In the claim presented on direct appeal, petitioner discussed only the application of the requirement in N.R.S. 175.291 that accomplice testimony be independently corroborated. Petitioner did not invoke any federal constitutional provisions, and he cited no state or federal decisions whatsoever. The Supreme Court of Nevada analyzed the issue presented solely with respect to "the statutory standard of independent evidence connecting the defendant to the crime," pursuant to N.R.S. 175.291. The state supreme court did not directly or indirectly cite to or apply the federal due process standard for sufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).[5]

In Ground 6, petitioner alleges that he was denied due process and equal protection of the laws in violation of the Fifth, Sixth, and Fourteenth Amendments when the state district court sentenced him as a habitual criminal.

In the claim presented on direct appeal, petitioner contended that the state district court "abused its discretion" in sentencing him as a habitual criminal. Petitioner did cite to and discuss at a fair amount of length federal constitutional authority holding that state sentencing procedural requirements may give rise to a liberty interest protected by the due process clause.[6] However, petitioner did not argue that constitutional error occurred in *his* case. He instead argued:

> It appears clear that the district court make [sic] a finding of habitual criminal status based upon all the evidence presented. The three prior certifications of judgment of convictions appear to be constitutionally sound. The district court listened to all the parties, considered aggravating and mitigating evidence, *and incorporated language consistent with due process protection*. However, the district court abused its discretion when finding two counts satisfied the habitual criminal statute and ran those life sentences consecutively. When considering Appellant's untreated mental health problems and the fact that the prior convictions were not violent, *the district court abused its discretion*.

#22, Ex. 59, at 17-18 (emphasis added). The Supreme Court of Nevada, consistent with the argument presented, analyzed the claim exclusively under state law. See #22, Ex. 68, at 7-9.

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[5]See #22, Ex. 59, at 11-12; *id.*, Ex. 68, at 5-7.

[6]#22, Ex. 59, at 16-17.

The federal constitutional claims presented in federal Grounds 3 through 6 were not fairly presented to the Supreme Court of Nevada and exhausted. Fair presentation requires that the petitioner present the state courts with both the operative facts and the federal legal theory upon which the claim is based. *E.g., Castillo*, 399 F.3d at 999. Here, none of the four grounds fairly presented the federal legal theories now pursued on federal habeas review.

With regard to federal Ground 5, which challenges the sufficiency of the corroboration of the accomplice testimony under N.R.S. 175.291, the Ninth Circuit has held that a state law requiring corroboration of accomplice testimony does not implicate constitutional concerns. *See,e.g., Laboa v. Calderon*, 224 F.3d 972, 979 (9th Cir. 2001). The mere assertion of the claim challenging the sufficiency of corroboration of accomplice testimony in satisfaction of the state statutory requirement therefore did not, in and of itself, present a federal due process challenge to the sufficiency of the evidence under *Jackson v. Virginia.*

With regard to federal Ground 6, which challenges the habitual criminal adjudication, no appellate court would have construed petitioner's state law argument on the claim as presenting a federal constitutional claim. While petitioner discussed due process protections, he expressly conceded that the sentencing court's findings were "consistent with due process protection," and he instead argued only that the court abused its discretion.[7]

Grounds 3 through 6 therefore are not exhausted.

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[7]The state court claim further did not even discuss equal protection, which is also is alleged as a legal theory in federal Ground 6.

Petitioner relies upon a sentence fragment by respondents stating: "although the opening brief cited to federal authority." A sentence fragment of course is not a complete sentence, and the rest of the sentence goes on to state, as also is observed in the text, that the brief conceded that the district court complied with due process. See #19, at 3, lines 19-20. Respondents did not concede that Ground 6 – or any of the other grounds in question – were exhausted.

Petitioner further relies – with respect to the habitual criminal adjudication claim – upon a motion to recall the remittitur in pursuit of an untimely petition for rehearing. This motion filed after the conclusion of the *post-conviction* appeal does not lead to a different outcome on the exhaustion issue for at least two reasons. First, neither the motion nor the proposed petition for rehearing articulated any federal claims. Second, the state supreme court denied the motion and denied permission to submit a late petition for rehearing. See #25, Exhs. 149-150. Even if, *arguendo*, the untimely petition for rehearing had presented a federal claim, presenting a claim in a procedural context where the merits will not be considered or will be considered only in special circumstances does not fairly present a claim. *Castille, supra.*

Ground 8

In Ground 8, petitioner alleges that he was denied rights to effective assistance of counsel, due process, equal protection of the laws, and a fair trial when trial counsel allowed him to be subjected to an indictment that allegedly : (a) contained alleged multiplicitous and duplicitous charges, violating his right to be free from double jeopardy; (b) was not supported by the trial evidence; and (c) lacked specificity such that petitioner was left with no ability to defend the charges.

The Court is persuaded by respondents' contention that subparts (b) and (c) as described above were not exhausted. The only claim presented to and/or considered by the Supreme Court of Nevada on the state post-conviction appeal pertained to trial counsel's alleged failure to challenge charges as multiplicitious and duplicitious and thus violative of double jeopardy protections.[8]

The Court further *sua sponte* holds that the independent substantive claims based on an alleged denial of rights to due process, equal protection, and a fair trial were not exhausted. In the state post-conviction appeal, petitioner presented a claim only of ineffective assistance of trial counsel to the Supreme Court of Nevada in this regard. He did not present any independent substantive claims based upon an alleged denial of rights to due process, equal protection and a fair trial.[9]

Ground 8 therefore is exhausted only to the extent that petitioner alleges that he was denied effective assistance of counsel when trial counsel allowed him to be subjected to an indictment that allegedly contained multiplicitous and duplicitous charges, violating his right to be free from double jeopardy. Ground 8 is unexhausted to the extent that petitioner alleges that he was denied rights to due process, equal protection of the laws, and a fair trial and also to the extent that petitioner alleges that he was denied effective assistance of counsel when trial counsel allowed him to be subjected to an indictment that allegedly was not supported by the trial evidence and lacked specificity.

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[8]See #25, Ex. 137, at 7-8; *id.*, Ex. 147, at 4-5.

[9]See #25, Ex. 137, at 7-8. Respondents contend that petitioner may not combine the independent substantive claims with the claims of ineffective assistance of counsel within a single ground. See #19, at 6. That very well may be true at the very least under Local Rule LSR 3-1 and the instructions for the petition form required thereby. However, there would appear to be little utility in directing a *pro se* habeas petitioner to amend a 143-page petition to separate out independent substantive claims into separate grounds where not only the vast majority of the claims in the petition are unexhausted but, further, the independent substantive claims themselves are not exhausted.

Ground 9

In federal Ground 9, petitioner alleges that he was denied rights to effective assistance of counsel, due process, equal protection and a fair trial when trial counsel failed to request jury instructions for lesser included offenses. As noted previously, petitioner was charged and convicted 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 urges that these charges "are lesser-included offenses of each other, in particular, the Burglary charges are lesser-included offenses of each other and the conspiracy charge." He maintains that he "could not have committed the elements of the Conspiracy Offense without committing the elements of the Burglary offenses."[10]

Respondents note that petitioner referred to the state district court's rejection of the ineffective assistance claim in state Ground 9 in the argument on state Ground 8 on the state post-conviction appeal. Respondents contend, however, that petitioner nonetheless did not provide any argument specifically challenging the ruling and claiming that the offenses are lesser included offenses.

Respondents' argument is not without force. Petitioner's state court briefing does refer to the state district court's rejection of the ineffective assistance claim in state Ground 9 with little if anything in the way of argument as to the issue of lesser included offenses.[11] However, giving petitioner a substantial benefit of the doubt, the Court will read the state court briefing as challenging the rejection of the ineffective assistance claims in both state Grounds 8 and 9 on the same basis, that the charges were merged into one. The state court briefing on this point is far from a model of clarity. However, giving petitioner the benefit of the doubt, the Court will hold that the ineffective assistance claim in Ground 9 is exhausted.

The Court is persuaded by petitioner's alternative argument that the ineffective assistance claim in federal Ground 9 clearly is without merit. Under 28 U.S.C. § 2254(b)(2), an unexhausted claim may be dismissed on the merits notwithstanding a lack of exhaustion. As construed by the Ninth Circuit,

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[10] #7, at 49-50.

[11] See #25, Ex. 137, at 7-8.

a district court can dismiss an unexhausted claim on the merits under § 2254(b)(2) "only when it is perfectly clear that the applicant does not raise even a colorable federal claim." *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005).

It is perfectly clear that the ineffective assistance claim in federal Ground 9 does not raise even a colorable federal claim. The state supreme court held that the crimes of burglary and of unlawful possession, making forging or counterfeiting of inventory pricing labels are distinct individual offenses with different elements.[12] This holding on Nevada state law by the state's highest court is the end of the matter with regard to that subsidiary point, as the Supreme Court of Nevada is the final arbiter of Nevada state law. Petitioner's contention that he could not have committed the conspiracy without committing the burglaries plainly is meritless on its face. It is axiomatic that commission of a conspiracy offense does not require full commission of the underlying offense that is the subject of the conspiracy. *See,e.g., Nunnery v. Eighth Judicial District Court*, 124 Nev. 477, 480, 186 P.3d 886, 888 (2008)(under Nevada law, conspiracy is committed under N.R.S. 199.480 upon reaching the unlawful agreement, without the requirement even of an overt act).

The claim of ineffective assistance of counsel in Ground 9 therefore will be dismissed on the merits under § 2254(b)(2) as not raising even a colorable federal claim.

The Court further *sua sponte* holds that the independent substantive claims in federal Ground 9 based on an alleged denial of rights to due process, equal protection, and a fair trial were not exhausted. In the state post-conviction appeal, petitioner presented a claim, at the very level best, only of ineffective assistance of trial counsel to the Supreme Court of Nevada in this regard. He did not present any independent substantive claims based upon an alleged denial of rights to due process, equal protection and a fair trial.[13]

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[12]#25, Ex. 147, at 4-5.

[13]See also note 9, *supra*. As an alternative holding, the Court holds that the independent substantive claims in federal Ground 9 further do not raise even a colorable federal claim, for the reasons discussed in the text as to the claim of ineffective assistance of counsel.

Ground 18

In Ground 18, petitioner alleges that he was denied rights to effective assistance of counsel, due process, equal protection, and a fair trial when trial and appellate counsel allowed him to be sentenced as a habitual criminal. Petitioner maintains: (a) that the Nevada legislature did not intend for non-violent property crimes to be subject to habitual criminal sentencing under N.R.S. 207.010; and (b) that a February 11, 2004, conviction did not constitute a prior offense under N.R.S. 207.010.

On the state post-conviction appeal, petitioner pursued a claim only that trial and appellate counsel were ineffective because they failed to argue that the 2004 conviction was not a prior offense.[14]

With regard to Ground 18(a), petitioner thus did not exhaust a claim that trial and appellate counsel were ineffective for failing to argue that the Nevada legislature did not intend for non-violent property crimes to be subject to habitual criminal sentencing under N.R.S. 207.010. No such claim was presented to the Supreme Court of Nevada in the state post-conviction appeal.

With regard to Ground 18(b), the Court is not persuaded by respondents' argument that Ground 18(b) presents only an independent substantive ground rather than a claim of ineffective assistance of counsel. Fairly read, part (b) of Ground 18 specifies the substantive issue that trial and appellate counsel allegedly were ineffective for failing to raise. So read, the claim of ineffective assistance of trial and appellate counsel in Ground 18(b) is exhausted.

That said, any and all independent substantive grounds asserted in Ground 18 – including the claimed deprivation of rights to due process, equal protection, and a fair trial – are not exhausted. Only a claim of ineffective assistance of counsel was pursued on the state post-conviction appeal. Further, the challenge to the habitual criminal adjudication pursued on direct appeal maintained that the state district court abused its discretion in adjudicating petitioner a habitual criminal. The underlying substantive arguments in neither Ground 18(a) nor Ground 18(b) were presented to the state supreme court.[15]

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[14]#25, Ex. 137, at 3-7; *id.*, Ex. 147, at 2-4.

[15]See also note 9, *supra*. The Court is not necessarily persuaded by respondents' initial suggestion that petitioner violated Rule 2(c) of the Rules Governing Section 2254 Cases when petitioner divided Ground 18 into two (continued...)

Ground 18 therefore is exhausted only to the extent that petitioner alleges in Ground 18(b) that he was denied effective assistance of counsel because trial and appellate counsel did not argue that the February 11, 2004, conviction did not constitute a prior offense under N.R.S. 207.010 for purposes of habitual criminal enhancement. Ground 18 is unexhausted to the extent that petitioner alleges: (a) that he was denied effective assistance of counsel because trial and appellate counsel did not argue that the Nevada legislature did not intend for non-violent property crimes to be subject to habitual criminal sentencing under N.R.S. 207.010; and (b) that he was denied rights to due process equal protection, and a fair trial.

Ground 23

In Ground 23, petitioner alleges that he was denied rights to effective assistance of counsel, due process, equal protection, and a fair trial when trial counsel failed to protect him from the erroneous application of the habitual criminal statute. In support of this ground, petitioner alleges a variety of alleged errors in the habitual criminal adjudication, including alleged improper reliance on the February 11, 2004, conviction as a prior conviction, reliance upon a detective's testimony as to prior bad acts, reliance upon the detective's testimony as to hearsay statements by petitioner's ex-wife without his being able to confront or cross-examine her, reliance upon another detective's testimony as to hearsay statements by petitioner's accomplice, consideration of evidence not admitted at trial and facts not established beyond a reasonable doubt before the jury, and dissimilar treatment of petitioner in violation of equal protection.

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[15](...continued)

subparts. The Court is not sanguine that Rule 2(c) operates in such a hypertechnical matter. Moreover, respondents have argued in past cases that the pleading rules *require* that a petitioner subdivide claims of ineffective assistance of counsel.

As an alternative holding, the Court holds that all claims in Ground 18(a) do not raise even a colorable federal claim. The underlying moving premise that N.R.S. 207.010 does not contemplate imposition of habitual criminal sentencing based upon nonviolent crimes is fundamentally flawed. *See,e.g., Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992)("N.R.S. 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the court.") The frequent contention by *pro se* petitioners that the habitual criminal statute does not authorize habitual criminal sentencing when only nonviolent crimes are involved is one that holds sway in the jailhouse, not the courthouse.

Respondents contend that Ground 23 is at least partially unexhausted. The Court is persuaded that the only exhausted claim in the ground is redundant of the claim in another partially exhausted ground. The entire ground therefore either is unexhausted or redundant.

Petitioner raised claims pertaining to the habitual criminal adjudication on direct appeal and in the state post-conviction appeal. As discussed, *supra*, regarding federal Ground 6, petitioner fairly presented only a state law claim on direct appeal alleging that the state district court abused its discretion in adjudicating petitioner a habitual criminal. He exhausted no independent substantive federal law claims on direct appeal with regard to the habitual criminal adjudication. As further discussed, *supra*, regarding federal Ground 18(b), on the state post-conviction appeal, petitioner fairly presented only a claim that trial and appellate counsel were ineffective for failing to argue that the February 11, 2004, conviction did not constitute a prior offense under N.R.S. 207.010. None of the remaining myriad specific claims of ineffective assistance of counsel and/or specific underlying independent substantive error outlined in Ground 23 were fairly presented to the Supreme Court of Nevada either on direct appeal or on the state post-conviction appeal. Federal Ground 23 thus is exhausted only to the extent that petitioner alleges that trial counsel was ineffective for failing to object to the use of the February 11, 2004, conviction as a prior conviction. However, the claim is wholly redundant of the exhausted portion of Ground 18(b) to the limited extent that it is exhausted.

The Court will dismiss Ground 23 in part as redundant of Ground 18(b) to the extent that Ground 23 alleges that trial counsel was ineffective for failing to object to the use of the February 11, 2004, conviction as a prior conviction. Ground 23 in all other respects is unexhausted.

Sua Sponte Consideration of Exhaustion of the Substantive Claims in Grounds 7 and 11

In Ground 7, petitioner alleges that he was denied rights to effective assistance of counsel, due process, equal protection, and a fair trial when trial counsel failed to protect him from an allegedly excessive restitution order by the sentencing court.

In Ground 11, petitioner alleges, *inter alia*, that he was denied rights to effective assistance of counsel, due process, equal protection, and a fair trial when trail counsel failed to protect him from the admission of irrelevant, inconsistent, and/or perjured testimony at trial by petitioner's accomplice and co-conspirator, Brett Bowman.

With regard to Ground 7, the only claim that was exhausted was a claim on the state post-conviction appeal alleging that petitioner was denied effective assistance of counsel when trial counsel failed to protect him from an allegedly excessive restitution order by the sentencing court. No independent substantive claims of trial court error – whether as violations of rights to due process, equal protection and a fair trial or otherwise – were fairly presented to the state supreme court in this regard.[16]

With regard to Ground 11, the only claim that was exhausted was a claim on the state post-conviction appeal alleging that petitioner was denied effective assistance of counsel when trial counsel failed to impeach accomplice Bowman's allegedly inconsistent and/or perjured testimony with his prior inconsistent statements. No independent substantive claims of error were fairly presented to the state supreme court in this regard.[17]

With regard to the independent substantive claims, as noted previously, respondents contend that petitioner may not combine the independent substantive claims with the claims of ineffective assistance of counsel within a single ground. As discussed previously, that may well be true at the very least under the instructions for the Court's required habeas petition form. However, as also noted previously, there would appear to be little utility in directing a *pro se* habeas petitioner to amend a 143-page petition to separate out independent substantive claims into separate grounds where not only the vast majority of the petition is unexhausted but, further, the independent substantive claims themselves are not exhausted. The Court accordingly takes up the lack of exhaustion *sua sponte* rather than taking up pleading technicalities in the first instance.[18]

Ground 7 therefore is exhausted only to the extent that petitioner alleges that he was denied effective assistance of counsel when trial counsel failed to protect him from an allegedly excessive restitution order by the sentencing court. All other claims therein are unexhausted.[19]

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[16]See #25, Ex. 137, at 9-10; *id.*, Ex. 147, at 5-6.

[17]See #25, Ex. 137, at 10-11; *id.*, Ex. 143, at 9-12; *id.*, Ex. 147, at 6.

[18]See note 9, *supra*.

[19]It appears subject to substantial question whether the claim seeking a reduction in the restitution order is

(continued...)

Ground 11 therefore is exhausted only to the extent that petitioner alleges that he was denied effective assistance of counsel when trial counsel failed to impeach accomplice Brett Bowman's allegedly inconsistent and/or perjured testimony with his prior inconsistent statements. All other claims therein are unexhausted.

Petitioner's Generalized Exhaustion Arguments

The Court is not persuaded by petitioner's remaining generalized, across-the-board arguments seeking to establish that all or part of the foregoing claims nonetheless are exhausted and/or that the lack of exhaustion of the claims should be disregarded.

Petitioner's various arguments challenging respondents' ability to pursue the defenses raised herein by a motion to dismiss are without merit. Moreover, the scheduling order (#17) in this matter specifically provided for the assertion of defenses raised herein by way of a motion to dismiss. The presentation of defenses such as lack of exhaustion, failure to state a claim, and failure to raise a colorable claim via such a motion is entirely proper. Petitioner's arguments regarding the interaction between the Federal Rules of Civil Procedure and habeas practice in this context are without merit.

Petitioner's argument that the motion to dismiss is based upon sealed documents that have not been provided to him also is meritless. Respondents filed three documents under seal – the presentence report and two orders for payment of attorneys fees to state post-conviction counsel. While these documents possibly may have relevance to issues later in the case, a point which the Court does not address at this juncture, the issues raised by the motion to dismiss do not turn on these documents. The content of petitioner's presentence report and of the two orders have nothing to do, in particular, with the question of whether petitioner exhausted his claims in the state courts. That issue turns upon the content of his briefing in the state supreme court. Petitioner's arguments regarding the sealed exhibits, here and as discussed *infra* as to other issues, present nothing more than a red herring.

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[19](...continued)
cognizable in federal habeas corpus. *See Bailey v. Hill*, 599 F.3d 976 (9th Cir. 2010). Further, there is no clearly established federal law vis-à-vis the adequacy of representation at a noncapital sentencing proceeding. *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th Cir.2006)(quoting prior authority); *Davis v Belleque*, 2012 WL 76897 (9th Cir., Jan. 11, 2012)(unpublished); *Vigil v. McDonald*, 2011 WL 5116915 (9th Cir., Oct. 28, 2011)(unpublished)(harmonizing circuit authority).

Petitioner further contends that respondents' state court record exhibit No. 62, designated as a "Notice of Election Not to File a Reply Brief," filed on the direct appeal, is incomplete. Petitioner urges that "this exhibit most certainly provide [sic] additional supporting legal memorandum[sic]."[20] This argument lacks any rationally conceivable merit. A notice by appellate counsel that she was not filing a reply brief – by definition – would not be accompanied by any briefing, much less briefing fairly presenting claims not included in the appellant's opening brief on direct appeal.[21]

Petitioner's reliance upon the presentation of claims in his state post-conviction petition as establishing exhaustion is misplaced. To exhaust a claim, petitioner must fairly present the claim in the state courts all the way through to the state's highest court, here the Supreme Court of Nevada. *Peterson, supra; Vang, supra.* A claim that is asserted in the state district court but that is not specifically argued thereafter on the state post-conviction appeal is not exhausted.(22)

Petitioner further maintains that he could not present claims *pro se* on the represented direct appeal and state post-conviction appeal. However, even on a direct appeal in the underlying criminal case, a represented defendant has no right to have *pro se* filings considered because a criminal defendant has no constitutional right to both self-representation and the assistance of counsel in the same proceeding. *See,e.g., United States v. Bergman*, 813 F.2d 1027, 1030 (9th Cir.1987); *United States v. Halbert*, 640 F.2d 1000, 1009 (9th Cir.1981). Moreover, a criminal defendant has no right of self-representation on direct appeal in the first instance. *Martinez v. Court of Appeal of California*, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000). And, even on direct appeal, a defendant does not have a constitutional right to have appointed appellate counsel present every nonfrivolous issue requested by the defendant. *See Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

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[20] #31, at 8-9.

[21] The Court further takes judicial notice of the content of the online docket record of the Supreme Court of Nevada for No. 43203. The copy in the record in this Court is in every respect identical to the copy available on the state supreme court's online docket. Both have a cover page as page 1, a body of the notice as page 2, and a certificate of mailing as a page 4, with no page 3. See http://cascinfo.nvsupremecourt.us/public/caseView.do?csIID=11054. It again is completely ludicrous to suggest that such a filing would include a missing phantom brief exhausting claims on direct appeal that were not included in the appellant's opening brief.

(22) The automatic inclusion of the state petition in the record exhibit appendix as required by state appellate rules did not fairly present any claim. See text, *supra*, at 6.

Appellate counsel instead is expected to exercise independent professional judgement in selecting the issues to pursue on appeal. *Id.*

Petitioner has not identified any *pro se* submissions that he sought to present to the state supreme court on either the represented direct appeal or state post-conviction appeal. However, even if petitioner had made such submissions that were not accepted for filing, the submissions would not have exhausted any claim. Again, presenting a claim in a procedural context in which the merits of the claim will not be considered, or will be considered only in special circumstances, does not constitute fair presentation of the claim. *See,e.g., Castille, supra.* Merely because a defendant or petitioner would not have been able to present claims *pro se* on represented state court appeals does not give a federal habeas petitioner *carte blanche* thereafter to raise claims that never were fairly presented to the state supreme court. It would be a strange exhaustion rule indeed that would allow the state courts to be automatically bypassed in this fashion for what then would be a *de novo* review in federal court of claims that two attorneys did not deem worthy of specific argument on direct appeal or a state post-conviction appeal. Any alleged deficiencies in the state appellate representation are more appropriately addressed under procedural default doctrine, not by circumventing exhaustion rules in the first instance.

In this same vein, petitioner urges that any failure to exhaust on state post-conviction review was due to counsel's alleged failure to comply with state procedural requirements. The issue at present, however, is whether the claims were exhausted. They were not. The mere fact that counsel did not pursue a claim in the state courts does not necessarily establish deficient representation as opposed to an independent professional judgment as to the most potentially viable claims to argue on an appeal. If petitioner believes that he can establish cause and prejudice for his failure to present the claims previously to the state supreme court based on alleged failures by his appellate counsel, he must make that argument in the first instance to the state courts, as discussed below.

In this regard, the Court is not persuaded by petitioner's argument on the showing made that the claims should be deemed exhausted on the basis that they would be found to be procedurally barred by the state courts. The standards for excusing a procedural default are substantially the same in Nevada state court as they are in federal court. Accordingly, this Court does not hold claims to be exhausted on this basis in the absence of an unequivocal stipulation by a petitioner that the unexhausted claims

in fact would be denied on state procedural grounds if he returned to state court to present the claims. Such an unequivocal stipulation, to in truth be unequivocal in light of the application of the procedural default rules under Nevada state post-conviction procedure, must include concessions: (1) that petitioner cannot avoid dismissal of the claims in the state courts because he cannot demonstrate cause and prejudice in the state courts to overcome the state procedural bars;[23] (2) that petitioner cannot avoid dismissal of the claims in the state courts because he cannot demonstrate in the state courts that the alleged constitutional violation probably has resulted in the conviction of one who is actually innocent and cannot thereby overcome these procedural bars;[24] and (3) that the procedural bars otherwise are now consistently applied by the Nevada state courts, such that it is not possible that the state courts, as a discretionary matter, would consider the claims despite the procedural default and despite a failure to demonstrate either cause and prejudice or actual innocence.

In the absence of such concessions, the Court will not hold that there is no possibility that the unexhausted claims would be considered by the state courts on the merits. In the presence of such concessions, the Court will dismiss the claims instead with prejudice on the basis of procedural default. Given the substantial similarity of the Nevada and federal standards, there simply is no reason for not according the state courts the first opportunity to address a petitioner's efforts to overcome a state procedural bar.

The Court accordingly is not persuaded, on the showing made, that there is an absence of corrective process in the state courts and/or that exhaustion would be futile on the premise that the unexhausted claims necessarily would be deemed procedurally barred.

Nor is the Court persuaded that exhaustion otherwise would be futile because the state supreme court allegedly has rejected similar claims previously. *See,e.g., Engle v. Isaac,* 456 U.S. 107, 130, 102

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[23] *See,e.g., Mitchell v. State*, 149 P.3d 33, 36 (Nev. 2006)("A petitioner can overcome the bar to an untimely or successive petition by showing good cause and prejudice."); *see also Robinson v. Ignacio*, 360 F.3d 1044, 1052 n.3 (9th Cir. 2004)(recognizing that Nevada's cause and prejudice analysis and the federal cause and prejudice analysis are nearly identical).

[24] *See,e.g., Mitchell*, 149 P.3d at 36 ("Even when a petitioner cannot show good cause sufficient to overcome the bars to an untimely or successive petition, habeas relief may still be granted if the petitioner can demonstrate that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent," *citing Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)).

S.Ct. 1558, 1573, 71 L.Ed.2d 783 (1982)("If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.").

The Court accordingly rejects all of petitioner's generalized arguments seeking to overcome the lack of exhaustion of the foregoing claims. To exhaust his claims, petitioner must fairly present them to the state courts through to the Supreme Court of Nevada, along with any arguments that he may have to overcome any procedural defenses raised in those courts.

Remaining Issues on the Motion to Dismiss

The Court's exhaustion holdings eliminate any need to reach the remaining issues raised by respondents in the motion to dismiss except as to one issue.

Respondents contend that Ground 18(b) is moot. In the exhausted portion of Ground 18(b), petitioner alleges that he was denied effective assistance of counsel because trial and appellate counsel failed to argue that the February 11, 2004, conviction did not constitute a prior offense under N.R.S. 207.010 for purposes of habitual criminal enhancement. Respondents urge that these claims are moot because the Supreme Court of Nevada held on the state post-conviction appeal that the error in considering the 2004 conviction was harmless because the State presented a sufficient number of other prior convictions. The Court is not persuaded that the state supreme court's holding renders Ground 18(b) moot. A state court's holding that an error was harmless does not render a claim moot. Rather, the issue remains for the merits of whether the state court's rejection of the claims of ineffective assistance of counsel was contrary to or an unreasonable application of clearly established federal law.

On another issue, petitioner requests in the alternative in his opposition that he be granted a stay to return to state court to exhaust any unexhausted claims. To seek a stay, a party must file a separate motion. Parties may not present such requests for other relief within a brief. This order provides petitioner a time period within which to file a motion for dismissal of the entire petition, for dismissal of only the unexhausted claims and/or for other appropriate relief. If petitioner wishes to move for a stay, that is the juncture in the proceedings to request same.

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Petitioner should note in this regard that the requirements for a stay under *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005), operate independently of one another. That is, a petitioner must show, for example, good cause for the failure to exhaust the claims as a separate and independent requirement from the requirement that he must show that the unexhausted claims include at least one claim that is not plainly meritless. Petitioner contends in his opposition that "this Court should find good cause, as Ground 23 is not meritless, and Volpicelli has shown some extreme or unusual event beyond his control."[25] The question of whether a claim is not plainly meritless is a separate and distinct question from whether the petitioner had good cause for the failure to exhaust the claim. Showing that a claim is not plainly meritless does not establish good cause.

Remaining Matters

Petitioner's motion for leave to file a traverse, *i.e.*, a surreply, to respondents reply or in the alternative renewed motion for appointment of counsel will be denied.

As discussed *supra* at 18, the sealed exhibits – primarily petitioner's presentence report – have nothing to do with the issues decided on the motion to dismiss. The filing of the sealed exhibits thus provides a basis neither for the filing of an additional memorandum or for the appointment of counsel.

As also discussed *supra* at 19, petitioner's suggestion that Exhibit 62 – a notice of intent to *not* file a reply brief on direct appeal – *is* incomplete and might show exhaustion of otherwise unexhausted claims is simply ludicrous. The Court is not going to grant leave to file a surreply, appoint counsel, order expansion of the record, and/or order discovery to pursue petitioner's utterly frivolous argument in this regard. The copy of Exhibit 62 in the record in this matter is identical to the copy on the online docket record of the state supreme court, and – in all events – any suggestion that the document would demonstrate exhaustion of claims, again, is wholly without merit.

Petitioner's contention that respondents have presented new argument in their reply is without merit. All of the argument presented in the reply was in response to argument by petitioner.

The renewed request for appointment of counsel is denied, for the reasons previously assigned in #11. Petitioner is an experienced frequent litigator in this Court, and he has demonstrated an

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[25] #31, at 21.

adequate ability to articulate his claims, both in this and other matters. To the extent that petitioner expresses concern about the alleged complexity of the case – on a 143-page petition that he filed in proper person – it would appear that the case potentially is about to become markedly less complicated. Petitioner in any event has demonstrated the ability to articulate both a multitude of claims and voluminous argument in support of same. While almost any *pro se* litigant would be better served with the assistance of counsel, that is not the standard for appointment of counsel.

Respondents' motion to substitute a successor officer for the prior warden will be granted.

Respondents – in the briefing – seek clarification of the order (#29) granting their motion (#26) to file exhibits under seal and *in camera*.[26] Respondents filed a motion that the Court granted without qualification. To the extent that the motion sought, and obtained, an order directing the filing of the exhibits not only under seal but also *in camera*, respondents state a willingness to provide petitioner a copy of the sealed exhibits other than the presentence report at this time. Respondents further state a willingness to provide petitioner an opportunity to review the presentence report if it becomes at issue, pursuant to the procedure in NDOC AR 568. The Court has no objection to petitioner being copied with the other exhibits, and it has no objection to petitioner being allowed to review his presentence report in a manner consistent with required institutional procedures. The Court indeed has no objection to respondents doing both without waiting for the presentence report to become at issue, if it ever will, to, hopefully, eliminate any further discussion in this regard.

IT THEREFORE IS ORDERED that respondents' motion (#19) to dismiss is GRANTED IN PART, such that:

(1) Ground 9 is DISMISSED IN PART on the merits under § 2254(b)(2) as not raising even a colorable federal claim to the extent that petitioner claims ineffective assistance of counsel in Ground 9;

(2) Ground 23 is DISMISSED IN PART as redundant of Ground 18(b) to the extent that Ground 23 alleges that trial counsel was ineffective for failing to object to the use of the February 11, 2004, conviction as a prior conviction; and

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[26] #33, at 2-3.

(3) the Court holds that the following grounds and/or claims (hereafter, the "unexhausted claims") are not exhausted:

(a) Grounds 1 through 6, 10, 12 through 17, and 19 through 22;

(b) all claims in Ground 7 **other than** the claim that petitioner was denied effective assistance of counsel when trial counsel failed to protect him from an allegedly excessive restitution order by the sentencing court;

(c) all claims in Ground 8 **other than** the claim that petitioner was denied effective assistance of counsel when trial counsel allowed him to be subjected to an indictment that allegedly contained multiplicitous and duplicitous charges, violating his right to be free from double jeopardy;

(d) any and all claims remaining in Ground 9 following upon the Court's dismissal of the claim of ineffective assistance of counsel in Ground 9;

(e) all claims in Ground 11 **other than** the claim that petitioner was denied effective assistance of counsel when trial counsel failed to impeach accomplice Brett Bowman's allegedly inconsistent and/or perjured testimony with his prior inconsistent statements;

(f) all claims in Ground 18 **other than** the claim in Ground 18(b) that petitioner was denied effective assistance of counsel when trial and appellate counsel did not argue that the February 11, 2004, conviction did not constitute a prior offense under N.R.S. 207.010 for purposes of habitual criminal enhancement; and

(g) any and all claims remaining in Ground 23 following upon the Court's dismissal of Ground 23 in part as redundant of a claim in Ground 18(b).

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IT FURTHER IS ORDERED that petitioner shall have **thirty (30) days** from entry of this order within which to mail to the Clerk for filing a motion for dismissal without prejudice of the entire petition, for partial dismissal only of the unexhausted claims, and/or for other appropriate relief. The entire petition will be dismissed without prejudice for lack of complete exhaustion if a motion is not timely filed. Further, if petitioner seeks dismissal only of the unexhausted claims, he shall specify the claims as to which dismissal is sought, using the same language as is used in subparagraphs 3(a) through (g) in the above paragraph. Any failure to unambiguously so identify the specific claims to be dismissed on a motion for partial dismissal may result instead in the entire petition being dismissed, for lack of a clear election of requested remedies by petitioner.

IT FURTHER IS ORDERED that the standard opposition (14 days from service of the motion) and reply (7 days from service of the opposition) times under Local Rule LR 7-2 shall apply to any motion filed.

IT FURTHER IS ORDERED that petitioner's motion (#34) for leave to file a traverse to the reply or in the alternative renewed motion for counsel is DENIED.

IT FURTHER IS ORDERED that respondents' motion (#36) to substitute party is GRANTED, and Robert LeGrand shall be substituted for Jack Palmer as a respondent.

IT FURTHER IS ORDERED that, notwithstanding any prior order, respondents may provide petitioner copies of Sealed Exhibits 2 and 3 in #27 and, in their discretion, may enable petitioner to review Sealed Exhibit 1 in #27 in a manner consistent with the applicable administrative regulations and institutional procedures.

DATED this 16th day of May, 2012.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

APPENDIX 9

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FERRILL J. VOLPICELLI,

Petitioner,

vs.

JACK PALMER, *et al.*,

Respondents.

3:10-cv-00005-LRH-VPC

ORDER

Following upon petitioner's motion (#47) for partial dismissal of the claims held by the Court to be unexhausted,

IT IS ORDERED that petitioner's motion (#47) for partial dismissal is GRANTED and that the following claims are DISMISSED without prejudice:

(a) Grounds 1 through 6, 10, 12 through 17, and 19 through 22;

(b) all claims in Ground 7 **other than** the claim that petitioner was denied effective assistance of counsel when trial counsel failed to protect him from an allegedly excessive restitution order by the sentencing court;

(c) all claims in Ground 8 **other than** the claim that petitioner was denied effective assistance of counsel when trial counsel allowed him to be subjected to an indictment that allegedly contained multiplicitous and duplicitous charges, violating his right to be free from double jeopardy;

(d) any and all claims remaining in Ground 9 following upon the Court's dismissal of the claim of ineffective assistance of counsel in Ground 9;

(e) all claims in Ground 11 **other than** the claim that petitioner was denied effective assistance of counsel when trial counsel failed to impeach accomplice Brett Bowman's allegedly inconsistent and/or perjured testimony with his prior inconsistent statements;

(f) all claims in Ground 18 **other than** the claim in Ground 18(b) that petitioner was denied effective assistance of counsel when trial and appellate counsel did not argue that the February 11, 2004, conviction did not constitute a prior offense under N.R.S. 207.010 for purposes of habitual criminal enhancement; and

(g) any and all claims remaining in Ground 23 following upon the Court's dismissal of Ground 23 in part as redundant of a claim in Ground 18(b).

IT FURTHER IS ORDERED that respondents shall file an answer to the remaining claims within **thirty (30) days** of entry of this order and that petitioner shall have **thirty (30) days** from service of the answer within which to mail a reply to the answer to the Clerk for filing.

Due to the age of the case, extensions of time will be considered only for extraordinary circumstances. In the event of scheduling conflicts with other matters in this Court, any request for extension of time should be sought in the later-filed case.

DATED this 19th day of November, 2012.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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

Petitioner, In Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

FERRILL J. VOLPICELLI,

Petitioner,

vs.

