

A: Ah... I don't know if I even have the right to approach him, at least not for a while. Ah, but based on, ah, what he said supposedly, what the newspaper said he said, uh, it doesn't seem like he really had much respect for his daughter at all, but I would send not only him, but his family a letter of apology. I know it's

not really, it's, it's practically nothing, it does nothing to bring her back, but I, uh, tell him that I will be serving my time and I will pay for what I've done.

Q: Uhm, Jeremy, just a couple of real quick things. Uhm, before we started this interview and before we turned on the tape, uhm, had we, had we threatened you at all in any way?

A: No you did not.

Q: Okay. And did we make you any promises or considerations for giving us a statement?

A: No you did not.

Q: Okay. Uhm, does anybody else have any questions?

TURLEY: Phil or Bill, I don't.

Q: Okay.

COLLETTE: Do you have any questions of us, Jeremy? Now's your time to ask us anything, any problems, anything you need to discuss, let us know.

A: No questions.

Q: Okay. That'll be the end of this statement, the same people are present, it's now 0310 hours. Thanks very much.

EXHIBIT A9

EXHIBIT A9

ORIGINAL

1 JOCP

2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 200 South Third Street
6 Las Vegas, Nevada 89155-2211
7 (702) 455-4711
8 Attorney for Plaintiff

FILED

MAR 23 9 34 AM '04

Shirley E. Longjumeau
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -vs-

10 VERNELL RAY EVANS,
11 #924477

12 Defendant.

Case No: C116071

Dept No: VIII

JUDGMENT OF CONVICTION (JURY TRIAL)

15 The Defendant previously entered plea(s) of not guilty to the crime(s) of COUNTS 2
16 THROUGH 5 - MURDER WITH USE OF A DEADLY WEAPON (Felony), in violation of
17 NRS 200.010, 200.030, 193.165, and the matter having been tried before a jury, and the
18 Defendant being represented by counsel and having been found guilty of the crime(s) of
19 COUNTS 2 THROUGH 5 - FIRST DEGREE MURDER WITH USE OF A DEADLY
20 WEAPON (Felony); and thereafter on the 17th day of March, 2004, the Defendant was
21 present in Court for sentencing with his counsel, PETE CHRISTIANSEN, Esquire, and good
22 cause appearing therefor,

23 THE DEFENDANT HEREBY ADJUDGED guilty of the crime(s) as set forth in the
jury's verdict and, in addition to the \$25.00 Administrative Assessment Fee and \$150.00
DNA Analysis Fee, the Defendant is sentenced as follows: Defendant is SENTENCED on
COUNT II to a MAXIMUM term of LIFE WITHOUT THE POSSIBILITY OF PAROLE
with an EQUAL AND CONSECUTIVE term of LIFE WITHOUT THE POSSIBILITY OF
PAROLE for use of a deadly weapon, CONSECUTIVE to COUNT I (on which Defendant

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COUNTY CLERK

has previously been sentenced to TEN YEARS, which term has expired); on COUNT III to a MAXIMUM term of LIFE WITHOUT THE POSSIBILITY OF PAROLE with an EQUAL AND CONSECUTIVE term of LIFE WITHOUT THE POSSIBILITY OF PAROLE for use of a deadly weapon, CONSECUTIVE to COUNT II; on COUNT IV to a MAXIMUM term of LIFE WITHOUT THE POSSIBILITY OF PAROLE with an EQUAL AND CONSECUTIVE term of LIFE WITHOUT THE POSSIBILITY OF PAROLE for use of a deadly weapon, CONSECUTIVE to count III; on COUNT V to a MAXIMUM term of LIFE WITHOUT THE POSSIBILITY OF PAROLE with an EQUAL AND CONSECUTIVE term of LIFE WITHOUT THE POSSIBILITY OF PAROLE for use of a deadly weapon, CONSECUTIVE to COUNT IV. Defendant to receive 3,392 days credit for time served.

DATED this 22 day of March, 2004.

Lee A. Gates
DISTRICT JUDGE

SC

mb

EXHIBIT A10

EXHIBIT A10

1 SMEM
 2 DAVID ROGER
 3 DISTRICT ATTORNEY
 4 Nevada Bar #002781
 5 VICKI J. MONROE
 6 Chief Deputy District Attorney
 7 Nevada Bar #003776
 8 200 South Third Street
 9 Las Vegas, NV 89155-2211
 10 (702) 455-4711
 11 Attorney for Plaintiff

FEB 04 2004

SHARON COFFMAN

DISTRICT COURT
 CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

VERNELL RAY EVANS,
 #924477

Defendant.

CASE NO: C116071
 DEPT NO: VIII

SENTENCING AGREEMENT

I, VERNELL RAY EVANS, having been found guilty by a jury of: COUNTS 2 THROUGH 5 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165)), hereby agree to enter into the following sentencing agreement:

Both parties stipulate that the Defendant will be sentenced to a term of life in the Nevada Department of Corrections without the possibility of parole, plus an equal and consecutive term of life in the Nevada Department of Corrections without the possibility of parole for the deadly weapon enhancement, per count. Further, both parties stipulate that all counts will run consecutive to one another and will run consecutive to Count 1, which the Defendant is currently serving time for. Additionally, both parties agree that if the Court is not inclined to sentence the Defendant as stipulated, either party may withdraw from these negotiations and proceed to a penalty hearing.

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COUNTY CLERK

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CONSEQUENCES OF THE AGREEMENT

I understand that as a consequence of my having been found guilty of COUNTS 2 THROUGH 5 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony), and as a consequence of this sentencing agreement, the Court must sentence me to a term of life without the possibility of parole plus an equal and consecutive term of life without the possibility of parole as and for the deadly weapon enhancement for each count.

I understand that the law requires me to pay an Administrative Assessment Fee.

I understand that, if appropriate, I will be ordered to make restitution to the victim of the offense(s) to which I have been found guilty. I will also be ordered to reimburse the State of Nevada for any expenses related to my extradition, if any.

I understand that I am not eligible for probation for the offense to which I have been found guilty.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute.

I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation.

I understand that if the State of Nevada has agreed to recommend or stipulate a particular sentence or has agreed not to present argument regarding the sentence, or agreed not to oppose a particular sentence, such agreement is contingent upon my appearance in court on the initial sentencing date (and any subsequent dates if the sentencing is continued).

I understand that if I fail to appear for the scheduled sentencing date or I commit a new criminal offense prior to sentencing the State of Nevada would regain the full right to argue for any lawful sentence.

I understand if the offense(s) to which I have been found guilty to was committed while I was incarcerated on another charge or while I was on probation or parole that I am not eligible for credit for time served toward the instant offense(s).

I understand that the Division of Parole and Probation will prepare a report for the sentencing judge prior to sentencing. This report will include matters relevant to the issue of

1 sentencing, including my criminal history. This report may contain hearsay information
 2 regarding my background and criminal history. My attorney and I will each have the
 3 opportunity to comment on the information contained in the report at the time of sentencing.
 4 Unless the District Attorney has specifically agreed otherwise, then the District Attorney
 5 may also comment on this report.

6 WAIVER OF RIGHTS

7 I understand that the Nevada Supreme Court has ordered a new penalty hearing for
 8 me in this case. I agree, after speaking with attorneys, that it is in my best interests to accept
 9 the conditions set forth in the sentencing agreement. I further agree that I waive my right to
 10 appeal my decision to waive my penalty hearing at this time.

11 VOLUNTARINESS OF PLEA

12 I have discussed with my attorney any possible appellate issues and circumstances
 13 which might be in my favor.

14 All of the foregoing elements, consequences, rights, and waiver of rights have been
 15 thoroughly explained to me by my attorney.

16 I believe that entering into this sentencing agreement is in my best interest, and that a
 17 penalty hearing would be contrary to my best interest.

18 I am signing this agreement voluntarily, after consultation with my attorney, and I am
 19 not acting under duress or coercion or by virtue of any promises of leniency, except for those
 20 set forth in this agreement.

21 I am not now under the influence of any intoxicating liquor, a controlled substance or
 22 other drug which would in any manner impair my ability to comprehend or understand this
 23 agreement or the proceedings surrounding my entry into this agreement.

24 My attorney has answered all my questions regarding this sentencing agreement and

25 //

26 //

27 //

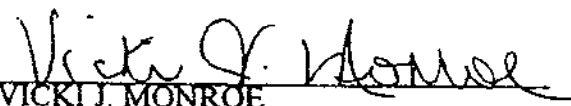
28 //

its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

DATED this 4 day of ^{February}~~January~~, 2004.


VERNELL RAY EVANS
Defendant

AGREED TO BY:


VICKI J. MONROE
Chief Deputy District Attorney
Nevada Bar #003776

CERTIFICATE OF COUNSEL:

I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the Defendant the allegations contained in the charge(s) and sentencing options for which the Defendant was convicted.

2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.

3. All waivers offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.

4. To the best of my knowledge and belief, the Defendant:

a. Is competent and understands the charges and the consequences of the agreement and waivers as provided in this agreement.

b. Executed this agreement voluntarily.

c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the defendant as certified in paragraphs 1 and 2 above.

Dated: This 4 day of January, 2004.


ATTORNEY FOR DEFENDANT



mb

EXHIBIT A11

EXHIBIT A11

1 CODE 1785
 2 Richard A. Gammick
 3 #001510
 4 P.O. 30083
 5 Reno, NV. 89520-3083
 6 (775)328-3200
 7 Attorney for Plaintiff

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

12 * * *

13 THE STATE OF NEVADA,

14 Plaintiff,

Case No. CR06-2974

15 v.

Dept. No. 6

16 VALERIE JEAN MOORE,
 17 also known as
 18 VALARIE MOORE,

19 Defendant.

20 GUILTY PLEA MEMORANDUM

21 1. I, VALERIE JEAN MOORE, also known as VALARIE MOORE,
 22 understand that I am charged with the offense(s) of: COUNT I FIRST
 23 DEGREE ARSON, a violation of NRS 205.010, a felony, and COUNTS II
 24 through XIII MURDER IN THE FIRST DEGREE, a violation of NRS 200.010
 25 and NRS 200.030(1)(b), a felony.

26 2. I desire to enter a plea of guilty to the offense(s) of
 COUNT I FIRST DEGREE ARSON, a violation of NRS 205.010, a felony,
 and COUNTS II through XIII MURDER IN THE FIRST DEGREE, a violation
 of NRS 200.010 and NRS 200.030(1)(b), a felony, as more fully alleged

///

1 in the charge(s) filed against me. I am competent to proceed and to
2 enter into this plea agreement with the State of Nevada.

3 3. By entering my plea of guilty I know and understand
4 that I am waiving the following constitutional rights:

5 A. I waive my privilege against self-incrimination.

6 B. I waive my right to trial by jury, at which trial the
7 State would have to prove my guilt of all elements of the offenses
8 beyond a reasonable doubt.

9 C. I waive my right to confront my accusers, that is, the
10 right to confront and cross examine all witnesses who would testify
11 at trial.

12 D. I waive my right to subpoena witnesses for trial on my
13 behalf.

14 4. I understand the charge(s) against me and that the
15 elements of the offense(s) which the State would have to prove beyond
16 a reasonable doubt at trial are that on the 31st day of October,
17 2006, or thereabout, in the County of Washoe, State of Nevada, I did,
18 as to Count I FIRST DEGREE ARSON, willfully, unlawfully, and
19 maliciously set fire to a residential structure and/or items
20 contained therein, located at 214 Lake Street, known as the Mizpah
21 Hotel, Reno, Washoe County, Nevada.

22 I understand the charge(s) against me and that the elements
23 of the offense(s) which the State would have to prove beyond a
24 reasonable doubt at trial are that on the 31st day of October, 2006,
25 or thereabout, in the County of Washoe, State of Nevada, I did, as to
26 Count II MURDER IN THE FIRST DEGREE, willfully, unlawfully, and with

1 malice aforethought, kill or cause the death of GREGORY JACK WILTSE,
2 a human being, during the commission of the crime of Arson, said
3 death occurring on October 31, 2006.

4 I understand the charge(s) against me and that the elements
5 of the offense(s) which the State would have to prove beyond a
6 reasonable doubt at trial are that on the 31st day of October, 2006,
7 or thereabout, in the County of Washoe, State of Nevada, I did, as to
8 Count III MURDER IN THE FIRST DEGREE, willfully, unlawfully, and
9 with malice aforethought, kill or cause the death of ERNEST JAMES
10 DUARTE, a human being, during the commission of the crime of Arson,
11 said death occurring on October 31, 2006.

12 I understand the charge(s) against me and that the elements
13 of the offense(s) which the State would have to prove beyond a
14 reasonable doubt at trial are that on the 31st day of October, 2006,
15 or thereabout, in the County of Washoe, State of Nevada, I did, as to
16 Count IV MURDER IN THE FIRST DEGREE, willfully, unlawfully, and with
17 malice aforethought, kill or cause the death of PAUL DRUM SMITH, a
18 human being, during the commission of the crime of Arson, said death
19 occurring on October 31, 2006.

20 I understand the charge(s) against me and that the elements
21 of the offense(s) which the State would have to prove beyond a
22 reasonable doubt at trial are that on the 31st day of October, 2006,
23 or thereabout, in the County of Washoe, State of Nevada, I did, as to
24 Count V MURDER IN THE FIRST DEGREE, willfully, unlawfully, and with
25 malice aforethought, kill or cause the death of CHRISTOPHER JAMES
26 ///

1 COVERT, a human being, during the commission of the crime of Arson,
2 said death occurring on October 31, 2006

3 I understand the charge(s) against me and that the elements
4 of the offense(s) which the State would have to prove beyond a
5 reasonable doubt at trial are that on the 31st day of October, 2006,
6 or thereabout, in the County of Washoe, State of Nevada, I did, as to
7 Count VI MURDER IN THE FIRST DEGREE, willfully, unlawfully, and with
8 malice aforethought, kill or cause the death of NADINE INGE
9 NICODEMUS, a human being, during the commission of the crime of
10 Arson, said death occurring on October 31, 2006.

11 I understand the charge(s) against me and that the elements
12 of the offense(s) which the State would have to prove beyond a
13 reasonable doubt at trial are that on the 31st day of October, 2006,
14 or thereabout, in the County of Washoe, State of Nevada, I did, as to
15 Count VII MURDER IN THE FIRST DEGREE, willfully, unlawfully, and
16 with malice aforethought, kill or cause the death of PHILLIP JAMES
17 BRIDGES, a human being, during the commission of the crime of Arson,
18 said death occurring on October 31, 2006.

19 I understand the charge(s) against me and that the elements
20 of the offense(s) which the State would have to prove beyond a
21 reasonable doubt at trial are that on the 31st day of October, 2006,
22 or thereabout, in the County of Washoe, State of Nevada, I did, as to
23 Count VIII MURDER IN THE FIRST DEGREE, willfully, unlawfully, and
24 with malice aforethought, kill or cause the death of ALFORD EDWARD
25 YATES, a human being, during the commission of the crime of Arson,
26 said death occurring on October 31, 2006.

