, the  
24 second answer is I am not sure it was relevant. That is me



1       answering as of this time.

2           Q       Why wouldn't it be relevant if the items had been  
3       returned?

4           A       Because these items had been taken from a property  
5       owner, and they had been deprived of the full retail value of  
6       that item. Even if, assuming they were returned, you know the  
7       wholesale and/or trade-in value and/or restorative value of a  
8       piece of property may not necessarily be what the full retail  
9       value might be.

10          Q       Isn't that still something you would argue on behalf  
11       of Mr. Volpicelli? That is your role is to help him out and to  
12       limit the damage as much as possible.

13                 MR. MCCARTHY: Objection to the argumentative  
14       question.

15                 THE COURT: Well, I think you can ask him what he  
16       did. It does sound argumentative.

17                 MS. ARMSTRONG: I apologize.

18       BY MS. ARMSTRONG:

19           Q       Was one of your goals at sentencing to help  
20       Mr. Volpicelli receive the lowest possible sentence and only  
21       pay the proper amount of restitution?

22           A       I would agree with that, yes.

23           Q       Do you believe if you had questioned the detective on  
24       the case about this property being returned, you could have



1 kept the restitution amount down?

2 MR. MCCARTHY: Calls for the witness to speculate how  
3 the detective would have responded had he been questioned.

4 THE COURT: Sustained.

5 BY MS. ARMSTRONG:

6 Q Were you aware the property that was recovered from  
7 the storage shed and the van at the time of the arrest was  
8 returned to the rightful owners? Did you know that at  
9 sentencing?

10 A I don't remember. I am sorry, I really don't.  
11 Again, as I stated, as I sit here today, I am not sure it is  
12 really relevant, to be honest with you. I am not the Judge in  
13 the case. I mean they were deprived the use of their property,  
14 so to say that they got it back a year later doesn't make up  
15 for the fact they were deprived of the use of their property.

16 Q Why do you say they got it back a year later?

17 A I am just assuming that they did get it back.

18 Q It is your legal opinion that that doesn't impact the  
19 restitution question?

20 A If I was a judge, it wouldn't, but I am not the judge  
21 in the case. That doesn't mean much to me. They were still  
22 deprived of the fair market value. That doesn't take into  
23 consideration the fact Mr. Volpicelli and his crony didn't  
24 actual pay fair market value of the property when they left the



1 store with it. They used label makers and put lesser amounts  
2 of value on those items of property.

3 Q For your logic then, Mr. Van Ry, the store actually  
4 had a little bit of a gain because they got the property back  
5 and paid a lesser price for it?

6 A No, I don't think that is logical at all. If, using  
7 a hypothetical a \$500 rug. Mr. Volpicelli and/or his crony  
8 goes in, puts a label on that says the rug is only \$75. You  
9 walk out the door, you being Mr. Volpicelli or his crony paying  
10 \$75 for a \$500 rug, how is there a gain?

11 Q Because the rightful owner got the rug back?

12 A Okay. But they were only paid \$75 in the first  
13 place.

14 Q So it is your legal opinion today there was no sense  
15 in making that argument to Judge Elliott at sentencing?

16 A Well, as I sit here today, yes. As I did the  
17 sentencing, I don't really recall what went through my mind  
18 with regard to that issue. But I think it is pretty ridiculous  
19 for a--strike that. I think it is ridiculous for a defendant  
20 who took property at value significantly less than its retail  
21 value to come into the court and say his restitution amount is  
22 too high. I think that is, again I am not the judge, I will  
23 let Judge Elliott rule on that, in my opinion, I think it is  
24 ridiculous. He got property--let me finish. He got thousands



1 of dollars worth of property for less than hundreds of dollars,  
2 and he stored it for a period of time, and it may or may not  
3 have been returned. To me, it doesn't seem-- Well, I don't  
4 think it would be just or fair to the property owner. That is  
5 my feeling, my opinion.

6 Q I appreciate that?

7 A For what it is worth.

8 Q I don't know if it is really relevant, but I  
9 appreciate it. But let me review then and see if I can  
10 capsulize what you have said about this restitution issue.

11 It is true that you don't recall comparing what was  
12 in A with 5 prior to sentencing, right?

13 A Couple of double negatives there. Yes, I did not  
14 compare them.

15 Q Yet more than \$10,000 was ordered in restitution,  
16 right?

17 A That's correct.

18 Q And you made no argument on behalf of Mr. Volpicelli  
19 in regard to the restitution amount, did you?

20 A I can't remember. I am not sure I fought it very  
21 hard. I'd have to see the transcript to really verify that. I  
22 don't think I fought it very hard.

23 Q Do you feel you were adequately prepared to fight it?

24 A Yes.



1 Q You do?

2 A Yes. Just let me interject if I may. This is one of  
3 the, I shouldn't say the exception, but this is one of the most  
4 difficult cases I ever tried because the evidence in the case  
5 was overwhelming. And that included the amounts of the  
6 restitution, in my opinion.

7 Q When you say overwhelming, do you mean in terms of  
8 showing Mr. Volpicelli's guilt or the volume of it?

9 A Both.

10 Q It was voluminous, wasn't it?

11 A Yes.

12 Q And it seems as though there were difficulties during  
13 your representation acquiring all of the discovery. Do you  
14 agree with that?

15 A I would say as a general statement that would--that  
16 is accurate.

17 Q And we know from reviewing the record that as late as  
18 two days before trial, Monday before the trial started on  
19 Wednesday, Mr. Volpicelli still had concerns about your  
20 readiness to proceed. Do you recall that?

21 A That he had concerns, yes.

22 Q But you felt adequately prepared?

23 A Yes.

24 Q Even though the records were voluminous?



1           A     Yeah. I had adequate time over the weekend to review  
2 them.

3           Q     I think you even testified or told the Court at some  
4 point you had met with Ms. Riggs over at evidence looking at  
5 each and every piece for a while?

6           A     I believe we did that, yes. Yes.

7           Q     So most of the evidence was either photographs or  
8 receipts, that type of thing?

9           A     Yeah. It was interesting, because it was kind of a  
10 white color crime in that there were a lot of accounting  
11 related, you know, invoicing or labels or price tags, receipts  
12 that kind of thing.

13          Q     You feel comfortable reviewing that type of thing?

14          A     Sure.

15          Q     Do you have some business background?

16          A     Not necessarily.

17          Q     Do you run a business?

18          A     I run a business.

19          Q     But you are not a business major?

20          A     Not necessarily a business major, no, nor  
21 accounting. I did take an accounting class many years ago  
22 but--

23          Q     You have just testified that you had time over the  
24 weekend to review and prepare for this trial which was going to



1 begin the following Wednesday right?

2 A Yes.

3 Q And do you recall if, during that review, you  
4 concentrated particularly on Mr. Bowman's prior statements to  
5 the police?

6 A I am sure that was part of it, yes.

7 Q Do you recall when you were actually in trial in here  
8 in the courtroom when Mr. Bowman was testifying?

9 A Vaguely. Vaguely. I have probably, to let you know,  
10 I have probably since then tried ten cases. I haven't numbered  
11 them, but it has been four years.

12 Q Do you recall Mr. Volpicelli asking you to ask  
13 additional questions on cross-examination of Mr. Bowman?

14 A I do remember Mr. Volpicelli being very active and  
15 feeding me questions that he thought needed to be brought up,  
16 yes.

17 Q And the method he used to do that, was it like note  
18 cards?

19 A He had them on three by five index cards I believe or  
20 maybe bigger, five by eight.

21 Q Did you have any difficulty understanding what he was  
22 asking you to ask the witness?

23 A You know, that is a difficult question, because  
24 sometimes, yeah. When you are in trial and listening to a



1 witness, you are watching the judge, you are watching the jury,  
2 listening to the D.A., to have a client continually feeding you  
3 information, it can be difficult, you know. Three by five or  
4 five by eight cards was not my method or recommended method of  
5 communicating with me. I gave him a tablet. I always bring a  
6 tablet and say if you have something, write it on the tablet,  
7 when I get a minute I will look at it. I guess the long answer  
8 is, sometimes yes, I did have difficulty understanding, because  
9 I was trying to keep track of other things.

10 Q Mr. Volpicelli was, in his way, making an effort to  
11 aid you in the cross-examination, don't you think?

12 A Oh, yes.

13 Q And--

14 A Absolutely.

15 Q And he has a pretty good recollection of what is on  
16 file and what is of record, would you agree with that?

17 A Well, good being, you know, characterized how? I  
18 mean he has a recollection, yes. Whether I would call it good,  
19 I don't know.

20 Q Was he able at times to point you specifically to  
21 places that you could use to impeach something that Mr. Bowman  
22 had just testified?

23 A Sometimes. Sometimes.

24 Q He did help you with that, didn't he?



1           A     Sometimes.

2           Q     Those times, didn't he walk or take you right to the  
3 place where you could say, Mr. Bowman, it says here in black  
4 and white left and today you have testified right?

5           A     I don't remember to be honest with you. Sometimes he  
6 may have stumbled on something. Again, that would be the  
7 exception not the rule.

8           Q     Do you recall asking Mr. Bowman if he had received  
9 any favors? Do you recall the State asking Mr. Bowman if he  
10 had received any favors in exchange for his testimony?

11          A     I don't. I know it is in the transcript. I know  
12 that was an issue, because he had turned State's evidence and  
13 was going to testify against Mr. Volpicelli. I know that he  
14 had some sort of plea agreement or some leniency in terms of  
15 the State's recommended sentence or something. But I don't  
16 recall the State--I know she did, I just specifically don't  
17 recall it.

18          Q     Do you recall Mr. Bowman was at least a three-time  
19 convicted felon, himself?

20          A     Yes, I do remember that.

21          Q     And do you recall that he also could have been  
22 eligible for the habitual sentencing enhancement?

23          A     I guess that is two questions. Do I recall it, no.  
24 Was it possible he was subject to habitual criminal, maybe. I



1 am sorry, I don't fit in this little area very well. I am kind  
2 of struggling. I apologize for that.

3 Q You just agreed Mr. Bowman had at least three felony  
4 convictions at the time of this trial?

5 A I believe so.

6 Q Wouldn't you agree that he might be eligible for the  
7 habitual?

8 A Possibly, yes.

9 Q And so isn't that something that could have been  
10 brought up on cross-examination to demonstrate Bowman really  
11 got a good deal only having to plead to one count of burglary?