LENARD VARE, (Warden; Lovelock Correctional Center),

Respondent,

Case No. CR 03P1263

Dept. No. 10

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

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

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

Statement Of The Case

A Grand Jury was convened on June 11, 2003, to determine whether a true bill should be made against Ferrill Joseph Volpicelli, hereinafter called Petitioner. An Indictment was filed against Petitioner on June 11, 2003. An arraignment on the Indictment was heard on June 18, 2003. Trial counsel filed a Petition for Writ of Habeas Corpus on September 4, 2003. An Opposition to Petition for Writ of Habeas Corpus was filed on September 4, 2003. Trial counsel filed a Reply in Support of Petition for Writ of Habeas Corpus on September 17, 2003. The State filed Notice of Intent to Seek Habitual Criminal Status on October 9, 2003. The district court filed an Order granting the Motion to Suppress regarding the presentation of Petitioner's prior bad acts to the grand jury and denied the Motion to Quash the Indictment. Jury trial commenced and Petitioner was found guilty of all charges within the Indictment. A presentence report was done on November 25, 2003. A sentencing hearing was held on April 1, 2004. During sentencing, trial counsel argued that Petitioner had some mental health problems and referred to competency reports that had been requested and received in another recent case. Additional information was provided during the sentencing hearing for district court's consideration. These included exhibits 1-7, certificates of achievment, and letters of completion from trial counsel. The State presented three certificates of judgment of convictions 1997, 1998 and 2004, and a photograph of Petitioner while in custody, which was sent to his family. Judgment was filed on April 1, 2004. Notice of Appeal was filed on April 19, 2004. An Order declaring

Petitioner a Habitual Criminal was filed on June 1, 2004. Counsel for Appellant filed an Opening Brief in the Nevada Supreme Court on or about July 14, 2004. Respondents filed an Answering Brief on or about August 6, 2004. The Nevada Supreme Court issued it's Order of Affirmance on JUNE 29, 2005.

Remittitur issued on August 1, 2005.

Petitioner now brings forth the instant petition.

Statement Of The Facts

Petitioner was on parole and living in Reno, Nevada from approximately June 1, 2001 through October, 17, 2001. Petitioner was being investigated by the Washoe County Repeat Offender Program (ROP). ROP detectives conducted surveillance on Petitioner in a non-continuous fashion. ROP detectives also non-continuously surveilled Petitioner's alleged co-conspirator, Brett Bowman; also on parole at the time of the instant offenses.

The State and detectives allege that Petitioner entered several retail establishments in the Reno area and proceeded to write information on a tablet, allegedly copying pricing information from various items.

Detectives testified that Brett Bowman entered various retail establishments wherein he would affix pricing labels to merchandise, purchase the merchandise at a discounted rate, and leave the retail establishment with the property, thus constituting burglary, larceny, uttering forged instruments and/or obtaining property under false pretense.

The State alleges that the property purchased from the Reno area

stores was then returned to the retail establishments for a correct retail price, thus allowing Petitioner and Brett Bowman to reap a profit. (However, according to police records, detectives located and searched a personal storage unit rented by Petitioner's step-daughter. ROP detectives secured numerous items, new, and in unopened boxes from the storage unit. Detectives or other personnel returned the items to various retail stores in the Reno area, thus eliminating any and all financial impact on the establishments. Additionally, if the State's theory is accurate, the retail establishments reaped a profit by securing their property which was originally purchased at some price.)

On October 17, 2001, Petitioner waited outside a Wal-Mart store in south Reno where Brett Bowman exited the store with a bicycle. Bowman then placed the bicycle in the van with Petitioner, and Brett Bowman sat in the passenger seat of the vehicle while Petitioner drove north on Virginia Street. ROP detectives commenced a trafffic stop on Petitioner and Bowman who were then both subsequently arrested. A subsequent search of the van revealed a small black vinyl bag containing a label maker, UPC bar code labels, receipts, the bicycle, and numerous other items.

Brett Bowman and various detectives testified at Petitioner's trial alleging the entire above noted scheme was entirely the result of Petitioner's actions and planning.

Brett Bowman eventually received a sentence of only sixteen to forty two (16-42) months for his actions, while the Petitioner was sentenced to nine (9) life sentences..

Applicable Law-Standard For Effective Assistance Of Counsel

Petitioner has no choice but to raise the questions regarding the effectiveness of his counsel through the forum of a Petition for Writ of Habeas Corpus (Post-Conviction). See Franklin v. State, 110 Nev. 750, 877 P2d 1058 (1994). The question of ineffective assistance of counsel should not be considered in a direct appeal from a judgment of conviction. Instead, the issues should be raised, in the first instance, in the district court in a petition for post-conviction relief so that an evidentiary record regarding counsel's performance can be created. See Wallach v. State, 106 Nev. 470, 796 P2d 224 (1990).

It is possible for Petitioner to go straight to the Nevada Supreme Court on the issues of ineffectiveness of counsel, but the fact setting must be one where the Supreme Court can determine that there was not good reason for counsel's actions that could exist. See Jones v. State, 110 Nev. 730, 877 P2d 1052 (1994).

In the case at hand, the appropriate process is for the Petitioner to raise the claims of ineffective assistance of counsel at the district court level in the procedure of a petition for post-conviction relief and the district court to entertain the matter by conducting an evidentiary hearing.

In State v. Love, 109 Nev. 1136, 865 P2d 322 (1993), the Nevada Supreme Court reviewed the issue of whether or not a Defendant had received ineffective assistance of counsel at trial in violation of the Sixth Amendment. The Nevada Supreme Court held that this question is a mixed question of law in fact and is subject to

independent review. The Supreme Court reiterated the ruling of Strickland v. Washington, 466 U.S. 668 (1984). The Nevada Supreme Court indicated that the test on a claim of ineffective assistance of counsel is that of "reasonably effective assistance" as enunciated by the United States Supreme Court in Strickland. The Nevada Supreme Court revisited this issue in Warden v. Lyons, 100 Nev. 430 (1984) and Dawson v. State, 108 Nev. 112 (1992). The Supreme Court has provided a two-prong test in that the Defendant must show first that counsel's performance was deficient and second, that the Defendant was prejudiced by this deficiency.

The court will uphold a presumption that counsel was effective. Petitioner must, therefore, show that his attorney's performance was unreasonable under prevailing professional norms and that he was prejudiced as a result of the deficient performance.

In Smithhart v. State, 86 Nev. 925, (1970), the Nevada Supreme Court held that it will presume that an attorney has fully discharged their duties and that such presumption can only be overcome by strong and convincing proof to the contrary. The Court went on in Warden v. Lischko, 90 Nev. 220 (1974) to hold that the standard of review of counsel's performance was whether the representation of counsel was of such low caliber as to reduce the trial to a sham, a farce or a pretense. Thus, Petitioner is properly before the court on issues of ineffective assistance of counsel and would request this court grant him an evidentiary hearing on these issues.

GROUND ONE

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT ISSUES ON DIRECT APPEAL TO THE NEVADA SUPREME COURT IN A PROPER CONSTITUTIONAL MANNER; THEREBY PREJUDICING AND BURDENING PETITIONER. THIS TANTAMOUNTS TO A VIOLATION OF PETITIONER'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND THE DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The court appointed Appellate counsel, Mary Lou Wilson, Esq., to represent Petitioner on direct appeal. However, she failed to present issues to the Nevada Supreme Court in a federalized and constitutional manner. This effectively precluded Petitioner from presenting those issues to a federal court for review at a possible future date.

Appellate counsel presented the following issues to the Nevada Supreme Court in an Opening Brief. (See Supreme Court Case No. 43203)

I. WHETHER THE DISTRICT COURT ERRED IN FINDING THE INDICTMENT LAWFUL WHEN THE PROSECUTOR ADMITTED THE 1998 BURGLARY CONVICTION DURING THE GRAND JURY HEARING.

II. WHETHER APPELLANT WAS COMPETENT DURING THE CRIMES.

III. WHETHER THE JURY FOUND SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF ALL COUNTS IN THE INDICTMENT.

IV. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN FINDING HABITUAL CRIMINAL STATUS FOR TWO COUNTS AND RUNNING THEM CONSECUTIVE.

The issues, as noted above, were not presented as constitutional issues; thereby preventing the Nevada Supreme Court's review of the issues under constitutional (U.S. & Nevada) scrutiny.

As is clear, counsel never pointed to constitutional errors or federal law in the above issues in order to preserve those issues

for federal review. This clearly put Petitiioner at a disadvantage, wherein Petitioner could have filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C 2254 in the United States District Court if it were not for the failures of counsel. A federal court will not grant a state prisoner's petition for habeas relief until prisoner has exhausted his available state remedies for all claims raised. See Rose v. Lundy, 455 U.S. 509 (1982). State remedies have not been exhausted unless the claim has been "fairly presented" to the state courts and the highest state court has disposed of the claim on the merits. See Carothers v. Rhay, 594 F2d 225, 228 (9th Cir. 1979). Furthermore, the state remedies are only exhausted where the Petitioner "characterized the claims he raised in the state proceedings specifically as federal claims." See Lyons v. Crawford, 232 F3d 666, 670 (9th Cir. 2000). The constitutional rights to effective assistance of counsel extend to a direct appeal. See Burke v. State, 110 Nev. 1366, 1368, 887 P2d 267, 268 (1994); and Evitts v. Lucey, Supra. A claim of ineffective assistance of counsel is reviewed under the "reasonable effective assistance" test set forth in Strickland v. Washington, Supra and Kirksey v. State, Supra.

Even the issues counsel did raise in the Opening Brief Statement were not addressed as far as their federal implications are concerned. It was ineffective for counsel to ignore constitutional issues, as failure to raise them on appeal may preclude further remedy in the federal court system. Generally, any exhausted claims must be dismissed without prejudice for failure to exhaust

all state created remedies. "To satisfy the exhaustion requirement, Petitioner must present every claim raised in the federal petition to each level of state courts." See Doctor v. Walters, 96 F3d 675 (3rd Cir. 1996).

Appellate counsel's failure to raise all viable issues on appeal, including all constitutional issues, fell below an objective standard of reasonableness. Because counsel failed to use her expertise and legal training to present all of Petitioner's appellate issues before the court, Petitioner was prejudiced. Pursuant to the standards set forth in Strickland ,Supra, counsel denied Petitioner the right to effective assistance of counsel during appeal.

Due to counsel's errors, Petitioner is forced to bring forth Grounds Two, Three, Four, Five and Six which are cited below.

GROUND TWO

PETITIONER WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION WHEN THE NEVADA SUPREME COURT FAILED TO PROVIDE ADEQUATE APPELLATE REVIEW ON DIRECT APPEAL; IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On behalf of Petitioner, appellate counsel, Mary Lou Wilson, submitted an Opening Brief to the Nevada Supreme Court on or about July 14, 2004. Petitioner did not review or sign or authorize the contents of the brief prior to submittal. The pleading contained brief arguments on four (4) grounds for relief outlined in Ground One, above.

The Nevada Supreme Court issued an Order of Affirmance on wherein the court did not apply the controlling precedent(s) of the United States Supreme Court. The court did not apply the just and proper review necessary, under constitutional scrutiny, to protect Petitioner's rights as guaranteed by the U.S. Constitution.

The Nevada Supreme Court has discretion to review issues of a U.S. Constitutional magnitude pursuant to the Nevada Constitution, Article 1 sec. 2, as well as Article 6 sec.(s) 4 & 6.

The Nevada Supreme Court has exercised its power to review U.S. Constitutional issues in the past. see e.g. Natchez v. State, 721 P2d 361.

Article 1, section 2 of the Nevada Constitution gives the Nevada Supreme Court the "power to compel obedience to the U.S. Constitutional Authority."

The Nevada Supreme Court failed to provide the necessary and adequate judicial review as necessary to protect Petitioner's U.S. Constitutional rights of equal protection and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.

Petitioner is now compelled to bring forth the following grounds (Grounds Three, Four, Five & Six) as outlined below, for this Court's review, seeking application of the U.S. Supreme Court and Constitutional precedence.

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GROUND THREE

PETITIONER'S RIGHTS TO DUE PROCESS WERE VIOLATED WHEN THE PROSECUTOR ADMITTED A PRIOR BURGLARY CONVICTION TO THE GRAND JURY IN SUPPORT OF AN INDICTMENT IN VIOLATION OF THE RIGHTS GUARANTEED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The district court erred in finding the Indictment should stand after the prosecutor admitted Petitioner's 1998 burglary conviction. At the conclusion of a nine-witness grand jury hearing on June 11, 2003, the prosecutor admitted Exhibit 16, Petitioner's 1998 burglary conviction, for a limited purpose. The prosecutor explained that the allegation is not relevant as to whether Petitioner committed the offenses charged in the Indictment. However, it was relevant for the sentencing judge if the Petitioner was convicted of any of the burglary charges. Thereafter, trial counsel filed a pretrial petition for writ of habeas corpus. It stated that the prior burglary conviction was improperly presented for the grand jury's consideration. The State filed an Opposition to the writ of habeas corpus on September 4, 2003, indicating that the habeas corpus is an inappropriate vehicle to challenge the State's evidence at a grand jury proceeding; the State appropriately introduced the 1998 burglary conviction for a limited purpose of notice; and the State's evidence at the grand jury was sufficient to indict the Petitioner even if the prior conviction was inadmissible. The proper vehicle to challenge the validity of evidence presented at the grand jury proceedings is a Motion. NRS 174.105(1), Franklin v. State, 89 Nev. 382, 387, 513 P2d 1252, 1256

(1973); Cook v. State, 85 Nev. 692, 462 P2d 523 (1969), and Turpin v. Sheriff, 87 Nev. 236, 484 P2d 1083 (1971). The State relied upon NRS 484.3792 (2), Nevada's DUI sentencing provision, requiring that evidence of prior DUI convictions used to enhance a DUI to a felony be presented to the grand jury. Finally, the State argued that even if the admissibility of the 1998 burglary conviction was improper, there was sufficient evidence to return a true bill. The State relied on the nine witnesses and fifteen exhibits to bolster their argument. Trial counsel replied by asking the district court to consider the writ as a motion, NRS 484.3792(2) inapplicable to the facts, and Petitioner was unfairly prejudiced by the admission of the 1998 burglary conviction. The district court held that the Petitioner's pretrial writ of habeas corpus was considered as a motion to suppress under NRS 174.105(2). After consideration of the arguments submitted, the court granted the Petitioner's motion to suppress finding that the prior burglary conviction, when presented during a seven count burglary grand jury proceeding, was improper bad act evidence and the cases cited by the State relating to DUI law were inapplicable. However, the request to quash the Indictment was denied because the State presented nine witnesses, including an accomplice, who testified to witnessing various acts committed by Petitioner during the ten charged crimes, as well as describing the merchandise obtained.

The district court erred in not quashing the Indictment based upon the improper admission of the 1998 burglary conviction because the grand jurors were tainted by this information and returned a true

bill. Furthermore, even if the nature of the witnesses and exhibits presented during the grand jury hearing made it reasonable to believe that the slight to marginal test for the Indictment was met, the question of whether improper evidence substantially influenced the grand jury's decision to indict, or whether there is grave doubt that the decision to indict was free from substantial influence of improper evidence, thereby justifying a dismissal of said Indictment, requires examination of the state of mind of the reasonable grand juror. U.S. v. Sigma Intern, 244 F3d 841. Evidence is unfairly prejudicial if it tempts the jury to decide the case on an improper basis; especially when there exists a similarity between the charged criminal act(s) and the prior bad act. The more similar the acts, the greater the likelihood that the jury will draw the improper inference that if the defendant did it once, he probably did it again. Williams v. State, 99 P3d 432, 441.

In addition, even if this Court considers that the prosecutorial misconduct was harmless beyond a reasonable doubt given the subsequent jury trial convictions, there is case precedence from the U.S. Supreme Court which redirects the harmless error analysis to the grand jury proceedings; rather than the outcome of the trial. There, it was held that when a defendant raises a constitutional objection prior to the conclusion of trial-the rule set forth in Bank of Nova Scotia controls. That is to say, courts should not hesitate to remedy the violation because the Indictment is NOT, in reality, "of a grand jury" (USCA 5). U.S. v. Bank of

Nova Scotia, 108 Sct 2369, 2374.

In sum, the Ninth Circuit Court of Appeals has held that a prosecutor may not seek a grand jury Indictment by proffering tainted, prejudicial evidence to the grand jury. U.S. v. De Rosa, 783 F2d 1401, (9th Cir. 1986). Also, the existence of prosecutorial discretion may not be arbitrary and capricious. U.S. v. Samango, 607 F2d 877, 881 (9th Cir. 1979).

GROUND FOUR

PETITIONER'S CONVICTIONS ARE CONSTITUTIONALLY INVALID DUE TO PETITIONER'S MENTAL INCOMPETENCE AT THE TIME OF THE ALLEGED CRIMES IN VIOLATION OF PETITIONER'S RIGHTS OF EQUAL PROTECTION AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

In an earlier case, Petitioner was evaluated for competency by Dr. Robert Hiller and Dr. Bill Davis. At that time, Dr. Hiller noted that Petitioner presented with numerous characteristics associated with a significant personality disorder and a history of significant polysubstance dependence. Additionally, Dr. Davis opined that Petitioner had an adjustment disorder with mixed anxiety and depressed mood. The Department of Parole and Probation interviewed Petitioner after his conviction, and, at that time, purported that the Petitioner admitted to suffering from asthma, sleep apnea, vertigo, depression, panic anxiety disorder, and drug addiction. During sentencing, trial counsel advised the parties that Petitioner was diagnosed with clinical depression, prescribed Prozac, and felt better than he had ever felt in his whole life. Furthermore, since Petitioner was in custody, October 2001, he was

successfully treated for his mental illness condition and that he had been productive. Thereafter, trial counsel admitted several positive documents showing Petitioner's achievments while in custody awaiting sentencing. Therefore, Petitioner was untreated for his mental illness until he was placed in custody. Thereafter, Petitioner had improved mentally and become productive, completing programs and staying trouble free at jail. Petitioner described his family members as having mental illnesses. For example, Petitioner's sister had been on psychotropic medication for ten to fifteen years, because of a familial chemical imbalance. Petitioner further explained his drug addiction and how that came about because he wa self-medicating and attempting to produce some endorphins. Petitioner believed that he needed some psychotherapy to help his mental illness. Therefore, given the nature of Petitioner's mental health problems, and his obvious rehabilitation after receiving medical treatment, he was ostensibly not competent during the crimes.

To this, the courts have long held that a defendant must be competent at the time of the alleged crimes for a valid conviction. Additionally, a person lacks sufficient mens rea if he is mentally incompetent at the time of the alleged crimes. See Santobello v. New York, 404 U.S. 257, 92 Sct 495 (1971); Moran v. Godinez, 57 F3d 690.

Clearly, there exists sufficient evidence in support of Petitioner's mental incompetence during the alleged crimes. Hence, the imposition of sentence on Petitioner is a violation of his constitutional rights and must be vacated.

GROUND FIVE

PETITIONER'S SENTENCES AND CONVICTIONS ARE CONSTITUTIONALLY INVALID DUE TO INSUFFICIENT EVIDENCE BEING PRODUCED AT TRIAL IN VIOLATION OF PETITIONER'S RIGHTS OF EQUAL PROTECTION AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The evidence presented during the jury trial encompassed many witnesses and documents. For example, on November 12, 2003, the prosecutor called Detective Della to testify that he and other detectives surveyed Petitioner over a period of time noticing that he had access to a storage unit in Sparks in which he moved boxes in and out of; picked up Brett Bowman while driving his van; observed Mr. Bowman purchase a mountain bike at a great reduction in price; arrested Petitioner and Mr. Bowman while driving after a fraudulent purchase; and located property and indicia of fraud within the vehicle. Other surveillance officers presented were Detective Scott Armitage, who noticed Petitioner looking at labels and recording information on a small note pad; inventoried Petitioner's van upon arrest; and located comforters, a mountain bike, a label maker, bar code labels, receipts and a transposition sheet inside said vehicle. Detective Lodge also noticed Petitioner looking at items from Home Depot and writing down notes on a note pad. Detective Brown noticed the same alleged suspicious behavior from Petitioner while shopping at WalMart. After arrest, Detective Thomas received a search warrant for the storage unit to which the Petitioner had legal access and located three pick-up truckloads of merchandise. After receiving cooperating information from Accomplice Brett Bowman, the receipts and transposition sheet were

used to match fraudulently purchased items. According to Mr. Bowman, Petitioner would make fictitious labels reflecting lower prices and then Mr. Bowman would affix these UPC bar codes on higher priced merchandise; thereby reflecting savings of several dollars to hundreds of dollars. This included the purchases of one or more home theater systems, computer monitors, sewing machines, rugs, coffee machines, a toilet, a toothbrush, and other miscellaneous items.

The defense requested, but was denied, a Motion to Dismiss the State's case for failure to prove their case based upon a violation of NRS 175.291, opining that there was no independent evidence to show Petitioner's guilt outside of Accomplice Brett Bowman's testimony. The prosecutor then argued that the question was properly for the jury to decide and that the physical evidence found in Petitioner's van and the storage unit supported Accomplice Bowman's testimony. The district court agreed with the state.

As a result, the jury convicted based upon insufficient evidence because not one witness, except Accomplice Brett Bowman, ever testified about any criminal conduct exhibited by Petitioner, and that Mr. Bowman could have achieved all crimes by himself-having access to all indicia of fraud.

Therefore, absent Accomplice Brett Bowman's testimony, nobody viewed Petitioner commit any crime. In addition, mere presence and knowledge of Accomplice Bowman's intentions are insufficient to convict aiding and abetting culpability. 512 P2d 923, and U.S. v Dingle 114 F3d 307 (D.C. Cir. 1997). As such, the jury convicted based upon insufficient evidence since NRS 175.291 provides (1) a

conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corrobration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

It is abundantly clear that the courts have long recognized not only that the uncorroborated testimony of an accomplice has doubtful worth, but that his incrimination of another is not corroborated simply because he accurately describes the crime or the circumstances thereof. The requirement that a criminal charge must be proven beyond a reasonable doubt is "indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issues." In re Winship, 397 U.S. 358, 364, 90 Sct 1068, 1072, 25 L.Ed. 2d 368 (1970).

Hence, since a conviction shall not be had based on uncorroborated testimony of an accomplice, as cited at NRS 175.291 (1) and in Austin v. State, 491 P2d 714 (Nev. 1971), as well as U.S. v. Laing, 889 F2d (D.C. Cir. 1989), Petitioner's convictions rest solely on the testimony of an alleged Accomplice and evidence submitted on the basis of the Accomplice's testimony; thereby rendering Petitioner's convictions and sentences constitutionally invalid.

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GROUND SIX

PETITIONER'S CONVICTIONS AND SENTENCES ARE UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION AND DUE PROCESS OF LAW PROTECTIONS OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE COURT IMPOSED THE HABITUAL CRIMINAL STATUTES UPON PETITIONER.

The State filed Notice of Intent to Seek the Habitual Criminal Status on October 9, 2003, under NRS 207.010. Upon review of the prior certificates of judgment of convictions from 1997, 1998, and 2004, and hearing argument and witnesses during sentencing, the district court found Petitioner to be an Habitual Criminal and filed an Order on June 1, 2004. During the sentencing hearing, the State requested that the district court find Petitioner an habitual criminal for a variety of reasons. Initially, the State marked and admitted the three prior certificates of judgment of convictions under exhibits 1, 2, and 3. SEE EXHIBIT [**1] The first certificate of conviction was filed February 11, 2004, in CR02-0148, involving the crime of aiding and abetting in the commission of attempting to obtain money by false pretenses. The prior certification showed that Petitioner was represented by counsel, had a sentencing, and judgment of conviction sentencing Petitioner to 12-48 months in prison consecutive to CR03-1263. The second prior certificate of conviction of judgment was filed November 3, 2003, 1998, in CR98-2160, involving two counts of burglary. This prior certification showed an arraignment with the assistance of counsel, a guilty plea memorandum, and sentence of 24-72 and 16-72 months in prison to run consecutive to each other and consecutive to the federal prison term. The third certificate of judgment of

conviction was filed on May 16, 1997, in CR-N-96-46-HDM (RAM), in the United States District Court, involving four counts of tax perjury. Petitioner was represented by counsel and received 22 months for each count to run concurrent with each other. Thereafter, the State requested that the district court impose a sentence of life of imprisonment with 10 years minimum served in prison on each felony count. The State called Officer Scott Hopkins as a sentencing witness. During the surveillance of Petitioner in 1997, he testified that he observed Petitioner committing these crimes after he had been sentenced for his federal case. Allegedly, the Petitioner had commented to the officer that the federal prison time of 22 months was worth a million; insinuating that he had made a million dollars through his various fraud scams. The officer identified a photograph of Petitioner that was allegedly sent by him to Lori, Petitioner's wife at the time, which was inscribed on the back stating, "I'm too sexy for this place. It has been like a vacation. Just missing stores." The State called Officer Reed Thomas to describe the Repeat Offender Program's involvement with the Petitioner, and the officer's contact with Petitioner and Brett Bowman. The officer discussed Petitioner's use of his son to obtain money by false pretenses; advising his daughter to run up their credit cards; putting the storage unit in his step-daughter's name; and describing the contents of the storage unit packed with stolen items. Finally, the office testified to making a report as to the estimate of value and property located in the storage unit at over ten thousand dollars of merchandise, as well as a speculative idea of

Petitioner's alleged tax-free income per year at somewhere between fifty thousand to ninety three thousand dollars. The State explained the federal conviction for tax perjury to the parties during the sentencing hearing, explaining that from 1989 and 1992, Petitioner allegedly managed to accumulate eight hundred thousand dollars worth of credits on his credit cards which were allegedly used to pay down mortgages, obtain a rental unit, and purchased personal items for himself and his family. Thereafter, trial counsel attempted to bring forward mitigating evidence on behalf of Petitioner. After finally being properly diagnosed and treated for his mental illness, Petitioner was presented as feeling better than he had ever felt in his life. From the evaluations done by Drs. Hiller and Davis, Petitioner received mental health care through psychotropic medication during the last two years of incarceration. Trial counsel then outlined Petitioner's productivity during his jail experience and proffered letters and certificates of achievement. Although not specifically reviewed by trial counsel, these documents included: Street Readiness Program, Parenting Module, Substance Abuse Addiction and Recovery Module, Relapse Prevention Module, Anger Management Module, two classes in computer assisted Chemical Abuse Prevention, and a Domestic Violence Module. Additional credentials included Inmate Achievment Certificates in Survive And Change Programs, two classes for Life Skills And Overcoming Substance Abuse, Literacy/ESL Tutor Training, NSP Gardening Class I, Participation in Bridges to Freedom, the Way To Happiness Course, Self Improvement and Job Search Workshop, and Christian Way In Marriage. Thereafter, trial counsel argued that

Petitioner was ready to lead a lawful life now that he had been treated for mental health conditions; he had honorable discharges from periods of probation; the disparity in treatment between Petitioner and Mr. Bowman was great wherein Accomplice Bowman received a mere 16-42 months; the mature age and intelligence of the Petitioner, all of which contribute to the Petitioner deserving a sentence of 4-40 years in prison and no habitual offender status. Petitioner explained to the district court about his troubled childhood, familial chemical imbalance, self-medication with drugs, and the need for psychotherapy. Thereafter, the district court found that upon review of Petitioner's prior record, including the prior felony convictions; the long pattern of theft, and the fact that he had allegedly made a living for years as a career criminal, he was the poster child for habitual criminality. Therefore, the district court imposed 9 terms of life in prison with the possibiblty of parole in ten years; two of which would run consecutive to one another and the others to run concurrently. Hence, Petitioner would have to spend at least twenty years in prison before parole eligibility and the sentences would run consecutive to any other sentencing currently being served. This includes initially expiring cases CR 98-2160, CR-N-96-46-HDM (RAM), CR02-0147 and CR02-0148. Thus, this would then bring the aggregate minimum time in custody wherein Petitoner would be eligible for parole when he attains 80 years of age.

NRS 207.010(2) indicates that the trial judge may, at his discretion, dismiss a count under the section, which is included in any indictment or information for purposes of habitual criminal

status. Clark v. State, 109 Nev. 426, 428, 851 P2d 426, 427 (1993). The decision to adjudicate an individual as a habitual criminal is not an automatic one. Sessions v. State, 106 Nev. 186, 190, 789 P2d 1242, 1244 (1990). The district court may dismiss counts brought under the habitual criminal statute when the prior offenses are stale, trivial, or where an adjudication of habitual criminality would not serve the interests of the statute or justice. Some considerations within the discretion of the district court are whether the prior convictions were violent or remote in time. Arajakas v. State, 108 Nev. 976, 983, 843 P2d 800, 805 (1992). The district court should provide reasons for finding an habitual criminal status, however, this Court has stated that there is not a requirement for the district courts to utter talismanic phrases such as "just and proper". Hughes v. State, 116 Nev. 327, 333, 996 P2d 890, 893 (2000).

In Walker v. Deeds, 50 F3d 673 (1995), the district court must weigh the appropriate factors for and against the habitual criminal enhancement. The sentencing judge is required to make an actual judgment on the question of whether it is just and proper for the defendant to be punished and segregated as a habitual criminal. In Hicks v. Oklahoma, 447 U.S. 343, 346, 100 Sct 2227, 2229 (1980), the Supreme Court held that the state laws guaranteeing a defendant procedural rights at sentencing may create liberty interests protected against arbitrary deprivations by the due process clause of the Fourteenth Amendment. Therefore, when a state has provided a specific method for determining whether a certain sentence shall

be imposed, "it is not to say that the defendant's interest in having that method adhered to is merely a matter of state procedural law." Fetterly v. Paskett, 997 F2d 1295, 1300 (9th Cir. 1993) citing Hicks v. Oklahoma, cert. denied,---U.S.---,115 Sct. 290, 130 L.Ed.2d 205 (1994). Based on Hicks, this Court found that state law requiring that the Washington Supreme Court review and make particular findings before affirming a death sentence created a constitutionally protected interest. Campbell v. Blodgett, 997 F2d 512, 522 (9th Cir. 1992), cert. denied, ---U.S.---, 114 Sct. 1337, 127 L.Ed2d 685 (1994). Nevada's law requiring a court to review and make particularized findings that it is "just and proper" for a defendant to be adjudged a habitual offender also creates a constitutionally protected liberty interest in a sentencing procedure. In Walker v. Deeds, 50 F3d 673 (9th Cir. 1995), it was held that because the state court did not make the requisite individualized determination that it was "just and proper", Walker be adjudged a habitual offender as mandated by Nevada law, Walker's due process rights were violated.

In the present case, the district court determined habitual status after hearing from all parties. In particular, the finding was the following:

Well, in reviewing Petitioner's record, I have to consider the nature of his prior felony convictions. And the prior felony convictions, in fact, are largely part of a theft scheme that Petitioner developed years ago and persisted in stealing from stores over the course of a long time and perhaps various methods.

Apparently, he starts this activity with getting duplicate

copies of credit card receipts and then using that method to return property for full value that wasn't purchased for the full value, and progressed to more sophisticated crime of using false UPC labels on boxes of merchandise. But that shows a long pattern of this type of theft.

And not only is it theft, but it's a theft that was actually used to support Petitioner, so it's different than you see in most cases. You don't see that many people who actually earn a living from theft or crime. Usually people have other employment, they, you know, live their life generally supporting themselves lawfully but then have a sideline perhaps of criminal activity, but Petitioner in fact, is a career criminal and that's how he has made a living for years while not incarcerated.

And under all the evidence that I see here, I do in fact, find that Petitioner is a habitual criminal. In fact, you are the poster child for habitual criminality in that every time you're released from custody, it seems like you're out making a full-time living stealing. So there really isn't any doubt in my mind that the statutory scheme for habitual criminality applied to you, Petitioner.

And with that, I will sentence you as a habitual criminal. I think society needs to be protected from this level of theft where you're actually making a full good living from stealing. And also our law enforcement authorities need to devote themselves to other people than to constantly monitor you as you pursue this scheme of theft to make a living.

It appears that the district court made a finding of habitual criminal status based upon all of the evidence presented. However, the District Court abused its discretion when finding nine counts satisfied the habitual criminal statute and ran two of them consecutively; with the remaining seven running concurrent to them. When considering Petitioner's untreated mental health problems and the fact that the prior convictions were not violent, the district court abused its discretion.

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GROUND SEVEN

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROTECT PETITIONER FROM THE SENTENCING COURT IMPOSING EXCESSIVE RESTITUTION NOT SUPPORTED BY TRIAL FACTS AND/OR TRIAL EVIDENCE; THEREBY VIOLATING PETITIONER'S RIGHTS OF DUE PROCESS, FAIR TRIAL, AND EQUAL PROTECTION, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At the sentencing hearing held in this action on April 1, 2004, this Court imposed restitution of ten-thousand three-hundred thirty-nine dollars and sixteen cents ($10,339.16), where no factual basis existed for the imposition of such an inflated amount.

The prosecution's theory of this case was that Petitioner purchased sore items at a reduced price. The Reno Police Department ("RPD") officers testified that they located a storage unit containing items purported to belong to various Reno area retail establishments. The officers claim to have returned the aforementioned merchandise to its original owners. (See Exhibit [**2]- Inventory List of Returned Items).

Restitution is a sentencing option, and as such, under **Apprendi vs. New Jersey** and **Blakely vs. Washington**, (530 US 466, 130 SCt 2348 (2000); and, 542 US ___, 124 SCt 2531 (2004), respectively), it was this Court's abuse of discretion to sanction Petitioner with restitution beyond that which the indictment specifically cited in the burglary counts, as well as what the trial jury adjudicated of same in their deliberation. Under Victim and Witness Protection Act, the court may not authorize restitution for losses from crimes for which Defendant is not convicted, even if those other crimes are significantly related to crimes of conviction. **18 U.S.C.A. §**

3663(a); U.S. v. Young, 953 F2d 1288. Hence, Defendant's sentence with respect to restitution had to be limited to amounts in counts on which the particular Defendant was found guilty. U.S. v. Cronan, 990 F2d 663 (1st Cir. 1993). Additionally, "a Defendant cannot be ordered to pay restitution for criminal activities for which the Defendant did not admit responsibility, was not specifically charged and convicted, or did not agree to pay restitution." State v. Wallace, 100 P3d 273, 274. Moreover, ... district court erred in ordering restitution amounts greater than that alleged in indictment. 18 U.S.C.A. § 3651, U.S. v. Black, 767 F2d 3651, and restitution order was illegal to the extent it covered losses which were not specifically related to offense counts of conviction. U.S. v. Savely, 814 FSupp 1519. (See Exhibit(s) [**3] Items Specifically Noted in Indictment & adjudicated as such).

Aside from the foregoing issue, and if the State's theory is to be taken as true, then the various retail items were not only paid for in part, but RPD subsequently returned the items to the retail establishments as new, in unopened boxes, and in original condition. Thus, the retail stores retained a profit; as opposed to incurring a loss as a victim. Restitution amounts must be ascertained and delineated with accurate computation. It cannot exceed actual loss incurred and must be clearly set out with specific findings. U.S. v. Boyle, 10 F3d 485 (9th Cir. 1993).

Therefore, it is patently clear from the record that this Court imposed restitution upon the Petitioener; wherein there is no evidence of actual loss to any victim. Restitution is to be based on an actual pecuniary loss to the victims. U.S. v. Harper, 32 F3d 1387,

(9th Cir. 1994).

Additionally, Petitioner is indigent as proven by this Court's Order To Proceed In Forma Pauperis, on file herein. Petitioner was indigent at the time of trial and sentencing, as this Court appointed counsel to represent Petitioner. This Court did not take into consideration Petitioner's ability to pay restitution, as the record is silent as to the Court's basis or reasoning for the imposition of restitution.

The district court may order an indigent defendant to pay restitution provided that there is sufficient evidence in the record demonstrating that he will have a future ability to make restititution. U.S. v. Sarno, 73 F3d 1470, 1503 (9th Cir. 1995); U.S. v. Ramillo, 986 F2d 333, 336, n.5 (9th Cir. 1993). Due to the length of sentences imposed by this Court, the Court cannot justify the Petitioner will eventually be able to pay restitution while incarcerated for the rest of his natural life, with no viable income or employment resources while incarcerated.

This issue is properly before this Court, as the Nevada Supreme Court has held in Martinez v. State, 974 P2d 133 (Nev. 1999), as follows:

Petitioner is entitled to challenge restitution by the State and may obtain and present evidence to support that challenge.

Trial counsel's failure to object or otherwise protect Petitioner from the excessive restitution imposed by this Court was ineffective under the guarantees of theSixth Amendment and Strickland v. Washington, supra.. Petitioner has clearly been prejudiced as a result of counsel's failures.

GROUND EIGHT

TRIAL COUNSEL WAS INEFFECTIVE FOR ALLOWING PETITIONER TO BE SUBJECTED TO AN INDICTMENT/COMPLAINT CONTAINING MULTIPLICITOUS AND DUPLICITOUS CHARGES, THUS DENYING PETITIONER HIS DUE PROCESS, EQUAL PROTECTION, AND FAIR TRIAL RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The ban against duplicitous indictments derives from four (4) concerns: (1) prejudicial evidenciary rulings at trial; (2) the lack of adequate notice of the nature of the charges against a defendant; (3) prejudice in obtaining appellate review and prevention of double jeopardy; and, (4) risk of a jury's non-unanimous verdict. **US v. Cooper, 966 F2d 936, 939, n.3 (5th Cir. 1992)**. Duplicitous indictments may prevent jurors from acquitting on a particular charge by allowing them to convict on another charge that is improperly lumped together with another offense on a single count. A duplicitous indictment precludes assurance of jury unanimity, and may prejudice a subsequent double jeopardy defense. **US v. Morse, 785 F2d 771, 774 (9th Cir. 1986) (citing, US v. UCo Oil Co., 546 F2d 833, 835 (9th Cir. 1976))**.

It shall be noted that the duplicitous and multiplicitous charges in this case arise due to the fact that the charges relate to acts alleged to have occurred between August 30, 2001, and October 17, 2001; wherein, trial testimony of retail investigators and RPD officers indicate there was no crime committed on the aforementioned dates by Petitioner, as is evidenced by the following quotes from the Trial Transcripts ("TT") in this matter:

...