1 I understand the charge(s) against me and that the elements
2 of the offense(s) which the State would have to prove beyond a
3 reasonable doubt at trial are that on the 31st day of October, 2006,
4 or thereabout, in the County of Washoe, State of Nevada, I did, as to
5 Count IX MURDER IN THE FIRST DEGREE, willfully, unlawfully, and with
6 malice aforethought, kill or cause the death of KEVIN M. SUTHERIN, a
7 human being, during the commission of the crime of Arson, said death
8 occurring on October 31, 2006.

9 I understand the charge(s) against me and that the elements
10 of the offense(s) which the State would have to prove beyond a
11 reasonable doubt at trial are that on the 31st day of October, 2006,
12 or thereabout, in the County of Washoe, State of Nevada, I did, as to
13 Count X MURDER IN THE FIRST DEGREE, willfully, unlawfully, and with
14 malice aforethought, kill or cause the death of WILLIAM JOHN SERRAO,
15 a human being, during the commission of the crime of Arson, said
16 death occurring on October 31, 2006.

17 I understand the charge(s) against me and that the elements
18 of the offense(s) which the State would have to prove beyond a
19 reasonable doubt at trial are that on the 31st day of October, 2006,
20 or thereabout, in the County of Washoe, State of Nevada, I did, as to
21 Count XI MURDER IN THE FIRST DEGREE, willfully, unlawfully, and with
22 malice aforethought, kill or cause the death of SANTIAGO MCDONALD, a
23 human being, during the commission of the crime of Arson, said death
24 occurring on October 31, 2006.

25 I understand the charge(s) against me and that the elements
26 of the offense(s) which the State would have to prove beyond a

1 reasonable doubt at trial are that on the 31st day of October, 2006,
2 or thereabout, in the County of Washoe, State of Nevada, I did, as to
3 Count XII MURDER IN THE FIRST DEGREE, willfully, unlawfully, and
4 with malice aforethought, kill or cause the death of JEREMY LEE WREN,
5 a human being, during the commission of the crime of Arson, said
6 death occurring on October 31, 2006.

7 I understand the charge(s) against me and that the elements
8 of the offense(s) which the State would have to prove beyond a
9 reasonable doubt at trial are that on the 31st day of October, 2006,
10 or thereabout, in the County of Washoe, State of Nevada, I did, as to
11 Count XIII MURDER IN THE FIRST DEGREE, willfully, unlawfully, and
12 with malice aforethought, kill or cause the death of DIANA BARBARA
13 POCHINI, a human being, during the commission of the crime of Arson,
14 said death occurring on October 31, 2006.

15 5. I admit the facts which support all the elements of the
16 offenses by pleading guilty. I admit that the State possesses
17 sufficient evidence which would result in my conviction. I have
18 considered and discussed all possible defenses and defense strategies
19 with my counsel, including but not limited to, insanity, diminished
20 mental capacity, intoxication, lack of specific or other criminal
21 intent, alibi, that another person or persons committed the offenses
22 and that the fire was accidentally caused, or otherwise not
23 intentionally set by myself or any other person. I understand that
24 any substantive or procedural pretrial issue or issues which could
25 have been raised at trial are waived by my plea.

26 ///

1 6. I understand that the consequences of my plea of
2 guilty, as to Count I FIRST DEGREE ARSON, are that I may be
3 imprisoned for a minimum period of two and a maximum period of
4 fifteen years in the Nevada State Department of Corrections and that
5 I am eligible for probation. I may also be fined up to \$15,000.00.

6 I understand that the consequences of my plea of guilty, as
7 to Count II MURDER IN THE FIRST DEGREE, are that I may be imprisoned
8 for a period of life with or without the possibility of parole or for
9 a definite term of fifty years in the Nevada State Department of
10 Corrections and that I am not eligible for probation. I understand
11 that if the penalty is fixed at life imprisonment with the
12 possibility of parole, or for a definite term of fifty years,
13 eligibility for parole begins when a minimum of twenty years has been
14 served.

15 I understand that the consequences of my plea of guilty, as
16 to Count III MURDER IN THE FIRST DEGREE, are that I may be
17 imprisoned for a period of life with or without the possibility of
18 parole or for a definite term of fifty years in the Nevada State
19 Department of Corrections and that I am not eligible for probation.
20 I understand that if the penalty is fixed at life imprisonment with
21 the possibility of parole, or for a definite term of fifty years,
22 eligibility for parole begins when a minimum of twenty years has been
23 served.

24 I understand that the consequences of my plea of guilty, as
25 to Count IV MURDER IN THE FIRST DEGREE, are that I may be imprisoned
26 for a period of life with or without the possibility of parole or for

1 a definite term of fifty years in the Nevada State Department of
2 Corrections and that I am not eligible for probation. I understand
3 that if the penalty is fixed at life imprisonment with the
4 possibility of parole, or for a definite term of fifty years,
5 eligibility for parole begins when a minimum of twenty years has been
6 served.

7 I understand that the consequences of my plea of guilty, as
8 to Count V MURDER IN THE FIRST DEGREE, are that I may be imprisoned
9 for a period of life with or without the possibility of parole or for
10 a definite term of fifty years in the Nevada State Department of
11 Corrections and that I am not eligible for probation. I understand
12 that if the penalty is fixed at life imprisonment with the
13 possibility of parole, or for a definite term of fifty years,
14 eligibility for parole begins when a minimum of twenty years has been
15 served.

16 I understand that the consequences of my plea of guilty, as
17 to Count VI MURDER IN THE FIRST DEGREE, are that I may be imprisoned
18 for a period of life with or without the possibility of parole or for
19 a definite term of fifty years in the Nevada State Department of
20 Corrections and that I am not eligible for probation. I understand
21 that if the penalty is fixed at life imprisonment with the
22 possibility of parole, or for a definite term of fifty years,
23 eligibility for parole begins when a minimum of twenty years has been
24 served.

25 I understand that the consequences of my plea of guilty, as
26 to Count VII MURDER IN THE FIRST DEGREE, are that I may be

1 imprisoned for a period of life with or without the possibility of
2 parole or for a definite term of fifty years in the Nevada State
3 Department of Corrections and that I am not eligible for probation.
4 I understand that if the penalty is fixed at life imprisonment with
5 the possibility of parole, or for a definite term of fifty years,
6 eligibility for parole begins when a minimum of twenty years has been
7 served.

8 I understand that the consequences of my plea of guilty, as
9 to Count VIII MURDER IN THE FIRST DEGREE, are that I may be
10 imprisoned for a period of life with or without the possibility of
11 parole or for a definite term of fifty years in the Nevada State
12 Department of Corrections and that I am not eligible for probation.
13 I understand that if the penalty is fixed at life imprisonment with
14 the possibility of parole, or for a definite term of fifty years,
15 eligibility for parole begins when a minimum of twenty years has been
16 served.

17 I understand that the consequences of my plea of guilty, as
18 to Count IX MURDER IN THE FIRST DEGREE, are that I may be imprisoned
19 for a period of life with or without the possibility of parole or for
20 a definite term of fifty years in the Nevada State Department of
21 Corrections and that I am not eligible for probation. I understand
22 that if the penalty is fixed at life imprisonment with the
23 possibility of parole, or for a definite term of fifty years,
24 eligibility for parole begins when a minimum of twenty years has been
25 served.

26 ///

1 I understand that the consequences of my plea of guilty, as
2 to Count X MURDER IN THE FIRST DEGREE, are that I may be imprisoned
3 for a period of life with or without the possibility of parole or for
4 a definite term of fifty years in the Nevada State Department of
5 Corrections and that I am not eligible for probation. I understand
6 that if the penalty is fixed at life imprisonment with the
7 possibility of parole, or for a definite term of fifty years,
8 eligibility for parole begins when a minimum of twenty years has been
9 served.

10 I understand that the consequences of my plea of guilty, as
11 to Count XI MURDER IN THE FIRST DEGREE, are that I may be imprisoned
12 for a period of life with or without the possibility of parole or for
13 a definite term of fifty years in the Nevada State Department of
14 Corrections and that I am not eligible for probation. I understand
15 that if the penalty is fixed at life imprisonment with the
16 possibility of parole, or for a definite term of fifty years,
17 eligibility for parole begins when a minimum of twenty years has been
18 served.

19 I understand that the consequences of my plea of guilty, as
20 to Count XII MURDER IN THE FIRST DEGREE, are that I may be
21 imprisoned for a period of life with or without the possibility of
22 parole or for a definite term of fifty years in the Nevada State
23 Department of Corrections and that I am not eligible for probation.
24 I understand that if the penalty is fixed at life imprisonment with
25 the possibility of parole, or for a definite term of fifty years,
26 ///.

1 eligibility for parole begins when a minimum of twenty years has been
2 served.

3 I understand that the consequences of my plea of guilty, as
4 to Count XIII MURDER IN THE FIRST DEGREE, are that I may be
5 imprisoned for a period of life with or without the possibility of
6 parole or for a definite term of fifty years in the Nevada State
7 Department of Corrections and that I am not eligible for probation.
8 I understand that if the penalty is fixed at life imprisonment with
9 the possibility of parole, or for a definite term of fifty years,
10 eligibility for parole begins when a minimum of twenty years has been
11 served. The sentence on each count may be concurrent or consecutive
12 to each other.

13 7. In exchange for my plea of guilty, and pursuant to this
14 plea agreement, the State will not file or pursue the death penalty.
15 I understand and agree that if I do not plead guilty to First Degree
16 Arson and twelve counts of Murder in the First Degree, or if I at any
17 time challenge my conviction or sentence and am successful, the State
18 reserves the right to file and pursue the death penalty. For this
19 purpose, I hereby waive any right I may have under Supreme Court Rule
20 250(4) to require the State to file notice of intent to seek the
21 death penalty within thirty days of the filing of a criminal
22 Information.

23 I agree to be sentenced by a single Judge pursuant to NRS
24 175.552(1)(c). I waive any right to have a jury decide the penalty
25 for any of these offenses.

26 ///

1 In exchange for my plea of guilty, the State, my counsel
2 and I have agreed to recommend the following: Both parties shall
3 recommend a minimum sentence of 6 years and a maximum sentence of 15
4 years on Count I FIRST DEGREE ARSON. On Counts II through XIII
5 MURDER IN THE FIRST DEGREE, the parties shall recommend a sentence of
6 life without the possibility of parole on each count. The sentences
7 imposed upon all thirteen counts are to run consecutively with each
8 and every other count. For this reason, neither my counsel nor I
9 will present any evidence or argument in mitigation of these crimes
10 at sentencing. I further understand and agree that the sentence on
11 each and every count must run consecutively to my prior Washoe County
12 conviction for MURDER IN THE SECOND DEGREE WITH THE USE OF A DEADLY
13 WEAPON (C87-452), for which crime I was on parole during the
14 commission of the instant offenses. The State will not file any
15 additional criminal charges against me stemming from this arrest.

16 8. I understand that, even though the State and I have
17 reached this plea agreement, the State is reserving the right to
18 present arguments, facts, and/or witnesses at sentencing in support
19 of the plea agreement.

20 9. I also agree that I will make full restitution in this
21 matter, as determined by the Court.

22 10. I understand that the State, in its discretion, is
23 entitled to either withdraw from this agreement and proceed with the
24 prosecution of the original charges or be free to argue for an
25 appropriate sentence at the time of sentencing if I fail to appear at
26 any scheduled proceeding in this matter OR if prior to the date of my

1 sentencing I am arrested in any jurisdiction for a violation of law
2 OR if I have misrepresented my prior criminal history. I represent
3 that I have multiple felony and misdemeanor convictions all known to
4 the State, including a 1987 conviction for MURDER IN THE SECOND
5 DEGREE WITH THE USE OF A DEADLY WEAPON in Washoe County, Nevada. I
6 understand and agree that the occurrence of any of these acts
7 constitutes a material breach of my plea agreement with the State. I
8 further understand and agree that by the execution of this agreement,
9 I am waiving any right I may have to remand this matter to Justice
10 Court should I later be permitted to withdraw my plea.

11 11. I understand and agree that pursuant to the terms of
12 the plea agreement stated herein, any counts which are to be
13 dismissed and any other cases charged or uncharged which are either
14 to be dismissed or not pursued by the State, may be considered by the
15 court at the time of my sentencing.

16 12. I understand that the Court is not bound by the
17 agreement of the parties and that the matter of sentencing is to be
18 determined solely by the Court. I have discussed the charge(s), the
19 facts and the possible defenses with my attorney. All of the
20 foregoing rights, waiver of rights, elements, possible penalties, and
21 consequences, have been carefully explained to me by my attorney. I
22 am satisfied with my counsel's advice and representation leading to
23 this resolution of my case. I am aware that if I am not satisfied
24 with my counsel I should advise the Court at this time. I believe
25 that entering my plea is in my best interest and that going to trial
26 is not in my best interest.

13. I understand that this plea and resulting conviction may have adverse effects upon my residency in this country if I am not a U. S. Citizen.

14. I offer my plea freely, voluntarily, knowingly and with full understanding of all matters set forth in the Information and in this Plea Memorandum. I understand everything contained within this Memorandum.

15. My plea of guilty is voluntary and is not the result of any threats, coercion or promises of leniency.

16. I am signing this Plea Memorandum voluntarily with advice of counsel, under no duress, coercion, or promises of leniency.

DATED this 19th day of January, 2007.

DEFENDANT

Attorney Witnessing
Defendant's Signature

David W. Clifton
Prosecuting Attorney

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AFFIRMATION PURSUANT TO NRS 239B.030

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

3 DATED this 19th day of January, 2007

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5 David V. Clifton
6 Prosecuting Attorney

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EXHIBIT B1

EXHIBIT B1

1 VER

FILED IN OPEN COURT
FEB 17 2006 2:56 p.m.
DISTRICT COURT SHIRLEY D. FARRAGUT, CLERK
CLARK COUNTY, NEVADA

ALAN PAUL CASTLE SR DEPUTY

4 THE STATE OF NEVADA,

5 Plaintiff,

6 -vs-

7 JAMES A. SCHOLL,

8 Defendant.

Case No. C204775

Dept No. IX

10 SPECIAL
11 VERDICT

12 We, the Jury in the above entitled case, having found the Defendant, JAMES A.
13 SCHOLL, Guilty of COUNT 7 - MURDER OF THE FIRST DEGREE, designate that the
14 aggravating circumstance or circumstances which have been checked below have been
15 established beyond a reasonable doubt.

16 ☒ The murder was committed by Defendant, who before the penalty hearing is
17 conducted, will have been convicted of a felony involving the use or threat of violence to the
18 person of another, to-wit: Count 3 of the Information charging the Defendant with Robbery
19 With Use of a Deadly Weapon.

20 ☒ The murder involved torture of the victim.