12 A It could have been possibly another additional item,  
13 yes.

14 Q We know Mr. Bowman was worried about it because he  
15 had discussed it with the detectives and his sister on the  
16 telephone. Do you recall that?

17 A I don't. I don't.

18 Q Do you remember Mr. Bowman told you the habitual  
19 enhancement had never come up when you cross-examined him?

20 A I don't remember that. If it is in the transcript I  
21 did, but I just don't remember. To be fair, I did not review  
22 the transcript in the entirety.

23 Q Before coming here today?

24 A Correct, I didn't.



1 MS. ARMSTRONG: Your Honor, what I am looking at in  
2 asking these questions at this time is Ground 11. You might  
3 recall that the Petitioner has laid out specific instances of  
4 testimony from Mr. Bowman, and then he pointed out where he  
5 could have been impeached based on records. I'd be glad to  
6 walk Mr. Van Ry through each of those, but I would prefer the  
7 Court would take notice of exactly what has been pled. I have  
8 double checked each and every cite. They are accurate. The  
9 only issue that might cause a difficulty, and I mentioned this  
10 to Mr. McCarthy yesterday, is in Mr. Volpicelli's pleadings  
11 when he refers to a prior written or recorded statement of  
12 Mr. Bowman, he will tell you about the date that the Reno  
13 detectives interviewed him. He will give the first page of the  
14 interview, then if he is talking about something that happened  
15 on page 10. He doesn't include pages 2 through 9. He just goes  
16 from the face sheet to the page he's talking about. I have the  
17 entire transcripts, but they are marked up and they are not  
18 appropriate for filing with the Court, I don't believe.

19 THE COURT: And, Mr. McCarthy, do you have any  
20 opinion on how the Court could consider this?

21 MR. MCCARTHY: Well, I think the best we could do  
22 would be to introduce the entire transcripts. I found  
23 Mr. Volpicelli's pleadings to be, on occasion, misleading by  
24 omission, and there is the lack of completeness. It may



1 mislead the Court. Now I don't have such transcripts with me,  
2 however, Ms. Riggs is available today, and I wouldn't be at all  
3 surprised if I can get them for you. I am sure we can agree to  
4 their authenticity.

5 MS. ARMSTRONG: If they are supplied by Ms. Riggs and  
6 not marked up, I would agree they are authentic.

7 THE COURT: Well, it seems to me I have some  
8 extensive transcripts here as well. I have the Transcript of  
9 Proceedings, Jury Trial November 13, 2003 through November 14,  
10 2003. It is real thick.

11 MR. MCCARTHY: It is interviews with cops, Judge, the  
12 ones we are talking about, not trial transcripts. Interviews  
13 with cops, police officers.

14 THE COURT: Oh. So this isn't from the actual  
15 transcript of the trial.

16 MR. MCCARTHY: I think what Ms. Armstrong is trying  
17 to demonstrate is the trial transcript was accurate.  
18 Mr. Volpicelli has pled places where he thinks trial counsel  
19 should have tried to impeach a witness, and she's suggesting  
20 the transcripts of interviews with the police officers would  
21 form the basis of that impeachment.

22 I might point out that a question to the witness has  
23 no value to itself. It is only the answer. Unless we are going  
24 to hear what the answers are, I don't know what value it is.



1 But in any event, I don't object to the Court considering the  
2 transcripts of the Bowman interviews with the policemen, and we  
3 can get them for you, but I don't have them right this minute.

4 THE COURT: Okay. I will be happy to consider them  
5 even though they are outside the record I have.

6 MR. McCARTHY: I think that is the purpose of the  
7 hearing is to expand the record.

8 THE COURT: Okay.

9 MS. ARMSTRONG: Thank you, Your Honor. Thank you.  
10 If the Court is willing to do that, I believe that will  
11 satisfactorily illuminate the issues that you have agreed to  
12 hear today on Grounds 11, 12 and 14.

13 I should let Mr. Van Ry off the stand. I have  
14 finished with him. Let me think about that real quick.

15 BY MS. ARMSTRONG:

16 Q I do have one last group of questions I would like to  
17 ask you, Mr. Van Ry. As far as the prior convictions that were  
18 used as the idea for the Judge to consider in the habitual  
19 sentencing, did you have an opportunity to review those before  
20 you came into court that day?

21 A You mean the actual documentation of the convictions,  
22 themselves?

23 Q Whatever was provided to Judge Elliott?

24 A I had an opportunity to review the pre-sentence



1 report which included reference to the prior convictions, but I  
2 did not see--I never put my fingers on each separate conviction  
3 of record, formal written conviction of record.

4 Q So you don't know if they were--if they met the  
5 constitutional standard require for the Judge to consider them?

6 A Again, I didn't put my fingers on every conviction  
7 that was listed, no.

8 Q I am particularly talking about the three that the  
9 Judge considered for the enhancement?

10 A I believe Ms. Riggs did bring those to the  
11 sentencing. So I guess, to elaborate, I believe at the  
12 sentencing I did see the three prior to her admitting them for  
13 purposes of habitual criminal.

14 Q Did you review them for authenticity and other  
15 requirements?

16 A I would say yes, but I don't remember. I am sure she  
17 and I had a little discussion about it before. Again, I don't  
18 remember.

19 MS. ARMSTRONG: That is all I have for this witness,  
20 Your Honor.

21 THE COURT: Mr. McCarthy, do you have any questions  
22 of Mr. Van Ry?

23 MR. MCCARTHY: I do, yeah.

24 ///



CROSS-EXAMINATION

BY MR. MCCARTHY:

Q You were asked a few minutes ago if Mr. Volpicelli actually used transcripts of Bowman's interviews with police to help you frame questions. Does that refresh your recollection at all on the question whether you had been provided with those transcripts before the trial?

A If he was referring to them during trial, I would presume that we had them.

Q Did it help you recall whether or not you had them?

A I still don't really recall to be honest. During trial he pointed to a lot of different things on a lot of different occasions during the trial. In fact I kept asking him to quit giving me so much information.

Q The prosecutor in this case was Tammy Riggs; is that right?

A Yes.

Q Have you dealt with her before?

A Yes.

Q Did she have an open file?

A Yes.

Q She would make--Whatever she had would be available to you for your inspection and copying; is that correct?

A I would agree with that, yes.



1           Q     Now, on cases where you do not employ an  
2 investigator, you are free to do your own investigation, aren't  
3 you?

4           A     Sure.

5           Q     When as a general rule if you are at sentencing with  
6 a client and you are trying to persuade the Judge to impose a  
7 relatively lenient prison sentence, do you find it wise to  
8 dispute the amount of restitution?

9           A     My answer would be it depends on the Judge.

10          Q     Do you recall what judge imposed sentence in this  
11 case?

12          A     Judge Elliott.

13          Q     How do you think about doing that with Judge Elliott?

14          A     That's kind of a loaded question.

15          Q     Are there judges, in your experience, who would see  
16 such an argument about restitution being inconsistent with the  
17 notion of one who is taking responsibility, is amenable to  
18 rehabilitation, all those good things?

19          A     Yes.

20          Q     I won't ask you about Judge Elliott at this point.  
21 Prior to sentencing, did your client seem to be more interested  
22 in the length of the prison term or in the amount of  
23 restitution?

24          A     Clearly, the length, potential length of the criminal



1 sentence.

2 Q Do you recall at the time of trial whether or not  
3 Mr. Bowman had already been sentenced?

4 A Again, two questions. I don't recall, but I believe  
5 he had been.

6 Q Assuming he had already been sentenced by the time of  
7 trial, can you think of how he might be perceived of as still  
8 owing some allegiance to the prosecutor?

9 A It is a speculative question at best.

10 Q As a trial attorney?

11 A Yeah. I think that would be a hard sell.

12 Q Okay. Do you know or do you believe whether or not  
13 Bowman negotiated directly with the District Attorney?

14 A I have actually no idea how that negotiation went.

15 Q It would be unusual for that to happen, wouldn't it?

16 A Well, it would be unusual for me to find out about  
17 it.

18 Q When your client is on trial, who generally does the  
19 negotiating, you or the defendant?

20 A Usually the lawyer.

21 MR. MCCARTHY: That is all I have. Thank you.

22 THE COURT: Ms. Armstrong, any other questions?

23 MS. ARMSTRONG: Just a couple, Your Honor. Thank  
24 you.



REDIRECT EXAMINATION

BY MS. ARMSTRONG:

Q Is it your testimony this afternoon, Mr. Van Ry, you chose not to contest the restitution amount as a sentencing tactic or a trial tactic at sentencing?

A I really don't remember. Perhaps. I honestly don't remember.

MS. ARMSTRONG: Thank you.

THE COURT: Anything else?

MR. MCCARTHY: No.

THE COURT: Then, Mr. Van Ry, you are excused.

THE WITNESS: Thank you, Judge.

THE COURT: Sorry about the small chair.

THE WITNESS: It is this thing. My knees are two inches above it. Should I leave Exhibit 5 and A here, Judge?

THE COURT: Ms. Armstrong, you may take them.

THE WITNESS: Am I free to go or do I need to stay?

MS. ARMSTRONG: You are free to go as far as I am concerned.

MR. MCCARTHY: So am I.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

MS. ARMSTRONG: I don't have any further witnesses, but as I stand here thinking about this Exhibit A that has not



1     been admitted or authenticated, I believe that I should have  
2     had a witness here to do that, and I wonder if the Court would  
3     allow me to come back at a later time to have this  
4     authenticated and admitted in support of our restitution  
5     argument.

6 THE COURT: Well, I am kind of hopeful to get this  
7 case taken care of today. I think there is another witness out  
8 there that might know something about it anyway.

9 MS. ARMSTRONG: If I could authenticate it through  
10 that witness, if Mr. McCarthy is planning to call her.

11 MR. MCCARTHY: I am planning to call her. I don't  
12 know. I don't have the entire trial file here. I have no  
13 police reports, things like that. So Ms. Riggs might know. I  
14 don't know where that document came from. She might.

15 MS. ARMSTRONG: I'd be willing to ask her.

16 THE COURT: Does the State want to call a witness?

17 MR. McCARTHY: Sure. Soon as she is done, I will  
18 call Tammy Riggs if the Petitioner is done.

19 THE COURT: Please have a seat in the witness chair.

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TAMMY RIGGS

called as a witness, having been first duly sworn,  
took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. MCCARTHY:

Q Do you want to introduce yourself, please?