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

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

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

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

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

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

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

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

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

Q: And let's finally get to the beginning of your testimony where you testified about Northtowne Wal-Mart. And what did you observe him in the Northtown Wal-Mart?
A: September 4th.
Q: That September 4th, you observed Mr. Volpicelli

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go to the sporting goods section of the store, is that correct?
A: Yes
Q: And you followed him 20 to 30 feet behind?
A: Yes, Sir.
Q: As you walked into the store and the defendant was in the store, you testified that he stopped and looked at golf clubs and accessories, correct?
A: Correct
Q: And it appeared from your advantage point that he was observing the label and the pricing information, is that correct?
A: Yes.
Q: Observing pricing information isn't necessarily a chargeable offense, is it?
MS. RIGGS: Objection. Calls for a legal conclusion.
THE COURT: As I ruled yesterday, I will overrule that objection. I'm not going to prevent somebody from testifying as to a legal conclusion if it's within their sphere of knowledge. And I would find that this witness would know of these kinds of things.
THE WITNESS: Observing, no.
BY MR. VAN RY:
Q: How about writing down pricing information?

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A: Potentially, probably a crime.
Q: So you're saying if I walk in a Raley's, and I write down price information for the milk and yogurt, and I walk out of the store, that would be a chargeable

offense?
A: Not necessarily the pricing information, maybe the bar code information.
Q: But you would need additional information?
A: Correct.
Q: But just by itself?
A: Correct.
MR. VAN RY: No further questions, Your Honor. Thank you.

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

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

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

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

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

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

Q: Officer Lodge, sounds to me like you surveilled my client and watched him walk into a store and walk out without doing anything that would have been criminal, is that correct?
A: At the time, sir, it didn't appear to be criminal, no.
Q: Okay.

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

Q: When you saw him inside the store, did you observe him do anything that you would consider inconsistent with someone who was a regular customer inside of the store?
A: Looking at things on the shelves and writing down whatever he was writing down was not something that I considered normal.
Q: So you would say someone who went in to comparison shop to write down prices would be inconsistent with a regular customer?
A: It's not something I usually see people do.
Q: Little bit different question, same thing. Based on your observations, was there enough to charge him with a crime?
A: No
Q: And during the time of this surveillance you didn't see him purchase anything, did you?
A: Not that I can recall.
Q: Okay. And I know that was repeated, kind of my

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fault there. A question you already answered.
You did not see my client adhere of affix any any UPC labels to any labels on merchandise in that store, did you?
A: In the store on Kietzke?
Q: The store you were just testifying about, the Home Depot?
A: No
Q: Okay. And you did not observe my client actually carrying the UPC label maker with him when he went into the Wal-Mart, did you?
A: No

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

71, Lines 2 - 10:

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

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

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

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

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

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

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

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

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

GROUND NINE

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

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

The above-noted charges are lesser-included offenses of each other, in particular, the Burglary charges are lesser-included offenses of each other and the Conspiracy charge.

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

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

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

the alleged Burglaries.

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

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

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

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

GROUND TEN

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

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

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

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

> Reno Police Department transcripts (hereafter 'RPDt') of 12/6/01; (Recorded testimonial, following Miranda, between Co-Defendant Bowman and Detective Thomas); Page 18, Lines 8 - 17: Exhibit [**7]
>
> THOMAS: ... But the District Attorney's opinion is right now that if he wants to play hard ball and he wants to take this to a jury, then every time he gets bound over on one of these cases, and I've got about six (6) or seven (7) of em right now, with about twenty (20) felonies facing him, she's gonna be asking for the twenty five (25) to life "bitch" every time. So. That's what he's looking at. So we'll see how much he really wants to play, if he wants to risk that, as opposed to what we're offering him. So, like I say, me talking to you is really contingent upon him at this point. If he wants to keep playing tough guy and being an asshole, then I'll keep charging him. But I may have to keep coming back and talking to you and ah, piecing together some more things.

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

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

...

THOMAS: ...You go to prelim, you get bound over on those charges. Okay? Which means now you got a trial date. Right. After that prelim she's gonna file her intent to file the "big bitch" against you, which is basically ten (10) to twenty five (25) years. Okay?

...

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

...

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

...

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

P.17

We'll start filing the big bitch."

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

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

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

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

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

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

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

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

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

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

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

GROUND ELEVEN

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

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

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

tt 11/12/03, District Attorney probes Co-Defendant Bowman;
Page 217, Lines 10 - 12:

Q: Were you threatened or promised anything in exchange for your plea or your testimony here today?
A: No.

and

RPDt 12/3/01, Co-Defendant Bowman and Detective Thomas;
Page 1, Lines 5 - 22: Exhibit [**6]

BOWMAN: And I was promised (Inaudible) never find that out, till we got to court.

THOMAS: Who were you promised that by?

BOWMAN: The detective.

THOMAS: Okay. I watched that interview tape and never once heard that mentioned. Okay? I never once heard that mentioned.

BOWMAN: It was said out in the corridor.

THOMAS: Well

BOWMAN: at Ferrill would never fi out (Inaudible).

THOMAS: Well, that's water under the bridge now.

BOWMAN: Yeah

and

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

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

and

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

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

* * * * *

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

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

and

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

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

BOWMAN: Probably five (5) now.

THOMAS: Five (5)?

and

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

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

THOMAS: Um hmm.

BOWMAN: And you know?

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

BOWMAN: I told her (Inaudible).

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

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

THOMAS: Yeah.

* * * * *

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

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

and

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

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

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

and

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

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

* * * * *

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

Q: During this time in the summer to the fall of October, excuse me, of 2001, did you have access to a computer?
A: No, I did not.
Q: You did not?

and

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

and

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

That thereafter, I sporadically observed email communication between my father and Bowman on my computer.
That I distinctly recall Bowman's unique domain name as being listed at Yahoo and included his year of birth.

* * * * *

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

Q: Sir, you said that Mr. Volpicelli did place the UPC tage on this bike. Where was that located specifically?
A: It was located specifically on the bar that holds the seat to the bike.

and

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

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

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

BROWN: Okay.

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

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

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

BROWN: Where was it on the bike?

35 BOWMAN: [redacted] the step of the bike, rig[redacted] front step.

and

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

12 BOWMAN: That's why I was getting so highly upset, cause of (Inaudible) he's supposed to go in
13 and set it up, right, I was just supposed to go in and buy it.
14
15 THOMAS: Okay.
16
17 BOWMAN: After that, I was getting ready to say something to him that night. When we was
18 getting ready to leave ah, right ther, as we was leaving Walmart with the bike, right,
19 he wouldn't even set that up.
20
21 THOMAS: Um hmm.
22
23 BOWMAN: Right? i was gonna tell him, "Look buddy, you know, (Inaudible) you're supposed to
24 set it up, right?" I was gonna tell him right flat out that I was gonna, I was done
25 running the bar code.

* * * * *

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

18 Q: What generally did he ask you to do?
19 A: To buy the merchandise after he placed a
20 fraudulent bar code on the merchandise.
...P.160
16 A: The original agreement was that he'd go in
17 the store, place the UPC bar code on an item and I'd come
18 in the store afterwards or a day later and purchase the
19 item.

and

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

...P.17
11 BOWMAN: That was all me. That was when I went in. I put the label on it and ah...
12
13 THOMAS: Which store?
14
15 BOWMAN: Walmart.
...
25 THOMAS: What was the name of the home entertainment center, do you know, the brand name?
26
27 BOWMAN: Panasonic. Cause we specifically asked for one.
28
29 THOMAS: Okay. So did he go inside and do the bar code switch?

BOWMAN: No.

THOMAS: Huh? You did?

BOWMAN: I did.

...P.19

THOMAS: So you had the bar code when you went into the store?

BOWMAN: Ah huh (affirmative).

...P.20

THOMAS: Okay. Well at the Lowe's, did he have the bar code, or did you?

BOWMAN: The one where I bought the rug?

THOMAS: Yeah.

BOWMAN: Where I actually bought the rug, right? No, I had the bar code.

* * * * *

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

Q; Have you ever purchased a Brother label maker at a Staples in California?

A: No, I have not.

and

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

BOWMAN: And I bought the one we were using.

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

BOWMAN: No. It was kind of legal. It was an actual buy.

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

* * * * *

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

Q: Did the detectives in this case ever assist you in obtaining a paycheck from the Sands?

A: No

Q: So your testimony is you never received assistance from the detectives in this matter to receive your paycheck from the Sands?

A: To receive my paycheck?

Q: Right.

A: That's correct.

Q: So that would be a no, it didn't happen?

A: It didn't happen.

and

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

8 BOWMAN: If you do (Inaudible) I've got two (2) paychecks from the Sands sitting in my
9 property. They're gonna be expired.
...P.15
4 THOMAS: ...So I'll have to arrange to (Inaudible) get em endorsed. But
5 let me talk to a deputy and find out exactly if that's the way to go about doing that.
6 And I'll see what we can do.

* * * * *

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

17 Q: Was there a search done of Mr. Bowman's
18 apartment?
19 A: Yes.
...P.136
14 Q: Did you try to compare any of the items in his
15 apartment with receipts you found in the accordian
16 folder?
17 A: I did not. Again, the only one would have been
18 the stereo system.
19 Q: Why did you not follow up on that stereo
20 System?
21. A: Again, it just didn't strike me as a new system
22 or didn't pique my interest at all to even attempt to
23 compare it. i wasnt concerned about it.

and

tt 11/13/03, wherein District Attorney probes Detective Thomas; Page 140, Lines20 - 25, and, Page 141, Lines 1 - 5:

20 Q: Detective, you just testified that you found
21 one item of electronic equipment in Brett Bowman's
22 apartment, is that true?
23 A: That's correct.
24 Q: It didn't raise your suspicion, it didn't seem
25 to be a super high-end item?
...P.141
1 A: I wasn't even convinced it was new. I didn't
2 know how old it was.
3 Q: And you basically weren't interested in it,
4 correct?
5 A: Correct.

and

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

23 THOMAS: In you phone call you described a home theater system that was fairly new. Was that
24 one of the home theatre systems that you guys went out and bought?
25
26 BOWMAN: No, it's my TV, my ah, surround sound and VCR, or not VCR, ah, VCR and ah, CD
27 (Inaudible).
...

42 THOMAS: Okay. You said it was all brand new is all.
...P.7
32 THOMAS: Okay. Well you also indicated in your phone call that ah, you know, you didn't want
33 to talk about anything on the phone, that you'd explain everything in a letter.
...P.9
31 THOMAS: ...I'm
32 interested in the stuff that you described on the phone to your sister, the home theater
33 system and the way you explain it, which sounds very similar to what you guys were
34 out buying. Okay?
35
36 BOWMAN: Oh that was what we were out buying, yeah.

and

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

1 BOWMAN: it was brand new, yeah. I bought it over a period of time.
2
3 THOMAS: Okay.
4
5 BOWMAN: While I was at the Ridge House.
6
7 THOMAS: Where did you buy it?
8
9 BOWMAN: I got it at Shopko and ah, I got the CD player at ah, Walmart.

and

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

21 Q: Isn't it true that you kept a CD player?
22 A: Not to my knowledge.
...P.224
2 Q: Is it also true that you kept one of those home
3 theater systems we talked about?
4 A: No, it is not.

* * * * *

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

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

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

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

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

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

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

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GROUND TWELVE

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

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

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

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

Huluhan, 294 US 103, 55SCt 340 (1935).

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

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

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

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

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

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

* * * * *

MS. RIGGS: Perhaps he didn't remember that he did or that Detective Thomas had gotten that for him.

(Id., at Lines 12 - 14).

* * * * *

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

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

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

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GROUND THIRTEEN

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

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

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

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

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

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

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

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

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

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

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

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

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GROUND FOURTEEN

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

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

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

At Page 3, Lines 19 - 24:

THE DEFENDANT: Well, I don't think we're prepared to go to trial because I have some issues here with respect to - -
THE COURT: I can resolve that very quickly, then.
Mr. Van Ry, are you prepared to go to trial?

* * *

At Page 4, Lines 1 - 21:

MR VAN RY: By Wednesday, I will be prepared to go to trial, Your Honor, yes.
THE COURT: Okay. Well, that takes care of that issue. Your attorney is prepared for trial, so is there anything else you want?
THE DEFENDANT: Well, we're deficient discovery, and I've been waiting for two years for it, and I don't understand why between now and Wednesday that's going to change any. I'll be glad to address the Court - -
THE COURT: Apparently the discovery is not deficient or your counsel wouldn't be saying that he's prepared for trial.
THE DEFENDANT: So when I get on the stand and testify and I have -- and it comes out in Court that I can't substantiate that claim because certain documentation was not provided pursuant to the discovery, then where are we left at?
THE COURT: I guess, you know, that's a

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

At Page 7, Lines 3 - 24:

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

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

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

Mr. Van Ry, do you --

At Page 8, Lines 1 - 12

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

At Page 9, Lines 2 - 6:

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

At Page 9, Lines 13 - 20:

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

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

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

CASE AND POINT.

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

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

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

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

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

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

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

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

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

The Prosecution must disclose all evidence favorable to the accused when evidence is material to either guilt or punishment. Evidence is material, for purposes of the Prosecution's duty to disclose exculpatory evidence, if there is reasonable probability that the result of the trial would have been different. United States v.Augurs, 427 US 97, 112, 96 SCT 2392, 2401-02 (1976). Evidence that would enable effective cross-examination and impeachment may be material, and the Ptosecution's non-disclosure of such evidence may deprive the accused of a fair trial. Passama v. State, 103 Nev 212, 213, 735 P2d 321, 322 (1989). Suppression of favorable and material evidence includes situations in which the state, although not soliciting false evidence, allows evidence to go uncorrected when it appears. Auson v. McKaskie, 724 F2d 1153 (1984).

* * *

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

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

shows the transaction for the purchase of the bicycle.

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

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

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

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

"I returned to my vehicle and continued to monitor the activity of Volpicelli. He drives his vehicle toward the front of the store and let Bowman out of his vehicle. Bowman went into the store and was followed by other detectives."
See, Exhibit [**15] RPD Incident Report, 10/25/01, Page 2 of 3, Officer Brown, at Paragraph 4.

* * * * *

"And when Bowman was buying the bike, Volpicelli drove his vehicle through the lot and then out onto Vriginia Street, where he drove North, eventually re-entered the parking lot and parked in a different space."
RPD Incident Report, 10/18/01, Page 6 of 7, at Paragraph 5.

* * * * *

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

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

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

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

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

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

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

That, according to NRS 205.165, the jury instruction is to include 'a requirement that the Defendant only provide some evidence to dispute the presumed element of criminal intent.' Redford v. State, 572 P2d 219, 222.

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

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

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GROUND FIFTEEN

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

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

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

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

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

> Grand Jury Indictment Transcripts ("GJIt"), June 11, 2003, Page 7, Lines 14 - 16:
> 14 Q: Do you understand that you are not a target of this
> 15 Grand Jury but are simply called here as a witness today?
> 16 A: I do.

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

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

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

Q: Were you able to see in a security video tape this purchase being made?
A: Absolutely, yes, ma'am.
Q: Can you describe the person who was making the purchase of the video tape, male or female?
A: Certainly. It was a male subject. I had previously not had the opportunity to ever see this person before. He was identified by detective Thomas as the defendant.

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

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

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

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

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

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

GJIT, June 11, 2003; Page 145, Lines 21 - 23:

THE FOREMAN: We have one question we would like explained, that is the definition of implements and adapting of tools for use of burglary and crimes.

* * *

GJIt, June 11, 2003; Page 146, Lines 15 - 21:

(Whereupon the Grand Jury deliberated.)
(Whereupon the Deputy District Attorney and the Court Reporter re-entered the Grand Jury room.)
THE FOREMAN: We have returned a true bill on Counts I through X and a no True Bill on Count XI.
MS. HIER-JOHNSON: In light of the Grand Jury's findings, I will strike Count XI from the Indictment.

* * * * *

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

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

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

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

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

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

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

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

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

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

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GROUND SIXTEEN

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

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

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

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

> **I'm not interested in Mr. Volpicelli's views and decisions regarding trial tactics.**
>
> (Id. at lines 16 - 18).

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

Petitioner at trial.

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

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

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

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

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

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

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

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

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

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

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

* * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

are false.

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

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

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

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

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

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

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

Clearly, the aforementioned scenarios paint the Petitioner in

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

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GROUND EIGHTEEN

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

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

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

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

> Moreover, if the trial Court had weighed Walker's prior convictions, under Nevada law, a prior conviction record for non-violent property crimes, "though reprehensible, simply doesn't warrant the harsh sanction available under the habitual criminality statute." Sessions v. State, 106 Nev 186, 789 P2d 1242, 1245 (1990) (per curiam). The Nevada Supreme Court has determined that it may be an abuse of discretion to adjudge a defendant a habitual criminal if his prior felonies are minor property crimes and remote in time, as such a ruling "serves neither the purposes of the statute not the interests of justice." See, also, Clark v. State, 851 P2d at 428.

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

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

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

The prior conviction used by the Court to determine the imposition of the Habitual Sentences in this case was not "final." The Judgment of Conviction considered and incorporated was entered on February 11, 2004 (Case # CR020148), and was eventually appealled to the Nevada Supreme Court (Docket # 42971). On 4/1/04, the Nevada Supreme Court had not ruled on the merits of the appeal. 'Final Judgment is a decision by the District Court that ends the litigation on the merits!' Williamson v. UNUM Life Ins. Co. of America, 160 F3d 1247 (9th Cir, 1998). The conviction must be deemed final after the end of the appellate procedure on the doubt phase of the trial. Brady v. Maryland, 83 SCt 1194; and, Gretzler v. Stewart, 112 F3d 992, 1004. Since a Judgment of Conviction is final only upon issuance of a Remittitur, (See, NRS 34.726), said alleged prior conviction is not final for enhancement purposes.

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

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

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GROUND NINETEEN

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

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

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

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

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

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

797 P2d 37 at 40.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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GROUND TWENTY

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

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

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

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

* * *

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

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

* * * * *

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

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

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

* * *

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

* * *

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

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

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

* * *

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

* * *

Tt, November 13, 2003, Van Ry cross-examines Detective Brown, Page 142, Lines 14 - 23:

Q: Just one question. It wasn't a crime on those days when Mr. Volpicelli walked into those stores without Mr. Bowman, was it?
A: It wasn't a crime to walk into the stores --
Q: Correct.
A: -- without Mr. Bowman?
Q: And then to walk out.
A: That in itself does not show anything that's a crime.
MR. VAN RY: Nothing further.

* * *

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

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

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

ment.

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

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

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

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GROUND TWENTY-ONE

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

Petitioner's convictions under NRS 205.060 and 205.965 are unconstitutional. Said statutes are unconstitutionally vague and overbroad, under both NOTICE and an ARBITRARY ENFORCEMENT ANALYSIS. **Grayned v. City of Rockford, 408 US 104, 108 - 109.**

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

CASE AND POINT.

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

CASE AND POINT.

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

* * *

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

go to the sporting goods section of the store, is that correct?
A: Yes.
Q: And you followed him 20 to 30 feet behind?
A: Yes, sir.
Q: As you walked into the store and the defendant was in the store, you testified that he stopped and looked at golf clubs and accessories, correct?

A: Correct
Q: And it appeared from your advantage point that he was observing the label and the pricing information, is that correct?
A: Yes.
Q: Observing pricing information isn't necessarily a chargeable offense, is it?
MS. RIGGS: Objection. Calls for a legal conclusion.
THE COURT: As I ruled yesterday, I will overrule that objection. I'm not going to prevent somebody from testifying as to a legal conclusion if it's within their sphere of knowledge. And I would find that witness would know of these kinds of things.
THE WITNESS: Observing, no.
BY MR. VAN RY:
Q: How about writing down pricing information?

--- P.41

A: Potentially, probably a crime.
Q: So you're saying if I walk in a Raley's, and I write down price information for milk and yogurt, and I walk out of the store, that would be a chargeable offense?
A: Not necessarily the pricing information, maybe the bar code information.
Q: But you would need additional information?
A: Correct.
Q: But just by itself?
A: Correct.
MR. VAN RY: No further questions, Your Honor. Thank you.

* * *

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

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

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

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

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

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GROUND TWENTY-TWO

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

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

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

1. Ineffective assistance of appellate counsel for failing to present issues to the Nevada Supreme Court in a proper, Federalized fashion.

2. The Nevada Supreme Court failed to conduct a proper appellate review.

3. The Grand Jury Indictment is flawed due to the Prosecution proffering a prior Burglary conviction thereof.

4. Petitioner's mental competency was in question at the time of the alleged crimes.

5. Petitioner's sentences and convictions are invalid, due to insufficient evidence.

6. Petitioner's sentence and convictions are unconstitutional due to the imposition of the Habitual Criminal Enhancement.

7. Trial Counsel was ineffective for allowing Petitioner to be subjected to excessive restitution.

8. Trial counsel was ineffective for allowing Petitioner to be subjected to multiplicitous and duplicative counts.

9. Trial Counsel was ineffective for allowing Petitioner to be subjected to lesser-included offenses.

10. Trial Counsel was ineffective for allowing Petitioner to be subjected to vindictive prosecution and/or selective prosecution.

11. Trial Counsel was ineffective for allowing Petitioner to be subjected to irrelevant and perjured testimony.

12. Trial Counsel was ineffective for allowing Petitioner's jury to be subjected to known-to-be perjured testimony and vouching by the

13. Trial Counsel was ineffective for not investigating and arguing that witnesses acted as police agents with violative conduct.

14. Trial Counsel was ineffective for not thoroughly investigating Discovery, thereby allowing Petitioner to be subjected to Prosecutorial Misconduct.

15. Trial Counsel was ineffective for not appealing the Court's decision to not quash the Indictment and proffer other Indictment deficiencies.

16. Trial counsel was ineffective due to an actual conflict of interest.

17. Trial Counsel was ineffective at Petitioner's Sentencing Hearing for not investigating and proffering a host of mitigating evidence.

18. Petitioner's Habitual Criminal sentences are unconstitutional due to priors not being violent and compliant with standards for enhancement.

19. Counsel was ineffective in not protecting Petitioner from prosecution, whereas Petitioner's Eighth Amendment rights were breached.

20. Counsel was ineffective in not protecting Petitioner from prosecution, whereas Petitioner's First Amendment rights were breached.

21. Counsel was ineffective in allowing Petitioner to be subjected to prosecution of NRS 205.060 and 205.965, which are unconstitutionally vague under the Due Process Clause.

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

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

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

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

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

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

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GROUND TWENTY-THREE

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

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

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

NRS 207.010 Habitual Criminals: Definition; Punishment.

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

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

(b) Any felon, who has previously been three times convicted, whether in this state or elsewhere, of any crime which under the alws 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, reversable 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 meand 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, maked 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 sentenes, 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

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

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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 depravation 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 11 DAY OF APRIL, 2003.

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 11 DAY OF April, 2013

By: Ferrill J. Volpicelli
Petitioner, In Proper Person

/ / /

/ / /

/ / /

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Memorandum of Points and Authorities & Accompanying Exhibits
(Title of Document)

filed in District Court Case No. CR03-P1263:

X Does NOT contain the social security number of any person.

-OR-

___ Contains the social security number of a person as required by:

A. A specific state or federal law, to-wit:

_____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Dated this 11 day of April, 2013.

Ferrell Vallicelli #79565
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Petitioner In Pro Se

LCC LL FORM 26.010

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Ferrill J. Volpicelli
Pro Se Litigant

EXHIBIT 1

EXHIBIT 1

I N D E X

EXHIBIT 2

EXHIBIT 2

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

RPD CASE NO. 01-216321
INVENTORY OF PROPERTY

ITEM	EVID. NO.	OWNER	STATUS
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

ITEM	EVID. NO.	OWNER	STATUS
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

ITEM	EVID. NO.	OWNER	STATUS
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

ITEM	EVID. NO.	OWNER	STATUS
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

ITEM	EVID. NO.	OWNER	STATUS
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

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

* Restitution items

EXHIBIT 3

EXHIBIT 3

DA # 314735

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

FILED
2003 JUN 11 PM 1:15
RONALD A. LONGTIN, JR.
G. Velarde
BY _____ DEPUTY

CODE 1795
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR03-1263

FERRILL JOSEPH VOLPICELLI,

Dept. No. 9

Defendant.

_____/

INDICTMENT

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

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

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

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

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

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

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

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

That the said defendant on or between the 11th day of September A.D. 2001, and the 29th day of September A.D. 2001, or thereabout, at the County of Washoe, State of Nevada, on one or more occasions did willfully and unlawfully enter a certain HOME DEPOT located at 5125 Summit Ridge Court and/or 2955 Northtowne Lane, Reno, Washoe County, Nevada, with the intent then and there to commit Theft, Forgery, Uttering a Forged Instrument, Larceny, and/or Obtaining Property by False Pretenses therein by entering to scout miscellaneous UPC label and/or other pricing information and/or obtain a toilet; and/or said defendant did aid and abet BRETT BOWMAN in the commission of said burglary by providing him a fictitious UPC bar code label to affix to said merchandise, by providing him with U.S. currency to fraudulently purchase said merchandise, by driving him to and/or from the scene, by acting as a look-out, by counseling, encouraging, inducing, or otherwise procuring him to enter said store and fraudulently obtain said merchandise with said fictitious UPC bar code label, after having been previously convicted of Burglary in 1998.

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

That the said defendant on the 21st day of September A.D. 2001, or thereabout, at the County of Washoe, State of Nevada, did willfully and unlawfully enter a certain BED BATH and BEYOND located at 4983 South Virginia Street, Reno, Washoe County, Nevada, with the intent then and there to commit Theft, Forgery, Uttering a Forged Instrument, Larceny, and/or Obtaining Property by False Pretenses therein by entering with the intent to fraudulently obtain one or more coffee pots and/or scout pricing information related to said merchandise; and/or did aid and abet BRETT BOWMAN in the commission of said burglary by providing him a fictitious UPC bar code label to affix to said merchandise, by providing him with U.S. currency to fraudulently purchase said merchandise, by driving him to and/or from the scene, by acting as a look-out, by counseling, encouraging, inducing, or otherwise procuring him to enter said store and fraudulently obtain said merchandise with said fictitious UPC bar code label, after having been previously convicted of Burglary in 1998.

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

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

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

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

That the said defendant on the 5th day of October A.D. 2001, or thereabout, at the County of Washoe, State of Nevada, on one or more occasions did willfully and unlawfully enter a certain LOWE'S HOME IMPROVEMENT STORE located at 5075 Kietzke Lane, Reno, Washoe County, Nevada, with the intent then and there to commit Theft, Forgery, Uttering a Forged Instrument, Larceny, and/or Obtaining Property by False Pretenses, and/or Unlawful Possession, Making, Forgery or Counterfeiting of Inventory Pricing Labels therein, by entering with the intent to fraudulently obtain one or more wool rugs and/or scout pricing information related to said rugs, and/or said defendant did aid and abet BRETT BOWMAN in the commission of said burglary by providing him a fictitious UPC bar code label to affix to said merchandise, by providing him with U.S. currency to fraudulently purchase said merchandise, by driving him to and/or from the scene, by acting as a look-out, by counseling, encouraging, inducing, or otherwise procuring him to enter said store and

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

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

That the said defendant on or between the 30th day of August A.D. 2001, and the 13th day of October A.D. 2001, or thereabout, at the County of Washoe, State of Nevada, on one or more occasions did willfully and unlawfully enter a certain WALMART located at 2863 Northtowne Lane and/or 155 Damonte Ranch Parkway, Reno, Washoe County, Nevada, with the intent then and there to commit Theft, Forgery, Uttering a Forged Instrument, Larceny, and/or Obtaining Property by False Pretenses, and/or Unlawful Possession, Making, Forgery or Counterfeiting of Inventory Pricing Labels, therein by entering with the intent to fraudulently obtain a Panasonic Home Theater system, Emerson 19" DVD-TV combo, KDS Rad-5 15" monitor, Serger sewing machine and/or a Hewlett-Packard printer and/or scout pricing information related to said merchandise; and/or said defendant did aid and abet BRETT BOWMAN in the commission of said burglary or burglaries by providing him a fictitious UPC bar code label to affix to said merchandise, by providing him with U.S. currency to fraudulently purchase said merchandise, by driving him to and/or from the scene, by acting as a look-out, by counseling, encouraging, inducing, or otherwise procuring him to enter said

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DESIGNATES ONE OF EACH

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

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

That the said defendant on or between the 30th day of August A.D. 2001, and the 17th day of October A.D. 2001, or thereabout, at the County of Washoe, State of Nevada, on one or more occasions did willfully and unlawfully enter a certain SHOPKO located at 5150 MaeAnne Avenue and/or 6139 South Virginia Street, Reno, Washoe County, Nevada, with the intent then and there to commit Theft, Forgery, Uttering a Forged Instrument, Larceny, and/or Obtaining Property by False Pretenses, and/or Unlawful Possession, Making, Forgery or Counterfeiting of Inventory Pricing Labels, therein, by entering with the intent to fraudulently obtain a Sonicare electric toothbrush and/or one or more Willow Bay comforters, after having been previously convicted of Burglary in 1998.

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

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

Pretenses, and/or Unlawful Possession, Making, Forgery or Counterfeiting of Inventory Pricing Labels, therein, by entering with the intent to fraudulently obtain a Mongoose bicycle and/or scout pricing information related to said bicycle; and/or said defendant did aid and abet BRETT BOWMAN in the commission of said burglary by affixing a fictitious UPC bar code label to said merchandise, by providing BOWMAN with U.S. currency to fraudulently purchase said merchandise, by driving him to and/or from the scene, by acting as a look-out, by counseling, encouraging, inducing, or otherwise procuring him to enter said store and fraudulently obtain said merchandise with said fictitious UPC bar code label, after having been previously convicted of Burglary in 1998.

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

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

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

Dated this 11th day of June, 2003.

RICHARD A. GAMMICK
District Attorney

By _____
CHERYL HIER-JOHNSON
5021
Deputy District Attorney

PCN 82444285
81788297
81625263
82444206
82444252

06105145

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

REED THOMAS

MICHAEL BROWN

SCOTT ARMITAGE

LARRY LODGE

BRETT BOWMAN

~~GREGORY DANIELSON~~ MATT CARTER

DAVID DELLA

JENNIFER POWELL

JOHN D. ELLIS

"A TRUE BILL"

FOREMAN

"NO TRUE BILL"

FOREMAN

EXHIBIT 4

EXHIBIT 4

5/27/03

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

LAW
OFFICE
OF
JACK
ALIAN
ESQ.

DEAR JACK,

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

THE MOTION TO DISMISS THE BURGLARY RELATED CHARGES SHOULD HAVE BEEN SUBMITTED AT THE PRELIMINARY HEARINGS. ADDITIONALLY, TO ENTER TRIAL DEVOID OF ALL THE DISCOVERY IS INSANITY. CONSEQUENTLY, WE ARE UNPREPARED FOR TRIAL ON THESE MATTERS.

CLEARLY, PRACTICING LAW IS NOT ABOUT JUGGLING CASE LOADS AND ACCOMMODATING THE PROSECUTION'S CREATIVE AND MANIPULATIVE STACKED, MULTIPLICITOUS & DUPLICITOUS CHARGES. IT INVOLVES A FIDUCIARY RELATIONSHIP WITH THE CLIENT TO PROFESSIONALLY AND VIGOROUSLY CHALLENGE THE WELL GROOMED PROSECUTION'S CASE

July 23, 2002

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

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

RE: PRE-TRIAL PREPARATION

Dear Jack,

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

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

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

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

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

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

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

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

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

According to my information, on 4/23/02, an agreement for reciprocal discovery was filed. To date, I have not received any additional discovery, except the deficient material provided to me at the February Preliminary Hearing. As I previously indicated to you in my 2/1/012, 2/21/02, 3/21/02/ 6/02/02 and 6/18/01 letters, I want a copy of ALL discoverable materials provided to me.

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

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

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

Sincerely,

Ferrill Volpicelli

Cc: file

EXHIBIT 5

EXHIBIT 5

RENO POLICE DEPARTMENT
TRANSCRIPT

CASE # 01-216321

PERSON GIVING STATEMENT:	Brent BOWMAN
SEX/RACE/DOB: ------1958	
AGE: 43 Years	
RESIDENCE ADDRESS:	695 W. 3rd St., Apt. #332, Reno, Nevada
HOME PHONE:	284-2280
EMPLOYMENT:	Sand's Hotel - Cabana Deli - Lead Supervisor
TAKEN BY:	Detective Mike BROWN - Sparks P.D. and Detective Larry LODGE - W.C. Sheriff's Office
ON: 10-17-01	FROM: TO:
LOCATION OF INTERVIEW:	
IN THE PRESENCE OF:	

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

LODGE. Okay. Up until, who's your P.O.?

BOWMAN. Myers.

LODGE. Myers?

BOWMAN.. Um hmm (affirmative)

LODGE. And August two thousand two (2002)?

BOWMAN. Um hmm (affirmative)

LODGE. How much a tail you got hanging over you?

BOWMAN. That's, what do you mean by tail?

LODGE. If you get violated?

BOWMAN. Ah, that's my expiration date.

BOWMAN. No conversation, just ah, "Howdy. How's the night going?" Things like that. Basic patron/clerk conversation. Nothing special or specific.

BROWN. Okay. You remember what we were talking of before we started the interview here, about us already knowing the answers to some questions?

BOWMAN. Hm umm (affirmative)

BROWN. Okay, keep that in mind as you're talking to us. Okay?

BOWMAN. Um hmm (affirmative)

BROWN. Or asking you questions.

BOWMAN. Alright.

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

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

BROWN. Okay.

BOWMAN. As long as I had the receipt I didn't (Inaudible)

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

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

BROWN. Where was it on the bike?

BOWMAN. On the step of the bike, right front step.

BROWN. Why did you tear it off?

BOWMAN. To hand her the receipt, to hand to the clerk to scan it.

BROWN. Is that something you normally do on all those things you buy?

BOWMAN. No.

EXHIBIT 6

EXHIBIT 6

RENO POLICE DEPARTMENT
TRANSCRIPT

CASE # 01-216321

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

RESIDENCE ADDRESS:

EMPLOYMENT:

TAKEN BY: Detective Reed THOMAS

ON: 12-03-01 FROM: TO:

LOCATION OF INTERVIEW:

IN THE PRESENCE OF:

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

BOWMAN. ...he asked him.

THOMAS. Okay.

BOWMAN. And I was promised (Inaudible) never find that out, till we got to court.

THOMAS. Who were you promised that by?

BOWMAN. The detective.

THOMAS. Okay. I watched that interview tape and never once heard that mentioned. Okay? I never once heard that mentioned.

BOWMAN. It was said out in the corridor.

THOMAS. Well..

BOWMAN. That Ferrill would never find out (Inaudible)

THOMAS. Well, that's water under the bridge now.

BOWMAN. Yeah.

12-3-01

bought something? I mean I know, based on the receipts and what not, that we found in this vehicle and the merchandise we found in the storage unit, I mean I know he was buying. But rather than spoon feed you, I'd rather align your memory to see if you can recall specifically what items you bought or returned, that you'd know were fraudulent, what kind of items?

BOWMAN. (Inaudible) There was (Inaudible)

THOMAS. Um hmm.

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

THOMAS. Which store?

BOWMAN. Ah, Walmart.

THOMAS. Which one?

BOWMAN. The one ah, up by here (Inaudible)

THOMAS. (Inaudible) line?

BOWMAN. Yeah. For a camcorder, I believe that's what we got.

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

BOWMAN. Panasonic. Cause we specifically asked for one.

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

BOWMAN. No.

I NEVER DID AND HE'LL COMPLAIN ABOUT IT LATER ON.

THOMAS. Huh? You did?

BOWMAN. I did.

THOMAS. What did he do?

BOWMAN. He just made, designed the label and said, "This is what I want and go in and get it. I'm gonna go get gas for the vehicle."

THOMAS. So he handed you the label and what was this label like? Was it sticky on the back or something, so you could stick it onto the box?

BOWMAN. Yeah. (Inaudible)

THOMAS. Yeah. Okay. Do you recall any other, what other merchandise?

BOWMAN. Ah... A rug, a hose ah...

THOMAS. And that's what you've already been booked for.

BOWMAN. Um hmm (affirmative)

THOMAS. What happened there?

BOWMAN. He told me whatever he wanted, right? I went and got it. I put this bar code to it.

THOMAS. So you had the bar code when you went into the store?

BOWMAN. Ah huh (affirmative)

THOMAS. And he told you which one he wanted, so (Inaudible)

HE ALWAYS ADDRESS VPC LABELS

BOWMAN. He said (Inaudible)

THOMAS. And the bin?

BOWMAN. When he went in the store he told me what bin it was it. I went and got it out of the bin, on the way up to the deal I put the bar code over the old, the original bar code, right? And paid for it.

THOMAS. Were you guys ever inside the store at the same time?

BOWMAN. ~~Yeah.~~ FALSE NEVER.

THOMAS. And

BOWMAN. For several times.

THOMAS. Why was that?

BOWMAN. There'd be times when he'd have the bar code himself.

THOMAS. Okay.

BOWMAN. He'd set it up, leave it in the basket or on floor for me to pick up and I'd buy it.

THOMAS. Okay. Did he ever say why he wasn't doing it himself?

BOWMAN. No.

THOMAS. I mean it's obvious to me why he's not doing it himself. He doesn't want to get caught. So he's willing to pay you to do it, right? Is that the feeling you got?

BOWMAN. That's the feeling I got.

THOMAS. Okay.

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

THOMAS. Okay.

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

THOMAS. Um hmm.

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

THOMAS. Um hmm.

BOWMAN. If he wanted any more, right, then he had to set up his own bar code.

THOMAS. Okay. How many other stops you planning on making that night before you were arrested? Because you only made the one (1) right?

BOWMAN. Three (3) He gave me three (3) stops.