21 DATED at Las Vegas, Nevada, this 17 day of February, 2006.

24 FOREPERSON

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FILED IN OPEN COURT
FEB 17 2006 2:56 p.m.
CHIEF CLERK PARRAGUE
BY Alan Paul Castle Sr.
ALAN PAUL CASTLE SR. CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES A. SCHOLL,

Defendant.

Case No. C204775

Dept No. IX

SPECIAL
VERDICT

We, the Jury in the above entitled case, having found the Defendant, JAMES A. SCHOLL, Guilty of COUNT 7 - MURDER OF THE FIRST DEGREE, designate that the mitigating circumstance or circumstances which have been checked below have been established.

(1) X The murder was committed while James Scholl was under the influence of extreme mental or emotional disturbance;

(2) X The Defendant suffered as a child and young adult with emotional disabilities;

(3) X The Defendant has no significant prior criminal history;

(4) X At the time of the commission of the crime, Defendant was under the influence of controlled substances or alcohol;

(5) X At a very young age, the Defendant was thrust into a position of adulthood and was ill-equipped to handle those responsibilities;

1 (6) X Any other mitigating circumstances.
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4 DRUG ADDICTION
5 CONSIDERATION OF HIS CHILDREN
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9 DATED at Las Vegas, Nevada, this 17 day of February, 2006.
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12 FOREPERSON
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EXHIBIT B2

EXHIBIT B2

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FILED IN OPEN COURT

FEB 17 2006

2:56 p.m.

STANLEY D. PARSONS, CLERK

BY Alan Paul Castle

ALAN PAUL CASTLE SR DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMES A. SCHOLL,

Defendant.

Case No. C204775

Dept No. IX

VERDICT

We, the Jury in the above entitled case, having found the Defendant, JAMES A. SCHOLL, Guilty of COUNT 7 - MURDER OF THE FIRST DEGREE and having found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,

- ☐ A definite term of 100 years imprisonment, with eligibility for parole beginning when a minimum of 40 years has been served,
- ☐ Life in Nevada Department of Corrections With the Possibility of Parole.
- ☒ Life in Nevada Department of Corrections Without the Possibility of Parole.
- ☐ Death.

DATED at Las Vegas, Nevada, this 17 day of February, 2006

FOREPERSON

1 in his possession, or under his control, a weapon, to-wit: firearms, the said JOSE MANUEL
2 VIGOA, aka Jose Manuel Vigoa-Perez being an ex-felon, having in February, 1991, been
3 convicted of Conspiracy to Possess With Intent to Distribute Cocaine, Distribution of Cocaine,
4 Possession of Cocaine With Intent to Distribute, and Assault Upon Federal Officers, in the
5 United States District Court for the District of Nevada, in Case No. CR-S-90-164-P.P. (LCL),
6 a felony under the laws of the State of Nevada.

7 COUNT 4 - ROBBERY WITH USE OF A DEADLY WEAPON

8 did, on or about 20th day of September, 1998 then and there wilfully, unlawfully, and
9 feloniously take personal property, to-wit: U.S. Currency and a Smith & Wesson .38 revolver,
10 bearing Serial No. #BDB3765, from the person of WERNER BOEHNKE, or in his presence,
11 by means of force or violence, or fear of injury to, and without the consent and against the will
12 of the said WERNER BOEHNKE, said Defendant using a deadly weapon, to-wit: a firearm,
13 during the commission of said crime; Defendant and OSCAR SANCHEZ CISNEROS aiding
14 or abetting each other in the commission of said acts by acting in concert with each other; and/or
15 being present before during and after said crime; and/or Defendant and OSCAR SANCHEZ
16 CISNEROS directly or indirectly counseling, encouraging, assisting, commanding, inducing or
17 supervising the actions of the other; and/or Defendant and OSCAR SANCHEZ CISNEROS
18 acting pursuant to a Conspiracy to Commit Robbery and/or Murder.

19 COUNT 5 - ROBBERY WITH USE OF A DEADLY WEAPON

20 did, on or about 20th day of September, 1998, then and there wilfully, unlawfully, and
21 feloniously take personal property, to-wit: U.S. Currency and a Smith & Wesson .38 revolver,
22 bearing Serial No. #BDE5765, from the person of BRIAN LANE, or in his presence, by means
23 of force or violence, or fear of injury to, and without the consent and against the will of the said
24 BRIAN LANE, said Defendant using a deadly weapon, to-wit: a firearm, during the commission
25 of said crime; Defendant and OSCAR SANCHEZ CISNEROS aiding or abetting each other in
26 the commission of said acts by acting in concert with each other; and/or being present before
27 during and after said crime; and/or Defendant and OSCAR SANCHEZ CISNEROS, directly or
28 indirectly counseling, encouraging, assisting, commanding, inducing or supervising the actions

1 of the other; and/or Defendant and OSCAR SANCHEZ CISNEROS acting pursuant to a
2 Conspiracy to Commit Robbery and/or Murder.

3 COUNT 6 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

4 did, on or about the 28th day of June, 1999, then and there, without authority of law and
5 malice aforethought, wilfully and feloniously attempt to kill DONALD BOWMAN, a human
6 being, by shooting at and into the body of said DONALD BOWMAN, with a deadly weapon,
7 to-wit: firearms: Glock Model 21 semi-automatic firearm, bearing Serial No. CMZ184US
8 and/or Norinco Mak 90 assault rifle, bearing Serial No. 616488; Defendant JOSE MANUEL
9 VIGOA, aka Jose Manuel Vigoa-Perez, and OSCAR SANCHEZ CISNEROS directly
10 committing said acts; and/or Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ
11 CISNEROS, aiding or abetting each other in the commission of said acts by acting in concert
12 with each other; and/or Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ
13 CISNEROS, being present before during and after said crime; and/or Defendant, PEDRO
14 RAFAEL DUARTE and OSCAR SANCHEZ CISNEROS, directly or indirectly counseling,
15 encouraging, assisting, commanding, inducing or supervising the actions of the other; and/or
16 PEDRO RAFAEL DUARTE driving the getaway vehicle; and/or Defendant, PEDRO RAFAEL
17 DUARTE and OSCAR SANCHEZ CISNEROS acting pursuant to a Conspiracy to Commit
18 Robbery and/or Murder.

19 COUNT 7 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

20 did, on or about the 28th day of June, 1999, then and there, without authority of law and
21 malice aforethought, wilfully and feloniously attempt to kill CHARLEY FICHTER, a human
22 being, by shooting at and into the body of said CHARLEY FICHTER, with a deadly weapon,
23 to-wit: firearms: Glock Model 21 semi-automatic firearm, bearing Serial No. CMZ184US
24 and/or Norinco Mak 90 assault rifle, bearing Serial No. 616488; Defendant JOSE MANUEL
25 VIGOA, aka Jose Manuel Vigoa-Perez, and OSCAR SANCHEZ CISNEROS directly
26 committing said acts; and/or Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ
27 CISNEROS, aiding or abetting each other in the commission of said acts by acting in concert
28 with each other; and/or Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ

1 CISNEROS, being present before during and after said crime; and/or Defendant, PEDRO
2 RAFAEL DUARTE and OSCAR SANCHEZ CISNEROS, directly or indirectly counseling,
3 encouraging, assisting, commanding, inducing or supervising the actions of the other; and/or
4 PEDRO RAFAEL DUARTE driving the getaway vehicle; and/or Defendant, PEDRO RAFAEL
5 DUARTE and OSCAR SANCHEZ CISNEROS acting pursuant to a Conspiracy to Commit
6 Robbery and/or Murder.

7 **COUNT 8 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON**

8 did, on or about the 28th day of June, 1999, did then and there wilfully, unlawfully and
9 feloniously attempt to take personal property, to-wit: U.S. Currency, from the person of
10 DONALD BOWMAN, or in his presence, by means of force or violence, or fear of injury to, and
11 without the consent and against the will of the said DONALD BOWMAN, Defendant using a
12 deadly weapon, to-wit: firearms: Glock Model 21 semi-automatic firearm bearing Serial No.
13 CMZ184US and/or Norinco Mak 90 assault rifle, bearing Serial No. 616488, during the
14 commission of said crime; by Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ
15 CISNEROS shooting at the said victim for the purpose of obtaining U.S. Currency from the
16 armored truck; and/or Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ
17 CISNEROS, aiding or abetting each other in the commission of said acts by acting in concert
18 with each other; and/or Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ
19 CISNEROS, being present before during and after said crime; and/or Defendant, PEDRO
20 RAFAEL DUARTE and OSCAR SANCHEZ CISNEROS, directly or indirectly counseling,
21 encouraging, assisting, commanding, inducing or supervising the actions of the other; and/or
22 PEDRO RAFAEL DUARTE driving the getaway vehicle; and/or Defendant, PEDRO RAFAEL
23 DUARTE and OSCAR SANCHEZ CISNEROS acting pursuant to a Conspiracy to Commit
24 Robbery and/or Murder.

25 **COUNT 9 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON**

26 did, on or about the 28th day of June, 1999, did then and there wilfully, unlawfully and
27 feloniously attempt to take personal property, to-wit: U.S. Currency, from the person of
28 CHARLEY FICHTER, or in his presence, by means of force or violence, or fear of injury to, and

1 without the consent and against the will of the said CHARLEY FICHTER, Defendant using a
2 deadly weapon, to-wit: firearms: Glock Model 21 semi-automatic firearm with Serial No.
3 CMZ184US and/or Norinco Mak 90 assault rifle, Bearing Serial No. 616488, during the
4 commission of said crime; by Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ
5 CISNEROS shooting at the said victim for the purpose of obtaining U.S. Currency from the
6 armored truck; and/or Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ
7 CISNEROS, aiding or abetting each other in the commission of said acts by acting in concert
8 with each other; and/or Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ
9 CISNEROS, being present before during and after said crime; and/or Defendant, PEDRO
10 RAFAEL DUARTE and OSCAR SANCHEZ CISNEROS, directly or indirectly counseling,
11 encouraging, assisting, commanding, inducing or supervising the actions of the other; and/or
12 PEDRO RAFAEL DUARTE driving the getaway vehicle; and/or Defendant, PEDRO RAFAEL
13 DUARTE and OSCAR SANCHEZ CISNEROS acting pursuant to a Conspiracy to Commit
14 Robbery and/or Murder.

15 COUNT 10 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

16 did, on or about the 28th day of June, 1999, did then and there wilfully, unlawfully and
17 feloniously attempt to take personal property, to-wit: U.S. Currency, from the person of
18 RANDY EASTON, or in his presence, by means of force or violence, or fear of injury to, and
19 without the consent and against the will of the said RANDY EASTON, Defendant using a
20 deadly weapon, to-wit: firearms: Glock Model 21 semi-automatic firearm with Serial No.
21 CMZ184US and/or Norinco Mak 90 assault rifle, Bearing Serial No. 616488, during the
22 commission of said crime; by Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ
23 CISNEROS shooting at the said victim for the purpose of obtaining U.S. Currency from the
24 armored truck; and/or Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ
25 CISNEROS, aiding or abetting each other in the commission of said acts by acting in concert
26 with each other; and/or Defendant, PEDRO RAFAEL DUARTE and OSCAR SANCHEZ
27 CISNEROS, being present before during and after said crime; and/or Defendant, PEDRO
28 RAFAEL DUARTE and OSCAR SANCHEZ CISNEROS, directly or indirectly counseling,

1 encouraging, assisting, commanding, inducing or supervising the actions of the other, and/or
2 PEDRO RAFAEL DUARTE driving the getaway vehicle; and/or Defendant, PEDRO RAFAEL
3 DUARTE and OSCAR SANCHEZ CISNEROS acting pursuant to a Conspiracy to Commit
4 Robbery and/or Murder.

5 COUNT 11 - POSSESSION OF FIREARM BY EX-FELON

6 Defendant JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez, did, on or about the
7 28th day of June, 1999, then and there wilfully, unlawfully, and feloniously own or have in his
8 possession, or under his control, a weapon, to-wit: Norinco Mak 90 assault rifle, bearing Serial
9 No. 616488, the said JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez being an ex-felon,
10 having in February, 1991, been convicted of Conspiracy to Possess With Intent to Distribute
11 Cocaine, Distribution of Cocaine, Possession of Cocaine With Intent to Distribute, and Assault
12 Upon Federal Officers, in the United States District Court for the District of Nevada, in Case No.
13 CR-S-90-164-PMP (LRL), a felony under the laws of the State of Nevada.

14 COUNT 12 - POSSESSION OF FIREARM BY EX-FELON

15 Defendant JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez, did, on or about the
16 28th day of June, 1999, then and there wilfully, unlawfully, and feloniously own or have in his
17 possession, or under his control, a weapon, to-wit: Glock Model 21 semi-automatic firearm,
18 bearing Serial No. CMZ184US, the said JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-
19 Perez being an ex-felon, having in February, 1991, been convicted of Conspiracy to Possess
20 With Intent to Distribute Cocaine, Distribution of Cocaine, Possession of Cocaine With Intent
21 to Distribute, and Assault Upon Federal Officers, in the United States District Court for the
22 District of Nevada, in Case No. CR-S-90-164-PMP (LRL), a felony under the laws of the State
23 of Nevada.

24 COUNT 13 - POSSESSION OF STOLEN VEHICLE

25 did, on or about the 28th day of June, 1999, then and there wilfully, unlawfully, and
26 feloniously possess a stolen motor vehicle wrongfully taken from CURTIS YVONNE LEWIS,
27 while in the possession of KENNETH PANIELLO, to-wit: a 1995 Isuzu Rodeo, bearing
28 VIN#4S2CG58V5S4302390, and stolen Nevada License Plate No. 294-HNS, which Defendant

1 knew, or had reason to believe, had been stolen.

2 COUNT 14 - BURGLARY WHILE IN POSSESSION OF A FIREARM

3 did, on or about the 11th day of October, 1999, then and there wilfully, unlawfully, and
4 feloniously enter, with intent to commit robbery and/or murder, while in possession of a firearm,
5 that certain building occupied by MANDALAY BAY HOTEL, located at 3950 Las Vegas
6 Boulevard South, Las Vegas, Clark County, Nevada.

7 COUNT 15 - POSSESSION OF FIREARM BY EX-FELON

8 Defendant JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez, did, on or about the
9 11th day of October, 1999, then and there wilfully, unlawfully, and feloniously own or have in
10 his possession, or under his control, a weapon, to-wit: firearms, the said JOSE MANUEL
11 VIGOA, aka Jose Manuel Vigoa-Perez being an ex-felon, having in February, 1991, been
12 convicted of Conspiracy to Possess With Intent to Distribute Cocaine, Distribution of Cocaine,
13 Possession of Cocaine With Intent to Distribute, and Assault Upon Federal Officers, in the
14 United States District Court for the District of Nevada, in Case No. CR-S-90-164-PMP (LRL),
15 a felony under the laws of the State of Nevada.