A Yes. My name is Tammy Riggs, T-A-M-M-Y. R-I-G-G-S.  
I am a Deputy District Attorney with the Washoe County District  
Attorney's Office.

Q Were you involved in the prosecution of Ferrill  
Volpicelli?

A Yes, I was. I was the prosecutor.

Q I am going to show you what is tagged as Exhibit A.  
Do you know what that is?

A Yes. This is the inventory of the property that was  
stolen by Ferrill Volpicelli.

Q Do you know who prepared that document?

A This was prepared by Reid Thomas of the Reno Police  
Department.

Q When you prosecuted this case, did you have that  
document in your file?

A If it is Exhibit A, I believe I did.

Q The thing that is labeled as Exhibit A, did you have



1       that in your file?

2           A     You know, Mr. McCarthy, I don't recall this specific  
3       exhibit, but I do recognize the list of items as those items  
4       that were stolen by him.

5           Q     Did you take a look at your files lately?

6           A     Yes, I have.

7           Q     Today?

8           A     Yes.

9           Q     What were you looking for?

10          A     Specifically, I was looking for what was alleged in  
11       the Writ of Habeas Corpus as far as what was discovered and  
12       what may not have been discovered in this case.

13          Q     Can you tell the Court what does a red star on a  
14       document in your file mean to you?

15          A     A red star indicates that this file has been  
16       presented to our Discovery Division, and that the Discovery  
17       Division has made a copy of that item. That they have  
18       forwarded that to be released to the defense for their use, and  
19       then they apply the red star to the item that has been  
20       discovered to indicate to us that that has been released to the  
21       defense.

22          Q     Did you check for red stars on transcripts of  
23       interviews by one Mr. Bowman and various police officers?

24          A     Yes, I did.



1 Q Were there red stars on those documents?

2 A On every single transcript in the file.

3 Q From those, do you conclude those transcripts had  
4 been provided to Bradley Van Ry?

5 A Yes, I do.

6 MR. MCCARTHY: That is all I have.

7 THE COURT: All right. Ms. Armstrong, you may ask  
8 questions of the witness.

9 MS. ARMSTRONG: Thank you.

10

11 CROSS-EXAMINATION

12 BY MS. ARMSTRONG:

13 Q Ms. Riggs, your testimony is that it is a practice in  
14 your office to put a star on something once it has been  
15 discovered or sent to the defense attorney?

16 A Yes.

17 Q Do you know in this particular case if those stars  
18 reflected that the materials had been sent to Jack Alian rather  
19 than Mr. Van Ry?

20 A I know that they had been specifically released to  
21 whoever was Ferrill Volpicelli's attorney at the time they were  
22 produced, because I went into the D.A.'s business system and it  
23 indicated discovery was requested by defendant Volpicelli and  
24 was released to him.



1           Q     So that tells you what, it was released to his  
2 attorney at that time?

3           A     Whoever was representing Ferrill Volpicelli.

4           Q     Do you know who that was?

5           A     No.

6           Q     So is it possible that those documents were provided  
7 to Mr. Alian and not directly to Mr. Van Ry?

8           A     They were provided to Ferrill Volpicelli.

9           Q     How could he get them?

10          A     Mr. Volpicelli repeated over and over again during  
11 the course of this trial that he wanted copies of his  
12 documents, so he was provided all of his documents, to my  
13 knowledge.

14          Q     By your office?

15          A     These were released to Ferrill Volpicelli. Whoever  
16 his agent was at that time received those documents.

17          Q     So what your system-- What your review of your  
18 system tells you today is that Mr. Volpicelli was represented  
19 by an attorney. The documents were provided to Mr. Volpicelli,  
20 to his attorney?

21          A     They were released to Ferrill Volpicelli.

22          Q     Did he come and pick them up?

23          A     I don't work in Discovery, so I don't know.

24          Q     Do you know he was in custody so he couldn't come



1 pick them up?

2 A I can't speculate.

3 Q He would have to rely on his attorney to provide the  
4 discovery, wouldn't he?

5 A Again, I can't speculate.

6 Q You don't provide two sets do you?

7 A Sometimes we do.

8 Q Is that in the event there has been a change in  
9 attorney?

10 A Sometimes we provide two sets of discovery. In fact,  
11 in this case, I noticed there were some items that were double  
12 discovered. It just happens.

13 Q Not every item was double discovered was it?

14 A No, but every item was discovered.

15 Q You were able to confirm that this morning?

16 A Yes, I did.

17 Q So let me ask you specifically, and I suppose  
18 Mr. McCarthy already did, I was trying to listen to  
19 Mr. Volpicelli, did you specifically say that you had  
20 discovered each and every interview of Brent Bowman with the  
21 Reno Police Department?

22 A Yes.

23 Q That is a total of five or six interviews?

24 A Yes.



1 Q And you are able to confirm those have been provided  
2 to someone?

3 A Yes.

4 Q You can't tell us as you sit here today exactly who  
5 received the document, can you?

6 A I don't work in discovery, so I don't know who came  
7 and picked them up.

8 Q Do you recall that several months before this case  
9 went to trial, I think it was in June or so, that you were in  
10 court with a group of attorneys. Mr. Volpicelli was  
11 represented by several attorneys at one time?

12 A I was in court on many, many days with  
13 Mr. Volpicelli. You would have to be more specific as to what  
14 you are talking about.

15 Q This particular day I believe you appeared in front  
16 of Judge Hardesty. Judge Hardesty ordered within a week you  
17 and Mr. Van Ry sign a reciprocal discovery agreement.

18 A I don't recall that specific inquiry or that  
19 requirement by Judge Hardesty or that conversation.

20 Q If I told you it was part of the record, you wouldn't  
21 dispute it, would you?

22 A No.

23 Q Do you recall that Mr. Volpicelli was originally  
24 represented by Mr. Alian in this case?



1           A     I recall that Mr. Volpicelli had a lot of arguments  
2 with Mr. Alian, and Mr. Alian at some point conflicted off the  
3 case and Mr. Van Ry became his attorney. I believe that  
4 Mr. Volpicelli went through several attorneys on this case. I  
5 am not sure. Well, he had four cases, so he had several  
6 attorneys.

7           Q     But Mr. Alian had this particular case before Mr. Van  
8 Ry had it?

9           A     Again, he had four cases. I don't specifically  
10 recall which Mr. Alian was on and which he was not.

11          Q     Do you have any recollection of Mr. Volpicelli  
12 specifically requesting that these interview documents be  
13 provided to Mr. Van Ry?

14          A     I know they were provided to Mr. Volpicelli, but I  
15 can't speculate as to what he wanted or didn't want.

16          Q     You have worked in Washoe County for several years?

17          A     Yes.

18          Q     And you have had experience with Mr. Alian over the  
19 years?

20          A     Yes.

21          Q     Is he the kind of guy that makes a set of copies of  
22 discovery and provides it to the client?

23          A     I have no idea.

24               MR. McCARTHY: Your Honor, it sounds like this



1 witness is being asked to testify either to Mr. Alian's  
2 character or habits and customs, and I don't think either one  
3 is appropriate.

4 THE COURT: Well, the witness already said she  
5 doesn't know. I guess that is to be expected, so I will  
6 overrule the objection. We'll accept the witness' statement.

7 BY MS. ARMSTRONG:

8 Q Was it at your request that detective Thomas prepare  
9 what was admitted as Exhibit 5 at sentencing? If you can't  
10 remember that, I can show you Exhibit 5?

11 A I don't remember.

12 MS. ARMSTRONG: May I approach, Your Honor?

13 THE COURT: You may.

14 MS. ARMSTRONG: Thanks.

15 BY MS. ARMSTRONG:

16 Q Now, that you have seen Exhibit 5, do you recall this  
17 exhibit?

18 A Not specifically, but I recall all the items on it  
19 that were stolen by Ferrill Volpicelli.

20 Q You don't know if you had this prepared to aid you at  
21 sentencing?

22 A I don't recall whether I had that or I specifically  
23 requested detective Thomas to prepare that or whether he did  
24 that through somebody's else request. I just don't remember. I



1 am sorry.

2 Q As you sit here today, Ms. Riggs, do you recall the  
3 two-day trial that involved all these Indictments regarding  
4 this stolen property?

5 A Do I recall being in it? Yes.

6 Q Not much specifically, though?

7 A Well, you know, that is kind of a vague question. I  
8 guess you would have to ask me more specifically.

9 Q All right. There were occasions when  
10 Mr. Volpicelli-- when Mr. Bowman testified. One instance he  
11 testified that he had never been a person who could have  
12 received the habitual criminal enhancement as a result of his  
13 conviction in this case. Do you remember him saying that at  
14 trial?

15 A I don't specifically remember him saying that.

16 Q If he did, it would have been false, wouldn't it?

17 A I don't know. I don't remember. Mr. Bowman was a  
18 repeat offender target.

19 Q The criteria for the habitual criminal enhancement  
20 isn't repeat offender program, is it?

21 A Oh, no.

22 Q It is the number of prior felony convictions?

23 A Yes.

24 Q Or misdemeanors?



1           A     Yes.

2           Q     So do you recall Mr. Bowman had more than three  
3 felony convictions?

4           A     I don't recall.

5           Q     So you don't recall him testifying that he didn't  
6 receive, as a favor in this case, no habitual criminal  
7 enhancement?

8           A     That was not contemplated as far as I know as part of  
9 his plea agreement.

10          Q     Did you do his plea agreement?

11          A     I did not, but I have had a chance to review it.

12          Q     Well, any three-time convicted felon is potentially  
13 subject to that; aren't they?

14          A     No.

15          Q     Is that right? Why not?

16          A     Because it would be a waste of the system's resources  
17 if we tried to apply the habitual offender status to all people  
18 who have three felonies in their background. That habitual  
19 offender status is reserved for the worst criminals.

20          Q     So it is a policy not a law because the law, itself,  
21 the statute, itself, simply requires three prior convictions?

22          A     I don't understand your question.

23          Q     I didn't understand your answer. I believe you said  
24 that the habitual criminal enhancement wouldn't have been



1 available to the State to impose on Mr. Bowman?