THOMAS. You were gonna do three (3)? Do you know where the other two (2) were gonna be?

BOWMAN. I have no idea.

THOMAS. So he hadn't told you yet?

BOWMAN. No.

THOMAS. Do you know what he's in for?

BOWMAN. Uttering.

THOMAS. Uttering?

BOWMAN. Uh hmm (affirmative)

THOMAS. Do you ever talk to him about what you did?

BOWMAN. A little bit. As little as possible I talk to him.

THOMAS. What's he say? Hmm?

BOWMAN. As little as possible. I try to talk to him about this case as little as possible.

THOMAS. Did you ever buy a slide projector (Inaudible)

BOWMAN. Yes, I did.

THOMAS. Where did you buy it?

BOWMAN. At one of the office supply stores.

THOMAS. Was it a legitimate purchase or was it fictitious?

BOWMAN. It was fictitious.

THOMAS. How much did you pay for it?

BOWMAN. I really don't remember. It was one of the first things I bought for him.

THOMAS. Do you know how much it was worth, how much it originally sold for?

BOWMAN. No.

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

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

I thought he was never there so how does he know that's to be fact?

THOMAS. What did you say, a good...

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

THOMAS. Okay.

BOWMAN. I'm not exactly sure.

THOMAS. Okay. Oh let's see here.

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

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

BOWMAN. Probably five (5) now.

THOMAS. Five (5)?

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

THOMAS. What are they all for?

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

THOMAS. Okay.

BOWMAN. And I trashed his car.

THOMAS. Okay.

BOWMAN. Ah, Forgery and Burglary.

THOMAS. Were those in Utah you said?

BOWMAN. Yeah.

THOMAS. How much prison time did you do there?

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

THOMAS. Okay.

THOMAS. Um hmm.

BOWMAN. And I bought the one we were using.

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

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

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

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

THOMAS. Okay.

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

THOMAS. Oh I'm sure.

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

THOMAS. Um hmm. Yeah I'm sure.

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

THOMAS. Um hmm.

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

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

BOWMAN. Ah huh (affirmative)

THOMAS. That you were involved in.

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

THOMAS. Okay.

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

EXHIBIT 7

EXHIBIT 7

RENO POLICE DEPARTMENT
TRANSCRIPT

CASE # 01-216321

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

RESIDENCE ADDRESS:

EMPLOYMENT:

TAKEN BY: Detective Reed THOMAS

ON: 12-06-01 FROM: TO:

LOCATION OF INTERVIEW:

IN THE PRESENCE OF:

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

THOMAS. Did you ask him not to?

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

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

THOMAS. Is that right?

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

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

BOWMAN. Yeah.

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

BOWMAN. Yeah.

lease.

THOMAS. Okay. Well I spoke to the apartment manager yesterday and she said nothing's been done.

BOWMAN. Nothing's been done?

THOMAS. Nothing's been done. She said, "As a matter of fact the eviction notice was supposed to come out this morning." Okay? And she said she, by law, has to keep your stuff for 45 days from today.

BOWMAN. Okay.

THOMAS. Okay? So that's apparently what's happened. So she said nobody's been to your apartment to collect anything.

BOWMAN. Okay.

THOMAS. Okay? So your stuff should all still be there.

BOWMAN. Alright.

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

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

THOMAS. So this is stuff that you bought on your own some time in the past? It wasn't from Volpicelli?

BOWMAN. No.

THOMAS. Are you sure?

BOWMAN. Yeah.

B.S. THE FRUIT OF ILLEGAL ACTIVITIES. THE ITEMS IN STORAGE MATCH THOSE AT HIS APARTMENT, CUSTOM MADE, HOME THEATER & ESTEEM

THOMAS. Okay. Because you seem to be very particular about that.

BOWMAN. Well that's the only thing I had in my life, that's the only thing I owned.

THOMAS. Okay. You said it was all brand new is all.

COURT TRANSCRIPT SHOWS STATEMENTS CONTRADICTS THIS

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

THOMAS. Okay.

BOWMAN. While I was at the Ridge House.

THOMAS. Where did you buy it?

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

THOMAS. Okay, you have the boxes and everything for em.?

BOWMAN. No, I threw em all out.

THOMAS. Okay.

BOWMAN. Ah, all it is, is it's a little studio apartment is what it is.

THOMAS. Um hmm.

BOWMAN. And I don't have a whole lot of room there. I don't have any storage to keep boxes. So.

THOMAS. Okay.

BOWMAN. (Inaudible) my bed and my clothes.

THOMAS. Um hmm.

BOWMAN. You know, it's everything I own in my life.

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

BOWMAN. Yeah.

THOMAS. Okay?

BOWMAN. I just (Inaudible) The reason I didn't want to explain everything over the phone was because of what was going on.

THOMAS. Okay.

V9.821

12-6-9

THOMAS. So.

BOWMAN. With two (2) felony holds, right?

THOMAS. Two (2) warrants, yeah.

BOWMAN. Two (2) warrants, yeah.

THOMAS. Apparently you failed to appear for an interview, for doing a PSI in Utah.

BOWMAN. Right.

THOMAS. So, although I would imagine those are extraditable warrants.

BOWMAN. Ah, not any more. They were dropped.

THOMAS. They were dropped?

BOWMAN. While I was in custody for em, yeah.

THOMAS. Okay. So you don't have to worry about having to go to Utah?

BOWMAN. No. I wouldn't of gotten out if they hadn't dropped em. You know?

THOMAS. Yeah, that's true. Okay. Well this is what I want to do. Ah.... because of what you described on the phone and because of what you guys were involved in.

BOWMAN. Ah huh.

THOMAS. I would like to go to your apartment and look at that home theater stuff. I'm not gonna turn your apartment upside down. Okay? I'm not interested in anything else. (I'm interested in the stuff that you described on the phone to your sister, the home theater system and the way you explain it, which sounds very similar to what you guys were out buying. Okay?

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

THOMAS. Okay. Well I want to go look at it. And if I think it's something that you guys bought together I'm gonna take it. Okay? And it's gonna be held in Evidence and we can deal with it later, once this is all over. Okay?

BOWMAN. Yeah.

BOWMAN. (Inaudible)

THOMAS. Okay. Okay. Alrighty. Well, I guess that's it for now. I hope I won't have to come up and talk to you again. Ah, it's all really contingent on how far he wants to take this. Ah, I'll tell you right now that if he wants, he's got another preliminary hearing coming up next week. Ah, I don't know if you do as well. I think they'll probably drag you down there as well and I'll try and make sure that they don't bring you guys in the same vehicle and keep you separated. But the district attorney's opinion is right now that if he wants to play hard ball and he wants to take this to a jury, then every time he gets bound over on one of these cases, and I've got about six (6) or seven (7) of em right now, with about twenty (20) felonies facing him, she's gonna be asking for the twenty five (25) to life "bitch" every time. So. That's what he's looking at. So we'll see how much he really wants to play, if he wants to risk that, as opposed to what we're offering him. So, like I say, me talking to you is really contingent upon him at this point. If he wants to keep playing tough guy and being an asshole, then I'll keep charging him. But I may have to keep coming back and talking to you and ah, piecing together some more things.

BOWMAN. (Inaudible)

THOMAS. Okay?

BOWMAN. (Inaudible)

THOMAS. I understand. And you know what's ah, and like I say, it's all really contingent on him. I mean he's the one that's (Inaudible) gonna make this thing go away or he's the one that can drag it out. So. Alright?

BOWMAN. Right.

THOMAS. Okay.

BOWMAN. (Inaudible) talking about those coffee pots?

THOMAS. The coffee pots? Yeah.

BOWMAN. You'll (Inaudible) Volpicelli. Like I told you, I told you the other day (Inaudible)

THOMAS. Okay. Was that one bought legitimately or was it (Inaudible)

BOWMAN. No. You got the receipt for it.

THOMAS. Do I?

EXHIBIT 8

EXHIBIT 8

1-2-02
Conflict/Julian

RENO POLICE DEPARTMENT
TRANSCRIPT

DA# 213980

CASE # 01-216321

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

RESIDENCE ADDRESS:

EMPLOYMENT:

TAKEN BY: Detective Reed THOMAS - #4042

ON: 01-02-02 FROM: TO:

LOCATION OF INTERVIEW:

IN THE PRESENCE OF:

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

VOLPICELLI. ....for your protection?

THOMAS. Ah, you asked to speak with me. Yeah. I don't want there to be any dispute down the road about what we talked about.

VOLPICELLI. Okay. Alright.

THOMAS. So if there's a problem at all and you got an issue with anything that was talked about here today, it's on tape. So it protects you, it protects me. Okay?

VOLPICELLI. I guess that understandable.

THOMAS. Okay? I got this ah, "kite."

VOLPICELLI. Did I see you, did I see you at the police station?

THOMAS. We've never met.

VOLPICELLI. Never met. But you're the one that's been on the charge of my case?

THOMAS. I'm the detective in charge of your case, yes.

10

EXHIBIT

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

VOLPICELLI. I understand.

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

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

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

VOLPICELLI. Okay.

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

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

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

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

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

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

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

EXHIBIT 9

EXHIBIT 9

RENO POLICE DEPARTMENT
TRANSCRIPT

CASE # 01-216321

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

RESIDENCE ADDRESS:

EMPLOYMENT:

TAKEN BY: Detective Reed THOMAS

ON: 01-03-02 FROM: TO:

LOCATION OF INTERVIEW:

IN THE PRESENCE OF:

BOWMAN. Cause he has court date on Monday.

THOMAS. On one of his prelims. Do you have any, are you scheduled to go there at all?

BOWMAN. (Inaudible)

THOMAS. Okay. I don't think you are. I know there's been a problem with transporting you guys again.

BOWMAN. Like when I have (Inaudible) or (Inaudible)

THOMAS. Do they?

BOWMAN. My court last time we were both transferred together.

THOMAS. Ah huh.

BOWMAN. And when we were sitting down there, right ah, (Inaudible)

THOMAS. Okay.

BOWMAN. (Inaudible) I told him I'm gonna testify.

BOWMAN. And (sighs) (Inaudible) bad memory man.

THOMAS. Yeah. Yeah. Okay.

BOWMAN. I mean I threw away a career, a (Inaudible) career. You know?

THOMAS. Yeah.

BOWMAN. I mean I was moving up the ladder.

THOMAS. Yeah.

BOWMAN. Hindsight was 20/20. You know?

THOMAS. Yeah. Yeah. Ah, do you have any questions (Inaudible) Anything for me (Inaudible)

BOWMAN. And you know, any idea (Inaudible) moved for? Any idea at all? You know what, at this point I'm so tired of seeing the postponements.

THOMAS. At this point it's contingent upon him. It really is. And I'm hoping that when I talk to him here in a few minutes I'm gonna be talking to him next. Because basically the way our meeting ended last night was he wanted me to take this deal to the D.A. that, the deal that he wants and I told him straight up, the D.A.'s not gonna take it." "Maybe she won't but would you please just take it to her anyway?" I said, "I'll think about it." So, I've spoken to the D.A. and there's no way that she is gonna give him the deal that he's asking for.

BOWMAN. What is he asking for? He told me ah, "Two (2) "birds" and ah, run the lewd to (Inaudible) "

THOMAS. He wants to whittle this down to one (1) "bird" basically. He's willing to plead to three (3) "birds" as long as we are willing to suspend two (2) of em, so that basically he'll only serve a sentence for one (1) "bird" and run the lewd concurrent. So basically he's looking to do time for one (1) "bird." And I keep telling him, "Ferrill you got six (6) cases, twenty five (25) charges here, you're not getting a one (1) "bird" but he just, he wouldn't listen to me. So he knows the district attorney is the one that makes the decision. And I said, "Fine, I'll take it to her and we'll see what she has to say." Well she gave me the answer that I knew she would and I could have told him that yesterday but he didn't want to listen to me, so he's gonna get the news today and it's gonna be up to him at this point to decide what he wants to do. Cause I told him, if he starts screwing with us and he wants to keep dragging this thing out and doing things like that, then we're just gonna start filing the habitual criminal on him and he can start looking at ten (10) to twenty five (25). So that's his choice. You know?

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

THOMAS. Um hmm.

BOWMAN. And you know?

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

BOWMAN. I told her (Inaudible)

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

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

THOMAS. Yeah.

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

THOMAS. Yeah.

BOWMAN. (Inaudible)

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

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

THOMAS. Um hmm.

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

THOMAS. Yeah.

BOWMAN. But you know, I'm making only seven forty (7.40) an hour.

THOMAS. Right.

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

THOMAS. Yeah.

BOWMAN. And my sister in Oregon, (Inaudible) right, but not really. I'm not (Inaudible) this time.

THOMAS. Okay. Alright. Well I'll call her and (Inaudible)

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

THOMAS. In your property?

BOWMAN. Um hmm.

THOMAS. Here?

BOWMAN. Um hmm (affirmative) I need somebody to get em cashed before they expire.

THOMAS. How do you do that?

BOWMAN. I don't have a clue. I've written letters, I've asked people to help get em cashed. That's the only help I really need.

THOMAS. You got to endorse em.

BOWMAN. I know, all they need to do is just let me endorse em. I (Inaudible) deposit em and the money put back on my books or whatever.

THOMAS. So did you put a "kite" in to say, "Hey I want to endorse these checks and have the County cash em and put em on my books."

BOWMAN. Yeah and ah, they said ah, the jail doesn't get a service for paychecks. They'll do it for, if it was a money order but they wouldn't do it, not for paychecks.

THOMAS. What about this guy that went and cleaned up your apartment?

BOWMAN. I wrote him a letter, right, and all things got mixed up.

THOMAS. When do the checks expire?

BOWMAN. The biggest one expires the thirteenth (13th) of this month and the smaller one (Inaudible) One's for two hundred eighty five (285) and one's for seventy seven dollars ($77.00). The two eighty five (285) one expires the thirteenth (13th) of this

1-3-02

FACILITATION OF $ TO BOWMANS INMATE ACCOUNT

month. The smaller one expires the following week.

THOMAS. Okay. Well at the very least you're gonna have to get em ah... you know, you're gonna have to endorse em. So I'll have to arrange to (Inaudible) get em endorsed But let me talk to a deputy and find out exactly if that's the way to go about doing that. And I'll see what we can do.

INVOLVEMENT FAVOR TO KEEP BOWMAN TALKING ABOUT SPECIFICS HE FIGURED THE DETECTIVES WANTED TO HEAR

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

THOMAS. Yeah.

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

THOMAS. Okay. Alright. Let me talk to a county deputy that I know and we'll see if we can try to work on that and figure something out.

BOWMAN. I appreciate it.

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

BOWMAN. Thank you man.

THOMAS. Okay?

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

THOMAS. Yeah.

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

THOMAS. Um hmm.

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

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

BOWMAN. No.

THOMAS. No? Okay. I'll talk to a deputy and see if there's something we can do. I don't know if there is or not but we'll give it a shot.

BOWMAN. Okay.

EXHIBIT 10

EXHIBIT 10

RENO POLICE DEPARTMENT
TRANSCRIPT

CASE # 01-216321

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

RESIDENCE ADDRESS:

EMPLOYMENT:

TAKEN BY: Detective Reed THOMAS

ON: 02-19-02 FROM: 1425 Hrs. TO:------

LOCATION OF INTERVIEW:

IN THE PRESENCE OF:

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

THOMAS. February nineteenth, two thousand two (02-19-02), at fourteen twenty five (1425) hours. Detective Thomas, Reno P.D., speaking with Brett Bowman, an inmate at the Washoe County Jail. Okay. We're good to go.

BOWMAN. Ah, where do you want to start? I mean I can give you his working alias, which is Joseph Vim.

THOMAS. Well he's got lots of aliases.

BOWMAN. This was his main alias.

THOMAS. Yeah.

BOWMAN. Main working alias is Joseph Vim.

THOMAS. Yeah, that stands for Volpicelli Investment Management, something like that. So he uses that to get cards and order merchandise.

BOWMAN. And his P.O. Box is underneath that name, right, it's on California Avenue.

THOMAS. Right. Got that.

THOMAS. Um hmm.

BOWMAN. I said, "Well you're a fool not to take it."

THOMAS. Yeah.

BOWMAN. Otherwise they will "bitch" you.

THOMAS. Yeah.

BOWMAN. (Inaudible)

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

BOWMAN. He has abused me, taken advantage of me.

THOMAS. Yeah.

BOWMAN. You know? Our original agreement, right, was that he'd go in, right, set it up, all I had to do was the buys.

THOMAS. Um hmm.

BOWMAN. And then it came down to where he had me doing everything.

THOMAS. Um hmm.

BOWMAN. You know? So the more I thought about it, yeah, he left me, I told him, "You left me twisted Poe. Cause I only did this thing to get by."

THOMAS. Yeah.

BOWMAN. You know?

THOMAS. Okay. Alright. Well let me get you back downstairs and I'm gonna go back down and call the prison and I'll follow up with them on that. And I will get ahold of your P.O. also and find out what the deal is with Warm Springs Institute.

BOWMAN. And you'll get ahold of my sister too?

THOMAS. Yeah. And I will try and call her again to let her know about the picture. I'll try and find this David guy and see if he's got this picture. I'm guessing that even if I find it

EXHIBIT 11

EXHIBIT 11

<3

The Ridge House

Founded 1982

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

Second Letter

January 7, 2004

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

Dear Mr. Volpicelli:

This letter is in response to your correspondence dated, December 6, 2003. As I stated via telephone, due to Federal Confidentiality, 42 CFR, part 2, and 45 CFR parts 160-165, Ridge House can not confirm or deny whether individuals reside at our facility.

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

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

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

Sincerely,

Dani Doehring, Lade

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

Serving the criminal justice population through prevention, intervention and rehabilitation treatment, thereby assisting the community in our fight against crime

EXHIBIT 12

EXHIBIT 12

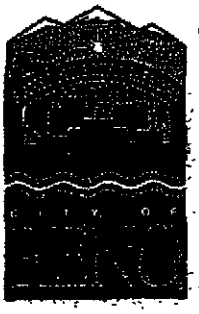
Affidavit and Claim

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

29) That in October of 2001, I specifically recall hearing a conversation on the telephone between
30) Bowman and my father- whereby my father insisted Bowman to remove his belongings from
31) my sister's storage unit and, instead of gambling away his pay checks, to save for a motorcycle.
33) Where to fore, I hereby request a prompt release of my property from our residence and my
34) sister's storage unit.
35)
36) Travis Volpicelli 4/21/2004
37) Travis Volpicelli Date

EXHIBIT 13

EXHIBIT 13



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

DO NOT SHOW TO TENANT

Detective SAID He IS UNDER COVER AND would like To STAY THAT WAY!

INQUIRED ON UNIT AND SHOWED Badge + I.D.

He took A Copy of Contract AND INFOSHEET 1st Page

9:32 AM ARIVED

9:40 AM ~~LEFT~~ LEFT

RECEIVED
SEP 26 2001

T P

B-114

RECEIVED
SEP 62 2001

Dave Della
232-2080

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

Tenant Notes

Site: AS | Date: 10/17/01 | Page: 1

SPACE : B114

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

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

ASHLEY SCHILLING
1060 VASSAR STREET
RENO, NV 89502

Balance: $0.00
Remarks: BXI ACOUNT

Paid-To : 11/01/01

NOTES

1 09/06/01 TENANT PAYED BXI 100.00 ON THE 31ST OF AUGUST IP GAVE CREDIT AND WAVED LATE FEE IP

2 10/17/01 PAROLE&PROBATION OFFICER CAME AT 6:38PM ON THUR. EVE., FOR VOLPICELLI'S. ASHLEY SCHILLING HAS A UNIT WHERE THEY ARE AUTHORIZED FOR ACCESS. OFFICER ASKED TO PARK CAR NEAR UNIT, GETTING A WARRANT.
KP AUTHORIZED

END

DECLARATION

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

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

Dale Prevost

SUBSCRIBED AND SWORN to before me this 23rd day of September 2005.

Susan G. Davis
NOTARY PUBLIC

SUSAN G. DAVIS
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 99-37796-2 - Expires September 24, 2007

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

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

Name: Ashley Schilling
Space No. B114
Address: 1060 Vassar St.
Contract No. 2787
City: Reno
State: NV **Zip:** 89502
Home ph.: (775) 329-0389
Cel. Pager No. ( )
Drivers License No: 4609555052
Social Security No.: [illegible]
Drivers License expiration date: 5/03
Birth Date: 5/19/79

EMPLOYMENT INFORMATION

Employers Name:
Work ph.: 321-8339
Address:
City: **State:** **Zip:**

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

Name: CARLA CUÉ
Address: 1060 VASSAR ST **City:** RENO
State: NV **Zip:** 89502 **Home Ph.** 329-0389 **Work ph.** —

PERSONS AUTHORIZED FOR ACCESS: **YES** _____ **NO** _____

Name Ferrill Joseph Volpicelli **Name** CHANEL Volpicelli

Name TRAVIS Volpicelli **Name**

****

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

Ashley Schilling
OCCUPANT SIGNATURE

8/7/01
DATE

HOW DID YOU HERE ABOUT AUSSIE SELF STORAGE:
_____ 1. Drive by / Saw sign _____ 2. Live in neighborhood _____ 3. Yellow pages _____ 4. Newspaper Ad
_____ 5. Word of Mouth ✓ 6. Referral-Company or business _____ 7. Other: _____

V9.845

2787

AUSSIE SELF STORAGE, L.L.C.

RENTAL AGREEMENT

30 Victorian Avenue • Sparks, Nevada 89431 • (775) 331-6080

BXI

☒ INDIVIDUAL

This agreement is executed on this 8th day of Aug 20 01, ("Commencement Date") by and between Aussie Self Storage, hereinafter called "Owner" and "Occupant", for the purpose of leasing or renting space as specified above and with the express understanding that no bailment or deposit of goods for safekeeping is intended or created hereunder. OCCUPANT whose name is:

Ashley Schilling
NAME

SPACE NO./ APPROX. SIZE: B 114 10X20

MONTHLY RENT: 100.00 (BXI)

BUSINESS NAME

1000 Vassar St.
STREET ADDRESS

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

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

SOCIAL SECURITY NO.

MAILING ADDRESS

Reno NV 89502
CITY STATE ZIP CODE

329 0389
RESIDENCE PHONE

321 8339
BUSINESS PHONE

DATE OF BIRTH 5/19/79

RENT SCHEDULE

PARTIAL MONTH	$ 0	LATE FEE (5 days past due)	$10.00
MONTHLY RENT	$ 86.67	PRE-LIEN FEE (min. 14 days past due)	$18.00
ADMINISTRATIVE FEE	$ 15.00	RETURN CHECK CHARGE	$25.00
SECURITY DEPOSIT	$ 0	LIEN FEE (min. 28 days past due)	$25.00
PREPAID RENT	$ 0	LIEN SALE FEE (min. 45 days + any auction fees)	$25.00
INSURANCE ($ _____)	$ 0	NOT LEAVING UNIT BROOM CLEAN	$50.00
OTHER (SPECIFY)	$ 0	LOCK CUT FEE	$10.00
SALES TAX	$ 0	(MAKE CHECKS PAYABLE TO: AUSSIE SELF STORAGE)	
TOTAL DUE	$ 101.67	Method: Cash _____ Check BXI Credit Card _____	

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

AL 1. PREMISES: Owner hereby rents to Occupant, and Occupant rents from Owner, on the terms and conditions herein set forth, the self storage space described above, herein called the "Premises". The Premises shall be used solely for the purpose of storage pursuant to the terms and conditions of this Rental Agreement and for no other purposes whatsoever.

AL 2. TERM: The term of this tenancy shall commence as of the Commencement Date and continue until Sept 1ST, 20 01. In the event that Occupant holds over the Premises beyond said term, such holdover shall be deemed a month-to month tenancy subject to all the terms and conditions of this Rental Agreement.

AL 3. RENT: Occupant agrees to pay to Owner at 30 Victorian Avenue, Sparks, NV 99431, without deduction, prior notice, demand or billing statement, the sum of money set forth in the Rent Schedule above per month beginning on the 8th day of Aug, 20 01, and continuing on the 1st day of each and every month thereafter until this Rental Agreement terminates. If the terms of this Rental Agreement shall commence other than on the first of the month, Occupant shall owe a prorate portion of the first month's rent. Occupant shall pay, in advance, at least one full month's rent. With respect to any month-to-month tenancy, the monthly rent may be adjusted by Owner effective the month following Owner's thirty (30) day written notice to Occupant specifying such adjustment. Upon vacating the premises, Occupant agrees to give Aussie Self Storage (7) seven days notice prior to actual vacate date and leave the premises clean without waste or damage. NO REFUNDS! Owner also reserves the right to give Occupant (7) seven days notice to vacate upon non-compliance and/or breach of any provision of the Rental Agreement or Rules and Regulations other than non-payment of rent (Nevada Self Storage Lien Laws Apply).

AL 4. LATE FEES, SERVICE CHARGES, DEPOSITS:--NO BILLINGS/NOTICES ARE SENT!

a. Concurrently with the execution of this Rental Agreement, Occupant shall pay to Owner a fee as specified in Rent Schedule above as a non-refundable new account administration fee.

b. All rent shall be paid in advance on the first day of each month and in the event Occupant shall fail to pay the rent by the 5th day of the month, Occupant shall pay, in addition to any of the amounts

[redacted] by signing for the insurance plan described in the insurance brochure made available by Owner, which insurance does not cover goods stored [redacted] other exclusions described in the insurance policy. To the extent Occupant does not obtain insurance coverage for the full value of Occupant's property stored [redacted] and the Parking Space, Occupant agrees Occupant will personally assume all risk of loss, including damage or loss by burglary, fire, vandalism or vermin. Owner and [redacted], affiliates, authorized representatives and employees ("Owner's Agents") will not be responsible for, and occupant hereby releases Owner and Owner's Agents from any responsibility for, any loss, liability, claim, expense, damage to property or injury to persons ("Loss") that could have been insured (including without limitation any Loss arising from the active or passive acts, omission or negligence of Owner or Owner's Agents) (the "Released Claims"), although Owner and Owner's Agents may give insurance information to Occupant, Occupant understands that Owner and Owner's Agents are not an insurance company or insurance agents. Owner has not provided any coverage to assisted Occupant in making any claim under any insurance policy. The provisions of this paragraph will not limit the right of Owner and Owner's Agents under paragraph 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ashley Schilling
Occupant, Print Name

Ashley Schilling
Occupant Signature

8/7/01
Date

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

Received by, Agent for Owner

END OF RENTAL AGREEMENT (pg 2 of 2)

EXHIBIT 14

EXHIBIT 14

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

NOKIA CHARGR 0043168404515	9.96	J
COUNTER CARD 0610290020755	1.99	J
15 MONITOR 0769940305005	394.44	J
SUBTOTAL	406.39	
SALES TAX 1	29.46	
TOTAL	435.85	
CASH TEND	436.00	
CHANGE DUE	0.15	

TC# 0000 2855 5464 9612 9341 9

10/01/01 13:03:01

Sorry!
This was the only one we could find

3-19-04

Cash Office

V9.850

WAL★MART
ALWAYS LOW PRICES. ALWAYS WAL-MART.
Always

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

ITEMS SOLD 1

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

WAL★MART
ALWAYS LOW PRICES. ALWAYS WAL-MART.
Always

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

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

ITEMS SOLD 3

TC# 7713 1233 1172 1055 5619 1
CASH YOUR TAX REBATE CHECK
08/20/01 13:24:1

WAL★MAR
ALWAYS LOW PRICES. ALWAYS WAL-MA
Always

WE SELL FOR LESS
MANAGER SAMUEL KUPFER
(775) 829 - 8088
ST# 2189 OP# 00002377 TE# 92 TR# 036
MICROWAVE 007400063950 99.96
REFRIGERATR 068805710122 169.84
FREEZER 068805711048 156.83
SUBTOTAL 426.63
JAW CLIPS 0043194139991 2.47
SKIN CARE 038137003475 4.77
SUBTOTAL 433.87
TAX 1 7.250 % 31.46
TOTAL 465.33
MCARD TEND 465.33

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

ITEMS SOLD 5

[redacted]

CUSTOMER COPY

WAL★MART
ALWAYS LOW PRICES. ALWAYS WAL-MART.
Always

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

ITEMS SOLD 2

TC# 0049 7541 6971 8872 4618
CASH YOUR TAX REBATE CHECKS HERE!

EXHIBIT 15

EXHIBIT 15

Incident Report

RENO POLICE DEPARTMENT	01-216321	Supplement No 0002

OFFICER 1: ;BROWN, MIKE

Invl	Seq	Type	Name
OFF	1	I	;BROWN, MIKE

Narrative

DETAILS:

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

WHAT CRIME IS SO UBMOS. NO ONE EVEN SAW BOWMAN OR VOLPICELLI ADHERE LABEL... ACCORDING TO JULIA VOLLOR BOWMAN PUT IT IN HIS HAND & ADHERE

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

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

CHECKING THE TAGS FOR BOWMAN TO RIDE IT HOME

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

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

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

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

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

Incident Report RENO POLICE DEPARTMENT	01-216321	Supplement No ORIG

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

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

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

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

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

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

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

Incident Report		
RENO POLICE DEPARTMENT	01-216321	Supplement No 0001

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

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

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

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

MOTHER NATURE CALLED.

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

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

EXHIBIT 16

EXHIBIT 16

9

STAPLES

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

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

QTY SKU		OUR PRICE
********** START RETURN **********		
RETURNED WITHOUT RECEIPT		
1 EPSON LASER TONER		
401331		-172.38
RETURN REASON CODE 2		
********** END RETURN **********		
1 BROTHER PT-2400 LA		
012502525912		159.95
SUBTOTAL		-12.43
7.0000%	Standard Tax	-0.87
TOTAL		$-13.30
Cash Card Issued		-13.30
Account No. **********17000060 <S>		
Card Balance: 13.30		

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

TOTAL ITEMS 2

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

THANK YOU FOR SHOPPING AT STAPLES !!

STAPLES

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

SALE 547519 10 002 [illegible]
0101 08/16/01 04:[illegible]

QTY SKU		OUR PRICE
1 CENTURY BP MUL IMP		
073228007274		20.98
1 3 PIECE LUGGAGE SE		
752717503948		49.98
SUBTOTAL		70.96
[illegible]%	[illegible] Tax	5.68
TOTAL		$76.64
Cash		100.00
Cash Change		23.36

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

TOTAL ITEMS 2

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

THANK YOU FOR SHOPPING AT STAPLES !!

V9.857

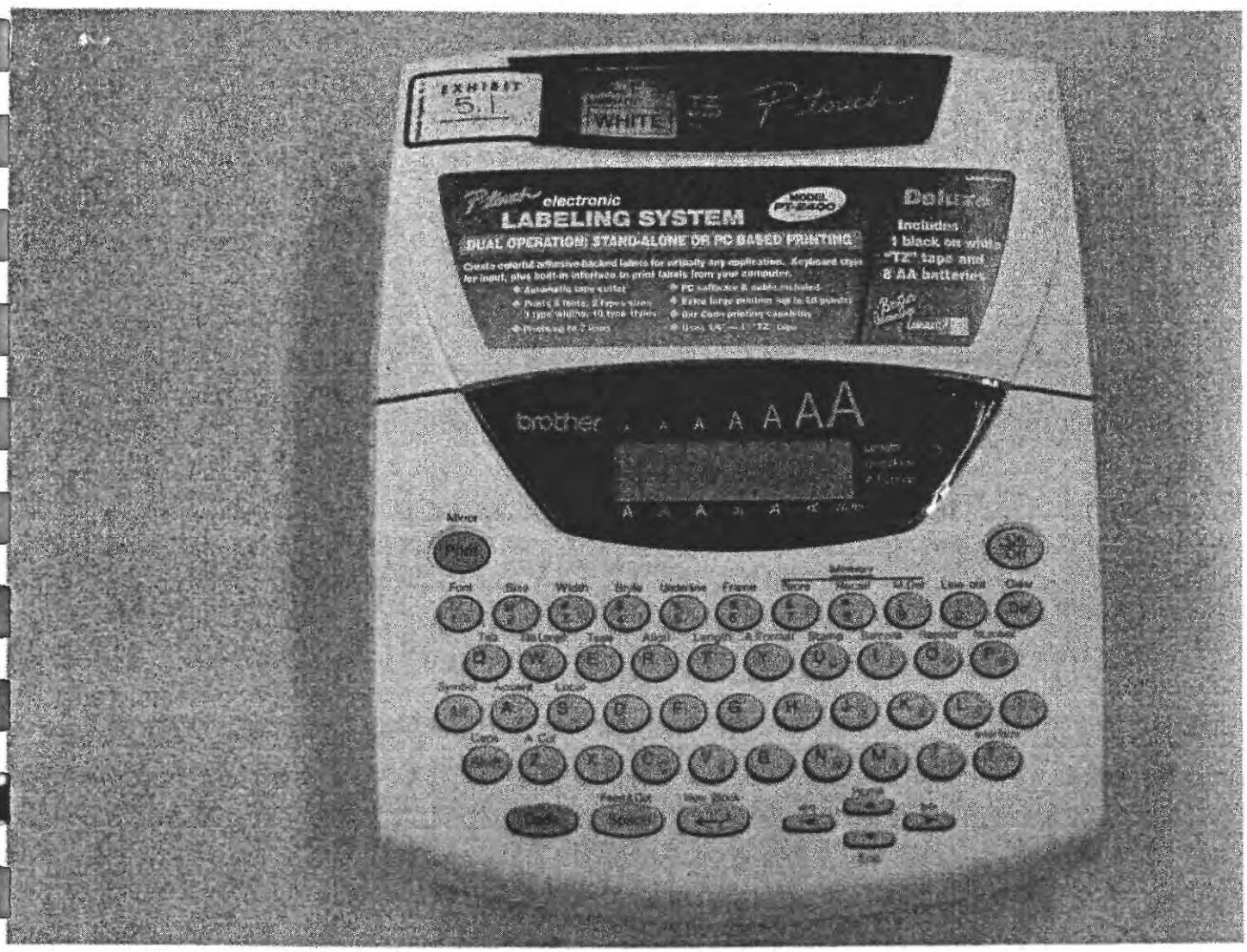
EXHIBIT
5.1
WHITE
electronic
LABELING SYSTEM
DUAL OPERATION: STAND-ALONE OR PC BASED PRINTING
Deluxe
includes
1 black on white
"TZ" tape and
6 AA batteries
brother

EXHIBIT 17

EXHIBIT 17

James R. Brooke Attorney at Law
3392 Lakeside Court • Reno, Nevada 89509
Phone: (702) 826-9110 • Fax: (702) 826-9113 • E-Mail: JBLawyer@aol.com

October 8, 1998

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

RE: State of Nevada vs. Ferrill J. Volpicelli

Dear Judge Springgate:

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

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

Thank you for your consideration.

Very truly yours,

James R. Brooke

JRB:bb

Exhibit

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

November 28, 2000

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

Re: Ferrill Volpicelli #60076 @WSCC/Parole Hearing

Dear Sirs:

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

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

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

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

Very truly yours,

James R. Brooke

JRB:bb

LAW OFFICES OF
ROBERT P. FAHRENDORF
338 CALIFORNIA AVENUE
P.O. BOX 3677
RENO, NV 89505

(702) 348-7775
FAX (702) 348-0540

March 27, 1997

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

RE: FERRILL VOLPICELLI

Honorable Judge McKibben:

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

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

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

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

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

Sincerely,

ROBERT P. FAHRENDORF, ESQ.

RPF:rlg

F. J. VOLPICELLI, M.D.
INTERNAL MEDICINE
5025 SCOTT STREET
TORRANCE, CA 90503
310-543-1211

October 10, 1998

TO WHOM IT MAY CONCERN:

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

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

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

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

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

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

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

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

F. J. Volpicelli

Exhibit

March 25, 1997

To Whom it May Concern:

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

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

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

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

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

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

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

Sandra Ruggiero

March 24, 1997

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

To whom it may concern,

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

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

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

Sincerely,

Stacy Ballard

The Ballard Family.

2-26-97

To Whom It May Concern;

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

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

Ferrill is always there for me, no matter how busy he is, he always makes time for me. How many brothers will come visit you on your birthday every year even though they live in another state? He does. Ferrill is always there for me on my birthday unless there is a rare hardship on him or his family, like the present time, then he is unable to come. I missed not being able to see him on this past birthday but I understand

it was attributable to all the strain and stress he and his family are now under.
What my brother may have done is wrong. I believe he is aware of that and he deeply regrets his actions. However, my brother is not a malicious, cruel man. He is not a threat to other human beings or even to animals.
I do not understand how so many people can rape, murder, and even maim other individuals, yet they get light sentences if any at all, when my brother, what he did may have been wrong, but he is by no means a threat to society. There are so many free people who should be behind bars. My brother is not one of them.
Why can he not be punished for his wrong doing by serving under house arrest or 2000 hours of community service? He would be fabulous at community service because he is a caring individual and he has the wonderful ability to help others and to make them realize that there is a light at the end of the tunnel and for them to never give up on hope.
In conclusion, I would like to say that I love my brother, Ferrill, dearly. He may have done an act that was wrong, but I sincerely believe in comparison to what other people do and then are free to walk, such as murder, rape, mutilation,

scamming little old ladies out of their life savings, and other sick actions, what my brother has done is insignificant in comparison.
I understand that he should be penalized but let the punishment fit the wrong. I believe house arrest or extensive community service would be much more suitable,
I appreciate you taking the time to read my letter and I believe a more lenient sentence would be beneficial for his entire family and society.

Sincerely,
Karen Volpicelli

652 Forest St., Reno, NV 89509 TELEPHONE (702) 688-4800

SOLD
Keystone Realty
Better Homes and Gardens®

March 16, 1997

Re: Ferrill Volpicelli

To Whom It May Concern,

I have been an acquaintance of Ferrill for approximately the past 5 years and a friend for approximately the past 2 years. We met by going to the same gym, the Reno Athletic Club. As far as I am concerned Ferrill has always been a fine upstanding member of our community.