16 COUNT 16 - ROBBERY WITH USE OF A DEADLY WEAPON

17 did, on or about the 11th day of October, 1999, then and there wilfully, unlawfully, and
18 feloniously take personal property, to-wit: U.S. Currency and Smith & Wesson .38 caliber
19 revolver, bearing Serial No. CCT5873, from the person of KYLE CARNEY, or in his presence,
20 by means of force or violence, or fear of injury to, and without the consent and against the will
21 of the said KYLE CARNEY, said Defendant using a deadly weapon, to-wit: a firearm, during
22 the commission of said crime; Defendant and OSCAR SANCHEZ CISNEROS aiding or
23 abetting each other in the commission of said acts by acting in concert with each other, and/or
24 being present before during and after said crime; and/or Defendant and OSCAR SANCHEZ
25 CISNEROS, directly or indirectly counseling, encouraging, assisting, commanding, inducing or
26 supervising the actions of the other; and/or Defendant and OSCAR SANCHEZ CISNEROS
27 acting pursuant to a Conspiracy to Commit Robbery and/or Murder.

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COUNT 17 - ROBBERY WITH USE OF A DEADLY WEAPON

did, on or about the 11th day of October, 1999, then and there wilfully, unlawfully, and feloniously take personal property, to-wit: U.S. Currency and Smith & Wesson .40 caliber revolver firearm, bearing Serial No. EKZ8317, from the person of KENNETH HUDERSKI, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of the said KENNETH HUDERSKI, said Defendant using a deadly weapon, to-wit: a firearm, during the commission of said crime; Defendant and OSCAR SANCHEZ CISNEROS aiding or abetting each other in the commission of said acts by acting in concert with each other, and/or being present before during and after said crime; and/or Defendant and OSCAR SANCHEZ CISNEROS, directly or indirectly counseling, encouraging, assisting, commanding, inducing or supervising the actions of the other; and/or Defendant and OSCAR SANCHEZ CISNEROS acting pursuant to a Conspiracy to Commit Robbery and/or Murder.

COUNT 18 - POSSESSION OF STOLEN VEHICLE

did, on or about the 11th day of October, 1999, then and there wilfully, unlawfully, and feloniously possess a stolen motor vehicle wrongfully taken from THRIFTY CAR RENTAL, 376 Warm Springs Road, Las Vegas, Clark County, Nevada, to-wit: a 1999 Jeep Grand Cherokee, bearing VIN#1J4GW58S1XC619922, and stolen California License Plate #4FNR022, which Defendant knew, or had reason to believe, had been stolen.

COUNT 19 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)

did, on or about March 3, 2000, then and there, without authority of law, with malice aforethought and premeditation and deliberation and/or by means of lying in wait and/or during the perpetration or attempted perpetration of Robbery, wilfully and feloniously kill RICHARD SAMAYOA SOSA, a human being, by shooting at and into the body of RICHARD SAMAYOA SOSA, said Defendant using a deadly weapon, to-wit: a Norinco Mak 90 assault rifle bearing serial #616488 and/or Smith and Wesson .38 caliber firearm bearing serial # CCT5873, during the commission of said crime, defendant JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez, directly committing said acts and/or Defendant, OSCAR SANCHEZ CISNEROS and

SVap1s12JDC05707

1 LUIS SUAREZ aiding or abetting each other in the commission of said acts by acting in concert
2 with each other; and/or Defendant, OSCAR SANCHEZ CISNEROS AND LUIS SUAREZ
3 being present before, during and after said crime; and/or Defendant, OSCAR SANCHEZ
4 CISNEROS AND LUIS SUAREZ directly or indirectly counseling, encouraging, assisting,
5 commanding, inducing or supervising the actions of the other; and/or Defendant, OSCAR
6 SANCHEZ CISNEROS AND LUIS SUAREZ acting pursuant to a Conspiracy to Commit
7 Robbery and/or Murder.

8 COUNT 20 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (OPEN
9 MURDER)

10 did, on or about March 3, 2000, then and there, without authority of law, with malice
11 aforethought and premeditation and/or by means of lying in wait and/or during the perpetration
12 or attempted perpetration of Robbery, wilfully and feloniously kill GARY DEAN PRESTIDGE,
13 a human being, by shooting at and into the body of GARY DEAN PRESTIDGE, said Defendant
14 using a deadly weapon, to-wit: a Norinco Mak 90 assault rifle bearing serial #616488 and/or
15 Smith and Wesson .38 caliber firearm bearing serial # CCT5873, during the commission of said
16 crime, defendant JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez, directly committing
17 said acts and/or Defendant, OSCAR SANCHEZ CISNEROS and LUIS SUAREZ aiding or
18 abetting each other in the commission of said acts by acting in concert with each other; and/or
19 Defendant, OSCAR SANCHEZ CISNEROS AND LUIS SUAREZ being present before, during
20 and after said crime; and/or Defendant, OSCAR SANCHEZ CISNEROS AND LUIS SUAREZ
21 directly or indirectly counseling, encouraging, assisting, commanding, inducing or supervising
22 the actions of the other; and/or Defendant, OSCAR SANCHEZ CISNEROS AND LUIS
23 SUAREZ acting pursuant to a Conspiracy to Commit Robbery and/or Murder.

24 COUNT 21 - ROBBERY WITH USE OF A DEADLY WEAPON

25 did, on or about the 3rd day of March, 2000, then and there wilfully, unlawfully, and
26 feloniously take personal property, to-wit: U.S. Currency, from the person of RICHARD
27 SAMAYOA SOSA, or in his presence, by means of force or violence, or fear of injury to, and
28 without the consent and against the will of the said RICHARD SAMAYOA SOSA, said

1 Defendant using a deadly weapon, to-wit: a Norinco Mak 90 assault rifle, bearing Serial No.
2 616488 and/or Smith & Wesson .38 caliber revolver bearing Serial No. CCT5873, during the
3 commission of said crime; Defendant JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez
4 directly committing said acts and/or Defendant, OSCAR SANCHEZ CISNEROS and LUIS
5 SUAREZ aiding or abetting each other in the commission of said acts by acting in concert with
6 each other; and/or Defendant, OSCAR SANCHEZ CISNEROS AND LUIS SUAREZ being
7 present before, during and after said crime; and/or Defendant, OSCAR SANCHEZ CISNEROS
8 AND LUIS SUAREZ directly or indirectly counseling, encouraging, assisting, commanding,
9 inducing or supervising the actions of the other; and/or Defendant, OSCAR SANCHEZ
10 CISNEROS AND LUIS SUAREZ acting pursuant to a Conspiracy to Commit Robbery and/or
11 Murder.

12 COUNT 22 - ROBBERY WITH USE OF A DEADLY WEAPON

13 did, on or about the 3rd day of March, 2000, then and there wilfully, unlawfully, and
14 feloniously take personal property, to-wit: U.S. Currency, from the person of GARY DEAN
15 PRESTIDGE, or in his presence, by means of force or violence, or fear of injury to, and without
16 the consent and against the will of the said GARY DEAN PRESTIDGE, said Defendant using
17 a deadly weapon, to-wit: a Norinco Mak 90 assault rifle, bearing Serial No. 616488 and/or Smith
18 & Wesson .38 caliber revolver bearing Serial No. CCT5873, during the commission of said
19 crime; Defendant JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez directly committing
20 said acts and/or Defendant, OSCAR SANCHEZ CISNEROS and LUIS SUAREZ aiding or
21 abetting each other in the commission of said acts by acting in concert with each other; and/or
22 Defendant, OSCAR SANCHEZ CISNEROS AND LUIS SUAREZ being present before, during
23 and after said crime; and/or Defendant, OSCAR SANCHEZ CISNEROS AND LUIS SUAREZ
24 directly or indirectly counseling, encouraging, assisting, commanding, inducing or supervising
25 the actions of the other; and/or Defendant, OSCAR SANCHEZ CISNEROS AND LUIS
26 SUAREZ acting pursuant to a Conspiracy to Commit Robbery and/or Murder.

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1 COUNT 23 - POSSESSION OF FIREARM BY EX-FELON

2 Defendant JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez, did, on or about the
3 3rd day of March, 2000, then and there wilfully, unlawfully, and feloniously own or have in his
4 possession, or under his control, a weapon, to-wit: a Norinco Mak 90 assault rifle, bearing Serial
5 No. 616488, the said JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez being an ex-felon,
6 having in February, 1991, been convicted of Conspiracy to Possess With Intent to Distribute
7 Cocaine, Distribution of Cocaine, Possession of Cocaine With Intent to Distribute, and Assault
8 Upon Federal Officers, in the United States District Court for the District of Nevada, in Case No.
9 CR-S-90-164-PMP (LRL), a felony under the laws of the State of Nevada.

10 COUNT 24 - POSSESSION OF FIREARM BY EX-FELON

11 Defendant JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez, did, on or about the
12 3rd day of March, 2000, then and there wilfully, unlawfully, and feloniously own or have in his
13 possession, or under his control, a weapon, to-wit: a Smith & Wesson .38 Caliber revolver,
14 bearing Serial No. CCT5873, the said JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez
15 being an ex-felon, having in February, 1991, been convicted of Conspiracy to Possess With
16 Intent to Distribute Cocaine, Distribution of Cocaine, Possession of Cocaine With Intent to
17 Distribute, and Assault Upon Federal Officers, in the United States District Court for the District
18 of Nevada, in Case No. CR-S-90-164-PMP (LRL), a felony under the laws of the State of
19 Nevada.

20 COUNT 25 - POSSESSION OF STOLEN VEHICLE

21 did, on or about the 3rd day of March, 2000, then and there wilfully, unlawfully, and
22 feloniously possess a stolen motor vehicle wrongfully taken from THRIFTY CAR RENTAL,
23 376 Warm Springs Road, Las Vegas, Clark County, Nevada, to-wit: a 2000 Plymouth Voyager,
24 bearing VIN#1P4GP45G8YB529568, and stolen Arizona License Plate No. 184-DZS., which
25 Defendant knew, or had reason to believe, had been stolen.

26 COUNT 26 - POSSESSION OF STOLEN VEHICLE

27 did, on or about the 3rd day of March, 2000, then and there wilfully, unlawfully, and
28 feloniously possess a stolen motor vehicle wrongfully taken from THRIFTY CAR RENTAL,

1 376 Warm Springs Road, Las Vegas, Clark County, Nevada, to-wit: a 2000 Plymouth Voyager,
2 bearing VIN#1P4GP45G1YB527029, and stolen Utah License Plate No. 690-KRG, which
3 Defendant knew, or had reason to believe, had been stolen.

4 **COUNT 27 - POSSESSION OF STOLEN VEHICLE**

5 did, on or about the 3rd day of March, 2000, then and there wilfully, unlawfully, and
6 feloniously possess a stolen motor vehicle wrongfully taken from THRIFTY CAR RENTAL,
7 376 Warm Springs Road, Las Vegas, Clark County, Nevada, to-wit: a 2000 Dodge Intrepid,
8 bearing VIN#2B3HD46R6YH128532, and stolen Utah License Plate No. 992-KNY, which
9 Defendant knew, or had reason to believe, had been stolen.

10 **COUNT 28 - CONSPIRACY TO COMMIT BURGLARY**

11 did, on or about June 3, 2000, then and there meet with each other and an unknown
12 individual and between themselves, and each of them with the other, wilfully and unlawfully,
13 conspire and agree to commit a crime, to-wit: burglary, and in furtherance of said conspiracy,
14 Defendant and OSCAR SANCHEZ CISNEROS did, together with the unknown individual,
15 commit the acts as set forth in Count 23, said acts being incorporated by this reference as though
16 fully set forth herein.

17 **COUNT 29 - BURGLARY WHILE IN POSSESSION OF A FIREARM**

18 did, on or about June 3, 2000, together with an unknown individual, then and there
19 wilfully, unlawfully, and feloniously enter, while in possession of a firearm, with intent to
20 commit larceny, that certain building occupied by BELLAGIO HOTEL & CASINO, located at
21 3600 Las Vegas Boulevard South, Las Vegas, Clark County, Nevada.

22 **COUNT 30 - CONSPIRACY TO COMMIT ROBBERY**

23 did, on or about June 3, 2000, then and there meet with each other and an unknown
24 individual and between themselves, and each of them with the other, wilfully, unlawfully, and
25 feloniously, conspire and agree to commit a crime, to-wit: robbery, and in furtherance of said
26 conspiracy, Defendant and OSCAR SANCHEZ CISNEROS did, together with the unknown
27 individual, commit the acts as set forth in Counts 25 through 29, said acts being incorporated by
28 this reference as though fully set forth herein.

1 COUNT 31 - ROBBERY WITH USE OF A DEADLY WEAPON

2 did, on or about June 3, 2000, then and there wilfully, unlawfully, and feloniously take
3 personal property, to-wit: lawful money of the United States, from the person of TERI M.
4 POTTER, or in her presence, by means of force or violence, or fear of injury to, and without the
5 consent and against the will of the said TERI M. POTTER, said Defendant using a deadly
6 weapon, to-wit: firearms, during the commission of said crime; the said Defendant, and the
7 unknown individual aiding or abetting each other through counsel and encourage and/or
8 conspiring among each other whereby the Defendant and OSCAR SANCHEZ CISNEROS are
9 vicariously liable for the actions of the others, and by entering into a course of conduct whereby
10 the Defendant, OSCAR SANCHEZ CISNEROS and the unknown individual arrived together
11 at the BELLAGIO HOTEL & CASINO where Defendant JOSE MANUEL VIGOA acted as a
12 lookout outside the casino cage while OSCAR CISNEROS SANCHEZ, aka Oscar Sanchez
13 Cisneros and the unknown individual entered the said cage to take money; thereafter the said
14 Defendant, OSCAR SANCHEZ CISNEROS and the unknown individual left together; the said
15 Defendant, OSCAR SANCHEZ CISNEROS and the unknown individual acting in concert
16 throughout the commission of the said crime.

17 COUNT 32 - ROBBERY WITH USE OF A DEADLY WEAPON

18 did, on or about June 3, 2000, then and there wilfully, unlawfully, and feloniously take
19 personal property, to-wit: lawful money of the United States, from the person of DAVID JOHN
20 BURTON, or in his presence, by means of force or violence, or fear of injury to, and without the
21 consent and against the will of the said DAVID JOHN BURTON, said Defendant and OSCAR
22 SANCHEZ CISNEROS using a deadly weapon, to-wit: firearms, during the commission of said
23 crime; the said Defendant and OSCAR SANCHEZ CISNEROS and the unknown individual
24 aiding or abetting each other through counsel and encourage and/or conspiring among each other
25 whereby the Defendant and OSCAR SANCHEZ CISNEROS are vicariously liable for the
26 actions of the others, and by entering into a course of conduct whereby the Defendant, OSCAR
27 SANCHEZ CISNEROS and the unknown individual arrived together at the BELLAGIO
28 HOTEL & CASINO where Defendant JOSE MANUEL VIGOA acted as a lookout outside the

3Van1s12JDC05712

1 casino cage while OSCAR CISNEROS SANCHEZ, aka Oscar Sanchez Cisneros and the
2 unknown individual entered the said cage to take money; thereafter the said Defendant, OSCAR
3 SANCHEZ CISNEROS and the unknown individual left together; the said Defendant, OSCAR
4 SANCHEZ CISNEROS and the unknown individual acting in concert throughout the
5 commission of the said crime.