2 A Are you saying--Are you asking me whether we would  
3 have considered imposing that or asking the Court for that or  
4 whether he is eligible for that under the law?

5 Q Eligible first.

6 A As far as I know, he would have been eligible if he  
7 had three felonies.

8 Q You know that he had three felonies?

9 A No, I don't.

10 Q Wouldn't that have been information you would have  
11 had to provide Mr. Van Ry five years ago?

12 A Yes.

13 Q So what are you saying? If you knew that he had  
14 three or more felony convictions in 2003, would you have let  
15 Mr. Van Ry know that?

16 A I am confused by your question.

17 Q In the defense practice, it is common to impeach a  
18 witness with prior convictions for felonies, particularly if  
19 they are within the last ten years. So in your practice, if  
20 you knew that the witness for the State had prior felony  
21 convictions, wouldn't you give that information to the defense  
22 attorney?

23 A I did.

24 Q How do you know that you did?



1           A     Because I reviewed my file on Brent Bowman that was  
2 included in the Volpicelli file today, and there was a faxed  
3 document that included the Guilty Plea Memorandum as well as  
4 the defendant's, Bowman's, criminal history attached to it.

5           Q     How is the criminal history attached?

6           A     It was--The criminal history was separate underneath  
7 the Guilty Plea Memo, and on top of that was the faxed document  
8 containing Mr. Van Ry's address, et cetera.

9           Q     Are you talking about the NCIC printout or is it  
10 something typed up that says conviction one, conviction two?

11          A     I am talking about the NCIC printout.

12          Q     Okay. In my jurisdiction, those aren't commonly  
13 given to defense attorneys. Here you allow them to have that?

14          A     Well, this one I did for the defense. That is what  
15 appears from my file.

16          Q     Do you recall when you were working with detective  
17 Thomas on this that he aided Mr. Bowman in obtaining his last  
18 paycheck from the Sands Casino?

19          A     I have no idea.

20          Q     Too long ago?

21          A     No knowledge about that.

22          Q     Too long ago?

23          A     I don't have any knowledge about it.

24          Q     Did you personally review the interviews between



1 Brent Bowman and the Reno Police Department? I am talking  
2 about five or six different ones beginning on the date of  
3 arrest, 10-17-03, then there are a couple more in December I  
4 think. We have some more at the beginning of the year of  
5 2002. Did you review those before trial?

6 A Yes.

7 Q Each and every one?

8 A To my knowledge I did. They are all in my file.

9 Q So you would have read every word of every interview?

10 A Yes, five years ago.

11 Q You, yourself, had a couple of interviews with  
12 Mr. Bowman before coming into court?

13 A I recall one.

14 MS. ARMSTRONG: I think that is all the questions I  
15 have, Your Honor. Thank you.

16 THE COURT: Any other questions Mr. McCarthy?

17  
18 REDIRECT EXAMINATION

19 BY MR. MCCARTHY:

20 Q You wouldn't happen to have an extra unmarked up copy  
21 of those police interview transcripts would you?

22 A Unmarked up?

23 Q Yeah?

24 A I don't believe that I do. All the transcripts I



1 have have the red stars on them.

2 Q Other than the star?

3 A I don't recall. I know several of them are marked  
4 up. I don't know how many are unmarked. I just don't know, I  
5 am sorry.

6 Q That's all right.

7 MR. MCCARTHY: That's all I have. We'll try to work  
8 it out.

9 MS. ARMSTRONG: Nothing further.

10 THE COURT: Then, Ms. Riggs, you may be excused. Why  
11 don't we take a recess?

12 (Short recess taken.)

13 THE COURT: You may be seated. Ms. Armstrong, how  
14 would you like to proceed?

15 MS. ARMSTRONG: Thank you, Your Honor. During the  
16 recess, I telephoned the office where Mr. Volpicelli told me he  
17 got this document, and it was the City Attorney's Office, and  
18 the City Attorney in particular that he had talked to is out of  
19 town until next week. I am not sure she could have  
20 authenticated it anyway. I think it will probably take the  
21 policeman who actually prepared it. So I think what I would  
22 like to ask the Court is to allow me to obtain an Affidavit to  
23 supplement the record from the author of this report within the  
24 next ten days or so, if possible, just so you would know that



1       this is true and accurate.

2               And other than that issue, I am prepared to argue.

3               THE COURT:  As to that matter, Mr. McCarthy, do you  
4       have any opinion?

5               MR. McCARTHY:  I will have to go out of character and  
6       get hard nosed.  Today is the date of the hearing, Judge, and  
7       the evidence is completed.  I ask it be submitted for  
8       decision.  I object to a ten-day recess to gather additional  
9       evidence.

10              THE COURT:  Well, I do feel every effort should be  
11      made to provide a complete record.  I mean this thing is coming  
12      on years later.  I think we can afford the time to allow  
13      Ms. Armstrong to obtain an Affidavit if she can get it from  
14      somebody to authenticate the document, you know, attempt to do  
15      that.  I am going to allow Ms. Armstrong to go forward to  
16      attempt do that with regard to what we know as Exhibit A,  
17      then.

18              MR. McCARTHY:  All right.  Okay.  Fine, Your Honor.

19              THE COURT:  But then I suppose as to the other issues  
20      Numbers 11, 12 and 14, I think we can go forward with those to  
21      determine those today.  And it would just be 7 that I guess is  
22      somewhat in the air.  What that really is is just a challenge  
23      to the amount of restitution.  It is not going to result in a  
24      retrial or re-sentencing or anything like that.  I think it is



1 just a way to get around to the restitution at a later time.

2 All right, Ms. Armstrong, you may proceed then.

3 MS. ARMSTRONG: Thank you, Your Honor. As far as the  
4 other issues, not the restitution as you have just stated,  
5 Grounds 11, 12 and 14, those all, to me, involve trial  
6 counsel's performance during the trial, and particularly in  
7 terms of what he had reviewed prior to beginning the trial, and  
8 then how effective he was in using that information to impeach  
9 the State's, one of the State's witnesses, the original  
10 co-defendant, Brent Bowman. And as I mentioned earlier, Your  
11 Honor, in Mr. Volpicelli's Pro Per Petition that was filed on  
12 November 9, 2005, he has I think done a very good job of lining  
13 out exactly what question was asked and then what could have  
14 been used by way of cross-examination by Mr. Van Ry to impeach  
15 the answer given by Mr. Bowman. And they mainly involve the  
16 issues of whether Mr. Bowman was given any reward in exchange  
17 for his testimony or his plea. The issues also involved  
18 whether Mr. Bowman ever went into the stores and put  
19 these--changed the UPC codes on the items, himself. At trial  
20 he continually denied doing so, yet in his statements to the  
21 police, he had told them that, yes, he had done that on several  
22 occasions. Mr. Van Ry did not cross-examine based on the  
23 previous inconsistent statement in that instance.

24 Another issue in which a previous inconsistent



1 statement was not used for cross-examination was the statement  
2 by Mr. Bowman that Mr. Volpicelli bought the label maker that  
3 was used to change the UPC codes. In one of the interviews,  
4 Mr. Bowman admits that he bought that label maker.

5 The third topic would have been something I alluded  
6 to earlier, because Mr. Bowman was in custody, he was unable to  
7 pick up his final paycheck from the Sands Casino where he was  
8 working, so the police officers helped him get that. He denied  
9 that that had happened at trial. And if Mr. Van Ry had, it is  
10 our argument, if Mr. Van Ry had in black and white something to  
11 impeach him with and that is the best kind of impeachment, he  
12 should have done that.

13 Another issue was what proceeds Mr. Bowman gained  
14 from this enterprise, and Mr. Bowman testified that he only  
15 received I think a coffee pot and a toothbrush or something.  
16 Again, in the interviews with the detectives, it is apparent he  
17 also received a home stereo television system, a home theater  
18 system. Pretty expensive item. Again, if Mr. Van Ry had  
19 confronted Mr. Bowman with his previous statement during the  
20 trial, the jury would have been able to discern that Mr. Bowman  
21 was less than honest about many of the facts of this case. And  
22 because he was such an important witness to the State, we think  
23 that would have made a difference in the long run.

24 You know, the State has agreed to supply you with the



1 transcripts of those interviews with Mr. Bowman, so I am  
2 arguing to you today only what has been recited by  
3 Mr. Volpicelli in his Petition. I think that is all I have on  
4 that issue, Your Honor.

5 But, generally, because there was impeachment  
6 available from prior recorded statements that was not used over  
7 and over and over, not just one time and not just, you know, a  
8 trial attorney can't be 100 percent all the time, of course,  
9 but we believe in this instance, because of the demonstrable  
10 inaccuracies as impeachment, this rises to the level of  
11 ineffective assistance.

12 THE COURT: Thank you. Mr. McCarthy.

13 MR. MCCARTHY: Thank you, Your Honor. The claims are  
14 phrased in a couple of ways. One is a failure to disclose  
15 evidence by the prosecution. I think that has been pretty  
16 disproved. Mr. Van Ry believed he had received everything, and  
17 Ms. Riggs was adamant that everything had in fact been  
18 delivered. So it converts to a claim of ineffective assistance  
19 standard, failure to properly utilize everything. I would  
20 remind the Court that a claim of ineffective assistance of  
21 counsel requires a demonstration that counsel's specific  
22 decisions fell below an objective standard of reasonableness.  
23 Subjective standard is not appropriate. Further, prejudice is  
24 an element of the claim. They must show if the lawyer had



1 acted differently, it is reasonably likely the result of the  
2 litigation would have been different. All we are talking about  
3 here, all this impeachment business is about much ado about  
4 nothing, for lack of a better phrase.

5 Furthermore, and finally before I get into the  
6 specifics, I mentioned earlier, Your Honor, in a trial,  
7 questions have no value. Answers are what the jury is to  
8 consider. Without Mr. Bowman here to testify how he would have  
9 responded to any given question, we have half a case at best.  
10 There is information available that could have led Mr. Van Ry  
11 to ask a question, but we have zero evidence on how Bowman  
12 would have responded. So I suggest there is nothing to  
13 consider here.

14 Moving from that to the specifics, I notice one of  
15 the claims concerns the label maker that was the instrument of  
16 this great fraud. And the specific question posed to Bowman  
17 was asked: Did you buy that at a Staples store in California?  
18 The answer was no. The transcript will show, which you don't  
19 yet have, will show the question was did you buy it and the  
20 answer was yes. Those are completely different things. They  
21 are different questions. So there is nothing to impeach here.  
22 It is not inconsistent at all.