In the past six months, I have become some what aware of his current problems with the IRS. He has employed Keystone Realty Better Homes & Gardens services in order to make sure that the financial institutions, that he has his obligations with, get paid the money they are owed. In the spirit of good will, Ferrill is doing the responsible thing with no monetary gain.

I look forward to continuing both a personal and working relationship with the Volpicelli's for a long time to come.

Sincerely,

Carl Jorgensen
Keystone Realty
Better Homes & gardens

PENINSULA EYE
PHYSICIANS & SURGEONS

October 10, 1998

To Whom It May Concern,

This letter is written on behalf of my brother, Ferrill J Volpicelli, and of equal importance for his four young children who reside in Reno, Nevada. As you may already know, Ferrill has been incarcerated at the Federal Corrections Institute in Safford , Arizona since January, 1998.

What you might not realize, however, is the total destruction and devastation his internment has caused on his young children His eldest son, Travis, has had recurrent problems with school truancy, while his sixteen year old daughter, Chanel, stays out until all hours of the night. His two other children are so confused and depressed that they won't interact with their peers and have lost all interest in any type of social interaction.

Ferrill has availed himself of many of the courses and "self-help" classes offered during his confinement. He is very proud and excited about the new parenting and living skills he has learned during his incarceration I can definately see and here a change for the positive during my telephone calls and personal correspondence with Ferrill; however, he too is worried and anguished over his children's future.

Although Ferrill's siblings and parents have tried to be give emotional and financial support to their nieces, nephews and grandchildren, his kids have been reluctant and withdrawn and truly need Ferrill at home or nearby to help with their day to day living conditions.

Ferrill has been repentant and remorseful for his ill deeds and should be given any potential leniency and/or early probation options that are available. I would like to make a final humble appeal on Ferrill's behalf and for the future sake of my nephews and nieces. Please do not hesitate to contact me for any additional information I may provide to expedite Ferrill's timely return to society.

Respectfully,

Mark Volpicelli, M.D

Exhibit

DANIEL J. BERRA, M.D MARK VOLPICELLI, M.D. HENRY F. LENARTZ, M.D.
1174 CASTRO STREET SUITE 100 MOUNTAIN VIEW CALIFORNIA 94040 TELEPHONE 650-961-2585 FAX 650-961-0527 WWW.LASIK2020.COM

PINK—Prison "C" File
BLUE—Prison "I" File

BOARD OF PAROLE COMMISSIONERS

CERTIFICATION OF ACTION
PAROLE VIOLATION HEARINGS

Warrant No.: 21441
Date: 10-31-01
Arrest: 10-17-01
CC No. 98 3160

To: THE WARDEN, NEVADA STATE PRISON

The Nevada Board of Parole Commissioners took the following action:

RE: Volpicelli, Ferrill NSP No.: 60076

AT: WNCC ON: Oct. 16, 2002

Request for/or waiver of Preliminary Hearing executed: ✓ New arrest/conviction: ✓ Notice of Rights executed: ✓

Retained counsel: ☐ Yes ☑ No Waived counsel: ☐ Yes ☑ No

Represented by: Washoe County Public Defender: Tom Mitchell

Subject appeared in person this date to answer charges as specified:

	Conditions	Plea	Board Action	Action Taken
✓	10. ~~RELEASE~~ ASSOCIATES	GUILTY/NOT GUILTY	GUILTY/NOT GUILTY	
✓	11. COOPERATION	GUILTY/NOT GUILTY	GUILTY/NOT GUILTY	
✓	12. LAWS AND CONDUCT	GUILTY/NOT GUILTY	GUILTY/NOT GUILTY	
	13. SPECIAL CONDITIONS:			
		GUILTY/NOT GUILTY	GUILTY/NOT GUILTY	
		GUILTY/NOT GUILTY	GUILTY/NOT GUILTY	
		GUILTY/NOT GUILTY	GUILTY/NOT GUILTY	
		GUILTY/NOT GUILTY	GUILTY/NOT GUILTY	

Return to prison ordered for reasons set forth in the retake warrant of which this order is a part. **WARRANT SUSTAINED.**

☑ Parole revoked Exp. Review on ____ with no two months advance
☐ Parole reinstated: RUAPP:
☐ Continued on parole with all previous special conditions: ____

Other action: ____

☐ The Board has determined that you have absconded from parole supervision:

☐ Loss of all flat time 0 days. Time on absconder status not credited on sentence per NRS 213.160, Sec. 4.
☐ Loss of 0 days stat time. ☐ Loss of stat/absc. time 0
☐ Loss of 0 days under MPR. Previously paroled under Mandatory Release. (Statutes of Nevada, 1987, Chapter 416, Sec. 2.)

Evidence relied on:

✓ Plea of guilty (where applicable) ✓ Report of Parole and Probation Department 10-24-01
Judgment of Conviction
✓ Testimony of Witnesses Officer Armitage (Det. City of Reno) P.O. Officer Brown (Det. City of Reno), Officer Thomas Reed
Laboratory Reports
✓ Other RPD# 01-a13180, a116452-01, 01-a16331, aa1241-01, a04619-01

Reason for revocation:

The Board heard substantial evidence which was presented to prove that you violated the above conditions of your parole agreement by:

Failed to follow supervision rules.

This is to certify that the above order is a true and correct copy of the action of the Board of Parole Commissioners.

Staff Representative — Nevada Board of Parole Commissioners

Commissioners present: Marcella Goodson

Exp. ____ Stat. ____ Flat. ____ Abs/Stat ____

V9.872

EXHIBIT 18

EXHIBIT 18

TESTIMONY OF GOV. BOB MILLER TO ASSEMBLY JUDICIARY
COMMITTEE ON COMPREHENSIVE CRIMINAL CODE REFORM. AB 317
MARCH 28, 1995

Chairman Anderson, Chairman Humke, and members of the Committee. Thank you for this opportunity to address one of the most imporant issues of the session.

I want to begin this morning by recognizing the diligent and responsible efforts that have been put forth by so many members of the Nevada Legislature in the quest for comprehensive reform of our criminal codes.

Members of the Judiciary Committees of both houses have been hard at work grappling with criminal reform since the first days of the session. I believe the numerous and lengthy hearings that have been held to date were highly productive. Many questions have been raised, and many questions have been answered as you have labored to develop the conceptual framework upon which to build concrete legislation. This effort is most laudable, all the more because it represents a sincere bi-partisan effort to serve the needs of our constituents.

I have looked forward to this day, when hearings would begin on the comprehensive legislation I have proposed to attack the problem of violent crime. I have been involved in dialogue with all of you on this issue. And going back for well over a year, I have gathered the strong opinions of people from throughout our communities...law enforcement professionals...victims of crime... civic leaders... and the general public.

The time has come to take action. As I've emphasized so often, we must take action to be both tough--and smart--on crime. AB 317 is the end product of that philosophy. I commend you for giving this proposed legisaltion a full and in-dpeth hearing, beginning today.

First, let me talk about "tough." Before the 1995 session adjourns, I want to sign a bill that sends the strongest message we can to violent criminals. I want them off our streets....locked away for longer terms...in many cases, life without parole--ever--is what justice demands.

That's why AB 317 beefs up Nevada's habitiual criminal statute in a very tough way. My proposal--and I'm 100 percent committed to it--requires prosecutors to invoke the habitual criminal statute whenever an offender is tried for a third violent crime. That means the prosecution must seek a life sentence. If it's with parole, a conviction means at least 20 years in prison. My proposal eliminates plea bargaining for repeat violent offenders.
It means, for example, that a third armed robbery, or a third assault, means a life sentence. Naturally, a violent offender can get a life sentence for a first offense for many crimes, but this reform eliminates the revolving door for all types of violent offenders.

This is getting tough on crime.

EXHIBIT

1075

EXHIBIT 19

EXHIBIT 19

EXHIB

Penalties to stiffen for thefts in stores

BY GEOFF DORNAN
Appeal Capitol Bureau Chief ✓

Penalties would be increased for people convicted of repeated petit larceny, or shoplifting, under a bill proposed by Sen. Kathy Augustine, R-Las Vegas.

SB31 would make the crime a gross misdemeanor instead of a misdemeanor for the third or subsequent offense.

Augustine said the bill is aimed at crimes such as shoplifting where a few people are guilty of multiple offenses.

She said some crooks go through a mall "and hit one store after another."

She said she is aware that current law already allows repeat misdemeanor offenders to be finally declared habitual criminals and sentenced as felons. But Augustine said the gross misdemeanor is more realistic since it's unlikely the felony statute would be applied.

The advantage of a gross misdemeanor is that it will be applied to cases automatically on the third offense and become part of a criminal's permanent record.

Petit larceny is defined as taking goods worth less than $250. Augustine said the damage these criminals do adds up to major losses for stores.

"They're ripping off thousands and thousands of dollars in merchandise," she said, adding that other customers pay for those crimes through higher prices.

But current law treats the third, 10th or 30th offense just like the first — as a misdemeanor. Augustine said if a shoplifter winds up facing a gross misdemeanor instead on their third offense, "maybe they'll wise up."

The measure was referred to the Judiciary Committee for

V9.876

EXHIB

Tough penalties sought for habitual shoplifters

By Faith Bremner
RENO GAZETTE-JOURNAL

Petty larceny isn't trivial to businesses such as Reno's Wild West Electronics.

Last year, the store lost several thousand dollars worth of merchandise to sticky fingered thieves.

In 1995 the electronic store lost $5,000 to $6,000, owner Brad Bolotin said.

"Shoplifting is a serious problem. It's not a lot different than burglary," said Bolotin, who installed an expensive video surveillance system at his new store. "It forces us to raise prices."

Until now, most shoplifting cases in Nevada have been treated as minor crimes. Those arrested

See SHOPLIFT on page 5A

The '97 Legislature

SENATE BILL 31

- **What it would do:** Increase the penalty for shoplifting from a maximum six months in jail and $1,000 fine to a year in prison and $2,000 fine for three or more convictions.
- **Introduced by:** Sen. Kathy Augustine, R-Las Vegas, 687-3634 and Sen. Mark James, R-Las Vegas, 687-8132.
- **Budget debate:** Prisons struggle to keep up with growing population.

Page 6A

RENO BLOTTER

Armed robber runs with sum of cash

1 Police said a man jumped over a counter at Winner's Corner, 2169 Prater Way, Sparks, at 12:15 a.m. Thursday, threatened a clerk with a knife and demanded money. He fled with an unspecified amount from a cash register. He was described as white, 28 to 32 years old, 5 feet 6 inches tall and weighing about 130 pounds.

Suspect tries to run down Kmart worker, flees

2 A thief fleeing from Super Kmart, 4855 Summit Ridge Drive, Wednesday tried to run over an employee, Reno police said.

It occurred at 10:30 a.m. What police initially would have called a petty theft is a robbery now because of the use of force, police said. No one was arrested.

Shoplift

From page 1A

are charged with a misdemeanor, which carries a punishment of up to six months in jail and a $1,000 fine. Most shoplifters aren't taken to jail but instead are given a ticket to appear in court.

As a result, shoplifting is on the increase and shoplifters are getting bolder and more dangerous, merchants and police told members of the Senate Judiciary Committee Tuesday. They said the penalties need to be increased and testified in favor of Senate Bill 31, which would make a third and subsequent conviction for shoplifting a gross misdemeanor punishable by up to one year in jail and a $2,000

oplifters) think it's a joke ...ey don't ever expect to see the inside of a jail," said Pamela Terry, representative of the Southern Nevada Retail Loss Preven... Associ...

bill it will send a message that we're tired of being ripped off by the same people over and over again."

Business owners complained shoplifters come in to the store with bulky coats and bags and load up but are smart enough to keep their take to under $250, the cut-off point for being charged with petty larceny. In Clark County, swarming — in which a group of kids hit a store and take everything they can — has become more common.

But Sen. Ernie Adler, D-Carson City, said changing the seriousness of the offense does not guarantee repeat shoplifters will go to jail. Judges could still sentence shoplifters to a $1 fine and one day in jail and prosecutors could still plea bargain the charge down to a misdemeanor, Adler said. Perhaps the bill should specify a mandatory jail sentence, he said.

"I don't see this bill ...

County public defender's chief administrative deputy, complained that gross misdemeanor shoplifting cases would have to be tried in district court instead of municipal courts, adding to an already overloaded system.

The state's Department of Parole and Probation would have to get involved as it does with all district court cases for presentencing investigations and reports for the judges, he said.

Plus it costs $60 a day to house convicted shoplifters in the Washoe County jail, Morrow said.

"Are we willing to pay that price ... to keep these people off the street," Morrow asked. "I'm not sure that's the case."

But Washoe County sheriff's Capt. Jim Nadeau said many of these shoplifters are in and out of jail anyway.

"If you put them in our jail for a year and we ...

Exhibit

V9.877

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

THE STATE OF NEVADA,
Plaintiff,
vs.

FERRILL JOSEPH VOLPICELLI,
Defendant.
_____/

Sup. Ct. Case No. 63554
Case No. CR03-1263
Dept. 9

RECORD ON APPEAL

VOLUME 9 OF 13

POST DOCUMENTS

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But in any event, I don't object to the Court considering the transcripts of the Bowman interviews with the policemen, and we can get them for you, but I don't have them right this minute.

THE COURT: Okay. I will be happy to consider them even though they are outside the record I have.

MR. McCARTHY: I think that is the purpose of the hearing is to expand the record.

THE COURT: Okay.

MS. ARMSTRONG: Thank you, Your Honor. Thank you. If the Court is willing to do that, I believe that will satisfactorily illuminate the issues that you have agreed to hear today on Grounds 11, 12 and 14.

I should let Mr. Van Ry off the stand. I have finished with him. Let me think about that real quick.

BY MS. ARMSTRONG:

Q I do have one last group of questions I would like to ask you, Mr. Van Ry. As far as the prior convictions that were used as the idea for the Judge to consider in the habitual sentencing, did you have an opportunity to review those before you came into court that day?

A You mean the actual documentation of the convictions, themselves?

Q Whatever was provided to Judge Elliott?

A I had an opportunity to review the pre-sentence

report which included reference to the prior convictions, but I did not see--I never put my fingers on each separate conviction of record, formal written conviction of record.

Q So you don't know if they were--if they met the constitutional standard require for the Judge to consider them?

A Again, I didn't put my fingers on every conviction that was listed, no.

Q I am particularly talking about the three that the Judge considered for the enhancement?

A I believe Ms. Riggs did bring those to the sentencing. So I guess, to elaborate, I believe at the sentencing I did see the three prior to her admitting them for purposes of habitual criminal.

Q Did you review them for authenticity and other requirements?

A I would say yes, but I don't remember. I am sure she and I had a little discussion about it before. Again, I don't remember.

MS. ARMSTRONG: That is all I have for this witness, Your Honor.

THE COURT: Mr. McCarthy, do you have any questions of Mr. Van Ry?

MR. McCARTHY: I do, yeah.

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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.

Q Now, on cases where you do not employ an investigator, you are free to do your own investigation, aren't you?

A Sure.

Q When as a general rule if you are at sentencing with a client and you are trying to persuade the Judge to impose a relatively lenient prison sentence, do you find it wise to dispute the amount of restitution?

A My answer would be it depends on the Judge.

Q Do you recall what judge imposed sentence in this case?

A Judge Elliott.

Q How do you think about doing that with Judge Elliott?

A That's kind of a loaded question.

Q Are there judges, in your experience, who would see such an argument about restitution being inconsistent with the notion of one who is taking responsibility, is amenable to rehabilitation, all those good things?

A Yes.

Q I won't ask you about Judge Elliott at this point. Prior to sentencing, did your client seem to be more interested in the length of the prison term or in the amount of restitution?

A Clearly, the length, potential length of the criminal

sentence.

Q Do you recall at the time of trial whether or not Mr. Bowman had already been sentenced?

A Again, two questions. I don't recall, but I believe he had been.

Q Assuming he had already been sentenced by the time of trial, can you think of how he might be perceived of as still owing some allegiance to the prosecutor?

A It is a speculative question at best.

Q As a trial attorney?

A Yeah. I think that would be a hard sell.

Q Okay. Do you know or do you believe whether or not Bowman negotiated directly with the District Attorney?

A I have actually no idea how that negotiation went.

Q It would be unusual for that to happen, wouldn't it?

A Well, it would be unusual for me to find out about it.

Q When your client is on trial, who generally does the negotiating, you or the defendant?

A Usually the lawyer.

MR. McCARTHY: That is all I have. Thank you.

THE COURT: Ms. Armstrong, any other questions?

MS. ARMSTRONG: Just a couple, Your Honor. Thank 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

been admitted or authenticated, I believe that I should have had a witness here to do that, and I wonder if the Court would allow me to come back at a later time to have this authenticated and admitted in support of our restitution argument.

THE COURT: Well, I am kind of hopeful to get this case taken care of today. I think there is another witness out there that might know something about it anyway.

MS. ARMSTRONG: If I could authenticate it through that witness, if Mr. McCarthy is planning to call her.

MR. McCARTHY: I am planning to call her. I don't know. I don't have the entire trial file here. I have no police reports, things like that. So Ms. Riggs might know. I don't know where that document came from. She might.

MS. ARMSTRONG: I'd be willing to ask her.

THE COURT: Does the State want to call a witness?

MR. McCARTHY: Sure. Soon as she is done, I will call Tammy Riggs if the Petitioner is done.

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

that in your file?

A You know, Mr. McCarthy, I don't recall this specific exhibit, but I do recognize the list of items as those items that were stolen by him.

Q Did you take a look at your files lately?

A Yes, I have.

Q Today?

A Yes.

Q What were you looking for?

A Specifically, I was looking for what was alleged in the Writ of Habeas Corpus as far as what was discovered and what may not have been discovered in this case.

Q Can you tell the Court what does a red star on a document in your file mean to you?

A A red star indicates that this file has been presented to our Discovery Division, and that the Discovery Division has made a copy of that item. That they have forwarded that to be released to the defense for their use, and then they apply the red star to the item that has been discovered to indicate to us that that has been released to the defense.

Q Did you check for red stars on transcripts of interviews by one Mr. Bowman and various police officers?

A Yes, I did.

Q Were there red stars on those documents?

A On every single transcript in the file.

Q From those, do you conclude those transcripts had been provided to Bradley Van Ry?

A Yes, I do.

MR. McCARTHY: That is all I have.

THE COURT: All right. Ms. Armstrong, you may ask questions of the witness.

MS. ARMSTRONG: Thank you.

CROSS-EXAMINATION

BY MS. ARMSTRONG:

Q Ms. Riggs, your testimony is that it is a practice in your office to put a star on something once it has been discovered or sent to the defense attorney?

A Yes.

Q Do you know in this particular case if those stars reflected that the materials had been sent to Jack Alian rather than Mr. Van Ry?

A I know that they had been specifically released to whoever was Ferrill Volpicelli's attorney at the time they were produced, because I went into the D.A.'s business system and it indicated discovery was requested by defendant Volpicelli and was released to him.

Q So that tells you what, it was released to his attorney at that time?

A Whoever was representing Ferrill Volpicelli.

Q Do you know who that was?

A No.

Q So is it possible that those documents were provided to Mr. Alian and not directly to Mr. Van Ry?

A They were provided to Ferrill Volpicelli.

Q How could he get them?

A Mr. Volpicelli repeated over and over again during the course of this trial that he wanted copies of his documents, so he was provided all of his documents, to my knowledge.

Q By your office?

A These were released to Ferrill Volpicelli. Whoever his agent was at that time received those documents.

Q So what your system-- What your review of your system tells you today is that Mr. Volpicelli was represented by an attorney. The documents were provided to Mr. Volpicelli, to his attorney?

A They were released to Ferrill Volpicelli.

Q Did he come and pick them up?

A I don't work in Discovery, so I don't know.

Q Do you know he was in custody so he couldn't come

pick them up?

A I can't speculate.

Q He would have to rely on his attorney to provide the discovery, wouldn't he?

A Again, I can't speculate.

Q You don't provide two sets do you?

A Sometimes we do.

Q Is that in the event there has been a change in attorney?

A Sometimes we provide two sets of discovery. In fact, in this case, I noticed there were some items that were double discovered. It just happens.

Q Not every item was double discovered was it?

A No, but every item was discovered.

Q You were able to confirm that this morning?

A Yes, I did.

Q So let me ask you specifically, and I suppose Mr. McCarthy already did, I was trying to listen to Mr. Volpicelli, did you specifically say that you had discovered each and every interview of Brent Bowman with the Reno Police Department?

A Yes.

Q That is a total of five or six interviews?

A Yes.

Q And you are able to confirm those have been provided to someone?

A Yes.

Q You can't tell us as you sit here today exactly who received the document, can you?

A I don't work in discovery, so I don't know who came and picked them up.

Q Do you recall that several months before this case went to trial, I think it was in June or so, that you were in court with a group of attorneys. Mr. Volpicelli was represented by several attorneys at one time?

A I was in court on many, many days with Mr. Volpicelli. You would have to be more specific as to what you are talking about.

Q This particular day I believe you appeared in front of Judge Hardesty. Judge Hardesty ordered within a week you and Mr. Van Ry sign a reciprocal discovery agreement.

A I don't recall that specific inquiry or that requirement by Judge Hardesty or that conversation.

Q If I told you it was part of the record, you wouldn't dispute it, would you?

A No.

Q Do you recall that Mr. Volpicelli was originally represented by Mr. Alian in this case?

A I recall that Mr. Volpicelli had a lot of arguments with Mr. Alian, and Mr. Alian at some point conflicted off the case and Mr. Van Ry became his attorney. I believe that Mr. Volpicelli went through several attorneys on this case. I am not sure. Well, he had four cases, so he had several attorneys.

Q But Mr. Alian had this particular case before Mr. Van Ry had it?

A Again, he had four cases. I don't specifically recall which Mr. Alian was on and which he was not.

Q Do you have any recollection of Mr. Volpicelli specifically requesting that these interview documents be provided to Mr. Van Ry?

A I know they were provided to Mr. Volpicelli, but I can't speculate as to what he wanted or didn't want.

Q You have worked in Washoe County for several years?

A Yes.

Q And you have had experience with Mr. Alian over the years?

A Yes.

Q Is he the kind of guy that makes a set of copies of discovery and provides it to the client?

A I have no idea.

MR. McCARTHY: Your Honor, it sounds like this

witness is being asked to testify either to Mr. Alian's character or habits and customs, and I don't think either one is appropriate.

THE COURT: Well, the witness already said she doesn't know. I guess that is to be expected, so I will overrule the objection. We'll accept the witness' statement.

BY MS. ARMSTRONG:

Q Was it at your request that detective Thomas prepare what was admitted as Exhibit 5 at sentencing? If you can't remember that, I can show you Exhibit 5?

A I don't remember.

MS. ARMSTRONG: May I approach, Your Honor?

THE COURT: You may.

MS. ARMSTRONG: Thanks.

BY MS. ARMSTRONG:

Q Now, that you have seen Exhibit 5, do you recall this exhibit?

A Not specifically, but I recall all the items on it that were stolen by Ferrill Volpicelli.

Q You don't know if you had this prepared to aid you at sentencing?

A I don't recall whether I had that or I specifically requested detective Thomas to prepare that or whether he did that through somebody's else request. I just don't remember. I

am sorry.

Q As you sit here today, Ms. Riggs, do you recall the two-day trial that involved all these Indictments regarding this stolen property?

A Do I recall being in it? Yes.

Q Not much specifically, though?

A Well, you know, that is kind of a vague question. I guess you would have to ask me more specifically.

Q All right. There were occasions when Mr. Volpicelli-- when Mr. Bowman testified. One instance he testified that he had never been a person who could have received the habitual criminal enhancement as a result of his conviction in this case. Do you remember him saying that at trial?

A I don't specifically remember him saying that.

Q If he did, it would have been false, wouldn't it?

A I don't know. I don't remember. Mr. Bowman was a repeat offender target.

Q The criteria for the habitual criminal enhancement isn't repeat offender program, is it?

A Oh, no.

Q It is the number of prior felony convictions?

A Yes.

Q Or misdemeanors?

A Yes.

Q So do you recall Mr. Bowman had more than three felony convictions?

A I don't recall.

Q So you don't recall him testifying that he didn't receive, as a favor in this case, no habitual criminal enhancement?

A That was not contemplated as far as I know as part of his plea agreement.

Q Did you do his plea agreement?

A I did not, but I have had a chance to review it.

Q Well, any three-time convicted felon is potentially subject to that; aren't they?

A No.

Q Is that right? Why not?

A Because it would be a waste of the system's resources if we tried to apply the habitual offender status to all people who have three felonies in their background. That habitual offender status is reserved for the worst criminals.

Q So it is a policy not a law because the law, itself, the statute, itself, simply requires three prior convictions?

A I don't understand your question.

Q I didn't understand your answer. I believe you said that the habitual criminal enhancement wouldn't have been

available to the State to impose on Mr. Bowman?

A Are you saying--Are you asking me whether we would have considered imposing that or asking the Court for that or whether he is eligible for that under the law?

Q Eligible first.

A As far as I know, he would have been eligible if he had three felonies.

Q You know that he had three felonies?

A No, I don't.

Q Wouldn't that have been information you would have had to provide Mr. Van Ry five years ago?

A Yes.

Q So what are you saying? If you knew that he had three or more felony convictions in 2003, would you have let Mr. Van Ry know that?

A I am confused by your question.

Q In the defense practice, it is common to impeach a witness with prior convictions for felonies, particularly if they are within the last ten years. So in your practice, if you knew that the witness for the State had prior felony convictions, wouldn't you give that information to the defense attorney?

A I did.

Q How do you know that you did?

A Because I reviewed my file on Brent Bowman that was included in the Volpicelli file today, and there was a faxed document that included the Guilty Plea Memorandum as well as the defendant's, Bowman's, criminal history attached to it.

Q How is the criminal history attached?

A It was--The criminal history was separate underneath the Guilty Plea Memo, and on top of that was the faxed document containing Mr. Van Ry's address, et cetera.

Q Are you talking about the NCIC printout or is it something typed up that says conviction one, conviction two?

A I am talking about the NCIC printout.

Q Okay. In my jurisdiction, those aren't commonly given to defense attorneys. Here you allow them to have that?

A Well, this one I did for the defense. That is what appears from my file.

Q Do you recall when you were working with detective Thomas on this that he aided Mr. Bowman in obtaining his last paycheck from the Sands Casino?

A I have no idea.

Q Too long ago?

A No knowledge about that.

Q Too long ago?

A I don't have any knowledge about it.

Q Did you personally review the interviews between

Brent Bowman and the Reno Police Department? I am talking about five or six different ones beginning on the date of arrest, 10-17-03, then there are a couple more in December I think. We have some more at the beginning of the year of 2002. Did you review those before trial?

A Yes.

Q Each and every one?

A To my knowledge I did. They are all in my file.

Q So you would have read every word of every interview?

A Yes, five years ago.

Q You, yourself, had a couple of interviews with Mr. Bowman before coming into court?

A I recall one.

MS. ARMSTRONG: I think that is all the questions I have, Your Honor. Thank you.

THE COURT: Any other questions Mr. McCarthy?

REDIRECT EXAMINATION

BY MR. McCARTHY:

Q You wouldn't happen to have an extra unmarked up copy of those police interview transcripts would you?

A Unmarked up?

Q Yeah?

A I don't believe that I do. All the transcripts I

have have the red stars on them.

Q Other than the star?

A I don't recall. I know several of them are marked up. I don't know how many are unmarked. I just don't know, I am sorry.

Q That's all right.

MR. McCARTHY: That's all I have. We'll try to work it out.

MS. ARMSTRONG: Nothing further.

THE COURT: Then, Ms. Riggs, you may be excused. Why don't we take a recess?

(Short recess taken.)

THE COURT: You may be seated. Ms. Armstrong, how would you like to proceed?

MS. ARMSTRONG: Thank you, Your Honor. During the recess, I telephoned the office where Mr. Volpicelli told me he got this document, and it was the City Attorney's Office, and the City Attorney in particular that he had talked to is out of town until next week. I am not sure she could have authenticated it anyway. I think it will probably take the policeman who actually prepared it. So I think what I would like to ask the Court is to allow me to obtain an Affidavit to supplement the record from the author of this report within the next ten days or so, if possible, just so you would know that

this is true and accurate.

And other than that issue, I am prepared to argue.

THE COURT: As to that matter, Mr. McCarthy, do you have any opinion?

MR. McCARTHY: I will have to go out of character and get hard nosed. Today is the date of the hearing, Judge, and the evidence is completed. I ask it be submitted for decision. I object to a ten-day recess to gather additional evidence.

THE COURT: Well, I do feel every effort should be made to provide a complete record. I mean this thing is coming on years later. I think we can afford the time to allow Ms. Armstrong to obtain an Affidavit if she can get it from somebody to authenticate the document, you know, attempt to do that. I am going to allow Ms. Armstrong to go forward to attempt do that with regard to what we know as Exhibit A, then.

MR. McCARTHY: All right. Okay. Fine, Your Honor.

THE COURT: But then I suppose as to the other issues Numbers 11, 12 and 14, I think we can go forward with those to determine those today. And it would just be 7 that I guess is somewhat in the air. What that really is is just a challenge to the amount of restitution. It is not going to result in a retrial or re-sentencing or anything like that. I think it is

just a way to get around to the restitution at a later time.

All right, Ms. Armstrong, you may proceed then.

MS. ARMSTRONG: Thank you, Your Honor. As far as the other issues, not the restitution as you have just stated, Grounds 11, 12 and 14, those all, to me, involve trial counsel's performance during the trial, and particularly in terms of what he had reviewed prior to beginning the trial, and then how effective he was in using that information to impeach the State's, one of the State's witnesses, the original co-defendant, Brent Bowman. And as I mentioned earlier, Your Honor, in Mr. Volpicelli's Pro Per Petition that was filed on November 9, 2005, he has I think done a very good job of lining out exactly what question was asked and then what could have been used by way of cross-examination by Mr. Van Ry to impeach the answer given by Mr. Bowman. And they mainly involve the issues of whether Mr. Bowman was given any reward in exchange for his testimony or his plea. The issues also involved whether Mr. Bowman ever went into the stores and put these--changed the UPC codes on the items, himself. At trial he continually denied doing so, yet in his statements to the police, he had told them that, yes, he had done that on several occasions. Mr. Van Ry did not cross-examine based on the previous inconsistent statement in that instance.

Another issue in which a previous inconsistent

statement was not used for cross-examination was the statement by Mr. Bowman that Mr. Volpicelli bought the label maker that was used to change the UPC codes. In one of the interviews, Mr. Bowman admits that he bought that label maker.

The third topic would have been something I alluded to earlier, because Mr. Bowman was in custody, he was unable to pick up his final paycheck from the Sands Casino where he was working, so the police officers helped him get that. He denied that that had happened at trial. And if Mr. Van Ry had, it is our argument, if Mr. Van Ry had in black and white something to impeach him with and that is the best kind of impeachment, he should have done that.

Another issue was what proceeds Mr. Bowman gained from this enterprise, and Mr. Bowman testified that he only received I think a coffee pot and a toothbrush or something. Again, in the interviews with the detectives, it is apparent he also received a home stereo television system, a home theater system. Pretty expensive item. Again, if Mr. Van Ry had confronted Mr. Bowman with his previous statement during the trial, the jury would have been able to discern that Mr. Bowman was less than honest about many of the facts of this case. And because he was such an important witness to the State, we think that would have made a difference in the long run.

You know, the State has agreed to supply you with the

transcripts of those interviews with Mr. Bowman, so I am arguing to you today only what has been recited by Mr. Volpicelli in his Petition. I think that is all I have on that issue, Your Honor.

But, generally, because there was impeachment available from prior recorded statements that was not used over and over and over, not just one time and not just, you know, a trial attorney can't be 100 percent all the time, of course, but we believe in this instance, because of the demonstrable inaccuracies as impeachment, this rises to the level of ineffective assistance.

THE COURT: Thank you. Mr. McCarthy.

MR. McCARTHY: Thank you, Your Honor. The claims are phrased in a couple of ways. One is a failure to disclose evidence by the prosecution. I think that has been pretty disproved. Mr. Van Ry believed he had received everything, and Ms. Riggs was adamant that everything had in fact been delivered. So it converts to a claim of ineffective assistance standard, failure to properly utilize everything. I would remind the Court that a claim of ineffective assistance of counsel requires a demonstration that counsel's specific decisions fell below an objective standard of reasonableness. Subjective standard is not appropriate. Further, prejudice is an element of the claim. They must show if the lawyer had

acted differently, it is reasonably likely the result of the litigation would have been different. All we are talking about here, all this impeachment business is about much ado about nothing, for lack of a better phrase.

Furthermore, and finally before I get into the specifics, I mentioned earlier, Your Honor, in a trial, questions have no value. Answers are what the jury is to consider. Without Mr. Bowman here to testify how he would have responded to any given question, we have half a case at best. There is information available that could have led Mr. Van Ry to ask a question, but we have zero evidence on how Bowman would have responded. So I suggest there is nothing to consider here.

Moving from that to the specifics, I notice one of the claims concerns the label maker that was the instrument of this great fraud. And the specific question posed to Bowman was asked: Did you buy that at a Staples store in California? The answer was no. The transcript will show, which you don't yet have, will show the question was did you buy it and the answer was yes. Those are completely different things. They are different questions. So there is nothing to impeach here. It is not inconsistent at all.

The question of Bowman that was asked at trial was did detectives assist you in getting a paycheck from the Sands

Hotel. Once again, the specific question. The answer was no, it never happened. The prior statement that is the taped interview with the police will reveal he said I picked up my paychecks. They were on my person when I was arrested. They are now in my property. They are going to expire if I don't get them negotiated. And the cop said, yes, I can help you with that, get it out of the evidence vault of personal property, give it to you so you can do with it what you will. There is no statement saying the police helped him obtain a paycheck from the Sands Hotel. He already had it. Again, there is nothing inconsistent. There is no impeachment there. Even if that were significant in some way, which it isn't, there is still no impeachment.

I notice that Mr. Bowman had already been sentenced, page 155 of the transcript, in which he testified he had already been sentenced by the time of the trial. So we want to impeach him with a perceived value of the plea bargain when he's no longer under the thumb of the prosecutor and the prosecutor can't do anything with him. I don't know the value of that. I suggest it would not have altered the outcome to see that the plea bargain is really a very good plea bargain.

He was thoroughly cross-examined, and Bowman was cross-examined on the subject, actually directly examined on the subject of his plea bargain, and it was fully disclosed to

the jury. They knew he pleaded out to avoid, I think he said six separate felonies. I suppose maybe it is a qualitative difference, you know. But I don't see how it can get--how that can make the difference. You have got a plea bargain. You got a very good plea bargain. Well, the jury would have acquitted if they had known it was a very, very, very, good plea bargain. That seems to suggest more likely than not the outcome would have been changed.

I also suggest there is no evidence anywhere that anyone discussed specifically the habitual criminal allegation with Mr. Bowman. Now whatever his lawyer said to him I have no idea. You may notice that lawyer did not testify in this hearing. I conclude from that, Your Honor, you also still don't know what that lawyer said to him, what came up in negotiation and what did not. Once again we have half a case.

The proceeds, what Bowman kept, you know, I couldn't figure out from the trial transcript precisely what question and answer one might impeach. I know what inconsistent statements are, but I don't know what is the consistent statement. There has to be a specific time in which one interposes or one raises the impeachment. I couldn't find that. I don't know where it is. But assuming it is somehow pertinent, and Van Ry could have asked some question about the home stereo system, when Your Honor is provided with the

complete transcripts not merely excerpts and the pleadings, Your Honor will see Mr. Bowman claimed then to have bought, purchased lawfully, the home entertainment system that was found in his home. How that is inconsistent with anything at trial I don't know. Can we ask Mr. Volpicelli to keep it down a little bit here?

By the way, among other things, Petitioner bears the burden of proving any decisions made by counsel were not strategic or tactical decisions. On that subject, Mr. Van Ry didn't recall a whole lot about the trial as one might expect. But you may notice that page 236 or 237 of the trial transcript, I am sorry, I don't remember which, today Mr. Van Ry described he told the court then that his choice of the scope of cross-examination was in fact a tactical strategic decision. There being no evidence to the contrary, it hasn't been proved it wasn't a tactical decision and, therefore, the Petition ought to be denied at least on those other grounds.

THE COURT: Okay. Thank you. Anything else on these subjects, Ms. Armstrong?

MS. ARMSTRONG: I don't believe so, Your Honor.

THE COURT: Well then from what I have heard, I mean we know Bowman was given a deal, had already pled, was sentenced at the time the trial came around. It was certainly true he was no longer beholding to the District Attorney's

Office to maintain some kind of a deal. So I think it would be somewhat ineffective to push it too far that he has, you know, gotten a deal. That was already known.

With regard to the issue of did Bowman change UPC codes, frankly, I guess we don't really care. I mean I can't see that it matters. It is certainly not falling below any objective standard of reasonableness on the part of the defense counsel not to pursue it any further than it was. In terms of who bought the label maker, I will accept that there really isn't any strong impeachment there based on what has been told to me by Mr. McCarthy.

The issue of did the police actually get Bowman's check from the Sands, again, I don't find any value to that if all that happened. They helped him negotiate the check when he had it in his personal property at the jail.