6 COUNT 33 - ROBBERY WITH USE OF A DEADLY WEAPON

7 did, on or about June 3, 2000, then and there wilfully, unlawfully, and feloniously take
8 personal property, to-wit: lawful money of the United States, from the person of HUEY ROTH,
9 or in his presence, by means of force or violence, or fear of injury to, and without the consent
10 and against the will of the said HUEY ROTH, said Defendant using a deadly weapon, to-wit:
11 firearms, during the commission of said crime; the said Defendant, OSCAR SANCHEZ
12 CISNEROS and the unknown individual aiding or abetting each other through counsel and
13 encourage and/or conspiring among each other whereby the Defendant and OSCAR SANCHEZ
14 CISNEROS are vicariously liable for the actions of the others, and by entering into a course of
15 conduct whereby the Defendant, OSCAR SANCHEZ CISNEROS and the unknown individual
16 arrived together at the BELLAGIO HOTEL & CASINO where Defendant JOSE MANUEL
17 VIGOA acted as a lookout outside the casino cage while OSCAR CISNEROS SANCHEZ, aka
18 Oscar Sanchez Cisneros and the unknown individual entered the said cage to take money;
19 thereafter the said Defendant, OSCAR SANCHEZ CISNEROS and the unknown individual left
20 together; the said Defendant, OSCAR SANCHEZ CISNEROS and the unknown individual
21 acting in concert throughout the commission of the said crime.

22 COUNT 34 - ROBBERY WITH USE OF A DEADLY WEAPON

23 did, on or about June 3, 2000, then and there wilfully, unlawfully, and feloniously take
24 personal property, to-wit: lawful money of the United States, from the person of KYLE
25 RUEGG, or in her presence, by means of force or violence, or fear of injury to, and without the
26 consent and against the will of the said KYLE RUEGG, said Defendant using a deadly weapon,
27 to-wit: firearms, during the commission of said crime; the said Defendant, OSCAR SANCHEZ
28 CISNEROS and the unknown individual aiding or abetting each other through counsel and

1 encourage and/or conspiring among each other whereby the Defendant and OSCAR SANCHEZ
 2 CISNEROS are vicariously liable for the actions of the others, and by entering into a course of
 3 conduct whereby the Defendant, OSCAR SANCHEZ CISNEROS and the unknown individual
 4 arrived together at the BELLAGIO HOTEL & CASINO where Defendant JOSE MANUEL
 5 VIGOA acted as a lookout outside the casino cage while OSCAR CISNEROS SANCHEZ, aka
 6 Oscar Sanchez Cisneros and the unknown individual entered the said cage to take money;
 7 thereafter the said Defendant, , OSCAR SANCHEZ CISNEROS and the unknown individual
 8 left together; the said Defendant, OSCAR SANCHEZ CISNEROS and the unknown individual
 9 acting in concert throughout the commission of the said crime.

10 **COUNT 35 - ROBBERY WITH USE OF A DEADLY WEAPON**
 11 did, on or about June 3, 2000, then and there wilfully, unlawfully, and feloniously take
 12 personal property, to-wit: lawful money of the United States, from the person of LAWANDA
 13 TAYLOR, or in her presence, by means of force or violence, or fear of injury to, and without the
 14 consent and against the will of the said LAWANDA TAYLOR, said Defendant using a deadly
 15 weapon, to-wit: firearms, during the commission of said crime; the said Defendant, OSCAR
 16 SANCHEZ CISNEROS and the unknown individual aiding or abetting each other through
 17 counsel and encourage and/or conspiring among each other whereby the Defendant and OSCAR
 18 SANCHEZ CISNEROS are vicariously liable for the actions of the others, and by entering into
 19 a course of conduct whereby the Defendant, OSCAR SANCHEZ CISNEROS and the unknown
 20 individual arrived together at the BELLAGIO HOTEL & CASINO where Defendant JOSE
 21 MANUEL VIGOA acted as a lookout outside the cage booth while OSCAR CISNEROS
 22 SANCHEZ, aka Oscar Sanchez Cisneros and the unknown individual entered the said cage to
 23 take money; thereafter the said Defendant, OSCAR SANCHEZ CISNEROS and the unknown
 24 individual left together; the said Defendant, OSCAR SANCHEZ CISNEROS and the unknown
 25 individual acting in concert throughout the commission of the said crime.

26 **COUNT 36 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON**
 27 did, on or about June 3, 2000, together with another unknown individual, then and there,
 28 out authority of law, and with premeditation and deliberation, and with malice aforethought,

1 wilfully and feloniously attempt to kill HARRY CZERNIAK and/or AL HADGIS and/or
2 KEVIN CAMPBELL, human beings, by shooting at the said HARRY CZERNIAK and/or AL
3 HADGIS and/or KEVIN CAMPBELL, with a deadly weapon, to-wit: a firearm; in the
4 following manner, to-wit: by the said Defendant, OSCAR SANCHEZ CISNEROS and the
5 unknown individual aiding or abetting each other and/or conspiring among each other, whereby
6 the Defendant and OSCAR SANCHEZ CISNEROS are vicariously liable for the actions of the
7 others in the commission of the said crime by attempting to kill HARRY CZERNIAK and/or AL
8 HADGIS and/or KEVIN CAMPBELL in order to facilitate their escape.

9 COUNT 37 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

10 did, on or about June 3, 2000, together with another unknown individual, then and there,
11 without authority of law, and with premeditation and deliberation, and with malice aforethought,
12 wilfully and feloniously attempt to kill HARRY CZERNIAK and/or AL HADGIS and/or
13 KEVIN CAMPBELL, human beings, by shooting at the said HARRY CZERNIAK and/or AL
14 HADGIS and/or KEVIN CAMPBELL, with a deadly weapon, to-wit: a firearm; in the
15 following manner, to-wit: by the said Defendant, OSCAR SANCHEZ CISNEROS and the
16 unknown individual aiding or abetting each other and/or conspiring among each other, whereby
17 the Defendant and OSCAR SANCHEZ CISNEROS are vicariously liable for the actions of the
18 others in the commission of the said crime by attempting to kill HARRY CZERNIAK and/or AL
19 HADGIS and/or KEVIN CAMPBELL in order to facilitate their escape.

20 COUNT 38 - DISCHARGING FIREARM OUT OF MOTOR VEHICLE

1 did, on or about June 3, 2000, together with and unknown individual, aiding or abetting
and/or conspiring together whereby the Defendant and OSCAR SANCHEZ CISNEROS are
vicariously liable, then and there wilfully, unlawfully, and feloniously, while in a motor vehicle
within an area designated by City or County Ordinance as a populated area for the purpose of
prohibiting the discharge of weapons, maliciously or wantonly discharge, or cause a firearm to
be discharged out of the motor vehicle; either of the said defendants and/or the unknown
individual actually firing the firearm from a 1999 Dodge Caravan, bearing VIN
4GP45B1XR233387.

COUNT 39 - DISCHARGING FIREARM AT OR INTO VEHICLE

did, on or about June 3, 2000, together with an unknown individual, together with and unknown individual, aiding or abetting and/or conspiring together whereby the Defendant and OSCAR SANCHEZ CISNEROS are vicariously liable, then and there wilfully, unlawfully, maliciously, and feloniously discharge a firearm at or into a 2000 Dodge Caravan, bearing Nevada License No. 716KLV and/or VIN 2B4EP4432YR697949, said vehicle not having been abandoned, located at 3600 Las Vegas Boulevard South, Las Vegas, Clark County, Nevada; the said vehicle occupied by HARRY CZERNIAK and/or AL HADGIS and/or KEVIN CAMPBELL; either of the said Defendants and/or the unknown individual actually firing the firearm from a 1999 Dodge Caravan, bearing VIN 2B4GP45B1XR233387.

COUNT 40 - POSSESSION OF STOLEN VEHICLE

did, on or about June 3, 2000, together with an unknown individual then, and there wilfully, unlawfully, and feloniously possess a stolen motor vehicle wrongfully taken from THRIFTY RENT-A-CAR, to-wit: a 1999 Dodge Caravan, bearing VIN 2B4GP45B1XR233387, which Defendant knew, or had reason to believe, had been stolen.

COUNT 41 - POSSESSION OF STOLEN VEHICLE

did, on or about June 3, 2000, together with an unknown individual then, and there wilfully, unlawfully, and feloniously possess a stolen motor vehicle wrongfully taken from THRIFTY RENT-A-CAR, to-wit: a 1999 Jeep Cherokee, bearing VIN 1J4GW58S3XC619923, which Defendant knew, or had reason to believe, had been stolen.

COUNT 42 - POSSESSION OF FIREARM BY EX-FELON

did, on or about June 3, 2000, then and there wilfully, unlawfully, and feloniously own or have in his possession, or under his control, a weapon, to-wit: an unknown make of firearm, the said JOSE MANUEL VIGOA being an ex-felon, having in 1991, by the Federal Courts, been convicted of Assault on Federal Officers and/or Possession of Cocaine with Intent to Distribute and/or Distribution of Cocaine and/or Conspiracy to Distribute Cocaine, felonies under the laws of the United States.

COUNT 43 - STOP REQUIRED ON SIGNAL OF POLICE OFFICER

did, on or about June 7, 2000, while driving a motor vehicle, to-wit: a 1999 Nissan Pathfinder, bearing Nevada License No. 171JLZ, from Pecos and Patrick at or near 4375 Sunset, Clark County, Nevada, wilfully, unlawfully, and feloniously fail or refuse to bring said vehicle to a stop, or otherwise flee or attempt to elude a peace officer in a readily identifiable vehicle of any police department or regulatory agency, to-wit: DET. R. ROGERS and/or DET. G. SHERWOOD and/or other representatives of the Las Vegas Metropolitan Police Department, after being given a signal to bring the vehicle to a stop, operate said motor vehicle in a manner which endangered, or was likely to endanger any person other than himself, or the property of any person other than himself.

COUNT 44 - CHILD ENDANGERMENT

did, on or about June 7, 2000, wilfully, unlawfully, and knowingly neglect, cause, or permit a child under the age of 18 years, to-wit: DUNA VIGOA, being approximately 12 years of age, to suffer unjustifiable physical pain, or mental suffering, or by permitting the said DUNA VIGOA to be placed in a situation where she might have suffered unjustifiable physical pain or mental suffering, by the said Defendant failing to yield to police vehicles, racing in his 1999 Nissan Pathfinder in speeds exceeding 100 miles per hour and eventually wrecking the vehicle while his daughter was a passenger in the said vehicle.

COUNT 45 - CONSPIRACY TO ESCAPE


did, on or between January 1, 2002, and June 3, 2002, then and there meet with unidentified individuals, and each of them with the other, wilfully and unlawfully conspire and agree to commit the crime of Escape, and in furtherance of said Conspiracy, defendant did commit the acts as set forth in Counts II, said acts being incorporated by this reference as though fully set forth herein.

COUNT 46 - ATTEMPT ESCAPE

did, on or between January 1, 2002, and June 3, 2002, then and there, without authority of law, wilfully, unlawfully, and feloniously commit a felony in the following manner, to-wit: escape, or attempt to escape, from the lawful custody of the Clark County Detention Center,

1 while he, the said defendant, was being held by the Clark County Detention Center on Felony
 2 charges, to-wit: Conspiracy to Commit Robbery And/or Murder, Burglary While in Possession
 3 of a Firearm, Robbery with Use of a Deadly Weapon, Attempt Murder with Use of a Deadly
 4 Weapon, Attempt Robbery with Use of a Deadly Weapon, Possession of Stolen Vehicle and
 5 Murder with Use of a Deadly Weapon, in the following manner, to-wit: by preparing or
 6 possessing a written escape plan setting forth a blueprint of the jail and the method of escape
 7 and/or fashioning a tool made from a metal mirror frame, breaking a metal plate covering the
 8 cell window and using said tool to chisel a hole in the window.

10 STEWART L. BELL
 11 DISTRICT ATTORNEY
 Nevada Bar #000477

12 BY 
 13 DAVID J.J. ROGER
 14 Chief Deputy District Attorney
 Nevada Bar #002781

22 DA#01F09354A/kjk
 23 LVMPD EV#9809200888;9906280741;
 24 9910110682;0003030900; 0006072010;
 0006030517; 0006090878; 0006030517;
 0206032216; HPD EV#00-4373
 25 CONSP ROBB/MURDER; BURG W/FA;
 26 POSS F/A BY EX-FEL; ROBB W/WPN;
 PSV; ATT MURDER W/WPN; ATT
 27 ROBB W/WPN; MURDER W/WPN;
 CONSP BURG; DISCH F/A OUT/ MV;
 28 PSV; EVAD; ENDANGERMENT; PFEF;
 CONSP ESCAPE; ATT ESCAPE - F/GM
 (TK4)

EXHIBIT A6

EXHIBIT A6

ORIGINAL

FILED IN OPEN COURT

NOV 06 2002

SHIRLEY D. PARRAGUIRRE, CLERK

BY Dorothy Kelly
DOROTHY KELLY DEPUTY

1 GMEM

2 STEWART L. BELL
3 DISTRICT ATTORNEY
4 Nevada Bar #000477
5 200 South Third Street
6 Las Vegas, NV 89155-2211
7 (702) 455-4711
8 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -vs-

10 MATTHEW SCOTT FRENN,
11 #1692905

12 Defendant.

CASE NO: C178954
DEPT NO: IV

13 **GUILTY PLEA AGREEMENT**

14 I hereby agree to plead guilty to: **COUNTS 1 & 2 - FIRST DEGREE MURDER**
15 **WITH USE OF A DEADLY WEAPON (Felony - 200.010, 200.030, 193.165)**, as more
16 fully alleged in the charging document attached hereto as Exhibit "1".

17 My decision to plead guilty is based upon the plea agreement in this case which is as
18 follows:

19 The State and Defendant stipulate to four (4) consecutive sentences of Life Without
the Possibility of Parole.

20 **CONSEQUENCES OF THE PLEA**

21 I understand that by pleading guilty I admit the facts which support all the elements of
the offense(s) to which I now plead as set forth in Exhibit "1".

22 I understand that as a consequence of my plea of guilty the Court must sentence me to
23 imprisonment in the Nevada State Prison as to each Count for Life Without Possibility of
24 Parole; or Life With Possibility of Parole with eligibility for parole beginning at 20 yrs (240
25 months); or a definite term of 50 yrs (600 months) with eligibility for parole beginning at 20
26 yrs (240 months). I understand that the law requires me to pay an Administrative
27
28

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CLERK

1 Assessment Fee.

2 I understand that, if appropriate, I will be ordered to make restitution to the victim of
3 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
4 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
5 reimburse the State of Nevada for any expenses related to my extradition, if any.