23 The question of Bowman that was asked at trial was  
24 did detectives assist you in getting a paycheck from the Sands



1 Hotel. Once again, the specific question. The answer was no,  
2 it never happened. The prior statement that is the taped  
3 interview with the police will reveal he said I picked up my  
4 paychecks. They were on my person when I was arrested. They  
5 are now in my property. They are going to expire if I don't  
6 get them negotiated. And the cop said, yes, I can help you  
7 with that, get it out of the evidence vault of personal  
8 property, give it to you so you can do with it what you will.  
9 There is no statement saying the police helped him obtain a  
10 paycheck from the Sands Hotel. He already had it. Again,  
11 there is nothing inconsistent. There is no impeachment there.  
12 Even if that were significant in some way, which it isn't,  
13 there is still no impeachment.

14 I notice that Mr. Bowman had already been sentenced,  
15 page 155 of the transcript, in which he testified he had  
16 already been sentenced by the time of the trial. So we want to  
17 impeach him with a perceived value of the plea bargain when  
18 he's no longer under the thumb of the prosecutor and the  
19 prosecutor can't do anything with him. I don't know the value  
20 of that. I suggest it would not have altered the outcome to  
21 see that the plea bargain is really a very good plea bargain.

22 He was thoroughly cross-examined, and Bowman was  
23 cross-examined on the subject, actually directly examined on  
24 the subject of his plea bargain, and it was fully disclosed to



1 the jury. They knew he pleaded out to avoid, I think he said  
2 six separate felonies. I suppose maybe it is a qualitative  
3 difference, you know. But I don't see how it can get--how that  
4 can make the difference. You have got a plea bargain. You got  
5 a very good plea bargain. Well, the jury would have acquitted  
6 if they had known it was a very, very, very, good plea  
7 bargain. That seems to suggest more likely than not the  
8 outcome would have been changed.

9 I also suggest there is no evidence anywhere that  
10 anyone discussed specifically the habitual criminal allegation  
11 with Mr. Bowman. Now whatever his lawyer said to him I have no  
12 idea. You may notice that lawyer did not testify in this  
13 hearing. I conclude from that, Your Honor, you also still  
14 don't know what that lawyer said to him, what came up in  
15 negotiation and what did not. Once again we have half a case.

16 The proceeds, what Bowman kept, you know, I couldn't  
17 figure out from the trial transcript precisely what question  
18 and answer one might impeach. I know what inconsistent  
19 statements are, but I don't know what is the consistent  
20 statement. There has to be a specific time in which one  
21 interposes or one raises the impeachment. I couldn't find  
22 that. I don't know where it is. But assuming it is somehow  
23 pertinent, and Van Ry could have asked some question about the  
24 home stereo system, when Your Honor is provided with the



1 complete transcripts not merely excerpts and the pleadings,  
2 Your Honor will see Mr. Bowman claimed then to have bought,  
3 purchased lawfully, the home entertainment system that was  
4 found in his home. How that is inconsistent with anything at  
5 trial I don't know. Can we ask Mr. Volpicelli to keep it down  
6 a little bit here?

7 By the way, among other things, Petitioner bears the  
8 burden of proving any decisions made by counsel were not  
9 strategic or tactical decisions. On that subject, Mr. Van Ry  
10 didn't recall a whole lot about the trial as one might expect.  
11 But you may notice that page 236 or 237 of the trial  
12 transcript, I am sorry, I don't remember which, today Mr. Van  
13 Ry described he told the court then that his choice of the  
14 scope of cross-examination was in fact a tactical strategic  
15 decision. There being no evidence to the contrary, it hasn't  
16 been proved it wasn't a tactical decision and, therefore, the  
17 Petition ought to be denied at least on those other grounds.

18 THE COURT: Okay. Thank you. Anything else on these  
19 subjects, Ms. Armstrong?

20 MS. ARMSTRONG: I don't believe so, Your Honor.

21 THE COURT: Well then from what I have heard, I mean  
22 we know Bowman was given a deal, had already pled, was  
23 sentenced at the time the trial came around. It was certainly  
24 true he was no longer beholding to the District Attorney's



1 Office to maintain some kind of a deal. So I think it would be  
2 somewhat ineffective to push it too far that he has, you know,  
3 gotten a deal. That was already known.

4 With regard to the issue of did Bowman change UPC  
5 codes, frankly, I guess we don't really care. I mean I can't  
6 see that it matters. It is certainly not falling below any  
7 objective standard of reasonableness on the part of the defense  
8 counsel not to pursue it any further than it was. In terms of  
9 who bought the label maker, I will accept that there really  
10 isn't any strong impeachment there based on what has been told  
11 to me by Mr. McCarthy.

12 The issue of did the police actually get Bowman's  
13 check from the Sands, again, I don't find any value to that if  
14 all that happened. They helped him negotiate the check when he  
15 had it in his personal property at the jail.

16 The issue of did he get an expensive TV or, you know,  
17 what he personally got out of the deal in his relationship with  
18 Mr. Volpicelli, again, I don't see any value to the  
19 cross-examination. Should it have been fruitful to contend  
20 that he obtained a TV, something more than he claimed that he  
21 received on the stand, I don't imagine anybody would really  
22 believe Mr. Bowman is, you know, the most up and up, you know,  
23 outstanding citizen as he comes in to testify and that he  
24 admits he's a participant in a criminal enterprise and he



1 admits he's been convicted of prior felonies. We know that he  
2 is not, you know, your typical Chamber of Commerce member. I  
3 don't feel that any of these issues would fall below the  
4 objective reasonableness on the part of defense counsel for  
5 trying to raise some picky point that, you know, the answer  
6 doesn't correspond with some prior response he may have given  
7 to the police. And, certainly, the result would not have been  
8 any different for Mr. Volpicelli, because, again, I don't think  
9 anybody believes that, you know, Mr. Bowman is the most up and  
10 up guy, but he's just a guy that has, you know, already pled  
11 out. He admits to his participation and explains some of, you  
12 know, his role with Mr. Volpicelli. But the case doesn't hinge  
13 just on that, just on his 100 percent credibility. So, you  
14 know, there are many other things at issue in the case beyond  
15 that.

16           Anyway, I do make those findings. With regard to the  
17 exculpatory evidence, I believe, based on the testimony of  
18 Ms. Riggs, there was no withholding of any exculpatory  
19 evidence. All the information that the Court has benefit of is  
20 that, if anything, that the District Attorney's Office be found  
21 they released it to Mr. Volpicelli's attorney. And we know  
22 nothing else of this background is unfounded.

23           I would leave open the issue as to number 7, the  
24 correct amount of restitution. I can understand in a case like



1 this where, you know, prison time is the overwhelming issue and  
2 \$10,000 really doesn't mean that much, and I suppose in the  
3 reality, once Mr. Volpicelli received his sentence, there is a  
4 very slim possibility that any restitution will ever be  
5 collected from him, highly unlikely. It could happen, but I  
6 don't really expect it. So it is not an issue in the case when  
7 you look at the much bigger picture of a life sentence hanging  
8 in the balance here. So I think, still, Mr. Volpicelli is  
9 entitled to his case here that you would like to contest the  
10 amount of restitution, and maybe it wasn't in fact appropriate  
11 and more could have been done. But that is not something that  
12 is going to result, in essence, really, to a reopening of the  
13 entire sentencing or a new trial or anything to that extent.  
14 It would just be a contest of some of the dollars.

15 With that, I do rule in favor of the State as to  
16 Items 11, 12, 14. And number 7 I would like to receive  
17 additional information on that.

18 MR. MCCARTHY: Your Honor, you mentioned as you were  
19 making your rulings that it was partly dependent whether I  
20 accurately described the transcript interviews with the police,  
21 and we haven't provided those to you. Does it make a  
22 difference?

23 THE COURT: Well, do you feel, you know, I mean it  
24 just sounds to me like these are not points that is going to



1 turn anything around here.

2 MR. McCARTHY: I think Your Honor could legitimately  
3 argue if the impeachment was available, Your Honor could  
4 legitimately say it wouldn't have made any difference, then it  
5 doesn't matter if I described it correctly or not. I would  
6 still like to provide those to you. We have the ten-day  
7 extension.

8 THE COURT: Are you saying as an officer of the court  
9 you are representing these things accurately?

10 MR. McCARTHY: That is a good assumption. If you  
11 can't trust old uncle Terry, who can you trust? I would like  
12 you to have them. Maybe when we come back after you see the  
13 additional Affidavit, you can let us know if that has changed,  
14 if your review of those transcripts has changed your holding.  
15 How about that?

16 THE COURT: All right. That is fine. I am willing  
17 to wait to give any final ruling on this, so I can confirm what  
18 you are telling me is accurate.

19 MR. McCARTHY: I read them. I will make sure you get  
20 them one way or the other.

21 THE COURT: Okay.

22 MR. McCARTHY: By stipulation.

23 THE COURT: We'll stand in recess.

24 (Short recess taken.)



1 THE COURT: You may be seated.

2 MR. McCARTHY: Your Honor, just after you left the  
3 bench, Ms. Riggs gave me a copy of the transcript we have been  
4 talking about, the interviews between Brent Bowman and various  
5 policemen, and it has been marked as Exhibit 1. I believe we  
6 have an agreement Exhibit 1 is an authentic copy. I submit it  
7 to the Court.

8 THE COURT: All right.

9 THE COURT: Ms. Armstrong, do you agree with that?

10 MS. ARMSTRONG: Yes, that is so stipulated, Your  
11 Honor.

12 MR. McCARTHY: Thank you, Your Honor, for  
13 accommodating that.

14 THE COURT: Exhibit 1, the series of transcripts will  
15 be admitted for purposes of this proceeding.

16 MR. McCARTHY: Thank you, Your Honor.

17 (Exhibit 1 admitted in evidence.)

18 THE COURT: We shall be in recess again.

19 (Whereupon, the proceedings were concluded.)

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1 STATE OF NEVADA, )  
2 COUNTY OF WASHOE. ) ss.