The issue of did he get an expensive TV or, you know, what he personally got out of the deal in his relationship with Mr. Volpicelli, again, I don't see any value to the cross-examination. Should it have been fruitful to contend that he obtained a TV, something more than he claimed that he received on the stand, I don't imagine anybody would really believe Mr. Bowman is, you know, the most up and up, you know, outstanding citizen as he comes in to testify and that he admits he's a participant in a criminal enterprise and he

admits he's been convicted of prior felonies. We know that he is not, you know, your typical Chamber of Commerce member. I don't feel that any of these issues would fall below the objective reasonableness on the part of defense counsel for trying to raise some picky point that, you know, the answer doesn't correspond with some prior response he may have given to the police. And, certainly, the result would not have been any different for Mr. Volpicelli, because, again, I don't think anybody believes that, you know, Mr. Bowman is the most up and up guy, but he's just a guy that has, you know, already pled out. He admits to his participation and explains some of, you know, his role with Mr. Volpicelli. But the case doesn't hinge just on that, just on his 100 percent credibility. So, you know, there are many other things at issue in the case beyond that.

Anyway, I do make those findings. With regard to the exculpatory evidence, I believe, based on the testimony of Ms. Riggs, there was no withholding of any exculpatory evidence. All the information that the Court has benefit of is that, if anything, that the District Attorney's Office be found they released it to Mr. Volpicelli's attorney. And we know nothing else of this background is unfounded.

I would leave open the issue as to number 7, the correct amount of restitution. I can understand in a case like

this where, you know, prison time is the overwhelming issue and $10,000 really doesn't mean that much, and I suppose in the reality, once Mr. Volpicelli received his sentence, there is a very slim possibility that any restitution will ever be collected from him, highly unlikely. It could happen, but I don't really expect it. So it is not an issue in the case when you look at the much bigger picture of a life sentence hanging in the balance here. So I think, still, Mr. Volpicelli is entitled to his case here that you would like to contest the amount of restitution, and maybe it wasn't in fact appropriate and more could have been done. But that is not something that is going to result, in essence, really, to a reopening of the entire sentencing or a new trial or anything to that extent. It would just be a contest of some of the dollars.

With that, I do rule in favor of the State as to Items 11, 12, 14. And number 7 I would like to receive additional information on that.

MR. McCARTHY: Your Honor, you mentioned as you were making your rulings that it was partly dependent whether I accurately described the transcript interviews with the police, and we haven't provided those to you. Does it make a difference?

THE COURT: Well, do you feel, you know, I mean it just sounds to me like these are not points that is going to

turn anything around here.

MR. McCARTHY: I think Your Honor could legitimately argue if the impeachment was available, Your Honor could legitimately say it wouldn't have made any difference, then it doesn't matter if I described it correctly or not. I would still like to provide those to you. We have the ten-day extension.

THE COURT: Are you saying as an officer of the court you are representing these things accurately?

MR. McCARTHY: That is a good assumption. If you can't trust old uncle Terry, who can you trust? I would like you to have them. Maybe when we come back after you see the additional Affidavit, you can let us know if that has changed, if your review of those transcripts has changed your holding. How about that?

THE COURT: All right. That is fine. I am willing to wait to give any final ruling on this, so I can confirm what you are telling me is accurate.

MR. McCARTHY: I read them. I will make sure you get them one way or the other.

THE COURT: Okay.

MR. McCARTHY: By stipulation.

THE COURT: We'll stand in recess.

(Short recess taken.)

THE COURT: You may be seated.

MR. McCARTHY: Your Honor, just after you left the bench, Ms. Riggs gave me a copy of the transcript we have been talking about, the interviews between Brent Bowman and various policemen, and it has been marked as Exhibit 1. I believe we have an agreement Exhibit 1 is an authentic copy. I submit it to the Court.

THE COURT: All right.

THE COURT: Ms. Armstrong, do you agree with that?

MS. ARMSTRONG: Yes, that is so stipulated, Your Honor.

MR. McCARTHY: Thank you, Your Honor, for accommodating that.

THE COURT: Exhibit 1, the series of transcripts will be admitted for purposes of this proceeding.

MR. McCARTHY: Thank you, Your Honor.

(Exhibit 1 admitted in evidence.)

THE COURT: We shall be in recess again.

(Whereupon, the proceedings were concluded.)

--o0o--

STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, Judith Ann Schonlau, Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That as such reporter I was present in Department No. 10 of the above-entitled court on Thursday, September 20, 2007, at the hour of 8:30 o'clock a.m., of said day and that I then and there took verbatim stenotype notes of the proceedings had in the matter of THE STATE OF NEVADA vs. FERRILL J. VOLPICELLI, Case Number CR03P1263.

That the foregoing transcript, consisting of pages numbered 1- 62 inclusive, is a full, true and correct transcription of my said stenotypy notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the trial of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada this 5th day of November, 2007.

JUDITH ANN SCHONLAU CSR #18

ORIGINAL

Code No. 4270

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

FILED
2007 DEC -5 PM 12:30
HOWARD W. CONYERS
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. 9

THE STATE OF NEVADA,

Respondent.
_____/

WAIVER OF APPEARANCE

I, Ferrill Joseph Volpicelli, petitioner above-named, hereby waive my appearance for my appeal hearing on January 23, 2008. I understand my attorney, Kay Ellen Armstrong, will appear and argue on my behalf.

DATED this 28th day of November, 2007.

FERRILL JOSEPH VOLPICELLI

SIGNED UNDER PENALTY OF PERJURY on this 28th day of November, 2007.

FERRILL JOSEPH VOLPICELLI

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

AFFIRMATION PURSUANT TO NRS239B.030

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

Dated this 4th day of December, 2007.

Kay Ellen Armstrong
Attorney at Law

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

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

December 4th, 2007.

Anne Bowen
Anne Bowen

ORIGINAL

FILED
2007 DEC -5 PM 12:30
HOWARD W. CONYERS
BY
DEPUTY

Code No. 3860

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

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 Waiver of Appearance, filed on or about December 5, 2007, be submitted to the court for decision.

DATED this 4th day of December, 2007.

KAY ELLEN ARMSTRONG
State Bar No. 0715
415 West Second Street
Carson City, NV 89703
(775) 883-3990
Attorney for Petitioner
Ferrill Joseph Volpicelli

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

AFFIDAVIT PURSUANT TO NRS 239B.030

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

Dated this 4th day of December, 2007.

KAY ELLEN ARMSTRONG
State Bar No. 0715
415 West Second Street
Carson City, NV 89703
(775) 883-3990
Attorney for Petitioner
Ferrill Joseph Volpicelli

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

December 4th, 2007.

Anne Bowen

Anne Bowen

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

Code: 2610

FILED

DEC 21 2007

HOWARD W. CONYERS, CLERK
By: 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.

/

NOTICE OF WAIVER OF APPEARANCE

On December 5, 2007, Petitioner filed a Waiver of Appearance pertaining to his upcoming post-conviction habeas corpus hearing. Petitioner's counsel, Kay Ellen Armstrong, will appear and argue on his behalf. Also on December 5, 2007, Petitioner filed a Request for Submission of the Waiver of Appeal. Although a Request for Submission is unnecessary in this circumstance, the Court hereby takes notice of Petitioner's Waiver of Appearance.

DATED this 20 day of December, 2007.

STEVEN P. ELLIOTT
District Judge

V9.522

CERTIFICATE OF MAILING

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

Terry McCarthy
Deputy District Attorney
Appellate Division
P.O. Box 30083
Reno, NV 89520
(Interoffice Mail)

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

DATED this 21 day of December, 2007.

HEIDI HOWDEN
Judicial Assistant

ORIGINAL

CODE 1250

FILED
2008 JAN 28 PM 4:25
HOWARD W. CONYERS
BY DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

FERRILL VOLPICELLI
Plaintiff,

vs.

Case No. CR03P1263

LENARD VARE, WARDEN,
Defendant.

Dept. No. 10

/

APPLICATION FOR SETTING

TYPE OF ACTION: Petition for Writ of Habeas Corpus

MATTER TO BE HEARD: Post-Conviction Hearing

Date of Application : 1-28-08 Made by: Both Parties
Plaintiff or Defendant

COUNSEL FOR PLAINTIFF: Kay Ellen Armstrong, Esq.

COUNSEL FOR DEFENDANT: Deputy D.A. Terrence McCarthy

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

☐ Jury Demanded by (Name): _____

☐ No Jury Demanded by (Name): _____

Estimated Duration of Trial: _____

By Telephone	By Telephone

Attorney(s) for Plaintiff

Attorney(s) for Defendant

____ Motion - No.	1:30 Setting at	14th on the	February day of	08	20
____ Trial - No.	____ Setting at	____ on the	____ day of	____	20

JUD 500 (Rev 3/03)

V9.524

ORIGINAL

FILED
2008 JAN 30 PM 4:19
HOWARD W. CONYERS
BY
DEPUTY

Code 4045
Kay Ellen Armstrong
State Bar No. 0715
415 West Second Street
Carson City, NV 89703
775-883-3990

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

FERRILL JOSEPH VOLPICELLI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

_____/

Case No. CR03P1263

DEPT. NO. 10

STIPULATION FOR CONTINUANCE

COMES NOW, petitioner, Ferrill Joseph Volpicelli, by and through his attorney Kay Ellen Armstrong, and Terrance McCarthy, Deputy District Attorney, and hereby stipulate to continue the time set for an evidentiary hearing in this matter from January 23, 2008 to Thursday, February 14, 2008 at 1:30 p.m.

Dated: Jan 30 2008

KAY ELLEN ARMSTRONG
Attorney for Petitioner

Terrance McCarthy
Deputy District Attorney

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

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

Stipulation for Continuance

_____

(Title of Document)

filed in case number: _____

☒ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

_____

(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: Jan 30, 2008

_____
(Signature)

Michelle Foster
(Print Name)

_____
(Attorney for)

V9.526

F I L E D
Electronically
03-05-2008:10:19:53 AM
Howard W. Conyers
Clerk of the Court
Transaction # 152335

CASE NO. CRP3P1263 POST: FERRILL J. VOLPICELLI

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES-HEARING	CONTINUED TO
02/14/08 HONORABLE STEVEN P. ELLIOTT DEPT. NO. 10 C. Wynn (Clerk) J. Schonlau (Reporter)	HEARING RE: PETITION FOR POST CONVICTION CONTINUATION OF WRIT OF HABEAS CORPUS HEARING Deputy District Attorney Terry McCarthy represented Respondent, State of Nevada. Kay Armstrong, Esq. represented Petitioner, Ferrill Joseph Volpicelli who was not present. COURT noted the issues that were denied during the last hearing; further indicated the last remaining issue as to ground (7) seven regarding restitution. Counsel Armstrong addressed the Court and reviewed exhibit 5; further made statements regarding the list of property totaling over $10,000.00 and the affidavit filed with the City Attorney; and further presenting statement in support of the petition. Counsel McCarthy addressed the Court reviewing the two prongs and further presenting statement in opposition to the petition. COURT presented its findings of fact and conclusions of law. **COURT ORDERED:** Request for relief if hereby DENIED.	

ORIGINAL

1750

FILED

2008 APR 14 AM 11:35

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

FERRILL JOSEPH VOLPICELLI,

Petitioner,

v. Case No. CR03P1263

LENARD VARE, WARDEN, Dept. No. 10

Respondent.

_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause is before the court upon a petition for writ of habeas corpus (post-conviction). Petitioner Volpicelli was represented by counsel when he stood trial for several charges stemming from a scheme involving changing UPC price codes in retail stores. He was found guilty of several felonies and at sentencing the court sentenced him as a habitual criminal. He appealed, but the judgment was affirmed. He then filed a petition for writ of habeas corpus, asserting claims of ineffective assistance of counsel.

The State moved to dismiss some of the claims. On August 27, 2007 this court entered an order dismissing some of the claims and allowing a hearing on claims 7, 11, 12 and 14. The court incorporates that interim order into this final judgment.

The surviving claims were scheduled for a hearing on September 20, 2007. The court

heard evidence from attorney Van Ry and from the prosecutor, Tammy Riggs. Petitioner elected not to testify. Some of the claims concerned alleged prior inconsistent statements by a witness at the trial. The alleged prior statements mostly arose during an interview between that witness and police officers. The court was also able to review the transcripts of those interviews. These findings are based on the evaluation of the record, the transcripts of the police interviews and the evidence adduced at the habeas corpus hearing.

One of the claims involved restitution. The claim of ineffective assistance of counsel, however, was based on a chart showing the disposition of stolen property. That chart was prepared well after this litigation, by an Assistant City Attorney who was not involved in the instant litigation. In argument, counsel for petitioner conceded that trial counsel could not be ineffective in failing to utilize that which did not exist at the time. Accordingly, the claim that counsel was ineffective in failing to challenge the amount of restitution is denied.

Another claim was that the prosecutor failed to produce exculpatory evidence. By the end of the hearing the petitioner had not adduced any evidence that had not been provided to the defense. Accordingly, the claim of withholding evidence remains unproven and is denied.

Another claim is that trial counsel was ineffective in failing to adduce additional evidence to show the extent of the plea bargain that was accepted by Volpicelli's confederate, witness Brett Bowman. The record reveals that Bowman had already been sentenced by the time of Volpicelli's trial and the details of the agreement were fully disclosed in the trial. Petitioner has not introduced any evidence of any other or additional terms to Bowman's plea agreement and so that claim, too, remains unproven.

Finally, the petition had a list of alleged prior statements by Bowman that could have been used to impeach Bowman's testimony. The court has reviewed the trial transcripts and the transcripts of Bowman's interviews with police and finds nothing significant. Certainly there is nothing that would probably have altered the outcome of the trial. On that subject, the court notes that Bowman did not testify in the habeas corpus hearing and thus there is no

evidence at all about how Bowman would have responded if he had been questioned further about his prior statements.

Most of the alleged inconsistent statements were not inconsistent at all. For example, at trial Bowman was asked if he has purchased a certain bit of equipment at a Staples store in California. He answered "no." The alleged inconsistent statement arises from interview transcripts in which he admitted purchasing the device, but without any reference to the name of the store or the state in which it was purchased. Thus, the prior statement is not inconsistent at all. To the extent that the prior statement could have been used to start a dialogue, the court notes again that Bowman did not testify in the habeas corpus hearing and there is therefore no evidence showing how he would have responded to additional questions on the subject of purchasing the label making device.

Similarly, at trial he was asked specifically if police officers helped him get a paycheck from the Sands casino and he denied getting such help. The interview transcripts do not contradict that testimony as they only indicate that he had indeed got his paychecks but that they were in his personal property. The police offered only to help him negotiate the checks. That is not inconsistent with his trial testimony and there is no evidence showing how further discussions would have helped petitioner in any way.

At trial, Bowman minimized his share of the loot. Volpicelli contends that he could have been impeached with evidence that Bowman also acquired some home electronics. The interview transcripts, however, are not inconsistent as they do not show that the home electronics were stolen in the scheme with Volpicelli. Instead, Bowman claimed to have purchased those items. Volpicelli has adduced no evidence to the contrary and so the claim that counsel was ineffective in failing to impeach remains unproven.

The court has reviewed the evidence presented, including the transcripts of police interviews, and finds nothing that would have been likely to alter the outcome of this litigation.

One who would claim ineffective assistance of counsel bears the burden of showing, by a

preponderance of the evidence, that the specific acts, omissions or decisions of counsel fell below an objective standard of reasonableness and that but for the failings of counsel a different result was reasonably probable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). This court has simply not been persuaded by the evidence that counsel acted unreasonably or that the results would probably have been different if counsel had made different decisions. Accordingly, the petition is denied.

DATED this 11 day of April, 2008.

DISTRICT JUDGE

CERTIFICATE OF MAILING

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

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

Ferrill Joseph Volpicelli #79565
Lovelock Correctional Center
P.O. Box 359
Lovelock, NV 89419

DATED: April 14, 2008.

ORIGINAL

4185

JUDITH ANN SCHONLAU

CCR #18

75 COURT STREET

RENO, NEVADA

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

-o0o-

FERRILL J. VOLPICELLI, Petitioner, vs. THE STATE OF NEVADA, Respondent.	CASE NO. CR03P1263 DEPARTMENT NO. 10

TRANSCRIPT OF PROCEEDINGS

PETITION FOR POST CONVICTION

THURSDAY, FEBRUARY 14, 2008

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

For the Petitioner: KAY ARMSTRONG, ESQ.
Attorney at Law
Carson City, Nevada

For the Respondent: OFFICE OF THE DISTRICT ATTORNEY
BY: TERRENCE McCARTHY, ESQ.
Deputy District Attorney
1 S. Sierra Street
Reno, Nevada

RENO, NEVADA; THURSDAY, FEBRUARY 14, 2008; 1:30 P.M.

-oOo-

THE COURT: Good afternoon. You may be seated.

The record will reflect that we are meeting here concerning the Post Conviction Writ of Habeas Corpus filed by the Petitioner, Ferrill Joseph Volpicelli.

We previously had a hearing on this, and I denied several portions of the Petition. And, according, to my record, Item 7 was not ruled on and reserved pending a review of the transcript. And I have done the best I can, but I am interested really in hearing from the lawyers to see if you can pinpoint anything that is of help on this.

Ms. Armstrong, did you want to say anything?

MS. ARMSTRONG: Yes. Thank you, Your Honor, and thank you for rescheduling this due to my illness. I apologize for any inconvenience.

I also reviewed the record after our last hearing and the place that I can point you I believe in the sentencing transcript from April 1st, 2004 is at page 36, Petitioner's trial counsel, Mr. Van Ry, allowed Exhibit 5 to be admitted without objection.

THE COURT: Right.

MS. ARMSTRONG: And Exhibit 5 is the list that we have seen of the property that totals slightly over $10,000.

THE COURT: This is rally the inventory that detective Reid Thomas created; isn't it?

MS. ARMSTRONG: I believe so. It is part of the packet he prepared to aid the sentencing judge. After we were in court, I was able to contact Karen Fraley, the Deputy City Attorney, and we filed an Affidavit from her explaining that what we had attached to the original Pro Per Habeas Petition as Exhibit A was something that had been prepared by her. It appears, from her Affidavit, that it was not. It didn't exist at the time of sentencing. It was prepared sometime after sentencing at the request of Mr. Volpicelli. So I think I am unable to argue Mr. Van Ry had the benefit of this memo prepared by Ms. Fraley. But I would still like to argue that simply the fact that detective Reid Thomas testified at sentencing that this property was all found in the storage shed and would be returned to the proper owners should have flagged defense counsel to say, well, then no restitution should be paid for the things that were returned. So I think that is what it comes down to. It is as simple as that.

THE COURT: I don't happen to have Ms. Fraley's document handy, but what does it say? What is the difference between it and what detective Thomas came up with?

MR. McCARTHY: It lists what things were given back to the owners. I don't think the sentencing record included

that.

THE COURT: No, it did not.

MS. ARMSTRONG: Would you like me to approach? This is an unfiled stamped copy, but I believe it is exactly what was filed.

THE COURT: Okay. I have had a chance to see this. How does this affect--I actually went along I am pretty sure with Exhibit 5 which amounted to restitution. At least I know I issued an order for restitution in the amount of $10,339.16. How does this affect that now?

MS. ARMSTRONG: As I said, Your Honor, it appears from what Karen is telling me that she didn't prepare that until sometime after the sentencing, so I don't think I can argue that Mr. Van Ry should have been looking at that the way I did because he didn't have it.

When I originally saw this, Your Honor, I thought it had been prepared by Reid Thomas, but I was able to determine that no, he didn't do it. Ms. Fraley did. The restitution amount that you ordered did come from Exhibit 5 which was admitted. Mr. Van Ry, if you recall, testified that he thought the restitution was the least of the issues before you that day and it was somewhat of a matter of trial strategy in his opinion. And I am just always struck by a big $10,000 bill. I think that is a big thing. And I believe that competent

sentencing counsel, at the very least, would advance the argument if those items were recovered, they shouldn't have to be paid for again.

THE COURT: All right. Thank you. What is the State's position on this?

MR. McCARTHY: Geez, it is hard to have one, Your Honor. You know, I think if Mr. Volpicelli had ever paid a dime of restitution or ever indicated an intent to pay a dime of restitution, I could probably give this more attention. As it is, I suggest when a defense lawyer is looking at multiple life sentences, reasonable lawyers don't devote a moment's attention to the question of restitution. The truth of the matter is he probably could have got a lower ordered restitution if he had devoted his attention to that instead of trying to avoid the multiple life sentences. He probably would have been successful, but that doesn't make counsel reasonable.

There are, of course, two prongs for the claim of ineffective assistance, prejudice and performance. I say the performance was fine. If the performance was fine, we don't have to look at prejudice. I think you ought to just deny the Writ.

I was wondering, my notes don't make any sense here, and they never do, but I thought the Court also wanted to check

some other things in the transcript just to see if I had accurately represented the transcript to you. I assume the Court has checked that.

THE COURT: Well, I read the sentencing transcript, and I also read quite a bit of other matters. The Brent Bowen--

MR. McCARTHY: That was the guy their claims in the Petition regarding his testimony, I suggested that the transcript testimony reveals for instance that he did fully disclose the plea bargain despite the claim in the Petition that there were quotes in the Petition that were misleading by omission, and I had suggested to Your Honor that the transcript would repeal the allegation. When we were here last, the Court ruled as though I were accurately representing the transcript, but you hadn't actually read it, so I was asking, don't just take my word for it, if you would please read it. It sounds like you have.

THE COURT: So the bottom line on this issue concerning restitution is the State's position that the best information that the Court had was the $10,339 at the time of sentencing, and there certainly was no incompetence, nothing following below a reasonable standard of care on the part of defense counsel since that is all defense counsel had as well.

When you are looking at a guy who spent virtually a

lifetime of thievery and did this for a living and he's stolen a lot more than $10,000, so this is, you know, really just a drop in the bucket. It is just, you know, his current inventory.

MR. McCARTHY: As the Court said in Strickland over and over again, not every error is going to lead to relief, so even if--Well, anyway, in this case, there may indeed have been error, but it shouldn't lead to relief because counsel's performance was not unreasonable. I ask you deny the Petition.

THE COURT: All right. Then, Ms. Armstrong, anything else?

MS. ARMSTRONG: No, Your Honor.

THE COURT: Well, I would certainly find that Brad Van Ry acted, you know, appropriately. Certainly his conduct did not fall below any objective standard of reasonableness in presenting issues as to restitution, and I admitted Exhibit 5 prepared by detective Reid Thomas, and that is what we had at the sentencing, basically, an inventory of the stuff found in Mr. Volpicelli's warehouse that was gotten through ill means, in essence was part of his scheme to defraud various retail establishments.

Under those conditions, I don't think I have any grounds to grant a Petition for relief at this time. I would still accept Mr. McCarthy's representation as to anything that

Brent Bowen may have done, so I am going to deny the petition and direct the State then to prepare appropriate findings and conclusions.

MR. McCARTHY: I will, Your Honor. It won't be quick because I don't remember this case, and I need to order the transcript from the last hearing. But as soon as I have it, I know what we are talking about, I will prepare an order and send it to Ms. Armstrong.

MS. ARMSTRONG: That hearing was on September the 20th, 2007.

THE COURT: Yes. It is a distant memory.

MR. McCARTHY: It has nothing to do with me getting older either.

MS. ARMSTRONG: Thank you, Your Honor.

THE COURT: I do appreciate your work on this, both counsel, and appreciate you being here which helps me a bit in determining what to do on this.

Do we want this Affidavit of Karen Fraley to be part of this record?

MR. McCARTHY: If it is not now, let's make it. I don't object to it.

MS. ARMSTRONG: Yes.

THE COURT: I will staple it and cover it with this cover sheet then.

MS. ARMSTRONG: Thank you.

THE COURT: All right.

(Whereupon, the proceedings were concluded.)

--o0o--

STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, Judith Ann Schonlau, Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That as such reporter I was present in Department No. 10 of the above-entitled court on Thursday February 14, 2008,, at the hour of 1:30 o'clock p.m, of said day and that I then and there took verbatim stenotype notes of the proceedings had in the matter of FERRILL J. VOLPICELLI vs. THE STATE OF NEVADA, Case Number CR03P1263.

That the foregoing transcript, consisting of pages numbered 1- 10 inclusive, is a full, true and correct transcription of my said stenotypy notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the trial of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada this 3rd day of April, 2008.

JUDITH ANN SCHONLAU CCR #18

ORIGINAL

CODE 2505

FERRILL J. VOLPICELLI # 79565
Lovelock Correctional Center
~~P.O. Box 359~~ 1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

FILED
2008 MAY -8 PM 1:42
HOWARD W. CONYERS
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,

-vs-

LENARD VARE, WARDEN, Respondent.

Case No. CR03P1263

Dept. No. 10

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Petitioner, Ferrill J. Volpicelli, in pro se, hereby appeals to the Nevada Supreme Court the Findings of Fact, Conclusions of Law and Order Denying/Dismissing petition for writ of habeas corpus, as filed/entered ~~on~~ about the 11th day of April, 2008, in the above-entitled Court.

Dated this 6th day of May, 2008.

FERRILL J. VOLPICELLI #79565
Lovelock Correctional Center
~~P.O. Box 359~~ 1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

ORIGINAL

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL to the below addresses on this 6th day of May, 2008, by placing same into the hands of prison staff for posting in the U.S. Mail, per NRCP 5(b):

TERRY MCCARTHY
Deputy District Attorney
Appellate Div.
P.O. Box 30083
Reno, NV 89520

KAY ELLEN ARMSTRONG, Esq.
415 W. Second St.
Carson City, NV 89703

FERRIL J. VOLPICELLI # 29565
Lovelock Correctional Center
~~P.O. Box 359~~ 1200 Prison Rd.
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document, NOTICE OF APPEAL, filed in Case Number CR03P1263 does NOT contain the social security number of any person.

Dated this 6th day of May, 2008

FERRIL J. VOLPICELLI # 29565

Petitioner In Pro Se

V9.545

1365

FILED
MAY 12 2008
HOWARD W. CONYERS, CLERK
By: DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

FERRILL JOSEPH VOLPICELLI,

Appellant(s) **Case No. CR03P1263**

vs. **Dept. No. 10**

THE STATE OF NEVADA,

Respondent(s)

_____/

CERTIFICATE OF TRANSMITTAL

I hereby certify that the enclosed the Notice of Appeal and other required documents (certified copies) were delivered to the Second Judicial District Court mailroom system for transmittal to the Nevada Supreme Court.

Dated: **May 12, 2008**

Howard W. Conyers, Clerk of the Court,

By: C. Kepler

Cathy Kepler, Appeals Clerk

1350

FILED
MAY 12 2008
HOWARD W. CONYERS, CLERK
By DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

FERRILL JOSEPH VOLPICELLI,

Appellant(s) **Case No. CR03P1263**

vs. **Dept. No. 10**

THE STATE OF NEVADA,

Respondent(s)

/

CERTIFICATE OF CLERK

I hereby certify that the enclosed documents are certified copies of the original pleadings on file with the Second Judicial District Court, in accordance with the NRAP 3(e).

Dated: **May 12, 2008**

Howard W. Conyers, Clerk of the Court,

By: _____.

Cathy Kepler, Appeals Clerk

FILED

MAY 12 2008

HOWARD W. CONVERSE, CLERK
By: C. Kepler
DEPUTY CLERK

CODE 1310

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF Washoe County

FERRILL JOSEPH VOLPICELLI,

Appellant(s) **Case No. CR03P1263**

vs. **Dept. No. 10**

THE STATE OF NEVADA,

Respondent(s)

_____/

CASE APPEAL STATEMENT

1. **Ferrill Joseph Volpicelli** is the Appellant.
2. The appeal is from a **Judgment/Order on or about April 14, 2008 by the Honorable Steven Elliott.**
3. The parties below in District Court consisted of: **Ferrill Joseph Volpicelli** the Defendant, and **The State of Nevada,** the Plaintiff, in District Court.
4. The parties herein in the Nevada Supreme Court consist of: **Ferrill Joseph Volpicelli/Appellant,** and **The State of Nevada/Respondent.**
5. Counsel on Appeal for Appellant, consists of: **Ferrill Joseph Volpicelli /Pro Per Appellant #79565, Lovelock Correctional Center, P.O. Box 359, Lovelock, NV 89419.**

6. Counsel on appeal for Respondent is **Gary Hatlestad, Deputy District Attorney – Appellant Division, P.O. Box 30083, Reno, NV 89520-3083.**

7. In District Court Appellant was represented **In Proper Person.**

8. Appellant is represented **in Proper Person** in this appeal.

9. N/A in this case.

10. The **Indictment** was filed on **June 11, 2003.**

Dated: **May 12, 2008**

Howard W. Conyers, Clerk of the Court,

By: _____

Cathy Kepler, Appeals Clerk

(775) 328-3114

FILED

MAY 19 2008

HOWARD W. CONYERS, CLERK
By: DEPUTY CLERK

SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 51622
District Court Case No. CR031263

CR03P1263

RECEIPT FOR DOCUMENTS

TO: Ferrill Joseph Volpicelli #79565
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Howard W. Conyers , District Court Clerk ✓

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

05/14/08	Filing Fee Waived: Criminal.
05/14/08	Filed Certified Copy of proper person Notice of Appeal. Appeal docketed in the Supreme Court this day.

DATE: May 14, 2008

Tracie Lindeman, Clerk of Court

By: _____
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51622

CR03P1263

ORDER OF LIMITED REMAND
FOR DESIGNATION OF COUNSEL

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. We remand this appeal to the district court for the limited purpose of securing counsel for appellant. The district court shall have 30 days from the date of this order to appoint counsel for appellant. Within 5 days from the appointment or appearance of counsel, the district court clerk shall transmit to the clerk of this court a copy of the district court's written or minute order appointing appellate counsel.

It is so ORDERED.

_____, C.J.

cc: Hon. Steven P. Elliott, District Judge
Ferrill Joseph Volpicelli
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk✓

08-13941

Code: 2715

FILED
JUN - 9 2008
HOWARD W. CONYERS, CLERK
By: 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.

/

ORDER APPOINTING COUNSEL

The Court has received the Nevada Supreme Court's Order of Limited Remand for Designation of Counsel, entered June 3, 2008. Petitioner has previously been found indigent and has received leave to proceed in forma pauperis.

NOW, THEREFORE, IT IS HEREBY ORDERED that Kay Ellen Armstrong, Esq. is appointed to represent Petitioner in his appeal.

DATED this 6 day of June, 2008.

STEVEN P. ELLIOTT
District Judge

CERTIFICATE OF MAILING

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

Terry McCarthy
Deputy District Attorney
Appellate Division
P.O. Box 30083
Reno, NV 89520
(Interoffice Mail)

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

DATED this _____ day of June, 2008.

HEIDI HOWDEN
Judicial Assistant

CODE: 2540

FILED
08 JUN 10 AM 9:32
HOWARD W. CONYERS
BY
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

FERRILL JOSEPH VOLPICELLI,

Petitioner,

VS.

THE STATE OF NEVADA,

Respondent,

_____/

CASE NO: CR03P1263

DEPT. NO.: 10

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on April 14, 2008 the Court entered a decision or Order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of the Court. If you wish to appeal, you must file a notice of appeal with the Clerk of this Court within thirty-Three (33) days, after the date this notice is mailed to you. This notice was mailed on the 10 day of June, 2008.

HOWARD W. CONYERS
Clerk of the Court
By
Deputy Clerk

ORIGINAL

1750

FILED

2008 APR 14 AM 11: 35

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

RRILL JOSEPH VOLPICELLI,

Petitioner,

v. Case No. CR03P1263

LENARD VARE, WARDEN, Dept. No. 10

Respondent.

_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause is before the court upon a petition for writ of habeas corpus (post-conviction). Petitioner Volpicelli was represented by counsel when he stood trial for several charges stemming from a scheme involving changing UPC price codes in retail stores. He was found guilty of several felonies and at sentencing the court sentenced him as a habitual criminal. He appealed, but the judgment was affirmed. He then filed a petition for writ of habeas corpus, asserting claims of ineffective assistance of counsel.

The State moved to dismiss some of the claims. On August 27, 2007 this court entered an order dismissing some of the claims and allowing a hearing on claims 7, 11, 12 and 14. The court incorporates that interim order into this final judgment.

The surviving claims were scheduled for a hearing on September 20, 2007. The court

heard evidence from attorney Van Ry and from the prosecutor, Tammy Riggs. Petitioner elected not to testify. Some of the claims concerned alleged prior inconsistent statements by a witness at the trial. The alleged prior statements mostly arose during an interview between that witness and police officers. The court was also able to review the transcripts of those interviews. These findings are based on the evaluation of the record, the transcripts of the police interviews and the evidence adduced at the habeas corpus hearing.

One of the claims involved restitution. The claim of ineffective assistance of counsel, however, was based on a chart showing the disposition of stolen property. That chart was prepared well after this litigation, by an Assistant City Attorney who was not involved in the instant litigation. In argument, counsel for petitioner conceded that trial counsel could not be ineffective in failing to utilize that which did not exist at the time. Accordingly, the claim that counsel was ineffective in failing to challenge the amount of restitution is denied.

Another claim was that the prosecutor failed to produce exculpatory evidence. By the end of the hearing the petitioner had not adduced any evidence that had not been provided to the defense. Accordingly, the claim of withholding evidence remains unproven and is denied.

Another claim is that trial counsel was ineffective in failing to adduce additional evidence to show the extent of the plea bargain that was accepted by Volpicelli's confederate, witness Brett Bowman. The record reveals that Bowman had already been sentenced by the time of Volpicelli's trial and the details of the agreement were fully disclosed in the trial. Petitioner has not introduced any evidence of any other or additional terms to Bowman's plea agreement and so that claim, too, remains unproven.

Finally, the petition had a list of alleged prior statements by Bowman that could have been used to impeach Bowman's testimony. The court has reviewed the trial transcripts and the transcripts of Bowman's interviews with police and finds nothing significant. Certainly there is nothing that would probably have altered the outcome of the trial. On that subject, the court notes that Bowman did not testify in the habeas corpus hearing and thus there is no

evidence at all about how Bowman would have responded if he had been questioned further about his prior statements.

Most of the alleged inconsistent statements were not inconsistent at all. For example, at trial Bowman was asked if he has purchased a certain bit of equipment at a Staples store in California. He answered "no." The alleged inconsistent statement arises from interview transcripts in which he admitted purchasing the device, but without any reference to the name of the store or the state in which it was purchased. Thus, the prior statement is not inconsistent at all. To the extent that the prior statement could have been used to start a dialogue, the court notes again that Bowman did not testify in the habeas corpus hearing and there is therefore no evidence showing how he would have responded to additional questions on the subject of purchasing the label making device.

Similarly, at trial he was asked specifically if police officers helped him get a paycheck from the Sands casino and he denied getting such help. The interview transcripts do not contradict that testimony as they only indicate that he had indeed got his paychecks but that they were in his personal property. The police offered only to help him negotiate the checks. That is not inconsistent with his trial testimony and there is no evidence showing how further discussions would have helped petitioner in any way.

At trial, Bowman minimized his share of the loot. Volpicelli contends that he could have been impeached with evidence that Bowman also acquired some home electronics. The interview transcripts, however, are not inconsistent as they do not show that the home electronics were stolen in the scheme with Volpicelli. Instead, Bowman claimed to have purchased those items. Volpicelli has adduced no evidence to the contrary and so the claim that counsel was ineffective in failing to impeach remains unproven.

The court has reviewed the evidence presented, including the transcripts of police interviews, and finds nothing that would have been likely to alter the outcome of this litigation.

One who would claim ineffective assistance of counsel bears the burden of showing, by a

preponderance of the evidence, that the specific acts, omissions or decisions of counsel fell below an objective standard of reasonableness and that but for the failings of counsel a different result was reasonably probable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). This court has simply not been persuaded by the evidence that counsel acted unreasonably or that the results would probably have been different if counsel had made different decisions. Accordingly, the petition is denied.

DATED this 11 day of April, 2008.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

Case No. CR03P1263

Pursuant to NRCP 5 (b), I certify that I am an employee of the Second Judicial District Court, and that on the 10 day of June, 2008, I deposited in the Washoe County mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true copy of the attached document, addresses to:

WASHOE COUNTY DISTRICT
ATTORNEY'S OFFICE
APPELLATE DIVISION
(Inter-office mail)

ATTORNEY GENERAL'S OFFICE
100 N. CARSON STREET
CARSON CITY, NV 89701-4717

KAY ELLEN ARMSTRONG, ESQ.
415 W. SECOND STREET
CARSON CITY, NV 89703

FERRILL JOSEPH VOLPICELLI #79565
LOVELOCK CORRECTIONAL CENTER
P.O. BOX 359
LOVELOCK, NV 89419

Celina Galindo
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, AND THE HONORABLE ROBERT H. PERRY, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 52600
CR03P1263

ORDER DENYING PETITION

This is a proper person petition for a writ of mandamus. Petitioner seeks an order compelling the district court to reissue an amended judgment of conviction, provide appellant with credit for time served, and transmit the amended judgment of conviction to the Nevada Department of Corrections. We have considered the documents submitted to this court, and we conclude that this court's intervention in this matter is not warranted.[1] We are confident that the district court will comply with this court's prior directive to transmit the amended judgment of conviction to the Nevada Department of Corrections in an expeditious manner. To the extent that petitioner seeks presentence credits in district

[1]See NRS 34.160; NRS 34.170.

08-28347

court case number CR03-1263, a claim for additional presentence credits must be raised in a timely post-conviction petition for a writ of habeas corpus filed in the district court in the first instance.[2] Accordingly, we

ORDER the petition DENIED.

Cherry, J.

Cherry

Maupin, J.

Maupin

Saitta, J.

Saitta

cc: Hon. Robert H. Perry, District Judge
Ferrill Joseph Volpicelli
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

[2]See NRS 34.724(2)(c); NRS 34.738(1); Griffin v. State, 122 Nev. 737, 137 P.3d 1165 (2006).

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51622 CR03P1263

ORDER TO FILE SUPPLEMENTAL APPENDIX

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. On appeal, appellant argues that the district court erred when it concluded that his trial counsel was not ineffective for failing to argue that one of the judgments of convictions was not permissible to be nsed to adjudicate appellant a habitual criminal. The appendix filed by appellant's counsel does not contain the judgments of conviction that were used to prove that appellant had at least three prior felony convictions. See NRS 207.010. The judgments of conviction that were filed in the district court are necessary for this court's review of this appeal. See NRAP 10(b).