6 I understand that I am ^{not} eligible for probation for the offense to which I am pleading
7 guilty. I understand that, except as otherwise provided by statute, the question of whether I
8 receive probation is in the discretion of the sentencing judge.

9 I understand that if more than one sentence of imprisonment is imposed and I am
10 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order
11 the sentences served concurrently or consecutively.

12 I also understand that information regarding charges not filed, dismissed charges, or
13 charges to be dismissed pursuant to this agreement may be considered by the judge at
14 sentencing.

15 I have not been promised or guaranteed any particular sentence by anyone. I know
16 that my sentence is to be determined by the Court within the limits prescribed by statute.

17 I understand that if my attorney or the State of Nevada or both recommend any
18 specific punishment to the Court, the Court is not obligated to accept the recommendation.

19 I understand that if the State of Nevada has agreed to recommend or stipulate a
20 particular sentence or has agreed not to present argument regarding the sentence, or agreed
21 not to oppose a particular sentence, such agreement is contingent upon my appearance in
22 court on the initial sentencing date (and any subsequent dates if the sentencing is continued).

23 I understand that if I fail to appear for the scheduled sentencing date or I commit a new
24 criminal offense prior to sentencing the State of Nevada would regain the full right to argue
25 for any lawful sentence.

26 I understand if the offense(s) to which I am pleading guilty to was committed while I
27 was incarcerated on another charge or while I was on probation or parole that I am not
28 eligible for credit for time served toward the instant offense(s).

1 I understand that as a consequence of my plea of guilty, if I am not a citizen of the
2 United States, I may, in addition to other consequences provided for by federal law, be
3 removed, deported, excluded from entry into the United States or denied naturalization.

4 I understand that the Division of Parole and Probation will prepare a report for the
5 sentencing judge prior to sentencing. This report will include matters relevant to the issue of
6 sentencing, including my criminal history. This report may contain hearsay information
7 regarding my background and criminal history. My attorney and I will each have the
8 opportunity to comment on the information contained in the report at the time of sentencing.
9 Unless the District Attorney has specifically agreed otherwise, then the District Attorney
10 may also comment on this report.

11 WAIVER OF RIGHTS

12 By entering my plea of guilty, I understand that I am waiving and forever giving up
13 the following rights and privileges:

14 1. The constitutional privilege against self-incrimination, including the right to refuse
15 to testify at trial, in which event the prosecution would not be allowed to comment to the
16 jury about my refusal to testify.

17 2. The constitutional right to a speedy and public trial by an impartial jury, free of
18 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the
19 assistance of an attorney, either appointed or retained. At trial the State would bear the
20 burden of proving beyond a reasonable doubt each element of the offense charged.

21 3. The constitutional right to confront and cross-examine any witnesses who would
22 testify against me.

23 4. The constitutional right to subpoena witnesses to testify on my behalf.

24 5. The constitutional right to testify in my own defense.

25 6. The right to appeal the conviction, with the assistance of an attorney, either
26 appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional
27 or other grounds that challenge the legality of the proceedings and except as otherwise
28 provided in subsection 3 of NRS 174.035.

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.


I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.


I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

DATED this ^{1st} ~~30~~ day of ^{NOVEMBER} ~~October~~, 2002.


MATTHEW SCOTT FRENN
Defendant

AGREED TO BY:


DAVID P. SCHWARTZ
Chief Deputy District Attorney
Nevada Bar #000398

1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of
3 the court hereby certify that:

4 1. I have fully explained to the Defendant the allegations contained in the charge(s)
5 to which guilty pleas are being entered.

6 2. I have advised the Defendant of the penalties for each charge and the restitution
7 that the Defendant may be ordered to pay.

8 3. All pleas of guilty offered by the Defendant pursuant to this agreement are
9 consistent with the facts known to me and are made with my advice to the Defendant.

10 4. To the best of my knowledge and belief, the Defendant:

11 a. Is competent and understands the charges and the consequences of pleading
12 guilty as provided in this agreement.

13 b. Executed this agreement and will enter all guilty pleas pursuant hereto
14 voluntarily.

15 c. Was not under the influence of intoxicating liquor, a controlled substance or
16 other drug at the time I consulted with the defendant as certified in paragraphs
17 1 and 2 above.

18 Dated: This 1 day of ^{November}~~October~~, 2002

19 
20 ATTORNEY FOR DEFENDANT

21
22
23
24
25
26
27
28 kjk

1 **IND**
 2 **STEWART L. BELL**
 3 **DISTRICT ATTORNEY**
 4 **Nevada Bar #000477**
 5 **200 S. Third Street**
 6 **Las Vegas, Nevada 89155**
 7 **(702) 455-4711**
 8 **Attorney for Plaintiff**

ORIGINAL

FILED

Oct 17 12 52 PM '01

Shirley B. Langina
 CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

10 **THE STATE OF NEVADA,**
 11 **Plaintiff,**

12 **-vs-**

13 **MATHEW SCOTT FRENN,**
 14 **#1692905**

15 **Defendant(s).**

Case No. **C178954**
 Dept. No. **IV**

INDICTMENT

17 **STATE OF NEVADA**
 18 **COUNTY OF CLARK** } **ss.**

20 The Defendant(s) above named, **MATHEW SCOTT FRENN**, accused by the Clark
 21 County Grand Jury of the crime of **MURDER WITH USE OF A DEADLY WEAPON**
 22 **(Felony - NRS 200.010, 200.030, 193.165)**, committed at and within the County of Clark, State
 23 of Nevada, on or between June 1, 2001 and July 15, 2001, as follows:

24 **COUNT I**

25 did then and there wilfully, unlawfully, feloniously, and without authority of law, and
 26 with malice aforethought, kill **DOROTHY JACKSON**, a human being, in the following manner,
 27 to wit; by striking the said **DOROTHY JACKSON** about the head and/or body with a bludgeon
 28 device consisting of a hammer and/or a wooden stick and/or an unknown object and/or did stab

EXHIBIT " 1 "

AA01418

1 at and into the body of DOROTHY JACKSON with a knife, the said actions of the Defendant
2 resulting in the death of the said DOROTHY JACKSON; the Defendant being responsible
3 under one or more of the following principles of criminal liability, to-wit: (1) by having
4 premeditation and deliberation in its commission; and/or (2) the killing occurring during the
5 perpetration or attempted perpetration of robbery; and/or (3) by the said Defendant engaging
6 in a course of conduct whereby the killing occurred during the commission of an unlawful act,
7 which, in its consequences, naturally tended to destroy the life of a human being, or was
8 committed in the prosecution of felonious intent, by the said Defendant committing a battery
9 and/or battery with a deadly weapon upon the body of the said DOROTHY JACKSON causing
10 the death of the said DOROTHY JACKSON.

11 COUNT II - MURDER WITH USE OF A DEADLY WEAPON

12 did then and there wilfully, unlawfully, feloniously, and without authority of law, and
13 with malice aforethought, kill LEE JACKSON, a human being, in the following manner, to wit;
14 by striking the said LEE JACKSON about the head and/or body with a bludgeon device
15 consisting of a hammer and/or a wooden stick and/or an unknown object and/or did stab at and
16 into the body of LEE JACKSON with a knife, the said actions of the Defendant resulting in the
17 death of the said LEE JACKSON; the Defendant being responsible under one or more of the
18 following principles of criminal liability, to-wit: (1) by having premeditation and deliberation
19 in its commission; and/or (2) the killing occurring during the perpetration or attempted
20 perpetration of robbery; and/or (3) by the said Defendant engaging in a course of conduct
21 whereby the killing occurred during the commission of an unlawful act, which, in its

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1 consequences, naturally tended to destroy the life of a human being, or was committed in the
2 prosecution of felonious intent, by the said Defendant committing a battery and/or battery with
3 a deadly weapon upon the body of the said LEE JACKSON causing the death of the said LEE
4 JACKSON.

5 DATED this 16th day of October, 2001.

6 STEWART L. BELL
7 DISTRICT ATTORNEY
8 Nevada Bar #000477

9 BY David J. Roger
10 DAVID J.J. ROGER
11 Chief Deputy District Attorney
12 Nevada Bar #002781

13 ENDORSEMENT: A True Bill

14 Larry J. Cannon
15 Foreperson, Clark County Grand Jury
16
17

18 //

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1 Names of witnesses testifying before the Grand Jury:

2 REXENE WORRELL, 1704 PINTO LANE, LV, NV
 3 ALICE MACEO, HENDERSON POLICE DEPT/CRIME SCENE ANALYST
 4 KELLY JACKSON, C/O DISTRICT ATTORNEY'S OFFICE
 5 TYRONE JACKSON, C/O DISTRICT ATTORNEY'S OFFICE
 6 DET. LOUIS MARTINEZ, SAN ANTONIO POLICE DEPT., SAN ANTONIO, TX
 7
 8

9 Additional witnesses known to the District Attorney at the filing of the Indictment:

10 TENILLE SCHNEPP, 13 BOOK WAGON ST., HENDERSON, NV
 11 BRIAN SCHNEPP, 13 BOOK WAGON ST., HENDERSON, NV
 12 JUDE TOMALON, 9 BOOK WAGON ST., HENDERSON, NV
 13 ARCENIA TOMALON, 9 BOOK WAGON ST., HENDERSON, NV
 14 DONNA LUCERO, 16 BOOK WAGON ST., HENDERSON, NV
 15 KEVIN RUTH, 16 BOOK WAGON ST., HENDERSON, NV
 16 INGRID CHAPUT, 12 BOOK WAGON ST., HENDERSON, NV
 17 MAIDA KAHAI, 10 BOOK WAGON ST., HENDERSON, NV
 18 JOE KAHAI, 10 BOOK WAGON ST., HENDERSON, NV
 19 DONNA MARTIN, 1101 SUNSET RD., HENDERSON, NV
 20 OFFICER D. CICCONE, HPD #1005
 21 OFFICER E. BUCK, HPD #1015
 22 R. WORKMAN, HPD #1014
 23 M. MATTA, HPD #1046
 24 D. JONES, HPD #265
 25 G. SMITH, HPD #27
 26 L. GIBSON, HPD #323
 27 G. COLLINS, HPD #324
 28 H. MANCILLAS, HPD #361

- 1 T. WELLMAN, HPD #381
- 2 J. BROOKS, HPD #607
- 3 B. FLATT, HPD #680
- 4 K. SIMPSON, HPD #689
- 5 F. BENJAMINS, HPD #720
- 6 G. EDWARDS, HPD #748
- 7 D. HAMPTON, HPD #793
- 8 S. DAVIS, LVMPD #4923
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- 27 00BGJ112X/01FH1293X
HENDERSON PD EV# 0118034
- 28 MURDER WDW - F

EXHIBIT A7

EXHIBIT A7

ORIGINAL

1 JOCP

2 STEWART L. BELL
3 DISTRICT ATTORNEY
4 Nevada Bar #000477
5 200 S. Third Street
6 Las Vegas, Nevada 89155
7 (702) 455-4711
8 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 JEREMY STROHMEYER,
12 #1507326

13 Defendant.

Case No.
Dept. No.
Docket

C144577
XII
R

15 JUDGMENT OF CONVICTION (PLEA)

16 WHEREAS, on the 8th day of September, 1998, the Defendant JEREMY
17 STROHMEYER, appeared before the Court herein with his counsel and entered a plea of guilty
18 to the crime(s) of COUNT I - FIRST DEGREE MURDER (Felony); COUNT II - FIRST
19 DEGREE KIDNAPPING (Felony); COUNT III - SEXUAL ASSAULT WITH A MINOR
20 UNDER SIXTEEN YEARS OF AGE WITH SUBSTANTIAL BODILY HARM (Felony);
21 COUNT IV - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE
22 (Felony), committed on the 25th day of May, 1997, in violation of NRS 200.010, 200.030,
23 200.310, 200.320, 200.364, 200.366, 0.060 and

24 WHEREAS, thereafter on the 14th day of October, 1998, the Defendant being present
25 in court with his counsel RICHARD WRIGHT, ESQ. and LESLIE ABRAMSON, ESQ., and
26 STEWART BELL, District Attorney, and WILLIAM T. KOOT, Chief Deputy District Attorney,
27 also being present; the above entitled Court did adjudge the Defendant guilty thereof by reason
28 of his plea of guilty and, in addition to the \$25.00 Administrative Assessment Fee, sentenced

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1 Defendant to the Nevada Department of Prisons as follows:

2 COUNT I - FIRST DEGREE MURDER: LIFE WITHOUT THE POSSIBILITY OF
3 PAROLE and pay restitution in the amount of \$9,422.00 and extradition costs in the amount of
4 \$629.12;

5 COUNT II - FIRST DEGREE KIDNAPPING: LIFE WITHOUT THE POSSIBILITY OF
6 PAROLE, to be served consecutive to the sentence imposed in Count I;

7 COUNT III - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF
8 AGE WITH SUBSTANTIAL BODILY HARM: LIFE WITHOUT THE POSSIBILITY OF
9 PAROLE, to be served consecutive to the sentences imposed in Counts I and II;

10 COUNT IV - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF
11 AGE: LIFE WITH THE POSSIBILITY OF PAROLE, with parole eligibility after TWENTY
12 (20) years has been served, said sentence to be served consecutive to the sentences imposed in
13 Counts I, II and III

14 The Defendant will submit to a test for the purpose of determining genetic markers and
15 pay a \$250.00 Analysis Fee to the Clark County Clerk. Credit for time served 504 days.

16 THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this
17 Judgment of Conviction as part of the record in the above entitled matter.

18 DATED this 29th day of October, 1998, in the City of Las Vegas, County of Clark,
19 State of Nevada.

20 - -
21 
22 DISTRICT JUDGE
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25

26 DA#97-144577X/kjh
27 LVMPD EV#9705250452
28 1° MURDER; 1° KIDNAP;
SEX ASSLT W/MINOR W/SBH;
SEX ASSLT W/MINOR - F
(TK7)

EXHIBIT A8

EXHIBIT A8

ORIGINAL

1 **GMEM**
 2 STEWART L. BELL
 3 DISTRICT ATTORNEY
 4 Nevada Bar #000477
 5 200 S. Third Street
 6 Las Vegas, Nevada 89155
 7 (702) 455-4711
 8 Attorney for Plaintiff

FILED IN OPEN COURT

September 8 19 98
 LORETTA BOWMAN, CLERK

DISTRICT COURT BY Sue Deaton
 CLARK COUNTY, NEVADA SUE DEATON Deputy

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 JEREMY STROHMEYER,
 12 #1507326

13 Defendant.

Case No. C144577X
 Dept. No. XII
 Docket R

15 GUILTY PLEA AGREEMENT

16 I hereby agree to plead guilty to: FIRST DEGREE MURDER, FIRST DEGREE
 17 KIDNAPING, SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE
 18 WITH SUBSTANTIAL BODILY HARM and SEXUAL ASSAULT WITH A MINOR UNDER
 19 SIXTEEN YEARS OF AGE, COUNTS I, II, III and IV, as more fully alleged in the charging
 20 document attached hereto as Exhibit "1".