3 I, Judith Ann Schonlau, Official Reporter of the  
4 Second Judicial District Court of the State of Nevada, in and  
5 for the County of Washoe, DO HEREBY CERTIFY:

6 That as such reporter I was present in Department No.  
7 10 of the above-entitled court on Thursday, September 20, 2007,  
8 at the hour of 8:30 o'clock a.m., of said day and that I then  
9 and there took verbatim stenotype notes of the proceedings had  
10 in the matter of THE STATE OF NEVADA vs. FERRILL J. VOLPICELLI,  
11 Case Number CR03P1263.

12 That the foregoing transcript, consisting of pages  
13 numbered 1- 62 inclusive, is a full, true and correct  
14 transcription of my said stenotypy notes, so taken as  
15 aforesaid, and is a full, true and correct statement of the  
16 proceedings had and testimony given upon the trial of the  
17 above-entitled action to the best of my knowledge, skill and  
18 ability.

19 DATED: At Reno, Nevada this 5th day of November, 2007.

20  
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22   
23 JUDITH ANN SCHONLAU CSR #18  
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HOWARD W. CONYERS  
BY *[Signature]*  
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE  
BEFORE THE HONORABLE STEVEN P. ELLIOTT, DISTRICT JUDGE

-000-

FERRILL J. VOLPICELLI, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
THE STATE OF NEVADA, )  
 )  
Defendant. )  
\_\_\_\_\_ )

CR03P1263  
CASE NO. CR03-P1263  
DEPARTMENT NO. 10

TRANSCRIPT OF PROCEEDINGS  
PETITION FOR POST CONVICTION  
THURSDAY, SEPTEMBER 20, 2007

1:30 P.M.

Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18  
NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER  
Computer-aided Transcription



A P P E A R A N C E S

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BY: TERRY MCCARTHY, ESQ.

Deputy District Attorney

1 S. Sierra Street

Reno, Nevada



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I N D E X

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
BRADLEY OTTO VAN RY	4	31	34	
TAMMY RIGGS	36	38	48	



1 RENO, NEVADA; THURSDAY, SEPTEMBER 20; 1:30 P.M.

2 -oOo-

3 THE COURT: This afternoon we are here on a post  
4 conviction Petition for Habeas Corpus on behalf of Ferrill  
5 Volpicelli. And I see that what we have are grounds 7, 11, 12  
6 and 14 remaining to be heard today.

7 MS. Armstrong, do you want to proceed?

8 MS. ARMSTRONG: Yes, Your Honor. Thank you. Good  
9 afternoon. The first thing I would like to do is invoke the  
10 rule of exclusion. I don't have any witnesses here other than  
11 Mr. Van Ry whom I had asked Mr. McCarthy to make sure to  
12 arrange. I don't know if anybody else is going to be  
13 testifying who is in the room or not.

14 THE COURT: Mr. McCarthy?

15 MR. MCCARTHY: Yes, one other potential witness.  
16 She's on her way out.

17 THE COURT: Okay.

18 MS. ARMSTRONG: Thank you, Your Honor. I would like  
19 to begin by calling Mr. Van Ry.

20 THE COURT: Please have a seat in the witness chair.

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BRADLEY OTTO VAN RY

called as a witness, having been first duly sworn,  
took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MS. ARMSTRONG:

Q Would you please state your name?

A Sure. Bradley Otto Van Ry.

Q Would you please state your full name? You just did  
that. Spell your last name?

A Sure, V-A-N space R-Y.

Q What is your current occupation?

A I am an attorney.

Q Do you work here in Reno, Nevada?

A I do.

Q What type of practice do you have?

A I do primarily civil litigation. I have gotten out  
of doing much criminal representation lately. So I'd say it is  
primarily criminal--excuse me--primarily civil litigation with  
just a small portion of criminal litigation.

Q Previously, did you practice more criminal law?

A Yes. Yes. Probably when I went on my own four years  
ago it was probably fifty percent criminal, fifty percent  
civil.



1 Q How long have you been a lawyer, Mr. Van Ry?  
2 A This is going on my tenth year.  
3 Q How many jury trials have you had?  
4 A Over twenty.  
5 Q Over twenty?  
6 A Probably. That is civil and criminal.  
7 Q Can you approximate how many of them were criminal?  
8 A Probably fifteen.  
9 Q All to verdict?  
10 A I'd say probably. There may have been one or two  
11 that pled at a certain point in the trial. But I would say  
12 mostly, yes.  
13 Q Back when you were appointed to represent  
14 Mr. Volpicelli in 2003, would that have been when your practice  
15 was about fifty/fifty civil and criminal?  
16 A Yes, that's true.  
17 Q Do you remember representing Mr. Volpicelli?  
18 A Pretty broad question. Yes.  
19 Q All right. Do you remember being assigned to  
20 represent him on a case that arose from several Indictments?  
21 A Again, generally, yes.  
22 Q As part of your representation of him, would you  
23 normally obtain discovery from the State?  
24 A Of course.



1 Q And how does that work for you? Do you file a motion  
2 or do you just make a request?

3 A With this particular case, I can tell you that I was  
4 appointed I believe through the Jack Alian group as a conflict  
5 counsel, and all discovery would filter from the D.A.'s office,  
6 mostly through the D.A.'s office to Mr. Alian and then to me.

7 Q Because Mr. Alian was appointed before you were?

8 A That's correct.

9 Q And are you still working with the Alian group?

10 A No.

11 Q At the time when you were and you were representing  
12 Mr. Volpicelli, were you paid a flat rate for cases?

13 A That's correct.

14 Q Were you allowed or did you have the ability to use  
15 investigative help?

16 A If Mr. Alian and I discussed it and we thought it was  
17 prudent in a matter, yes, we could expend some cost in terms of  
18 investigative.

19 Q It sounds as though you were trying to be cautious  
20 about costs, though?

21 A Yeah. It would have been the exception in a case that  
22 I was assigned for Mr. Alian for me to use an investigator.

23 Q Do you recall if an investigator was used in helping  
24 Mr. Volpicelli?



1           A     I don't recall specifically, but I have a feeling  
2     there was not an investigator in this case.

3           Q     Specifically, let me ask you if you received, by way  
4     of discovery from Mr. Alian, the prior statements, prior  
5     recorded statements of the co-defendant, Brent Bowman?

6           A     I don't have a specific recollection. I would say  
7     generally, yes. But it has been a long time. I believe I did,  
8     yes.

9           Q     And do you recall in the case when you represented  
10    Mr. Volpicelli at trial the main point of attack for you or  
11    your general trial strategy was to attack Mr. Bowman, wasn't  
12    it?

13          A     You know, honestly, we had a difficult defense case.

14          Q     Do you recall?

15          A     Let me finish, please. Whether the primary defense  
16    strategy was to try to impeach or undercut Mr. Bowman, I am not  
17    sure that was an accurate statement. I think that was a part  
18    of the defense strategy, of course. I don't know if that was  
19    the primary part.

20          Q     Do you remember telling the jury in your opening  
21    statement that this case was a case about reasonable doubt and  
22    reasonable doubt would be shown through Brent Bowman?

23          A     If it is in the transcript, that is what I said. I  
24    am sorry I don't have a specific recollection. As a matter of



1 course in criminal trials that have very little--Honestly, this  
2 was one of those cases where you have very little defense. You  
3 know, reasonable doubt is what you hang your hat on or attempt  
4 to hang your hat on.

5 Q In this case, Mr. Bowman was somewhat attackable  
6 don't you agree? Pardon me?

7 A I am sorry, I didn't answer. I am still thinking. I  
8 don't remember. Maybe at the time, you know, 30 days after  
9 trial I had a better answer, but I just don't remember. I  
10 think I tried to go after him a little bit.

11 Q Do you recall--You have testified I believe that you  
12 think you received the complete discovery including the  
13 statements, the recorded statements of Brent Bowman of which  
14 there are five or six. Do you remember that? He interviewed  
15 with Reno police detectives on five or six occasions and each  
16 of those times it was transcribed. Do you recall that?

17 A Yeah, vaguely.

18 Q All right. When I was reviewing the transcripts in  
19 preparation for today's hearing, it appeared that even up to  
20 the last trial setting or trial confirmation hearing there was  
21 still some difficulties regarding obtaining discovery. Do you  
22 recall that?

23 A I have a recollection of my client at that time,  
24 Mr. Volpicelli, voicing that opinion.



1 Q But it wasn't your opinion?

2 A I don't--Let me just say this: I think prior to the  
3 trial, I received everything I needed to try to defend  
4 Mr. Volpicelli.

5 Q Did you have adequate time to review what you had  
6 received?

7 A Yes. Yes.

8 Q As you sit here today, you feel comfortable  
9 testifying that you adequately reviewed all of Mr. Brent  
10 Bowman's taped statements to the police?

11 A I believe so, yes.

12 Q Okay. And I am going to switch gears a little bit  
13 and ask you about the restitution issue as well. Now were you  
14 provided with I believe it was exhibit, let me see which  
15 exhibit it was at the sentencing, were you provided with  
16 Exhibit 5, a copy of that? It was an exhibit prepared by the  
17 detective, Reid Thomas, who was the head detective on the case  
18 in support of sentencing?

19 A If I might look at it, please.

20 MS. ARMSTRONG: May I approach, Your Honor?

21 THE COURT: Yes, you may.

22 MS. ARMSTRONG: Thank you.

23 THE WITNESS: Your question was was I provided this  
24 at the time of sentencing or prior to sentencing?



1 BY MS. ARMSTRONG:

2 Q Prior to sentencing?

3 A I would say the answer is I believe so, yes. If I  
4 could just magnify that.

5 Q I'd appreciate it?

6 A I have turned over all of my file to Mr. Volpicelli  
7 except for some jury trial Jury Instructions, et cetera, so I  
8 can't go to the file and pull it out and say here it is. But I  
9 believe that I did receive this prior to the sentencing of  
10 Mr. Volpicelli.

11 Q Do you recall if you had an opportunity to discuss it  
12 with Mr. Volpicelli prior to sentencing?

13 A You know, I don't recall specific conversation, but,  
14 again, as a matter of course, I am sure that we had some  
15 discussion over the restitution issues.

16 Q All right. Now I am going to refer to an Exhibit A  
17 that was filed attached to the Proper Person Writ filed by  
18 Mr. Volpicelli on November the 9th, 2005. I am going to have  
19 you look at Exhibit A.