Accordingly, Kay Ellen Armstrong, as post-conviction counsel for appellant, shall have 10 days from the date of this order to file a supplemental appendix containing the judgments of conviction that were used to adjudicate appellant a habitual criminal.

It is so ORDERED.

/ Saitta, C.J.

cc: Ferrill Joseph Volpicelli
Kay Ellen Armstrong
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51622

CR03P1263

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On April 1, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to commit crimes against property, eight counts of burglary, and one count of unlawful possession, making, forging or counterfeiting of inventory pricing labels. The district court adjudicated appellant a habitual criminal and sentenced appellant to terms totaling life in the Nevada State Prison with the possibility of parole after 20 years. Appellant was also ordered to pay $10,339.16 in restitution. On appeal, this court confirmed the judgment of conviction and sentence. Volpicelli v. State, Docket No. 43203 (Order of Affirmance, June 29, 2005). The remittitur issued on July 26, 2005.

On November 9, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Counsel was appointed and filed a supplement. On April 2, 2007, the district court entered an order dismissing the majority of appellant's claims and set an evidentiary

hearing concerning the remaining claims. Following an evidentiary hearing, the district court denied the remaining claims on April 14, 2008. This appeal follows.

Appellant argues that the district court erred in denying four of his ineffective assistance of trial counsel claims. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant argues that his trial counsel was ineffective for failing to object to the use of a 2004 Nevada conviction for aiding and abetting in the commission of attempting to obtain money by false

pretenses for adjudication as a habitual criminal. Appellant fails to demonstrate that he was prejudiced.

The criminal activity for the 2004 conviction for attempting to obtain money by false pretenses occurred after appellant had been charged and was awaiting trial for this case. However, appellant was convicted of attempting to obtain money by false pretenses prior to his conviction in this case. After the trial for this case, the State sought adjudication of appellant as a habitual criminal and filed the 2004 judgment of conviction for obtaining money by false pretenses along with two other judgments of conviction. The other judgments of conviction were a 1998 federal court conviction of four counts of felony tax perjury and a 1998 Nevada conviction for two counts of burglary. As the conviction for the attempt to obtain money by false pretenses was not entered before the unlawful actions leading to the instant offense occurred, the conviction for the attempt to obtain money by false pretenses was not properly used as a past conviction for purposes of adjudication as a habitual criminal in the instant matter. Brown v. State, 97 Nev. 101, 102, 624 P.2d 1005, 1006 (1981). However, we conclude that any error was harmless because a sufficient number of convictions was presented. See NRS 178.598 (stating that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded").

The two additional judgments of conviction list six additional felonies which were properly considered when determining appellant's adjudication as a habitual felon. Appellant makes no argument that any of the six other felonies were improperly considered. A review of the record reveals that, at the sentencing hearing, the State presented evidence that the felony tax perjury convictions stemmed from a plan

running over at least four years, with numerous transactions, throngh which appellant fraudulently gained at least $800,000. Accordingly, the previous tax perjury convictions were not the result of the same act, transaction, or occurrence and may be used as four separate convictions for purposes of babitual criminal adjudication. Rezin v. State, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979). Thus, even excluding the conviction for the attempt to obtain money by false pretenses, there were sufficient past felony convictions for the district court to adjudicate appellant a habitual criminal. NRS 207.010. Considering the district court's statement at the sentencing hearing to appellant that he was the "poster child for habitual criminality in that every time you're released from custody it seems like you're out making a full-time living stealing," appellant fails to demonstrate a reasonable probability that the outcome of the sentencing hearing would have been different had bis trial counsel objected to the use of the 2004 Nevada conviction for attempt to obtain money by false pretenses when adjudicating him as a habitual criminal. Therefore, the district court did not err in denying this claim.

Second, appellant argues tbat his trial counsel was ineffective for failing to argue that tbe burglary offenses and the unlawful possession, making, forging or counterfeiting of inventory pricing labels offense merged, and that conviction and sentence for both constitute a violation of double jeopardy. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. To determine whether multiple offenses violate double jeopardy principles "'[t]he test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then eacb act is punishable separately. If the latter, there can be but one penalty.'" Blockburger v. United States,

284 U.S. 299, 302 (1932) (quoting Wharton's Criminal Law § 35 (11th ed.)); see also United States v. Dixon, 509 U.S. 688, 696 (1993). Burglary occurs when a person enters a building with the intent to commit any felony, or to obtain money or property by false pretenses. NRS 205.060(1). The unlawful possession, making, forging or counterfeiting of inventory pricing labels occurs when a person possesses, makes, alters, forges, or counterfeits any sales receipt or inventory pricing label with the intent to cheat or defraud a retailer. NRS 205.965(1). Therefore, the acts of burglary and the unlawful possession, making, forging or counterfeiting of inventory pricing labels offense are distinct individual acts with different elements. Thus, conviction and sentencing for the offenses do not violate double jeopardy principles. Appellant fails to demonstrate a reasonable probability that the outcome of the proceedings would have been different had his trial counsel argued the conviction and sentence for both crimes violated double jeopardy. Therefore, the district court did not err in denying this claim.

Third, appellant argues that his trial counsel was ineffective for failing to argue for a lesser restitution amount. Appellant argues that the items taken from the various businesses were returned after they were recovered by the police, and therefore, the businesses did not lose the total amount of the restitution that was imposed. Appellant fails to demonstrate that he was prejudiced. Appellant fails to identify any way in which to reasonably calculate the value lost by the businesses due to appellant's crimes. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984); see also NRS 205.0831 (stating that the standard by which to calculate the value of property obtained through theft is the fair market value of the property at the time of the theft). The district court concluded

that trial counsel was not ineffective for failing to argue for a lower restitution amount and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

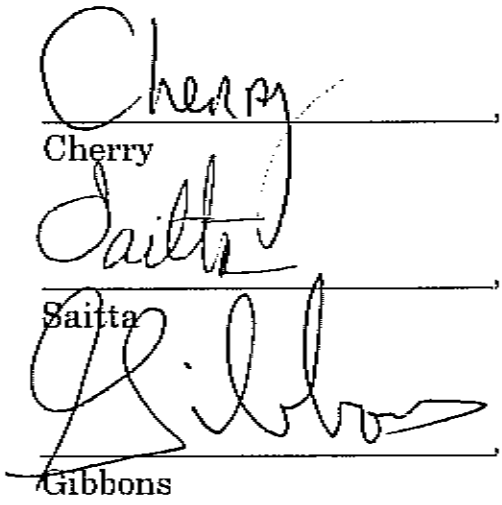
Fourth, appellant argues that his trial counsel was ineffective for failing to cross-examine Brett Bowman concerning his inconsistent statements. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant compares statements Bowman made prior to trial with those that Bowman made during trial and argues they were inconsistent. The district court determined that the statements appellant compares covered different topics and that the questions were posed differently in each situation. The district court also determined that the questions posed to Bowman necessarily elicited different answers. Those statements were, therefore, consistent statements that could not have been used for impeachment purposes. See NRS 51.035(2)(a); Leonard v. State, 114 Nev. 639, 652-53, 958 P.2d 1220, 1230 (1998). The district court also determined that appellant failed to demonstrate a reasonable probability that the outcome of the trial would have been different had counsel questioned Bowman about these statements. Appellant fails to demonstrate that the district court's determination was erroneous and we conclude that substantial evidence supports the district court's determination. Therefore, the district court did not err in denying this claim.

Next, appellant argues that the district court erred by conducting an evidentiary hearing over only four of his claims and dismissing the remainder. Other than the claim concerning the use of past convictions for adjudicating appellant as a habitual criminal, appellant makes no specific argument for why an evidentiary hearing

should have been conducted concerning any other claims or why the district court erred in dismissing any other claims. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Because appellant's claim was not supported by specific argument, we conclude appellant failed to demonstrate the district court erred. See Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000).

Accordingly, having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



Cherry, J.

Saitta, J.

Gibbons, J.

cc: Hon. Steven P. Elliott, District Judge
Kay Ellen Armstrong
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

****** IMPORTANT NOTICE - READ THIS INFORMATION *****
PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE:	CR03P1263
Judge:	STEVEN ELLIOTT
Official File Stamp:	12-04-2009:15:15:21
Clerk Accepted:	12-04-2009:15:16:09
Court:	Second Judicial District Court - State of Nevada
Case Title:	POST: FERRILL J. VOLPICELLI (D10)
Document(s) Submitted:	Supreme Court Order Affirming
Filed By:	Cathy Kepler
	You may review this filing by clicking on the following link to take you to your cases.

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The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

KAY ARMSTRONG

RICHARD GAMMICK, ESQ.

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 51622

District Court Case No. CR031263
CR03P1263

REMITTITUR

TO: Howard W. Conyers, Washoe District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: December 29, 2009

Tracie Lindeman, Clerk of Court

By: A. Ingersoll
Deputy Clerk

cc (without enclosures):
Hon. Steven P. Elliott, District Judge
Attorney General/Carson City
Washoe County District Attorney
Kay Ellen Armstrong

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on DEC 30 2009.

Howard W. Conyers by C. Kopler
District Court Clerk

V9.572
09-30324

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 51622

District Court Case No. CR031263
CR03P1263

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 3rd day of December, 2009.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 29th day of December, 2009.

Tracie Lindeman, Supreme Court Clerk

By: H. Ingersoll
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51622
CR03P1263

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On April 1, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to commit crimes against property, eight counts of burglary, and one count of unlawful possession, making, forging or counterfeiting of inventory pricing labels. The district court adjudicated appellant a habitual criminal and sentenced appellant to terms totaling life in the Nevada State Prison with the possibility of parole after 20 years. Appellant was also ordered to pay $10,339.16 in restitution. On appeal, this court confirmed the judgment of conviction and sentence. Volpicelli v. State, Docket No. 43203 (Order of Affirmance, June 29, 2005). The remittitur issued on July 26, 2005.

On November 9, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Counsel was appointed and filed a supplement. On April 2, 2007, the district court entered an order dismissing the majority of appellant's claims and set an evidentiary

hearing concerning the remaining claims. Following an evidentiary hearing, the district court denied the remaining claims on April 14, 2008. This appeal follows.

Appellant argues that the district court erred in denying four of his ineffective assistance of trial counsel claims. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant argues that his trial counsel was ineffective for failing to object to the use of a 2004 Nevada conviction for aiding and abetting in the commission of attempting to obtain money by false

pretenses for adjudication as a habitual criminal. Appellant fails to demonstrate that he was prejudiced.

The criminal activity for the 2004 conviction for attempting to obtain money by false pretenses occurred after appellant had been charged and was awaiting trial for this case. However, appellant was convicted of attempting to obtain money by false pretenses prior to his conviction in this case. After the trial for this case, the State sought adjudication of appellant as a habitual criminal and filed the 2004 judgment of conviction for obtaining money by false pretenses along with two other judgments of conviction. The other judgments of conviction were a 1998 federal court conviction of four counts of felony tax perjury and a 1998 Nevada conviction for two counts of burglary. As the conviction for the attempt to obtain money by false pretenses was not entered before the unlawful actions leading to the instant offense occurred, the conviction for the attempt to obtain money by false pretenses was not properly used as a past conviction for purposes of adjudication as a habitual criminal in the instant matter. Brown v. State, 97 Nev. 101, 102, 624 P.2d 1005, 1006 (1981). However, we conclude that any error was harmless because a sufficient number of convictions was presented. See NRS 178.598 (stating that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded").

The two additional judgments of conviction list six additional felonies which were properly considered when determining appellant's adjudication as a habitual felon. Appellant makes no argument that any of the six other felonies were improperly considered. A review of the record reveals that, at the sentencing hearing, the State presented evidence that the felony tax perjury convictions stemmed from a plan

running over at least four years, with numerous transactions, through which appellant fraudulently gained at least $800,000. Accordingly, the previous tax perjury convictions were not the result of the same act, transaction, or occurrence and may be used as four separate convictions for purposes of habitual criminal adjudication. Rezin v. State, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979). Thus, even excluding the conviction for the attempt to obtain money by false pretenses, there were sufficient past felony convictions for the district court to adjudicate appellant a habitual criminal. NRS 207.010. Considering the district court's statement at the sentencing hearing to appellant that he was the "poster child for habitual criminality in that every time you're released from custody it seems like you're out making a full-time living stealing," appellant fails to demonstrate a reasonable probability that the outcome of the sentencing hearing would have been different had his trial counsel objected to the use of the 2004 Nevada conviction for attempt to obtain money by false pretenses when adjudicating him as a habitual criminal. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his trial counsel was ineffective for failing to argue that the burglary offenses and the unlawful possession, making, forging or counterfeiting of inventory pricing labels offense merged, and that conviction and sentence for both constitute a violation of double jeopardy. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. To determine whether multiple offenses violate double jeopardy principles "'[t]he test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. If the latter, there can be but one penalty.'" Blockburger v. United States,

284 U.S. 299, 302 (1932) (quoting Wharton's Criminal Law § 35 (11th ed.)); see also United States v. Dixon, 509 U.S. 688, 696 (1993). Burglary occurs when a person enters a building with the intent to commit any felony, or to obtain money or property by false pretenses. NRS 205.060(1). The unlawful possession, making, forging or counterfeiting of inventory pricing labels occurs when a person possesses, makes, alters, forges, or counterfeits any sales receipt or inventory pricing label with the intent to cheat or defraud a retailer. NRS 205.965(1). Therefore, the acts of burglary and the unlawful possession, making, forging or counterfeiting of inventory pricing labels offense are distinct individual acts with different elements. Thus, conviction and sentencing for the offenses do not violate double jeopardy principles. Appellant fails to demonstrate a reasonable probability that the outcome of the proceedings would have been different had his trial counsel argued the conviction and sentence for both crimes violated double jeopardy. Therefore, the district court did not err in denying this claim.

Third, appellant argues that his trial counsel was ineffective for failing to argue for a lesser restitution amount. Appellant argues that the items taken from the various businesses were returned after they were recovered by the police, and therefore, the businesses did not lose the total amount of the restitution that was imposed. Appellant fails to demonstrate that he was prejudiced. Appellant fails to identify any way in which to reasonably calculate the value lost hy the businesses due to appellant's crimes. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984); see also NRS 205.0831 (stating that the standard by which to calculate the value of property obtained through theft is the fair market value of the property at the time of the theft). The district court concluded

that trial counsel was not ineffective for failing to argue for a lower restitution amount and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Fourth, appellant argues that his trial counsel was ineffective for failing to cross-examine Brett Bowman concerning his inconsistent statements. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant compares statements Bowman made prior to trial with those that Bowman made during trial and argues they were inconsistent. The district court determined that the statements appellant compares covered different topics and that the questions were posed differently in each situation. The district court also determined that the questions posed to Bowman necessarily elicited different answers. Those statements were, therefore, consistent statements that could not have been used for impeachment purposes. See NRS 51.035(2)(a); Leonard v. State, 114 Nev. 639, 652-53, 958 P.2d 1220, 1230 (1998). The district court also determined that appellant failed to demonstrate a reasonable probability that the outcome of the trial would have been different had counsel questioned Bowman about these statements. Appellant fails to demonstrate that the district court's determination was erroneous and we conclude that substantial evidence supports the district court's determination. Therefore, the district court did not err in denying this claim.

Next, appellant argues that the district court erred by conducting an evidentiary hearing over only four of his claims and dismissing the remainder. Other than the claim concerning the use of past convictions for adjudicating appellant as a habitual criminal, appellant makes no specific argument for why an evidentiary hearing

should have been conducted concerning any other claims or why the district court erred in dismissing any other claims. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Because appellant's claim was not supported by specific argument, we conclude appellant failed to demonstrate the district court erred. See Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000).

Accordingly, having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.

Cherry

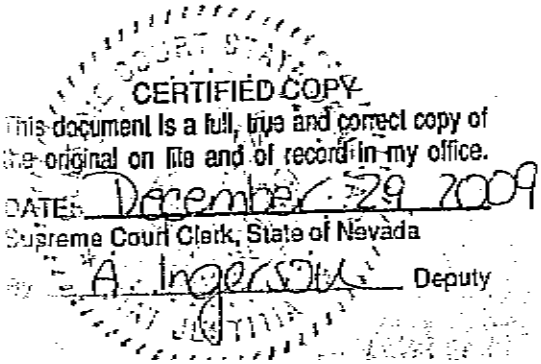
Saitta, J.

Saitta

Gibbons, J.

Gibbons

cc: Hon. Steven P. Elliott, District Judge
Kay Ellen Armstrong
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk


CERTIFIED COPY
This document is a full, true and correct copy of
the original on file and of record in my office.
DATE: December 29 2009
Supreme Court Clerk, State of Nevada
By: A. Ingersoll Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD WAYNE BEALL,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; THE HONORABLE STEVEN P. ELLIOTT, DISTRICT JUDGE; AND AMY HARVEY, WASHOE COUNTY CLERK,
Respondents.

Supreme Court No. 54899

District Court Case No. CR91396

NOTICE IN LIEU OF REMITTITUR

TO THE ABOVE-NAMED PARTIES:

The decision and Order of the court in this matter having been entered on 12/03/09, and the period for the filing of a petition for rehearing having expired and no petition having been filed, notice is hereby given that the Order and decision entered herein has, pursuant to the rules of this court, become effective.

DATE: December 29, 2009

Tracie Lindeman, Clerk of Court

By: A. Ingerson
Deputy Clerk

cc: Howard W. Conyers, Washoe District Court Clerk
Attorney General/Carson City
Ronald Wayne Beall

****** IMPORTANT NOTICE - READ THIS INFORMATION *****
PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE:	CR03P1263
Judge:	STEVEN ELLIOTT
Official File Stamp:	12-30-2009:16:35:37
Clerk Accepted:	12-30-2009:16:36:27
Court:	Second Judicial District Court - State of Nevada
Case Title:	POST: FERRILL J. VOLPICELLI (D10)
Document(s) Submitted:	Supreme Court Remittitur
	Supreme Ct Clk's Cert & Judg
	Supreme Court Order Affirming
Filed By:	Cathy Kepler
	You may review this filing by clicking on the following link to take you to your cases.

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KAY ARMSTRONG

RICHARD GAMMICK, ESQ.

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51622

CR03P1263

FILED

JAN 22 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING MOTION TO RECALL REMITTITUR AND DENYING PERMISSION FOR A LATE PETITION FOR REHEARING

On December 3, 2009, this court affirmed the order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. On December 29, 2009, the remittitur was issued in this case. On January 6, 2010, this court received a motion to recall the remittitur and a petition for rehearing. Appellant failed to demonstrate that that the remittitur should be recalled. See Wood v. State, 60 Nev. 139, 104 P.2d 187 (1940). Further, the petition for rehearing is untimely. NRAP 40(a)(1). No good cause appearing, this court denies the motion to recall remittitur and denies permission to submit a late petition for rehearing.

It is so ORDERED.

Parraguirre, C.J.

cc: Hon. Steven P. Elliott, District Judge
Kay Ellen Armstrong
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk ✓

****** IMPORTANT NOTICE - READ THIS INFORMATION *****
PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE:	CR03P1263
Judge:	STEVEN ELLIOTT
Official File Stamp:	01-28-2010:10:21:31
Clerk Accepted:	01-28-2010:10:22:13
Court:	Second Judicial District Court - State of Nevada
Case Title:	POST: FERRILL J. VOLPICELLI (D10)
Document(s) Submitted:	Supreme Court Order Denying
Filed By:	Cathy Kepler
	You may review this filing by clicking on the following link to take you to your cases.

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The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

KAY ARMSTRONG

RICHARD GAMMICK, ESQ.

Case No. CR03-P1263

Dept. No. 10

FILED

2013 APR 23 PM 1:43

JOEY ORLANDO HASTINGS
CLERK OF THE COURT
BY _____ DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * * *

FERRILL J. VOLPICELLI,

Petitioner,

-vs-

ROBERT LEGRAND WARDEN
LOVELOCK CORRECTIONAL CENTER
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

SUCCESSIVE HAINES V. WEBER 544 U.S. 269 (2005) STAY & ABEYANCE

"EVIDENTIARY HEARING REQUESTED"

INSTRUCTIONS:

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

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

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

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

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

LCC LL FORM 26.082

future petitions challenging your conviction and sentence.

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

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

PETITION

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

2. Name and location of court which entered the judgment of conviction under attack: SECOND JUDICIAL DISTRICT COURT, WASHOE COUNTY, STATE OF NEVADA

3. Date of judgment of conviction: APRIL 1, 2004

4. Case number: CR03-1263

5. (a) Length of sentence: MULTIPLE LIFE SENTENCES WITH TWO RUNNING CONSECUTIVELY/POSSIBILITY OF PAROLE AT TEN YEARS

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

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

Yes ___ No X

If "yes," list crime, case number and sentence being served at this time: N/A

7. Nature of offense involved in conviction being challenged: PROPERTY OFFENSES INCLUDING CONSPIRACY, BURGLARY AND POSSESSION OF INSTRUMENTALITIES ENHANCED BY HABITUAL CRIMINAL STATUTE NRS 207.010

8. What was your plea? (check one)

(a) Not guilty X
(b) Guilty ___
(c) Guilty but mentally ill ___
(d) Nolo contendere ___

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

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

(a) Jury X (b) Judge without a jury ___

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

12. Did you appeal from the judgment of conviction?

Yes X No ___

13. If you did appeal, answer the following:
(a) Name of court: NEVADA STATE SUPREME COURT
(b) Case number or citation: 43203
(c) Result: DISTRICT COURT RULING AFFIRMED
(d) Date of result: ___
(Attach copy of order or decision, if available.)

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

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

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

(a) (1) Name of court: UNITED STATES DISTRICT COURT

(2) Nature of proceeding: FEDERAL HABEAS PETITION PURSUANT TO 28 USC § 2254

(3) Grounds raised: GROUNDS ARE IDENTICAL TO THE INSTANT GROUNDS PRESENTED IN THIS SUCCESSIVE PETITION

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

(5) Result: COURT ISSUED STAY AND ABEYANCE

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: PLEASE REFER TO ATTACHED ORDERS & USDC (DKT #31); HOLMES V PALMER CASE: 3:10-CV-00005-LRH-VPC

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

(1) Name of court: SECOND JUDICIAL DISTRICT COURT

(2) Nature of proceeding: WRIT OF PROHIBITION

(3) Grounds raised: JURISDICTIONAL CHALLENGE SPECIFIC TO EXCESSIVE SENTENCE UNDER NRS 207.010(1)(b)(2) AS FILED DECEMBER 6, 2011

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

(5) Result: _____

(6) Date of result: MAY 24, 2012

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: SEE ATTACHED ORDER CR03-1263

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

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

(1) First petition, application or motion?
Yes ___ No X

Citation or date of decision: NA

(2) Second petition, application or motion?
Yes X No ___

Citation or date of decision: PENDING

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

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)
FIRST PETITION (FEDERAL/2254 HABEAS). COURT ADMINISTRATIVELY CLOSED CASE AND ISSUED A STAY AND ABEYANCE UNDER "RHINES V. WEBER, 544 U.S. 269 (2005); SECOND: PENDING APPELLATE REVIEW BEFORE THE NEVADA STATE SUPREME COURT.

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

(a) Which of the grounds is the same: ALL GROUNDS "23" INCLUSIVE

(b) The proceedings in which these grounds were raised: STATE WRIT OF HABEAS CORPUS (POST-CONVICTION); & FEDERAL HABEAS PETITION; NRS 34.726-735; 28 USC § 2254.

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)
U.S.D.C HAS ISSUED AN ORDER OF STAY AND ABEYANCE PURSUANT TO RHINES V. WEBER, SUPRA. THE STATE COURTS HAVE NOT REACHED THE MERITS OF THE PETITION FOR PURPOSES OF EXHAUSTION AS OUTLINED IN THE ATTACHED ORDERS. * CONTINUED ON PAGES 5(A)(B)(C).

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) SEE PARAGRAPH 17(A)(B)(C) ABOVE

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)
SEE PARAGRAPH 17(A)(B)(C) ABOVE

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

CONTINUED FROM page 5, 17(c)
IN ADDITION TO A COLORFUL SHOWING OF ACTUAL INNOCENCE, AS WELL AS DEMONSTRATING A FUNDAMENTAL MISCARRIAGE OF JUSTICE, PETITIONER CAN BE EXCUSED FOR ANY PROCEDURAL BARS UNDER NRS 34.810. PELLEGRINI V. STATE, 117 NEV. 860, 34 P3d 519 (2001); SAWYER V. WHITLEY, 112 SCT 2514 (1992).
PETITIONER'S SUCCESSIVE PETITION CAN BE ADDRESSED ON THE MERITS OF THE PROCEDURAL DEFAULT.
THE FINDINGS OF FACTS AND CONCLUSIONS OF LAW OF THE U.S.D.C REFERENCED HEREIN (DKT #31) ATTACHED VIA THE ACCOMPANYING APPENDIX SUPPORTS PETITIONER'S CAUSE AND PREJUDICE. MARTINEZ-VILLAREAL V. LEWIS, 77 F3d 1005 (9th CIR. 1996), CITING BROWN V CALDERON, 77 F3d 1155 (9th CIR. 1996).
PETITIONER HAS PRESENTED HIS CLAIMS TO THE STATE COURTS. THE CLAIMS CANNOT BE PROCEDURALLY BARRED IF THE STATE COURTS HAVE FAILED TO ADDRESS OR REACH THE MERITS OF A PROPERLY PRESENTED PETITION OF CONSTITUTIONAL CLAIMS WHICH FORM THE BASIS FOR FEDERAL HABEAS RELIEF. (SEE ATTACHED ORDER OF STAY AND ABEYANCE) THE CLAIMS ARE POTENTIALLY MERITORIOUS AND THERE IS NO INDICATION THAT PETITIONER ENGAGED IN INTENTIONAL DILATORY LITIGATION TACTICS. RHINES @ 278; JACKSON V. ROE, 425 F3d 654 (9th CIR. 2005).

Ferrill J. Volpicelli
Pro Se Litigant

THE FEDERAL COURT WILL NOT REVIEW A QUESTION OF FEDERAL LAW WITHOUT THE STATE COURTS ADDRESSING THE MERITS OF THE FEDERAL CONSTITUTIONAL VIOLATIONS. COLEMAN V. THOMPSON, 501 U.S 722 (1991). A HABEAS PETITIONER WHO HAS BEEN PREJUDICED BY THE STATE COURTS' OMISSIONS IN REVIEWING PRESENTED FEDERAL CONSTITUTIONAL CLAIMS CAN BY-PASS PROCEDURAL BARS IN A SUCCESSIVE PETITION FILED IN STATE COURT FOR THE PURPOSE OF EXHAUSTION. ESPECIALLY WHEN THE CAUSE AND PREJUDICE ARE ATTRIBUTABLE HERETO BY THE STATE COURTS. MURRAY V. CARRIER, 477 U.S. 478 (1986).

IN THE INSTANT CASE, THE STATE COURTS DECIDED ONLY (22)* OF THE PETITIONER'S TWENTY THREE (23) PRESENTED GROUNDS. GROUND 23 WAS TOTALLY OMITTED, AS EVIDENCED INITIALLY BY THE DISTRICT COURT'S ORDERS DATED AUGUST 2, 2007 AND APRIL 14, 2008, AS WELL AS THE NEVADA SUPREME COURT'S DECEMBER 3, 2009 ORDER OF AFFIRMANCE. YET, ALL GROUNDS WERE FAIRLY PRESENTED UNDER ROSE V. LUNDY, 455 U.S. 509 (1982) AND ANDERSON V. HARLESS, 459 U.S. 4, 6. (1982). FURTHER, ALL FACTS NECESSARY IN SUPPORT PETITIONER'S 23 GROUNDS WERE FAIRLY PRESENTED - DESCRIBING THE OPERATIVE FACTS AND LEGAL THEORY UPON WHICH THE FEDERAL CLAIMS ARE BASED.

Ferrill J. Volpicelli
Pro Se Litigant

IN DEMONSTRATING CAUSE FOR THE PROCEDURAL DEFAULT, IF ANY, PETITIONER HAS SHOWN AN OBJECTIVE FACTOR EXTERNAL TO THE IMPEDIMENT OF THE STATE COURTS FAILURE TO COMPLY WITH PETITIONERS EFFORTS WITH THE STATE PROCEDURAL RULES. MOREOVER, THE STATE COURTS THEMSELVES PREVENTED PETITIONER FROM RAISING AND/OR PRESENTING HIS CLAIMS.
McCLESKY V. ZANT, 499 U.S 467, 497 (1991);
CASEY V. MOORE, 386 F3d 896, 916 (9th Cir 2004);
BROWN V. REESE, 541 US 27, 29, 124 Sct 1347 (2004).

*THE DISTRICT COURT RULED ON 22 OF THE 23 PROFFERED GROUNDS, WHILE THE NEVADA SUPREME COURT RULED ON ONLY 4 OF THE PROFFERED 23 GROUNDS.

Ferrill J. Volpicelli
Pro Se Litigant

Yes X No ___

If yes, state what court and the case number: NEVADA STATE SUPREME COURT, DKT NO:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: JACK ARMSTRONG (ESQ.) (PRETRIAL), BRADLEY WHITLEY (ESQ.) (TRIAL), MARY LOU WILSON (ESQ.) (DIRECT APPEAL)

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

Yes ___ No X

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

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

(a) Ground one: PLEASE SEE ATTACHED MEMORANDUM OF POINTS AND AUTHORITIES FOR ALL GROUNDS AND SUPPORTING FACTS AS TO THE INSTANT PETITION.

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

* KAY ELLEN ARMSTRONG (ESQ.) WAS COUNSEL FOR FIRST PETITION FOR STATE WRIT OF HABEAS CORPUS (POST-CONVICTION)

(b) Ground two: ___

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

(c) Ground three: _____

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

(d) Ground four: _____

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

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

EXECUTED at Lovelock Correctional Center on the 11 day of the month of April of the year 2013

Terrell Vaughn #78566
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

VERIFICATION

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

[signature] #[redacted]
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

CERTIFICATE OF SERVICE BY MAIL

I, [redacted] hereby certify, pursuant to N.R.C.P. 5(b), that on this 11 day of the month of April of the year 2013, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Warden [redacted]
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada

Catherine Cortez Masto
Nevada Attorney General
100 No. Carson Street
Carson City, Nevada 89701-4717

[redacted] County District Attorney
[redacted]
[redacted], Nevada 89[redacted]

(District Attorney of County of Conviction)

[signature] #[redacted]
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Successive WRIT of HABEAS CORPUS (Post-Conviction) & Accompanying Appendices
(Title of Document)

filed in District Court Case No. CR03-P1263:

X Does NOT contain the social security number of any person.

-OR-

___ Contains the social security number of a person as required by:

A. A specific state or federal law, to-wit:

_____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Dated this 11 day of April, 2013.

Pearlie Johnson #78265
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

LCC LL FORM 26.010

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Ferrill J. Volpicelli
Pro Se Litigant

APPENDIX 1

ORIGINAL

CODE 1850

FILED

APR - 1 2004

RONALD A. LONGTIN, JR., CLERK

By: DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

vs.

FERRILL JOSEPH VOLPICELLI,

Defendant.

Case No. CR03-1263

Dept. No. 10

JUDGMENT

The Defendant having been found guilty by a jury, and no sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That Ferrill Joseph Volpicelli is guilty of the crimes of Conspiracy to Commit Crimes Against Property, a violation of NRS 199.480, NRS 205.060, NRS 205.0832, NRS 205.090, NRS 205.110, NRS 205.220, NRS 205.240, NRS 205.380 and NRS 205.965, a gross misdemeanor, as charged in Count I of the Indictment, Burglary, a violation of NRS 205.060, a felony, as charged in Counts II through IX of the Indictment and Unlawful Possession, Making, Forgery or Counterfeiting of Inventory Pricing Labels, a violation of NRS 205.965(2) and (3), a felony, as charged in Count X of the Indictment and the Court having adjudged the Defendant to be an Habitual Criminal as provided under NRS 207.010, the Court hereby sentences the Defendant by imprisonment in the Washoe County Jail for the term of twelve (12) months, as to Count I, to run concurrently with the sentences

EXHIBIT V9.600

imposed in Counts II through X. As to Count II, he be punished by imprisonment in the Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years has been served. As to Count III, he be punished by imprisonment in the Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years has been served, to run concurrently with Count II. As to Count IV, he be punished by imprisonment in the Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years has been served, to run concurrently with Count III. As to Count V, he be punished by imprisonment in the Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years has been served, to run concurrently with Count IV. As to Count VI, he be punished by imprisonment in the Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years has been served, to run concurrently with Count V. As to Count VII, he be punished by imprisonment in the Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years has been served, to run concurrently with Count VI. As to Count VIII, he be punished by imprisonment in the Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years has been served, to run concurrently with Count VII. As to Count IX, he be punished by imprisonment in the Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years has been served, to run concurrently with Count VIII. As to Count X, he be punished by imprisonment in the Nevada State Prison for the term of Life with parole eligibility beginning after ten (10) years has been served, to run consecutively to Counts II through IX. The Defendant is further ordered to pay the statutory Twenty-Five Dollar ($25.00) administrative assessment fee, a One Hundred Fifty Dollar ($150.00) DNA testing fee, restitution in the amount of Ten Thousand Three Hundred Thirty-Nine Dollars and Sixteen Cents ($10,339.16) and reimburse the County of Washoe the sum of Five Hundred Dollars ($500.00) for legal representation by the Washoe County Public Defender's Office.

///

///

The Defendant is given credit for zero (0) days time served.

It is further ordered the above sentence shall run consecutively to any other sentence the Defendant is obligated to serve.

DATED this 1st day of April, 2004.

DISTRICT JUDGE

APPENDIX 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43203

FILED

MAY 07 2004

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

ORDER OF LIMITED REMAND FOR APPOINTMENT OF COUNSEL

This is a proper person appeal from a judgment of conviction. We remand this appeal to the district court for the limited purpose of securing counsel for appellant.[1] The district court shall have 30 days from the date of this order to appoint counsel for appellant. Within 5 days from the date of appointment, the district court clerk shall transmit to the clerk of this court a copy of the district court's written or minute order appointing appellate counsel.

It is so ORDERED.

_____, C.J.

cc: Hon. Steven P. Elliott, District Judge
Ferrill Joseph Volpicelli
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

[1]See Evitts v. Lucey, 469 U.S. 387 (1985).

EXHIBIT

V9.604

APPENDIX 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43203

FILED

JUN 2 9 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of eight counts of burglary, one count of conspiracy, and one count of possession or making of counterfeit pricing labels. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant Ferrill Volpicelli asserts four errors on appeal of his indictment, conviction, and sentencing. First, Volpicelli claims that the district court erred in not quashing his indictment after the grand jury heard inadmissible evidence of his prior burglary conviction. Next, Volpicelli contends that the district court erred in finding him competent to stand trial. Volpicelli also argues that the jury had insufficient corroborating evidence of accomplice testimony to convict him. Finally, Volpicelli claims that the district court abused its discretion in enhancing his sentence after adjudicating him a habitual criminal. We disagree.

DISCUSSION

Grand jury indictment

Volpicelli cites no law, but contends that the district court erred in not quashing his indictment based on the improper admission of his prior conviction, claiming that the jurors were tainted by the prior conviction since they returned a true bill. The State cites State of Nevada

EXHIBIT

05-12862

V0606

v. Logan[1] and contends the applicable standard is whether the evidence presented to the grand jury, without the disputed evidence, was sufficient to sustain the indictment. The State further argues that there was more than sufficient evidence presented to sustain the indictment.

NRS 172.155 calls for grand jury indictment "when all the evidence before them, taken together, establishes probable cause to believe that an offense has been committed and that the defendant committed it." NRS 172.135 mandates that "the grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." But an indictment is not automatically quashed if some of the evidence presented is not legal evidence.[2]

In Robertson v. State, this court held that although the grand jury may have heard inadmissible hearsay evidence, the indictment could be sustained where there was sufficient legal evidence.[3] This court affirmed the dismissal of an indictment in Sheriff v. Frank, a case where

---

[1]1 Nev. 509 (1865) (republished as 1-2 Nev. 427, 431) ("[W]here there is the slightest legal evidence, the court cannot inquire into its sufficiency, or set it aside, because some illegal evidence was received with it.").

[2]Logan, 1-2 Nev. at 431:

> That a grand jury should receive none but legal proof, is an old and well-established rule, but that the admission of evidence not strictly legal will authorize a setting aside of an indictment, is a proposition which seems to have no authority to sanction it, and, if adopted, would only be an impediment to the execution of criminal justice[.]

[3]84 Nev. 559, 561-62, 445 P.2d 352, 353 (1968).

the grand jury heard inadmissible evidence.[4] However, contributing to this court's finding that the dismissal was proper was the omission by the prosecutor of important exculpatory evidence;[5] and this court specifically reiterated adherence "to the general rule announced in Robertson."

Here, there was testimony from many witnesses as to Volpicelli's involvement in the alleged burglary scheme. Additionally, the prosecutor advised the grand jury that the prior burglary conviction was being presented for a limited purpose,[6] and should not be considered in determining whether there was sufficient probable cause to indict Volpicelli. While the grand jury here heard inadmissible evidence, its effect does not rise to the level of "clearly destroying" the independence, and "irreparably impairing" the function, of the grand jury under Frank. We conclude that there was sufficient legal evidence presented to the grand jury to sustain the indictment; and that the district court did not err in refusing to dismiss the indictment.

Competency

Again citing no law, Volpicelli argues on appeal that he may not have been "competent during the crimes," citing as evidence the

---

[4]103 Nev. 160, 734 P.2d 1241 (1987).