21 Other than the potential death penalty as to Count I, the Defendant agrees to stipulate to
 22 the maximum sentences otherwise provided by law and that all four (4) sentences shall run
 23 consecutive to each other.

24 In that regard, the sentence for Count I, First Degree Murder, pursuant to NRS 200.030
 25 4(g)(1), shall be Life Without the Possibility of Parole.

26 The sentence for Count II, First Degree Kidnaping, pursuant to NRS 200.320(1)(a), shall
 27 be Life Without the Possibility of Parole, to run consecutive to the sentence imposed for Count

28 I.

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1 The sentence for Count III, Sexual Assault With a Minor Under Sixteen Years of Age
2 With Substantial Bodily Harm, pursuant to NRS 200.366(2)(a)(1), shall be Life Without the
3 Possibility of Parole, to run consecutive to the sentences imposed for Counts I and II.

4 The sentence for Count IV, Sexual Assault With a Minor Under Sixteen Years of Age,
5 pursuant to NRS 200.366(3)(g)(1), shall be Life With the Possibility of Parole after a minimum
6 of Twenty (20) years served, to run consecutive to the sentences imposed for Counts I, II and
7 III.

8 Notwithstanding the theoretical parole eligibility as to Count IV, I understand that due
9 to the sentences to be imposed for Counts I, II and III, I shall never be eligible for parole.

10 The State agrees to withdraw the Notice of Intent to Seek Death.

11 The Defendant understands and agrees that by his plea of guilty, he now and forever
12 waives any and all opportunity in the future to litigate or relitigate, any and all legal and factual
13 issues raised prior to his plea of guilty.

14 CONSEQUENCES OF THE PLEA

15 I understand that by pleading guilty the State can prove beyond a reasonable doubt the
16 facts which support all the elements of the offense(s) to which I now plead as set forth in Exhibit
17 "1".

18 I understand that as a consequence of my pleas of guilty the Court shall sentence me to
19 imprisonment in the Nevada State Prison for Life Without the Possibility of Parole as to Count
20 I, First Degree Murder; imprisonment in the Nevada State Prison for Life Without the Possibility
21 of Parole as to Count II, First Degree Kidnaping; imprisonment in the Nevada State Prison for
22 Life Without the Possibility of Parole as to Count III, Sexual Assault With a Minor Under
23 Sixteen Years of Age with Substantial Bodily Harm, and imprisonment in the Nevada State
24 Prison for Life With the Possibility of Parole with parole eligibility beginning at TWENTY (20)
25 years as to Count IV, Sexual Assault With a Minor Under Sixteen Years of Age, all counts to
26 run consecutively. I understand that the law requires me to pay an Administrative Assessment
27 Fee.

28 I understand that, if appropriate, I will be ordered to make restitution to the victim of the

1 offense(s) to which I am pleading guilty.

2 I understand that I am not eligible for probation for the offenses to which I am pleading
3 guilty.

4 I understand that the sentencing judge will order the sentences imposed as to each of the
5 four (4) counts in the Indictment to be served consecutively.

6 I understand that the Court has agreed to impose the sentences set forth in this agreement.

7 I also understand if, at any time, this plea agreement is set aside or its resultant
8 convictions are set aside, for any reason, the State reserves the right to reinstate the notice to
9 seek the death penalty in any subsequent proceedings.

10 I understand that the Division of Parole and Probation will prepare a report for the
11 sentencing judge prior to sentencing. This report will include matters relevant to the issue of
12 sentencing, including my criminal history. This report may contain hearsay information
13 regarding my background and criminal history. My attorney and I will each have the
14 opportunity to comment on the information contained in the report at the time of sentencing.
15 The District Attorney may also comment on this report.

16 WAIVER OF RIGHTS

17 By entering my plea of guilty, I understand that I am waiving and forever giving up the
18 following rights and privileges:

19 1. The constitutional privilege against self-incrimination, including the right to refuse to
20 testify at trial, in which event the prosecution would not be allowed to comment to the jury
21 about my refusal to testify.

22 2. The constitutional right to a speedy and public trial by an impartial jury, free of
23 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the
24 assistance of an attorney, either appointed or retained. At trial the State would bear the burden
25 of proving beyond a reasonable doubt each element of the offense charged.

26 3. The constitutional right to confront and cross-examine any witnesses who would
27 testify against me.

28 4. The constitutional right to subpoena witnesses to testify on my behalf.

1 5. The constitutional right to testify in my own defense.

2 6. The right to appeal the conviction, with the assistance of an attorney, either appointed
3 or retained, unless the appeal is based upon reasonable constitutional jurisdictional or other
4 grounds that challenge the legality of the proceedings.

5 VOLUNTARINESS OF PLEA

6 I have discussed the elements of all of the original charge(s) against me with my attorneys
7 and I understand the nature of the charge(s) against me.

8 I understand that the State would have to prove each element of the charge(s) against me
9 at trial.

10 I have discussed with my attorneys any possible defenses, defense strategies and
11 circumstances which might be in my favor.

12 All of the foregoing elements, consequences, rights, and waiver of rights have been
13 thoroughly explained to me by my attorneys.

14 I believe that pleading guilty pursuant hereto is in my best interest, and that a trial would
15 be contrary to my best interest.

16 I am signing this agreement voluntarily, after consultation with my attorneys, and I am
17 not acting under duress or coercion or by virtue of any promises of leniency, except for those
18 set forth in this agreement.

19 I am not now under the influence of any intoxicating liquor, a controlled substance or
20 other drug which would in any manner impair my ability to comprehend or understand this
21 agreement or the proceedings surrounding my entry of this plea.

22 My attorneys have answered all my questions regarding this guilty plea agreement and
23 its consequences to my satisfaction and I am satisfied with the services provided by my
24 attorneys.

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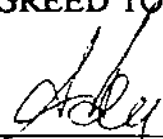
SVan1s12JDC05737

1 I hereby acknowledge that the transcript of the confession attached hereto is a true and
2 accurate transcription of my confession to Detective Phil Ramos given May 29, 1997, beginning
3 at approximately 2:20 a.m. in the offices of the Long Beach Police Department.

4 DATED this 8th day of September, 1998.

5
6 
7 JEREMY STROHMEYER
Defendant

8 AGREED TO BY:

9 
10 District Attorney
11 STEWART L. BELL
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1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of
3 the court hereby certify that:

4 1. I have fully explained to the Defendant the allegations contained in the charge(s) to
5 which guilty pleas are being entered.

6 2. I have advised the Defendant of the penalties for each charge and the restitution that
7 the Defendant may be ordered to pay.

8 3. All pleas of guilty offered by the Defendant pursuant to this agreement are consistent
9 with the facts known to me and are made with my advice to the Defendant.

10 4. To the best of my knowledge and belief, the Defendant:

11 a. Is competent and understands the charges and the consequences of pleading
12 guilty as provided in this agreement.

13 b. Executed this agreement and will enter all guilty pleas pursuant hereto
14 voluntarily.

15 c. Was not under the influence of intoxicating liquor, a controlled substance or
16 other drug at the time I consulted with the defendant as certified in paragraphs 1
17 and 2 above.

18 Dated: This 8th day of September, 1998.

19 
20 ATTORNEY FOR DEFENDANT

21 
22 ATTORNEY FOR DEFENDANT

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28 i:\mva\strohme\gpa\rmf

SV&H1S12JDC05739

FILED

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Joetta L. ...
CLERK

1 IND
2 STEWART L. BELL
3 DISTRICT ATTORNEY
4 Nevada Bar #000477
5 200 S. Third Street
6 Las Vegas, Nevada 89155
7 (702) 455-4711
8 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 JEREMY STROHMEYER,
12 #1507326

13 Defendant(s).

Case No. C144577
Dept. No. XIII
Docket G

INDICTMENT

15 STATE OF NEVADA }
16 COUNTY OF CLARK } ss.

17 The Defendant(s) above named, JEREMY STROHMEYER, accused by the Clark County
18 Grand Jury of the crimes of MURDER (OPEN MURDER) (Felony - NRS 200.010, 200.030);
19 FIRST DEGREE KIDNAPING (Felony - NRS 200.310, 200.320); and SEXUAL ASSAULT
20 WITH A MINOR UNDER SIXTEEN YEARS OF AGE WITH SUBSTANTIAL BODILY
21 HARM (Felony - NRS 200.364, 200.366, 0.060), committed at and within the County of Clark,
22 State of Nevada, on or about the 25th day of May, 1997, as follows:

23 COUNT I - MURDER (OPEN MURDER)

24 did then and there wilfully, feloniously, without authority of law, and with premeditation
25 and deliberation, and with malice aforethought, kill SHERRICE IVERSON, a human being, by
26 manual strangulation or suffocation; said killing being deliberate and premeditated and/or
27 perpetrated by means of child abuse and/or being committed during the perpetration or attempted
28 perpetration of kidnaping, sexual assault and/or sexual abuse of a child.

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COUNT II - FIRST DEGREE KIDNAPING

did wilfully, unlawfully, feloniously, and without authority of law, lead, take, entice, carry away or kidnap SHERRICE IVERSON, a minor, with the intent to keep, imprison, or confine said SHERRICE IVERSON from her parents, guardians, or other person or persons having lawful custody of said minor, or with the intent to hold said minor to unlawful service, or perpetrate upon the person of said minor, any unlawful act, to-wit: murder and/or sexual assault and/or inflicting substantial bodily harm.

COUNT III - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE WITH SUBSTANTIAL BODILY HARM

did then and there wilfully, unlawfully, and feloniously sexually assault and subject SHERRICE IVERSON, a female child under sixteen years of age, to sexual penetration, to-wit: digital penetration, by inserting his finger into the vagina of the said SHERRICE IVERSON, against her will, or under conditions in which Defendant knew, or should have known, that the said SHERRICE IVERSON was mentally or physically incapable of resisting or understanding the nature of Defendant's conduct; the defendant's conduct resulting in extreme trauma and substantial bodily injury, to-wit: bruising and tearing to the vaginal area.

COUNT IV - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE WITH SUBSTANTIAL BODILY HARM *JP*

did then and there wilfully, unlawfully, and feloniously sexually assault and subject SHERRICE IVERSON, a female child under sixteen years of age, to sexual penetration, to-wit: penile penetration, by inserting his penis into the vagina of the said SHERRICE IVERSON, against her will, or under conditions in which Defendant knew, or should have known, that the

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1 said SHERRICE IVERSON was mentally or physically incapable of resisting or understanding
2 the nature of Defendant's conduct.

3 DATED this 31st day of July, 1997.

4
5
6 
7 STEWART L. BELL
8 DISTRICT ATTORNEY
9 Nevada Bar #000477

10 ENDORSEMENT: A True Bill

11 
12 Foreperson, Clark County Grand Jury

13 Names of witnesses testifying before the Grand Jury:

14 Daniel Eitnier, Primm Valley Resorts, Director of Corporate Security

15 David Thomas Cash, Jr.

16 Giles Sheldon Green, M.D.

17 Leroy Iverson

18 Agnes Lee

19 Aleana Garcia

20 Terisa Cottrell

21 Phillip Ramos, LVMPD

22
23
24
25
26 97AGJ041X/97FG0219X/ts
27 LVMPD 970525-0452
28 MURD.; 1° KIDNAP.;
SA V/16 - F

SPEAKER:

Hi, this is Phil Ramos. I'm going to be doing a voluntary statement under event number 970525-0452. Subject is going to be murder. Division reporting is ISD. Division of occurrence is PD. Date and time of occurrence is going to be 5/25/97, approximately 0500 hours.

Uh, please use the rights form on this statement. Person giving this statement last name is Strohmeyer - STROHMEYER. First name is Jeremy - JEREMY. Middle name is Joseph. He is a white male adult, DOB 10/11/78, 5'8, 160, and his social is 602-26-5849.

His home address is 311 Silvera - SILVERA Avenue in Long Beach, California. Date and time of the interview is going to be 5/29/97, 0220 hours. Interview is taking place in the offices of the Long Beach, California Police Department. Conducting the

interview is Det. P. Ramos. Also present is Sergeant Walt Turley - TURLEY of the Long Beach Police Department and Detective Bill Collette - COLLETTE of the Long Beach Police Department.

Q: Jeremy, I wanna start this interview off by asking you if you know it's being recorded.

A: Yes I do.

Q: Okay, And is this, is this being recorded with your permission?

A: Yes it is.

Q: Alright. Before we get started any further, I need to advise you of your rights. And I know that you've been advised of your rights earlier. Is that right?

A: That's correct.

Q: Okay. So I'm gonna read you your rights one more time, okay?

A: Okay, you have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to an attorney and to have an attorney present during any questioning. If you so desire an attorney and cannot

afford one, an attorney will be appointed to you by the courts, at no cost to you, prior to any questioning. If you decide to stop during any of the questioning, you can do so without any problems or any continuation. If you wanna stop, we'll just stop, okay?

A: Alright.

Q: Do you understand those rights?

A: I understand those rights.

Q: Alright. And with those rights in mind, do you wanna continue talking to me?

A: Yes I do.

Q: Okay. Uhm, as you know, the reason we're here, I'm from the Las Vegas Metropolitan Police Department and we're investigating an incident that occurred at the Primadonna Hotel a couple days ago. And we understand that you might be involved in that and that you have some information for us. Is that right?

A: That's correct.

Q: Okay. Well you wanna just tell me what happened?

A: Ah, where should I start?

Q: Well, let's just start at the beginning. How did you get to, uh, Stateline?

A: I drove out with my friend, uh, David Cash and his father, David Cash, Sr.

Q: Mmhuh.

A: Ah, driving to Las Vegas, we stopped at Stateline and, uhm... stopped at that casino, uhm, 'cause, uh, David's dad wanted to play poker and we were gonna go, on the, uh, roller coaster at Wild Bill's. So, uh, we got out and parked the car in front of, uh, that one casino.

Q: Whiskey Pete's?

A: No.

Q: Primadonna?

A: Primadonna.

Q: Okay.

A: And, uh, we went inside, uh, with Dave's father, 'cause he wanted to get change so he could give us some money. And he gave us some money, we left and we walked across the street to Wild Bill's and we were looking for the entrance to the, uh... roller coaster. And ____--

- Q: Let me stop you for just second, okay? What time and what day was that?
- A: We arrived a little bit before 12, on, on Saturday.
- Q: Okay.
- A: Night, going on to Sunday morning.
- Q: Okay, so that was midnight?
- A: Yes.
- Q: Okay. Alright, go ahead.
- A: And so we were, we walked across Wild Bill's, uh, looking for the entrance to the roller coaster, couldn't find it, so we walked back to, uh, the Primadonna and then, uh, in the Primadonna we were looking for, uh, the arcade and at first we couldn't find it because, ah, last time Dave had been there, it had been in a certain place and I guess they were remodeling or something --
- Q: Mmnhuh.
- A: So we couldn't find it, so we went up _____ the, uh, floor and, uh, we were goin' around, doin' the slot machines and got some beers and drinkin' some beers and did some walkin' around and, uh, I think one of the guys stopped us and asked David for I.D., didn't ask me for I.D. though.
- Q: Okay. How old are you?
- A: Eighteen.
- Q: Alright. And tell me how you were able to buy beer?
- A: I walked up and ordered it.
- Q: Okay. Nobody asked you for your I.D. or anything?
- A: I think out of, ah, say five purchases, one time one guy asked me for I.D.
- Q: Okay. And did you show him your I.D.?