20 MS. ARMSTRONG: If I could approach the witness with  
21 that, Your Honor.

22 THE COURT: Yes, you may approach the witness.

23 MS. ARMSTRONG: I will trade him. Did counsel for  
24 the State want to verify this was Exhibit A? I don't know if



1 it is Exhibit A.

2 MR. McCARTHY: It is.

3 BY MS. ARMSTRONG:

4 Q All right.

5 A This looks like a list of property--excuse me--an  
6 inventory of property in RPD Case Number 01-216321; is that  
7 correct?

8 Q Yes. Have you seen that before?

9 A My answer will be probably. I don't have a specific  
10 recollection of it.

11 Q As you look at that Exhibit A, can you see that, I am  
12 not looking at it now, but I think almost everything on the  
13 right column says, returned or in evidence, or returned  
14 pending. That would be true of every page I believe.

15 MR. McCARTHY: Your Honor, I am willing to stipulate  
16 Mr. Van Ry can in fact read. If it is offered to prove the  
17 truth of any matter asserted in that document, I object to it.

18 THE COURT: You are not objecting to the question  
19 right now; is that right?

20 MR. McCARTHY: I believe the question that was asked  
21 is do you see that it says that. It says things were  
22 returned. If it is offered to prove things were in fact  
23 returned, I object to it.

24 THE COURT: I have to sustain that. But certainly



1 the witness can look at the document to see if it refreshes his  
2 recollection.

3 BY MS. ARMSTRONG:

4 Q Let me try a different question. Mr. Van Ry, do you  
5 recall comparing what has been filed as Exhibit A--what exhibit  
6 did I give him? Did you have an opportunity to compare Exhibit  
7 A from the Writ with Exhibit 5 from the sentencing prior to  
8 sentencing?

9 A Did I have the opportunity, is that the question?

10 Q Did you review them?

11 A Did I review them? Again, I don't have specific  
12 recollection. I would say I probably reviewed both of them,  
13 yes.

14 Q And you recall that at the time of sentencing, the  
15 request was made Mr. Volpicelli be ordered to make in excess of  
16 \$10,000 in restitution, correct?

17 A Yes. Yes.

18 Q The items that total the \$10,339.16 on Exhibit 5 are  
19 many of the same items in the inventory you are looking at now,  
20 aren't they?

21 A It is hard to go off my memory. It would be easier  
22 if I could compare them side by side.

23 Q I would be glad to give you this other one back?

24 A Thank you. It appears that some of Exhibit A are



1 included in Exhibit 5.

2 Q Now that you have had a chance to confirm that, do  
3 you recall objecting to the restitution amount at the  
4 sentencing hearing?

5 A Boy, I'd have to read the transcript. I do not  
6 recall. I just don't remember. I don't.

7 Q Based on what you have just reviewed, do you believe  
8 it would have been prudent at sentencing to inquire into why he  
9 was being charged restitution for items which had been returned  
10 to the rightful owners?

11 A In order to really answer that question, I would ask  
12 that--I don't know if it is feasible to really answer that  
13 question. I would have to compare item by item, line by line  
14 from Exhibit 5 with Exhibit A.

15 MS. ARMSTRONG: If the Court would like to recess to  
16 give him a chance to do that, Your Honor. I have done it. It  
17 took me 15 minutes or so.

18 MR. MCCARTHY: The question is based on assumption  
19 Exhibit A truthfully represents that which was returned and  
20 that which was not. That hasn't been established. The  
21 question is irrelevant. We don't need a recess to have him  
22 look at it.

23 THE COURT: Well, it sounds like all you are asking  
24 the witness to do is compare the document he didn't prepare,



1 doesn't know the truth about anything there. I am not sure it  
2 is that worthwhile in court to look at the document and do  
3 that.

4 MS. ARMSTRONG: True. I would argue, Your Honor,  
5 that the documents are self-authenticating. The one inventory  
6 is prepared by the Reno Police Department in connection with  
7 this particular case, and the other exhibit was filed at  
8 sentencing and accepted by the Court and relied upon by the  
9 Court. So I agree we don't need Mr. Van Ry to go through it  
10 line by line necessarily. Maybe I could rephrase a better  
11 question.

12 THE COURT: Should these be admitted for purposes of  
13 these proceedings?

14 MS. ARMSTRONG: Yes, Your Honor.

15 MR. MCCARTHY: On that I will object. If some police  
16 officer came in and said I prepared this, I would probably  
17 believe it and have no objection. Thus far I haven't heard  
18 that, and I don't know what that document is or where it came  
19 from.

20 THE COURT: I am not sure about A. You are saying  
21 Exhibit 5 was admitted at the sentencing perhaps?

22 MS. ARMSTRONG: Correct, Your Honor.

23 THE COURT: Well, things that were admitted at  
24 sentencing I think I can take judicial notice of. The other



1 matter, Exhibit A, I think you would have to lay some  
2 foundation for that. I don't think that has been admitted.

3 MS. ARMSTRONG: It hasn't, Your Honor. I agree with  
4 that. And I don't know who prepared the document because there  
5 is no author stated, but it does have an RPD case number at the  
6 top and it is titled Inventory of Property. I suppose I could  
7 ask the case agent to authenticate it for me. Is he in the  
8 courtroom? I don't know what detective Thomas looks like.  
9 Then I would suppose he could authenticate it for us if  
10 necessary.

11 THE COURT: Well, at least as to Exhibit 5 is there  
12 any contest to this having been admitted and reviewed by the  
13 Court at the sentencing?

14 MR. MCCARTHY: I believe it was in fact admitted,  
15 considered and I have no objection to it.

16 THE COURT: I will consider Exhibit 5 for purposes of  
17 this proceeding.

18 MS. ARMSTRONG: Thank Your Honor. But you agree with  
19 Mr. McCarthy there is no basis to admit what has already been  
20 filed as Exhibit A with the Pro Per Writ?

21 THE COURT: Well, I don't think I can consider that  
22 to be a document considered by the Court when it is merely  
23 attached to a pleading. It hasn't been admitted in any way or  
24 authenticated in any way.



1 MS. ARMSTRONG: Well let me take a different tact or  
2 try to.

3 BY MS. ARMSTRONG:

4 Q Mr. Van Ry, are you still looking at Exhibit 5?

5 A I have Exhibit A and Exhibit 5.

6 Q If you would look at Exhibit 5 with me, please.

7 On page 2 of the unnumbered pages, if you look at the  
8 second page, what does the bold writing at the top say?

9 A Recovered property.

10 Q All right. And then on the next page which would be  
11 page 3, what do you see the total?

12 A Bottom right total in bold \$10,339.16.

13 Q Do you recall that was the amount of restitution  
14 Mr. Volpicelli was ordered to pay exactly?

15 A I believe so.

16 Q All right. And so at sentencing it didn't occur to  
17 you to say, hey, fellows, if all this property has been  
18 recovered, where is it? Why does Mr. Volpicelli have to pay  
19 for it?

20 A Did it occur to me to ask that question?

21 Q Why didn't you ask that question?

22 A You know, I have two answers. The first answer is I  
23 don't really remember, to be honest. And the second, the  
24 second answer is I am not sure it was relevant. That is me



1       answering as of this time.

2           Q       Why wouldn't it be relevant if the items had been  
3       returned?

4           A       Because these items had been taken from a property  
5       owner, and they had been deprived of the full retail value of  
6       that item. Even if, assuming they were returned, you know the  
7       wholesale and/or trade-in value and/or restorative value of a  
8       piece of property may not necessarily be what the full retail  
9       value might be.

10          Q       Isn't that still something you would argue on behalf  
11       of Mr. Volpicelli? That is your role is to help him out and to  
12       limit the damage as much as possible.

13                 MR. MCCARTHY: Objection to the argumentative  
14       question.

15                 THE COURT: Well, I think you can ask him what he  
16       did. It does sound argumentative.

17                 MS. ARMSTRONG: I apologize.

18       BY MS. ARMSTRONG:

19          Q       Was one of your goals at sentencing to help  
20       Mr. Volpicelli receive the lowest possible sentence and only  
21       pay the proper amount of restitution?

22          A       I would agree with that, yes.

23          Q       Do you believe if you had questioned the detective on  
24       the case about this property being returned, you could have



1 kept the restitution amount down?

2 MR. McCARTHY: Calls for the witness to speculate how  
3 the detective would have responded had he been questioned.

4 THE COURT: Sustained.

5 BY MS. ARMSTRONG:

6 Q Were you aware the property that was recovered from  
7 the storage shed and the van at the time of the arrest was  
8 returned to the rightful owners? Did you know that at  
9 sentencing?

10 A I don't remember. I am sorry, I really don't.  
11 Again, as I stated, as I sit here today, I am not sure it is  
12 really relevant, to be honest with you. I am not the Judge in  
13 the case. I mean they were deprived the use of their property,  
14 so to say that they got it back a year later doesn't make up  
15 for the fact they were deprived of the use of their property.

16 Q Why do you say they got it back a year later?

17 A I am just assuming that they did get it back.

18 Q It is your legal opinion that that doesn't impact the  
19 restitution question?

20 A If I was a judge, it wouldn't, but I am not the judge  
21 in the case. That doesn't mean much to me. They were still  
22 deprived of the fair market value. That doesn't take into  
23 consideration the fact Mr. Volpicelli and his crony didn't  
24 actual pay fair market value of the property when they left the



1 store with it. They used label makers and put lesser amounts  
2 of value on those items of property.

3 Q For your logic then, Mr. Van Ry, the store actually  
4 had a little bit of a gain because they got the property back  
5 and paid a lesser price for it?

6 A No, I don't think that is logical at all. If, using  
7 a hypothetical a \$500 rug. Mr. Volpicelli and/or his crony  
8 goes in, puts a label on that says the rug is only \$75. You  
9 walk out the door, you being Mr. Volpicelli or his crony paying  
10 \$75 for a \$500 rug, how is there a gain?