[5]Id. at 165-66, 734 P.2d at 1245 (finding that the omission of exculpatory evidence, along with the presentation of substantial inadmissible evidence, "clearly destroyed the existence of an independent and informed grand jury and irreparably impaired its function").

[6]We note that the prosecution incorrectly interpreted this court's holding in Lewis v. State, 109 Nev. 1013, 862 P.2d 1194 (1993) as mandating formal notice in the charging documents of the State's intention to seek an enhanced sentence based on prior convictions.

successful treatment of his "mental illness" since his incarceration. The State assumes that since Volpicelli's appeal brief refers to the competency hearing, the competency being appealed was actually Volpicelli's competency to stand trial.

This court will make the same assumption, in light of the fact that the record contains no evidence that the defense of insanity was considered or even mentioned. In Ogden v. State, this court noted that "[c]ompetency at the time of trial is not to be confused with the defense of insanity. Competency to stand trial is a judicial determination, whereas the defendant's sanity at time of commission of the act is a factual question."[7] The competency determination is based on "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational and factual understanding of the proceedings against him."[8] In reviewing a district court's determination of competency, this court will sustain such a finding when substantial evidence exists to support it.[9]

Here, the judge reviewed evaluations from two different doctors, and allowed several different attorneys for Volpicelli to be heard on the matter of competency. The two evaluations both concluded that Volpicelli understood his legal situation, and had sufficient ability to consult with his attorneys. We therefore conclude that substantial

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[7]96 Nev. 697, 698, 615 P.2d 251, 252 (1980).

[8]Jones v. State, 107 Nev. 632, 637, 817 P.2d 1179, 1182 (1991) (citing Melchor-Gloria v. State, 99 Nev. 174, 178-80, 660 P.2d 109, 113 (1983)).

[9]Tanksley v. State, 113 Nev. 844, 847, 944 P.2d 240, 242 (1997) (citing Ogden v. State, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980)).

evidence existed to support the district court's determination that Volpicelli was competent to stand trial.

Sufficiency of the evidence to corroborate accomplice testimony

Next Volpicelli contends that the jury had insufficient evidence to convict him on some of the charges, although which specific charges were not supported by sufficient evidence is not enumerated in his appeal. Volpicelli bases this contention on the State's failure to provide adequate corroboration of the testimony of Volpicelli's alleged accomplice. Volpicelli argues that with the exception of accomplice Brett Bowman, nobody else testified to seeing Volpicelli commit any crimes.

The State counters that there was ample corroboration to meet the statutory standard of independent evidence connecting the defendant to the crime.[10] The State argues that there was corroborative testimony as to the planning and execution of the crimes, as well as corroborative testimony connecting Volpicelli to physical evidence, including both the instruments of the crimes and the "booty" of the crimes.

This court will not disturb a conviction if it is supported by substantial evidence.[11] NRS 175.291 requires that accomplice testimony be corroborated:

> 1. A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to

---

[10]NRS 175.291.

[11]Coffman v. State, 93 Nev. 32, 34, 559 P.2d 828, 829 (1977).

> connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.
>
> 2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

"Corroboration evidence need not be found in a single fact or circumstance and can, instead, be taken from the circumstances and evidence as a whole."[12] However, such evidence must "independently connect the defendant with the offense; evidence does not suffice as corroborative if it merely supports the accomplice's testimony."[13]

Here, there was corroborative evidence that connected Volpicelli with both the commission of the crimes and the merchandise that was the object of the crimes. Volpicelli was placed at the scene of the crime the day of the arrest by the testimony of multiple police officers. Further, the State introduced independent testimony that Volpicelli (1) closely inspected the bike that was ultimately found in the van with the two suspects; (2) purchased one of the comforters found in the van; (3) owned both the van and the bag containing the label maker; and (4) was seen in stores where much of the recovered merchandise had been

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[12]Cheatham v. State, 104 Nev. 500, 504, 761 P.2d 419, 422 (1988) (citing LaPena v. State, 92 Nev. 1, 544 P.2d 1187 (1976)).

[13]Heglemeier v. State, 111 Nev. 1244, 1250, 903 P.2d 799, 803 (1995).

purchased, recording UPC codes. Additionally, there was ample testimony from various store representatives that supported the testimony of Bowman as to the value of the various merchandise recovered in the storage unit. Finally, there was independent testimony from both a police officer and the owner of the mini-storage business that connected Volpicelli, and not Bowman, to the storage unit where much of the merchandise was found.

We conclude, therefore, that there was sufficient corroboration of accomplice Bowman's testimony under NRS 175.291 to support all the jury's guilty verdicts against Volpicelli.

Habitual criminal status

Volpicelli contends that the district court abused its discretion when it found habitual criminal status and ran two of the enhanced sentences consecutively. Volpicelli's argument is based on the fact that none of his prior convictions were violent, and that he had untreated mental health problems. The State responds that the district court did not abuse its discretion, based on case law that permits such discretion, and the validity of the prior convictions.

NRS 207.010, the statute applied to Volpicelli's sentencing, provides several different levels of sentence enhancement against convicted criminals, depending on the offense committed and the offender's prior convictions. From the use of three prior felony convictions, along with the ten-to-life sentencing, we can make a reasonable assumption that it was NRS 207.010(1)(b)(2) that was used in Volpicelli's case, although the specific subsection is not cited in the record. That subsection reads in pertinent part:

> 1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this state of:
>
> . . . .
>
> (b) Any felony, who has previously been three times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony . . . is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:
>
> . . .
>
> (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served . . .

"The decision to adjudicate a person as a habitual criminal is not an automatic one."[14] It may be an abuse of discretion for a court to adjudicate an offender a habitual criminal using convictions that are remote in time and non-violent.[15] However, the statute "makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court."[16] In exercising its discretion, a trial court considering habitual

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[14]Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993).

[15]Id. (citing Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990)).

[16]Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) (citing French v. State, 98 Nev. 235, 645 P.2d 440 (1982)).

criminal status must make a judgment on the question of "whether it [i]s just and proper" for the offender to be adjudicated as a habitual criminal.[17]

Here, it is clear from the record that the district court considered the nature of Volpicelli's prior convictions, and considered the impact of Volpicelli's crimes on both law enforcement and society as a whole. We conclude that this meets the requirements of Clark as to "weigh[ing] the appropriate factors"[18] and making a judgment that Volpicelli "deserved to be declared a habitual criminal."[19] Accordingly we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Maupin

_____, J.
Douglas

_____, J.
Parraguirre

cc: Hon. Steven P. Elliott, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[17]Clark, 109 Nev. at 428, 851 P.2d at 427.

[18]Id.

[19]Id. at 427, 851 P.2d at 427.

APPENDIX 4

ORIGIN

Code: 2922

FILED

AUG - 2 2007

RONALD A. LONGTIN, JR., CLERK

By: DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

FERRILL J. VOLPICELLI,

Petitioner,

vs.

LENARD VARE, WARDEN,

Respondent.

Case No.: CR03P1263

Dept. No.: 10

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.

EXHIBIT 9.616

Law

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

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

Analysis

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

Ground One

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

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

Ground Two

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

Grounds Three, Four, Five, and Six

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

Ground Seven

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

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

Ground Eight

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

dismissed.

Ground Nine

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

Ground Ten

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

Ground Eleven

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

Ground Twelve

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

Ground Thirteen

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

Ground Thirteen is dismissed.

Ground Fourteen

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

Ground Fifteen

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

Ground Sixteen

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

Ground Seventeen

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

Ground Eighteen

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

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

Ground Nineteen

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

Ground Twenty

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

Ground Twenty-One

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

Ground Twenty-Two

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

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

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

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

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

DATED this 2 day of August, 2007.

STEVEN P. ELLIOTT
District Judge

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FILED

2008 APR 14 AM 11:35

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

ERRILL JOSEPH VOLPICELLI,

Petitioner,

v. Case No. CR03P1263

LENARD VARE, WARDEN, Dept. No. 10

Respondent.

_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause is before the court upon a petition for writ of habeas corpus (post-conviction). Petitioner Volpicelli was represented by counsel when he stood trial for several charges stemming from a scheme involving changing UPC price codes in retail stores. He was found guilty of several felonies and at sentencing the court sentenced him as a habitual criminal. He appealed, but the judgment was affirmed. He then filed a petition for writ of habeas corpus, asserting claims of ineffective assistance of counsel.

The State moved to dismiss some of the claims. On August 27, 2007 this court entered an order dismissing some of the claims and allowing a hearing on claims 7, 11, 12 and 14. The court incorporates that interim order into this final judgment.

The surviving claims were scheduled for a hearing on September 20, 2007. The court

EXHIBIT 9.623

heard evidence from attorney Van Ry and from the prosecutor, Tammy Riggs. Petitioner elected not to testify. Some of the claims concerned alleged prior inconsistent statements by a witness at the trial. The alleged prior statements mostly arose during an interview between that witness and police officers. The court was also able to review the transcripts of those interviews. These findings are based on the evaluation of the record, the transcripts of the police interviews and the evidence adduced at the habeas corpus hearing.

One of the claims involved restitution. The claim of ineffective assistance of counsel, however, was based on a chart showing the disposition of stolen property. That chart was prepared well after this litigation, by an Assistant City Attorney who was not involved in the instant litigation. In argument, counsel for petitioner conceded that trial counsel could not be ineffective in failing to utilize that which did not exist at the time. Accordingly, the claim that counsel was ineffective in failing to challenge the amount of restitution is denied.

Another claim was that the prosecutor failed to produce exculpatory evidence. By the end of the hearing the petitioner had not adduced any evidence that had not been provided to the defense. Accordingly, the claim of withholding evidence remains unproven and is denied.

Another claim is that trial counsel was ineffective in failing to adduce additional evidence to show the extent of the plea bargain that was accepted by Volpicelli's confederate, witness Brett Bowman. The record reveals that Bowman had already been sentenced by the time of Volpicelli's trial and the details of the agreement were fully disclosed in the trial. Petitioner has not introduced any evidence of any other or additional terms to Bowman's plea agreement and so that claim, too, remains unproven.

Finally, the petition had a list of alleged prior statements by Bowman that could have been used to impeach Bowman's testimony. The court has reviewed the trial transcripts and the transcripts of Bowman's interviews with police and finds nothing significant. Certainly there is nothing that would probably have altered the outcome of the trial. On that subject, the court notes that Bowman did not testify in the habeas corpus hearing and thus there is no

evidence at all about how Bowman would have responded if he had been questioned further about his prior statements.

Most of the alleged inconsistent statements were not inconsistent at all. For example, at trial Bowman was asked if he has purchased a certain bit of equipment at a Staples store in California. He answered "no." The alleged inconsistent statement arises from interview transcripts in which he admitted purchasing the device, but without any reference to the name of the store or the state in which it was purchased. Thus, the prior statement is not inconsistent at all. To the extent that the prior statement could have been used to start a dialogue, the court notes again that Bowman did not testify in the habeas corpus hearing and there is therefore no evidence showing how he would have responded to additional questions on the subject of purchasing the label making device.

Similarly, at trial he was asked specifically if police officers helped him get a paycheck from the Sands casino and he denied getting such help. The interview transcripts do not contradict that testimony as they only indicate that he had indeed got his paychecks but that they were in his personal property. The police offered only to help him negotiate the checks. That is not inconsistent with his trial testimony and there is no evidence showing how further discussions would have helped petitioner in any way.

At trial, Bowman minimized his share of the loot. Volpicelli contends that he could have been impeached with evidence that Bowman also acquired some home electronics. The interview transcripts, however, are not inconsistent as they do not show that the home electronics were stolen in the scheme with Volpicelli. Instead, Bowman claimed to have purchased those items. Volpicelli has adduced no evidence to the contrary and so the claim that counsel was ineffective in failing to impeach remains unproven.

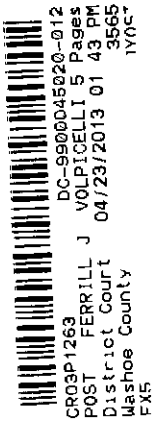
The court has reviewed the evidence presented, including the transcripts of police interviews, and finds nothing that would have been likely to alter the outcome of this litigation.

One who would claim ineffective assistance of counsel bears the burden of showing, by a

preponderance of the evidence, that the specific acts, omissions or decisions of counsel fell below an objective standard of reasonableness and that but for the failings of counsel a different result was reasonably probable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). This court has simply not been persuaded by the evidence that counsel acted unreasonably or that the results would probably have been different if counsel had made different decisions. Accordingly, the petition is denied.

DATED this 11 day of April, 2008.

DISTRICT JUDGE



APPENDIX 5

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FILED

2008 APR 14 AM 11:35

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

[illegible]RRILL JOSEPH VOLPICELLI,

Petitioner,

v. Case No. CR03P1263

LENARD VARE, WARDEN, Dept. No. 10

Respondent.

/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause is before the court upon a petition for writ of habeas corpus (post-conviction). Petitioner Volpicelli was represented by counsel when he stood trial for several charges stemming from a scheme involving changing UPC price codes in retail stores. He was found guilty of several felonies and at sentencing the court sentenced him as a habitual criminal. He appealed, but the judgment was affirmed. He then filed a petition for writ of habeas corpus, asserting claims of ineffective assistance of counsel.

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The surviving claims were scheduled for a hearing on September 20, 2007. The court

EXHIBIT

heard evidence from attorney Van Ry and from the prosecutor, Tammy Riggs. Petitioner elected not to testify. Some of the claims concerned alleged prior inconsistent statements by a witness at the trial. The alleged prior statements mostly arose during an interview between that witness and police officers. The court was also able to review the transcripts of those interviews. These findings are based on the evaluation of the record, the transcripts of the police interviews and the evidence adduced at the habeas corpus hearing.

One of the claims involved restitution. The claim of ineffective assistance of counsel, however, was based on a chart showing the disposition of stolen property. That chart was prepared well after this litigation, by an Assistant City Attorney who was not involved in the instant litigation. In argument, counsel for petitioner conceded that trial counsel could not be ineffective in failing to utilize that which did not exist at the time. Accordingly, the claim that counsel was ineffective in failing to challenge the amount of restitution is denied.

Another claim was that the prosecutor failed to produce exculpatory evidence. By the end of the hearing the petitioner had not adduced any evidence that had not been provided to the defense. Accordingly, the claim of withholding evidence remains unproven and is denied.

Another claim is that trial counsel was ineffective in failing to adduce additional evidence to show the extent of the plea bargain that was accepted by Volpicelli's confederate, witness Brett Bowman. The record reveals that Bowman had already been sentenced by the time of Volpicelli's trial and the details of the agreement were fully disclosed in the trial. Petitioner has not introduced any evidence of any other or additional terms to Bowman's plea agreement and so that claim, too, remains unproven.

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evidence at all about how Bowman would have responded if he had been questioned further about his prior statements.

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The court has reviewed the evidence presented, including the transcripts of police interviews, and finds nothing that would have been likely to alter the outcome of this litigation.

One who would claim ineffective assistance of counsel bears the burden of showing, by a

preponderance of the evidence, that the specific acts, omissions or decisions of counsel fell below an objective standard of reasonableness and that but for the failings of counsel a different result was reasonably probable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). This court has simply not been persuaded by the evidence that counsel acted unreasonably or that the results would probably have been different if counsel had made different decisions. Accordingly, the petition is denied.

DATED this 11 day of April, 2008.

DISTRICT JUDGE

APPENDIX 6

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51622

FILED

DEC 0 3 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On April 1, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to commit crimes against property, eight counts of burglary, and one count of unlawful possession, making, forging or counterfeiting of inventory pricing labels. The district court adjudicated appellant a habitual criminal and sentenced appellant to terms totaling life in the Nevada State Prison with the possibility of parole after 20 years. Appellant was also ordered to pay $10,339.16 in restitution. On appeal, this court confirmed the judgment of conviction and sentence. Volpicelli v. State, Docket No. 43203 (Order of Affirmance, June 29, 2005). The remittitur issued on July 26, 2005.

On November 9, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Counsel was appointed and filed a supplement. On April 2, 2007, the district court entered an order dismissing the majority of appellant's claims and set an evidentiary

EXHIBIT
09-29296

hearing concerning the remaining claims. Following an evidentiary hearing, the district court denied the remaining claims on April 14, 2008. This appeal follows.

Appellant argues that the district court erred in denying four of his ineffective assistance of trial counsel claims. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant argues that his trial counsel was ineffective for failing to object to the use of a 2004 Nevada conviction for aiding and abetting in the commission of attempting to obtain money by false

pretenses for adjudication as a habitual criminal. Appellant fails to demonstrate that he was prejudiced.

The criminal activity for the 2004 conviction for attempting to obtain money by false pretenses occurred after appellant had been charged and was awaiting trial for this case. However, appellant was convicted of attempting to obtain money by false pretenses prior to his conviction in this case. After the trial for this case, the State sought adjudication of appellant as a habitual criminal and filed the 2004 judgment of conviction for obtaining money by false pretenses along with two other judgments of conviction. The other judgments of conviction were a 1998 federal court conviction of four counts of felony tax perjury and a 1998 Nevada conviction for two counts of burglary. As the conviction for the attempt to obtain money by false pretenses was not entered before the unlawful actions leading to the instant offense occurred, the conviction for the attempt to obtain money by false pretenses was not properly used as a past conviction for purposes of adjudication as a habitual criminal in the instant matter. Brown v. State, 97 Nev. 101, 102, 624 P.2d 1005, 1006 (1981). However, we conclude that any error was harmless because a sufficient number of convictions was presented. See NRS 178.598 (stating that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded").

The two additional judgments of conviction list six additional felonies which were properly considered when determining appellant's adjudication as a habitual felon. Appellant makes no argument that any of the six other felonies were improperly considered. A review of the record reveals that, at the sentencing hearing, the State presented evidence that the felony tax perjury convictions stemmed from a plan

running over at least four years, with numerous transactions, through which appellant fraudulently gained at least $800,000. Accordingly, the previous tax perjury convictions were not the result of the same act, transaction, or occurrence and may be used as four separate convictions for purposes of habitual criminal adjudication. Rezin v. State, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979). Thus, even excluding the conviction for the attempt to obtain money by false pretenses, there were sufficient past felony convictions for the district court to adjudicate appellant a habitual criminal. NRS 207.010. Considering the district court's statement at the sentencing hearing to appellant that he was the "poster child for habitual criminality in that every time you're released from custody it seems like you're out making a full-time living stealing," appellant fails to demonstrate a reasonable probability that the outcome of the sentencing hearing would have been different had his trial counsel objected to the use of the 2004 Nevada conviction for attempt to obtain money by false pretenses when adjudicating him as a habitual criminal. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his trial counsel was ineffective for failing to argue that the burglary offenses and the unlawful possession, making, forging or counterfeiting of inventory pricing labels offense merged, and that conviction and sentence for both constitute a violation of double jeopardy. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. To determine whether multiple offenses violate double jeopardy principles "'[t]he test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. If the latter, there can be but one penalty.'" Blockburger v. United States,

284 U.S. 299, 302 (1932) (quoting Wharton's Criminal Law § 35 (11th ed.)); see also United States v. Dixon, 509 U.S. 688, 696 (1993). Burglary occurs when a person enters a building with the intent to commit any felony, or to obtain money or property by false pretenses. NRS 205.060(1). The unlawful possession, making, forging or counterfeiting of inventory pricing labels occurs when a person possesses, makes, alters, forges, or counterfeits any sales receipt or inventory pricing label with the intent to cheat or defraud a retailer. NRS 205.965(1). Therefore, the acts of burglary and the unlawful possession, making, forging or counterfeiting of inventory pricing labels offense are distinct individual acts with different elements. Thus, conviction and sentencing for the offenses do not violate double jeopardy principles. Appellant fails to demonstrate a reasonable probability that the outcome of the proceedings would have been different had his trial counsel argued the conviction and sentence for both crimes violated double jeopardy. Therefore, the district court did not err in denying this claim.

Third, appellant argues that his trial counsel was ineffective for failing to argue for a lesser restitution amount. Appellant argues that the items taken from the various businesses were returned after they were recovered by the police, and therefore, the businesses did not lose the total amount of the restitution that was imposed. Appellant fails to demonstrate that he was prejudiced. Appellant fails to identify any way in which to reasonably calculate the value lost by the businesses due to appellant's crimes. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984); see also NRS 205.0831 (stating that the standard by which to calculate the value of property obtained through theft is the fair market value of the property at the time of the theft). The district court concluded

that trial counsel was not ineffective for failing to argue for a lower restitution amount and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

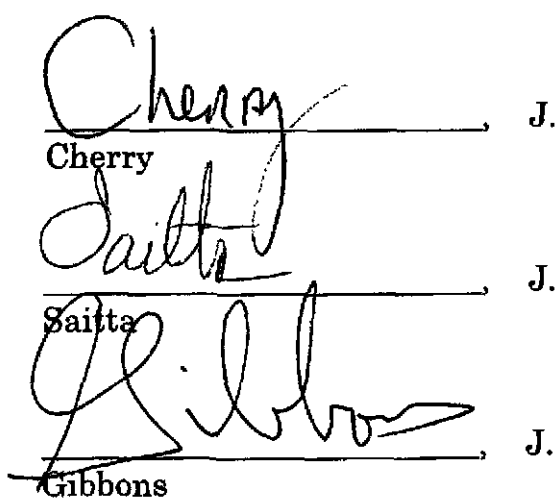
Fourth, appellant argues that his trial counsel was ineffective for failing to cross-examine Brett Bowman concerning his inconsistent statements. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant compares statements Bowman made prior to trial with those that Bowman made during trial and argues they were inconsistent. The district court determined that the statements appellant compares covered different topics and that the questions were posed differently in each situation. The district court also determined that the questions posed to Bowman necessarily elicited different answers. Those statements were, therefore, consistent statements that could not have been used for impeachment purposes. See NRS 51.035(2)(a); Leonard v. State, 114 Nev. 639, 652-53, 958 P.2d 1220, 1230 (1998). The district court also determined that appellant failed to demonstrate a reasonable probability that the outcome of the trial would have been different had counsel questioned Bowman about these statements. Appellant fails to demonstrate that the district court's determination was erroneous and we conclude that substantial evidence supports the district court's determination. Therefore, the district court did not err in denying this claim.

Next, appellant argues that the district court erred by conducting an evidentiary hearing over only four of his claims and dismissing the remainder. Other than the claim concerning the use of past convictions for adjudicating appellant as a habitual criminal, appellant makes no specific argument for why an evidentiary hearing

should have been conducted concerning any other claims or why the district court erred in dismissing any other claims. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Because appellant's claim was not supported by specific argument, we conclude appellant failed to demonstrate the district court erred. See Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000).

Accordingly, having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



Cherry, J.

Saitta, J.

Gibbons, J.

cc: Hon. Steven P. Elliott, District Judge
Kay Ellen Armstrong
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

APPENDIX 7

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51622

FILED

JAN 22 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING MOTION TO RECALL REMITTITUR AND DENYING PERMISSION FOR A LATE PETITION FOR REHEARING

On December 3, 2009, this court affirmed the order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. On December 29, 2009, the remittitur was issued in this case. On January 6, 2010, this court received a motion to recall the remittitur and a petition for rehearing. Appellant failed to demonstrate that that the remittitur should be recalled. See Wood v. State, 60 Nev. 139, 104 P.2d 187 (1940). Further, the petition for rehearing is untimely. NRAP 40(a)(1). No good cause appearing, this court denies the motion to recall remittitur and denies permission to submit a late petition for rehearing.

It is so ORDERED.

Parraguirre, C.J.

cc: Hon. Steven P. Elliott, District Judge
Kay Ellen Armstrong
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

EXHIBIT

APPENDIX 8

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FERRILL JOSEPH VOLPICELLI,

Petitioner,

vs.

JACK PALMER, *et al.*,

Respondents.

3:10-cv-00005-LRH-VPC

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents' (#19) to dismiss, petitioner's motion (#34) for leave to file a traverse to the reply or in the alternative renewed motion for counsel, and respondents' motion (#36) to substitute party. Respondents seek the dismissal of a large number of claims in the petition primarily for lack of exhaustion.

Background

Petitioner Ferrill Joseph Volpicelli challenges his Nevada judgment of conviction, pursuant to a jury verdict, 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 challenged his conviction on direct appeal and state post-conviction review.

Governing Exhaustion Law

Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court remedies on a claim before presenting that claim to the federal courts. To satisfy this exhaustion requirement, the claim must have been fairly presented to the state courts completely through to the highest court available, in this case the Supreme Court of Nevada. *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156

(9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific federal constitutional guarantee and must also state the facts that entitle the petitioner to relief on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir. 2000). That is, fair presentation requires that the petitioner present the state courts with both the operative facts and the federal legal theory upon which the claim is based. *E.g., Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement insures that the state courts, as a matter of federal-state comity, will have the first opportunity to pass upon and correct alleged violations of federal constitutional guarantees. *See,e.g., Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

Under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a mixed petition presenting both exhausted and unexhausted claims must be dismissed without prejudice unless the petitioner dismisses the unexhausted claims or seeks other appropriate relief.

Discussion

Petitioner presents 23 grounds in the federal petition. Respondents challenge the exhaustion, in full or in part, of every ground except Grounds 7 and 11. Sundry groupings of grounds share common exhaustion issues. The parties have organized their argument by these groupings, and the Court similarly organizes its discussion by these same groupings. The Court thereafter discusses any remaining generalized across-the-board exhaustion arguments presented by petitioner.

Grounds 1, 2, 10, 12 through 17, and 19 through 22

The exhaustion issue with regard to Grounds 1, 2, 10, 12 through 17, and 19 through 22 essentially is whether these claims were fairly presented to the Supreme Court of Nevada on the state post-conviction appeal.

In federal Ground 1, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel when appellate counsel failed to properly "federalize" direct appeal claims: (a) that the state district court erred in finding the indictment lawful after the State presented a prior burglary conviction to the grand jury; (b) that petitioner was not "competent" at the time of the crimes; (c) that the jury may have convicted petitioner on insufficient evidence; and (d) that the district court abused its discretion in finding habitual criminal status for two counts and running them consecutive.

In Ground 2, petitioner alleges that he was denied due process and equal protection in violation of the Fifth, Sixth, and Fourteenth Amendments when the state supreme court failed to provide necessary and adequate appellate review on direct appeal by allegedly not protecting petitioner's constitutional rights when adjudicating the direct appeal claims presented.

In Ground 10, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel when trial counsel allegedly failed to protect him from a selective and vindictive prosecution.

In Ground 12, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel when trial counsel failed to object to the prosecutor's alleged vouching for the co-defendant's allegedly known perjured testimony.

In Ground 13, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel when trial counsel failed to investigate and argue that storage unit representatives allegedly acted as agents for the police in derogation of his Fourth Amendment right to privacy.

In Ground 14, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel when trial counsel allegedly did not investigate "discovery issues related to prosecutorial transgressions, so as to unveil the state's purposeful withholding of exculpable [sic] evidence."

In Ground 15, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel when trial counsel failed to appeal the state district court's decision to not quash the indictment and failed to investigate and proffer other alleged deficiencies in the indictment.

In Ground 16, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel because of an alleged "actual conflict of interest" between trial counsel and petitioner, although the allegations presented do not reflect a true conflict of interest as opposed to a disagreement between petitioner and trial counsel over "counsel's and Petitioner's tactics and theories on how to defend Petitioner at trial."

In Ground 17, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel at sentencing when trial counsel allegedly failed to investigate and present "a host of mitigating information."

In Ground 19, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel when counsel allegedly failed to protect him from an excessive sentence and unfair sentencing hearing.

In Ground 20, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel when trial counsel failed to protect him from prosecution on two counts that allegedly impermissibly prosecuted him for his First Amendment freedom of thought in that he allegedly was prosecuted on the basis of law enforcement officer's perceptions of his private thoughts.

In Ground 21, petitioner alleges that he was denied, *inter alia*, effective assistance of counsel when trial counsel failed to protect him from prosecution under allegedly unconstitutionally vague statutes in N.R.S. 205.060 and 205.965.

In Ground 22, petitioner alleges that he was denied rights to due process, equal protection, effective assistance of counsel, and a fair tribunal due to the cumulative effect of errors by counsel, the prosecution, and the court, including but not limited to, the allegations in the prior 21 grounds.

The factual allegations and argument presented – in federal court – in support of the foregoing grounds collectively span 44 pages in the federal petition.

No such specificity was presented in the briefing to the Supreme Court of Nevada on the state post-conviction appeal.

On state post-conviction review, the state district court dismissed all but four of petitioner's grounds in an interlocutory order and thereafter held an evidentiary hearing on the remaining four grounds.[1]

On the state post-conviction appeal, the then-represented petitioner did not provide any argument specific to any of the grounds dismissed by the interlocutory order, with the limited exception of one conclusory reference to the habitual criminal adjudication.

Petitioner instead presented the following, in the main, conclusory argument:

> **I. The Trial Court Erroneously Dismissed all but Four of Petitioner's Grounds for Relief without a Hearing**
>
> An evidentiary hearing is required in regard to any claims that are supported by specific factual allegations unrepelled by the record and that would warrant relief if true. *Evans v. State*, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).
>
> This court recently held that the argument that counsel made

[1] #23, Ex. 100.

> reasonable strategic choices is in many instances a difficult assessment to make without the benefit of counsel's testimony at an evidentiary hearing. *Byford v. State,* 123 Nev. Adv. Op. No. 9 (2007) at p.3.
>
> Certainly the attorney's decision to stipulate to the admission of the "prior convictions" was not a reasonable strategic choice, and the district court should have heard evidence on this issue.

#25, Ex. 137, at 3; see also *id.*, Ex. 143, at 1 (verbatim argument in reply brief, as amended).

The Supreme Court of Nevada stated as follows in this regard:

> Next, appellant argues that the district court erred by conducting an evidentiary hearing over only four of his claims and dismissing the remainder. Other than the claim concerning the use of past convictions for adjudicating appellant as a habitual criminal, appellant makes no specific argument for why an evidentiary hearing should have been conducted concerning any other claims or why the district court erred in dismissing any other claims. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Because appellant's claim was not supported by specific argument, we conclude appellant failed to demonstrate the district court erred. See Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000).

#25, Ex. 147, at 6-7.

In the *Mazzan* decision invoked by the Supreme Court of Nevada, the state high court held as follows:

> Mazzan also lists six other claims which he raised in his petition and which the district court did not address: other instances of ineffective assistance of counsel; destruction of material evidence by the state; conflict-laden counsel; questioning by the state while Mazzan was held without a probable cause hearing; an unconstitutional instruction on reasonable doubt; and improper sentencing instructions. He does not cite the record regarding these claims, does not discuss their merits, and does not address whether they are procedurally barred. Contentions unsupported by specific argument or authority should be summarily rejected on appeal. *See Jones v. State*, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). *We therefore have not considered these claims.*

1116 Nev. at 75, 993 P.2d at 42 (emphasis added).

The state supreme court's citation to *Mazzan* thus reflects that the court summarily rejected the claims without considering the merits of the claims.

The grounds in question therefore were not fairly presented to the Supreme Court of Nevada and exhausted because they were not presented through a procedure in which the merits of the claims would be considered. It is established law that presenting a claim in a procedural context in which the merits

of the claim will not be considered, or will be considered only in special circumstances, does not constitute fair presentation of the claim. *See,e.g., Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). Appellate courts as a rule generally review only claims and issues argued specifically and distinctly in the briefing, and a bare assertion of a claim or issue does not preserve the claim or issue for appellate review. *See,e.g., Farmer v. McDaniel*, 666 F.3d 1228, 1233 n.5 (9th Cir. 2012); *Nevada Department of Corrections v. Greene*, 648 F.3d 1014, 1020 (9th Cir. 2011), *cert. denied*, 80 U.S.L.W. (Mar. 26, 2012). In the present case, the state high court's citation to *Mazzan* confirms that the Supreme Court of Nevada similarly did not review petitioner's wholly bare assertion of a multitude of claims in a blanket conclusory fashion here.

In this regard, the presence of petitioner's *pro se* state post-conviction petition in the record appendix on the state post-conviction appeal does not lead to a different conclusion. Under Nevada state practice, petitioner could not incorporate claims from materials in the appendix into the appellate briefing even if counsel had attempted to do so. Under Rule 28(e)(2) of the Nevada Rules of Appellate Procedure (NRAP), parties may not incorporate briefs or memoranda filed in the state district court for argument on the merits of an appeal. The provisions of NRAP 30(b)(2)(A) and (3) require the inclusion of the district court pleadings in the appendix as a matter of course. The mere presence of a pleading in an appendix on a Nevada appeal thus does not present any claim. Rather, the pleadings are present in the appendix simply because that is what Nevada appellate rules require. Generally, in order to fairly present a claim to a state appellate court, a petitioner must present the claim to the court within the four corners of his appellate briefing. *E.g., Castillo v. McFadden*, 399 F.3d 993, 1000 & 1002 n.4 (9th Cir. 2005); *see also Baldwin v. Reese*, 541 U.S. 27, 32, 124 S.Ct. 1347, 1351, 158 L.Ed.2d 64 (2004)("We . . . hold that ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so."). The state supreme court's citation to *Mazzan* in this case confirms that, under established Nevada appellate practice, petitioner did not fairly present any of the claims in question to the Supreme Court of Nevada because he did not present specific supporting argument within his briefing.

Moreover, even if the Court were to assume, *arguendo*, that the state supreme court's disposition constituted a disposition on the merits of the claims in question, the claims nonetheless would not be fairly presented and exhausted under established law. If the petitioner fundamentally alters the legal claim presented to the state courts on federal habeas review, the claim in federal court is not exhausted. *See,e.g., Beaty v. Stewart*, 303 F.3d 975, 989-90 (9th Cir. 2002). Here, there can be no doubt that presenting multiple specific claims in federal court with allegations and argument spanning 44 pages fundamentally alters a bare reference to claims *in globo* with no specific argument as to any of the claims in the state supreme court. None of the specifics presented in the federal petition were presented to the state supreme court within the governing appellate briefing rules.

However the exhaustion issue is analyzed in this regard, it would stand the exhaustion doctrine on its head to hold that petitioner's bare assertion on appeal – without any specific argument as to any of the claims in question – exhausted the corresponding 44 pages of claims in the federal petition.

Grounds 1, 2, 10, 12 through 17, and 19 through 22 therefore are not exhausted.[2]

Grounds 3 through 6

The exhaustion issue with regard to Grounds 3 through 6 is whether the claims presented in state court were presented as federal constitutional claims rather than claims of state law error.

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[2] As an alternative holding, the Court holds, in the event that a reviewing court concludes that the claims are exhausted, that the state supreme court's *arguendo* rejection of the conclusory presentation was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court. In this regard, federal courts are restricted on federal habeas review to the state court record when deciding claims previously adjudicated on the merits by the state courts. *Cullen v. Pinholster*, ___U.S. ___, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). In the present case, the state supreme court was presented with only the barest of assertions as to these claims in the briefing on the state post-conviction appeal. Any *arguendo* rejection of the claims on the merits on that showing was neither contrary to nor an unreasonable application of clearly established federal law.

On the exhaustion issue, the Court further has assumed, *arguendo*, that the claims presented in federal court are the same as the claims presented in the state district court. The critical issue is whether the claims were fairly presented to the Supreme Court of Nevada on the post-conviction appeal.

The Court notes that it appears that state Grounds 12 and 14 were not dismissed in the interlocutory order. The critical point, however, again, is that the claims therein were not fairly presented on the state post-conviction appeal. The claims in federal Grounds 12 and 14 were not fairly presented to and/or considered on the state post-conviction appeal, regardless of whether or not they were dismissed by the interlocutory order. See #25, Exhs. 137 & 147. If Grounds 12 and 14 were not dismissed by the interlocutory order, then this weakens rather than strengthens the argument for exhaustion of these claims, because the conclusory argument presented on the state post-conviction appeal pertained to claims dismissed by the interlocutory order, not to other claims.

In federal Ground 3, petitioner alleges that he was denied due process of law in violation of the Fifth and Fourteenth Amendments when a prior burglary conviction was presented to the grand jury.

In the claim presented on direct appeal, petitioner did not invoke any federal constitutional provisions, and he cited no state or federal cases in the argument applying federal constitutional law to overturn an indictment. Indeed, the Supreme Court of Nevada noted in its decision on direct appeal that petitioner "cite[d] no law" whatsoever supporting his contention that the state district court erred by not quashing the indictment. In the appellant's opening brief, petitioner asserted only that the state district court "may have erred" in not quashing the indictment, without invoking federal constitutional protections and/or citing applicable state or federal cases applying same.[3]

In federal Ground 4, petitioner alleges that he was denied due process and equal protection of the laws in violation of the Fifth, Sixth, and Fourteenth Amendments due to his alleged "mental incompetency" at the time of the alleged crimes, perhaps referring to an alleged lack of capacity at the time of the offenses. Petitioner alleges that he was not "competent" at the time of the burglaries and related offenses because he suffered from, *inter alia*, asthma, sleep apnea, vertigo, depression, panic anxiety disorder, and drug addiction.

In the claim presented on direct appeal, petitioner did not invoke any federal constitutional provisions, and he cited no state or federal decisions whatsoever. Both the State and the Supreme Court of Nevada – given the reference to competency rather than capacity – construed the claim presented on direct appeal as a challenge to petitioner's competency to stand trial. The state supreme court did not apply constitutional doctrine in rejecting the claim as so construed. Any federal constitutional doctrine *arguendo* applied necessarily would pertain to a claim challenging competency to stand trial, not a challenge to capacity to commit the offenses.[4]

In Ground 5, petitioner alleges that he was denied due process and equal protection of the laws in violation of the Fifth, Sixth and Fourteenth Amendments because insufficient evidence was presented at trial due to a lack of corroboration of accomplice testimony required by N.R.S. 175.291.

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[3]See #22, Ex. 59, at 8-9; *id.*, Ex. 68, at 1-3.

[4]See #22, Ex. 59, at 9-10; *id.*, Ex. 68, at 3-5.