11 Q Because the rightful owner got the rug back?

12 A Okay. But they were only paid \$75 in the first  
13 place.

14 Q So it is your legal opinion today there was no sense  
15 in making that argument to Judge Elliott at sentencing?

16 A Well, as I sit here today, yes. As I did the  
17 sentencing, I don't really recall what went through my mind  
18 with regard to that issue. But I think it is pretty ridiculous  
19 for a--strike that. I think it is ridiculous for a defendant  
20 who took property at value significantly less than its retail  
21 value to come into the court and say his restitution amount is  
22 too high. I think that is, again I am not the judge, I will  
23 let Judge Elliott rule on that, in my opinion, I think it is  
24 ridiculous. He got property--let me finish. He got thousands



1 of dollars worth of property for less than hundreds of dollars,  
2 and he stored it for a period of time, and it may or may not  
3 have been returned. To me, it doesn't seem-- Well, I don't  
4 think it would be just or fair to the property owner. That is  
5 my feeling, my opinion.

6 Q I appreciate that?

7 A For what it is worth.

8 Q I don't know if it is really relevant, but I  
9 appreciate it. But let me review then and see if I can  
10 capsulize what you have said about this restitution issue.

11 It is true that you don't recall comparing what was  
12 in A with 5 prior to sentencing, right?

13 A Couple of double negatives there. Yes, I did not  
14 compare them.

15 Q Yet more than \$10,000 was ordered in restitution,  
16 right?

17 A That's correct.

18 Q And you made no argument on behalf of Mr. Volpicelli  
19 in regard to the restitution amount, did you?

20 A I can't remember. I am not sure I fought it very  
21 hard. I'd have to see the transcript to really verify that. I  
22 don't think I fought it very hard.

23 Q Do you feel you were adequately prepared to fight it?

24 A Yes.



1 Q You do?

2 A Yes. Just let me interject if I may. This is one of  
3 the, I shouldn't say the exception, but this is one of the most  
4 difficult cases I ever tried because the evidence in the case  
5 was overwhelming. And that included the amounts of the  
6 restitution, in my opinion.

7 Q When you say overwhelming, do you mean in terms of  
8 showing Mr. Volpicelli's guilt or the volume of it?

9 A Both.

10 Q It was voluminous, wasn't it?

11 A Yes.

12 Q And it seems as though there were difficulties during  
13 your representation acquiring all of the discovery. Do you  
14 agree with that?

15 A I would say as a general statement that would--that  
16 is accurate.

17 Q And we know from reviewing the record that as late as  
18 two days before trial, Monday before the trial started on  
19 Wednesday, Mr. Volpicelli still had concerns about your  
20 readiness to proceed. Do you recall that?

21 A That he had concerns, yes.

22 Q But you felt adequately prepared?

23 A Yes.

24 Q Even though the records were voluminous?



1           A     Yeah. I had adequate time over the weekend to review  
2     them.

3           Q     I think you even testified or told the Court at some  
4     point you had met with Ms. Riggs over at evidence looking at  
5     each and every piece for a while?

6           A     I believe we did that, yes. Yes.

7           Q     So most of the evidence was either photographs or  
8     receipts, that type of thing?

9           A     Yeah. It was interesting, because it was kind of a  
10    white color crime in that there were a lot of accounting  
11    related, you know, invoicing or labels or price tags, receipts  
12    that kind of thing.

13          Q     You feel comfortable reviewing that type of thing?

14          A     Sure.

15          Q     Do you have some business background?

16          A     Not necessarily.

17          Q     Do you run a business?

18          A     I run a business.

19          Q     But you are not a business major?

20          A     Not necessarily a business major, no, nor  
21    accounting. I did take an accounting class many years ago  
22    but--

23          Q     You have just testified that you had time over the  
24    weekend to review and prepare for this trial which was going to



1 begin the following Wednesday right?

2 A Yes.

3 Q And do you recall if, during that review, you  
4 concentrated particularly on Mr. Bowman's prior statements to  
5 the police?

6 A I am sure that was part of it, yes.

7 Q Do you recall when you were actually in trial in here  
8 in the courtroom when Mr. Bowman was testifying?

9 A Vaguely. Vaguely. I have probably, to let you know,  
10 I have probably since then tried ten cases. I haven't numbered  
11 them, but it has been four years.

12 Q Do you recall Mr. Volpicelli asking you to ask  
13 additional questions on cross-examination of Mr. Bowman?

14 A I do remember Mr. Volpicelli being very active and  
15 feeding me questions that he thought needed to be brought up,  
16 yes.

17 Q And the method he used to do that, was it like note  
18 cards?

19 A He had them on three by five index cards I believe or  
20 maybe bigger, five by eight.

21 Q Did you have any difficulty understanding what he was  
22 asking you to ask the witness?

23 A You know, that is a difficult question, because  
24 sometimes, yeah. When you are in trial and listening to a



1 witness, you are watching the judge, you are watching the jury,  
2 listening to the D.A., to have a client continually feeding you  
3 information, it can be difficult, you know. Three by five or  
4 five by eight cards was not my method or recommended method of  
5 communicating with me. I gave him a tablet. I always bring a  
6 tablet and say if you have something, write it on the tablet,  
7 when I get a minute I will look at it. I guess the long answer  
8 is, sometimes yes, I did have difficulty understanding, because  
9 I was trying to keep track of other things.

10 Q Mr. Volpicelli was, in his way, making an effort to  
11 aid you in the cross-examination, don't you think?

12 A Oh, yes.

13 Q And--

14 A Absolutely.

15 Q And he has a pretty good recollection of what is on  
16 file and what is of record, would you agree with that?

17 A Well, good being, you know, characterized how? I  
18 mean he has a recollection, yes. Whether I would call it good,  
19 I don't know.

20 Q Was he able at times to point you specifically to  
21 places that you could use to impeach something that Mr. Bowman  
22 had just testified?

23 A Sometimes. Sometimes.

24 Q He did help you with that, didn't he?



1           A     Sometimes.

2           Q     Those times, didn't he walk or take you right to the  
3 place where you could say, Mr. Bowman, it says here in black  
4 and white left and today you have testified right?

5           A     I don't remember to be honest with you. Sometimes he  
6 may have stumbled on something. Again, that would be the  
7 exception not the rule.

8           Q     Do you recall asking Mr. Bowman if he had received  
9 any favors? Do you recall the State asking Mr. Bowman if he  
10 had received any favors in exchange for his testimony?

11          A     I don't. I know it is in the transcript. I know  
12 that was an issue, because he had turned State's evidence and  
13 was going to testify against Mr. Volpicelli. I know that he  
14 had some sort of plea agreement or some leniency in terms of  
15 the State's recommended sentence or something. But I don't  
16 recall the State--I know she did, I just specifically don't  
17 recall it.

18          Q     Do you recall Mr. Bowman was at least a three-time  
19 convicted felon, himself?

20          A     Yes, I do remember that.

21          Q     And do you recall that he also could have been  
22 eligible for the habitual sentencing enhancement?

23          A     I guess that is two questions. Do I recall it, no.  
24 Was it possible he was subject to habitual criminal, maybe. I



1 am sorry, I don't fit in this little area very well. I am kind  
2 of struggling. I apologize for that.

3 Q You just agreed Mr. Bowman had at least three felony  
4 convictions at the time of this trial?

5 A I believe so.

6 Q Wouldn't you agree that he might be eligible for the  
7 habitual?

8 A Possibly, yes.

9 Q And so isn't that something that could have been  
10 brought up on cross-examination to demonstrate Bowman really  
11 got a good deal only having to plead to one count of burglary?

12 A It could have been possibly another additional item,  
13 yes.

14 Q We know Mr. Bowman was worried about it because he  
15 had discussed it with the detectives and his sister on the  
16 telephone. Do you recall that?

17 A I don't. I don't.

18 Q Do you remember Mr. Bowman told you the habitual  
19 enhancement had never come up when you cross-examined him?

20 A I don't remember that. If it is in the transcript I  
21 did, but I just don't remember. To be fair, I did not review  
22 the transcript in the entirety.

23 Q Before coming here today?

24 A Correct, I didn't.



1 MS. ARMSTRONG: Your Honor, what I am looking at in  
2 asking these questions at this time is Ground 11. You might  
3 recall that the Petitioner has laid out specific instances of  
4 testimony from Mr. Bowman, and then he pointed out where he  
5 could have been impeached based on records. I'd be glad to  
6 walk Mr. Van Ry through each of those, but I would prefer the  
7 Court would take notice of exactly what has been pled. I have  
8 double checked each and every cite. They are accurate. The  
9 only issue that might cause a difficulty, and I mentioned this  
10 to Mr. McCarthy yesterday, is in Mr. Volpicelli's pleadings  
11 when he refers to a prior written or recorded statement of  
12 Mr. Bowman, he will tell you about the date that the Reno  
13 detectives interviewed him. He will give the first page of the  
14 interview, then if he is talking about something that happened  
15 on page 10. He doesn't include pages 2 through 9. He just goes  
16 from the face sheet to the page he's talking about. I have the  
17 entire transcripts, but they are marked up and they are not  
18 appropriate for filing with the Court, I don't believe.

19 THE COURT: And, Mr. McCarthy, do you have any  
20 opinion on how the Court could consider this?

21 MR. MCCARTHY: Well, I think the best we could do  
22 would be to introduce the entire transcripts. I found  
23 Mr. Volpicelli's pleadings to be, on occasion, misleading by  
24 omission, and there is the lack of completeness. It may



1 mislead the Court. Now I don't have such transcripts with me,  
2 however, Ms. Riggs is available today, and I wouldn't be at all  
3 surprised if I can get them for you. I am sure we can agree to  
4 their authenticity.

5 MS. ARMSTRONG: If they are supplied by Ms. Riggs and  
6 not marked up, I would agree they are authentic.

7 THE COURT: Well, it seems to me I have some  
8 extensive transcripts here as well. I have the Transcript of  
9 Proceedings, Jury Trial November 13, 2003 through November 14,  
10 2003. It is real thick.

11 MR. MCCARTHY: It is interviews with cops, Judge, the  
12 ones we are talking about, not trial transcripts. Interviews  
13 with cops, police officers.

14 THE COURT: Oh. So this isn't from the actual  
15 transcript of the trial.

16 MR. MCCARTHY: I think what Ms. Armstrong is trying  
17 to demonstrate is the trial transcript was accurate.  
18 Mr. Volpicelli has pled places where he thinks trial counsel  
19 should have tried to impeach a witness, and she's suggesting  
20 the transcripts of interviews with the police officers would  
21 form the basis of that impeachment.

22 I might point out that a question to the witness has  
23 no value to itself. It is only the answer. Unless we are going  
24 to hear what the answers are, I don't know what value it is.