- A: Yes.
- Q: And ____
- A: I, I have an I.D. from another country that I used to live in, it's a fake I.D.
- Q: Okay.
- A: It's for like 22 years old, makes me 22.
- Q: Okay. Alright, go ahead.
- A: So, uh... uh, we were just goin' around doin' some slot machines and, uh, drinkin' some beer and, uh, we also, we went on the, uh, the tram, or whatever that is, to Whiskey Pete's.
- Q: Mmhuh.
- A: -- from the Primadonna. And when we got to Whiskey Pete's, there wasn't really anything there that interested us and we didn't see anything in the arcade or anything, so we came back to the Primadonna and, uh, we went down and checked out the arcade and played some video games and then met, uh, two different girls. The first one was an Asian girl we met--
- Q: Mmhuh.
- A: And we were talking to her, but her mom came down and, uh, left and she left with her mom. And then we met another girl, a, uh, a Mexican gal and, uh, we were talkin' to her some and that's, uh, when, uh, the one girl, uh, the deceased girl was, uh, running around, uh, with a, uh, Mexican boy about the same age. And they were like, like throwin', uhm...like big wads at each other, you know, paper towels bunched up with water and stuff, and throwin' stuff around. And, uh, like I got hit by one, so I, I threw it back and I started messin' around with 'em and, uh, I was chasin' the girl around and she, uh, ran in the, uh, the girl's bathroom and I, uh, I followed her in and, uh, when we got inside, she, uh, picked up, uhm, a sign, you know, when you put it on the floor --
- Q: Mmhuh.
- A: -- for a wet floor?
- Q: Mmhuh.

A:

She picked that up and, uh, uh, swung it at me and I blocked it with my forearm and, uh, and then I, I, like when she did that, I reacted and I grabbed her and like I'd put my hand over her mouth and, uh, like I, I grabbed

her, uhm, underneath the left arm and put my left hand over her mouth and then, uh, like grabbed through her leg, under her crotch with the right hand and, uh... and then I, uh, I took her into the, uh, the stall, the, uh, the biggest stall, the handicapped stall and, uh,

took off her, uh, her, boots and her, uh, pants and her underwear and, uh... keep her quiet, I, uh, choked her, started choking her... then, uh, during that time, I, uh, touched, uh, touched her vagina with my

finger, inserted my, uh, index finger inside, all the way to the knuckle and moved it in and out quite a few times. And, uh, also touched the, uh, head of my penis to her vagina, inside her lips, it wasn't really any, uh,

penetration with it. And, uh... I was choking her to keep her quiet and I had her, she was laying on the toilet seat, with her head to the side of where you flush the toilet. And, uh, I was choking her, I proceeded to choke her and the, uh,

two Mexican girls, uh, walked in the bathroom and, uh-- ... so I sat on top of the girl and, uh, made it seem like there was a person in there using the restroom. And, uh, in that process, uhm, the, the two

Mexican girls were in the bathroom, uh, the one girl that I'd been choking, that was in the stall with me, uh, started to make a, a wheezing noise, uh, like air and like breathing very weakly, so I, uh, like uh, I used, uh, one

of my hands and I, I put it over her throat, stopped the, uh, wheezing until the, uh, Mexican girls left the bathroom. And... uh... after that, I... I decided that I had to leave. Actually, before that, I was sitting on the girl and I was, uh, uh, stroking my

penis, uh... I was trying to get it hard and the, uh, Mexican girls came in and, and then I stopped and, and after they left, I wanted, I just wanted to leave. And, uh, I noticed that the girl was still breathing, barely and I didn't wanna leave her that

way, so I, uh, I tried to break her neck ... so that, uh, she would die quickly, 'cause I knew that based on the amount that I had choked her, that she had a lotta loss of oxygen to the brain, probably lotta brain dead.

COLLETTE:

I think you told us, when we were talking to you, you thought you choked her probably as long as 20 minutes all together, right?

A:

I said fifteen.

COLLETTE: Fifteen minutes?

A: Yeah, 15, 20 minutes.

Q: Tell me, uhm, why you thought that these two girls that came in while this was going on were Mexican girls.

A: 'Cause I could tell by the accent.

Q: Okay. Were they speaking English?

A: Yes.

Q: Okay. And with what, uh, like a Hispanic accent?

A: Yes.

Q: Okay, let's go back a little bit, ah, to when you guys first got there. You said you had bought some beers. Uhm..., before this, before you'd gone into the bathroom, how many beers had you had?

A: I don't, probably 2 or 3.

Q: Two or three?

A: Before I went into the bathroom with the girl?

Q: Mmhuh.

A: I had a whiskey and coke, probably four or five beers.

Q: Okay. Tell me if you think that you were under the influence of alcohol then.

A: Ah... that's a reasonable assumption, yeah, I would say I was under the influence of alcohol.

Q: Alright, so would you let's say on a scale of one to ten, ten being stupid, falling down drunk, what would you say you were?

A: I'd say I was about a 6 or a 7.

- Q: Okay. So you had a pretty good --
- A: I'd-- yeah, I had a good buzz. I was feelin' pretty good.
- Q: Okay. Had you eaten anything? Something to eat while you got there, after you got there?
- A: Uh..during the day I, probably I had a ... some eggs in the morning, that morning, Saturday morning.
- Q: Mmhuh.
- A: And, uh, and Saturday night I had a hamburger and some fries in a small town, uh, on the way Stateline. And --
- Q: ____ -- I'm sorry, go ahead.
- A: That's it, go ahead.
- Q: Okay. So did you eat anything after you guys got to Stateline?
- A: No, I don't think so, no.
- Q: Alright. Uhm, you told me you went there with a friend of yours?
- A: Yes.
- Q: And his father.
- A: Yes. = -
- Q: What was your friend's name?
- A: David Cash.
- Q: David Cash?
- A: Yes.
- Q: And his father, David Cash, Sr.

A: Correct.

Q: Okay. Was David with you when all this was goin' on?

A: No, he, uhm... when I first went in the bathroom, he, he like followed in, not like all the way, he went to the door and he was at the doorway and, uh, when I grabbed the girl, he, he was like, "What are you doin'?" and then just, he left, freaked out. He was afraid I was gonna do somethin' stupid.

Q: Okay, when he first, when David first saw you in the bathroom, what part of the bathroom were you in?

A: I was in the main area, by the sinks.

Q: Okay. And there was nobody else in the bathroom, just the two of you?

A: No, no one else in the bathroom, just us.

Q: Okay.

TURLEY: That would be three of you, right, not two?

A: At the point in time when David was-

Q: When, when David came in.

A: -in the doorway. Yeah.

Q: So there was a total of you, David and the little girl:

A: Right. But then he, he, after I grabbed her, he said, "What are you doing?" and left.

Q: Okay. Uhm...

TURLEY: Phil, you know, if I may, if I may just 'cause from what, uh... Jeremy had told us a little bit earlier. You had talked to a Hispanic girl who was her, who you believed to be her younger brother was playing with the victim.

A: Right. And-

TURLEY: But hear my question first. The reason why I'm asking is because you, you describe her really good, you gave, you told her you were from Long Beach, if you remember what you, is that what you said?

A: Yeah, I told her I was from Long Beach, I showed her my nipple rings. Yes.

TURLEY: Yeah. And you showed her your things. I think that's really important that you, you give Phil that information, 'cause it, it, you know, it tells more _____.

Q: Tell, tell me about the Hispanic girl that you were talking to after the Asian girl.

A: Uhm, an Hispanic girl, she's probably about 5'6 and, uh, and a little, little obese, not, not fat but she's a little bit big.

Q: Okay. What color hair did she have?

A: Black hair.

Q: Do you remember her name?

A: No I don't.

Q: Okay.

A: I think I recall the, uh, Asian's girl's name as being Erica, but I don't recall the, uh, the Mexican girl's name.

Q: Okay, so you told the Mexican girl that you were from Long Beach?

A: Yeah, I just went up and start talking to her, you know, struck up a conversation and it came up where we were from. Told her we were from, uh, Southern California.

Q: Where was this at, when you first struck up the conversation with her?

A: In the arcade.

Q: Down in the arcade?

A: Right.

- Q: Alright. And you mentioned just a few seconds ago that you had showed her your rings?
- A: Right. And so we were talking and, uh, she, uh, I think she said something about my tongue ring, so I, uh, proceeded to show her my nipple rings also.
- Q: Okay. So you have your nipples pierced?
- A: That's correct.
- Q: Okay. And you showed those to her? To this Mexican girl?
- A: Yes.
- Q: Alright. And how long did you talk to her?
- A: That's tough. I'd say 5 to 10 minutes. It wasn't a long conversation.
- Q: Okay. And did you, did you end the conversation or did she end the conversation?
- A: You know, I'm not really sure. I think it was kind'a like a, you know, both of us were just standing there, not saying anything, so we both just like walked away.
- Q: Okay. Tell me about how much time you spent over at Whiskey Pete's, before you took the tram over to Primadonna.
- A: Shoot I, I don't remember.
- Q: Okay. Did you play any games in that arcade?
- A: I don't think so. I think we went in and it was like we were unimpressed, so we just went back.
- Q: Okay. Uhm, there was an incident that you told me about, where your friend, David, had gotten, uh, carded by a security guy and had his beer taken away?
- A: Yes.
- Q: Where was that at?
- A: That was in the, uh, the, uh, Madonna one.

SVan1s12JDC05752

Q:

The Primadonna?

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2JDC05752

A: The Primadonna, yeah.

Q: Okay. And would that have been just a little while after you took the tram over?

A: No, that was when we first, no, it's like, you know, our first couple of beers. I believe.

Q: Okay.

A: So- think that was before. Because what we did is we got some beers and some- alright. He got his taken away. The guy didn't say anything to me.

Q: Okay.

A: And so I finished mine. Then I went back and got two more for us and we drank em' on the way to the tram. You know, we finished 'em waiting for the tram to show up.

Q: Okay. So that particular incident, when David had the beers taken away -

A: Right.

Q: How much longer after that did you guys get to the, uh, Primadonna Arcade downstairs?

A: I don't know.

Q: Okay.

A: Uhm, I don't remember the time.

Q: Okay. Do you remember goin' to Buffalo Bill's with him?

A: Yeah, I-I said that. And when we first got there to the Primadonna, we got-uh, David's father gave us some money and we walked across the street to Wild Bill's and, uh, we walked around like halfway around the whole complex looking for the uh, the entrance to get on the, uh, roller coaster.

Q: Right.

A: And when we couldn't find it, we just like went inside, walked around inside, then walked out the front.

- Q: Okay. Tell me when was the very first time that you noticed the little girl-the little black girl.
- A: Uhm, that's tough to say. Uhm -
- Q: Had you seen her when you were over at Buffalo Bill's?
- A: No. First time I saw her was in, uh, in the Arcade at, uh, Primadonna.
- Q: Okay.
- A: That was the only time I saw her.
- Q: So estimate for me, uhm, the period of time when you first saw her until you chased her into the bathroom, or followed her into the bathroom.
- A: I'd say a good half hour.
- Q: Okay. So you didn't interact with her for a very long time, just maybe about half an hour?
- A: Yeah, it wasn't-
- Q: Okay.
- A: - wasn't a long time.
- Q: Okay. So, uh, when you first saw her, she was throwin' the spitballs with the- with the little Mexican boy that she was playin' with?
- A: Right.
- Q: Okay. And that little Mexican boy turned out to be the little brother of the Mexican girl you were talkin' to?
- A: Yeah, that was- I assumed that. That was my assumption because, uh, the girl's older brother was with the Mexican girl also. I believed that it was her younger brother.
- Q: Okay. The little black girl?
- A: Yeah. This is confusing.

Q: Yeah. I'm kind confused so -

A: The little black girl had an older brother.

Q: Right.

A: And the older brother was with the, uh, Mexican girl.

Q: Okay.

A: That I had talked to and I had showed my nipple rings to.

Q: Uhm-hmm.

A: And I saw them pretty much together, uh, everywhere in the Arcade. And then I believe that the, uh, little Mexican boy was the Mexican girl's younger brother.

Q: Okay. Alright, I gotcha now. So did you ever get a chance to talk to the little black girl's older brother?

A: I believe he was standing like right next to the Mexican girl while we were talking to her.

Q: Uhm-hmm.

A: So-I didn't talk directly to him.

Q: But he was there and could hear your conversation?

A: Yes.

Q: Okay. But you never had a direct conversation with him?

A: No.

Q: Okay. Uhm, when you were down there in the Arcade, did you notice any other kids that would have been your age down there?

A: When we were first there, earlier on in the evening -

Q: Uhm-hmm.

- A: -when we first check it out, there was like there's some older people down there. Not-not a lot, like maybe one older guy, two older guys or-you know, with their girlfriend or somethin'. That's about it.
- Q: Okay. Do you know where David Cash, Sr. was when you guys were downstairs in the Arcade?
- A: Yeah. He was up at the, uh, poker tables.
- Q: At the Primadonna?
- A: At the Primadonna. There's- I guess there's a little enclosed room.
- Q: Uhm-hmm.
- A: He was there.
- Q: Okay. And...so your friend, David, Jr., was with you downstairs in the Arcade?
- A: Yes.
- Q: Okay. Was he talking, uh, with the little black girl also?
- A: I don't really, we didn't really engage in conversation with her. I mean not like standing there talking to her. It was pretty much like, ah, playing kids games, running around chasing each other, uh, throwing stuff at each other. Just doing child-ish things. And David didn't really involve himself, it was mostly me.
- Q: Okay.
- A: It was pretty much all me.
- Q: Well, let me ask you about that. Uhm, tell me why you started playing with her.
- A: 'Cause I got hit by, uh, one of the things they were throwing.
- Q: Okay.
- A: So I threw it back and started playing around with them.

- Q: Is that somethin' that you would normally do? Play around with younger kids?
- A: Ah, not really, no.
- Q: Okay. Why do you think you did it that night?
- A: Ah...maybe it was 'cause I was bored, maybe it was because of the alcohol, I, I can't really say, I don't know.
- Q: Okay. Uhm, when you hit, when you were playin' around, you know, with the spit wads and, and, you know, just carrying on with her, were you also carrying on with, ah, the little Mexican boy that she was playin' with?
- A: Uh, yeah. We were like, uh, ___ like, he'd like, he'd like, "Hurry, "let's go get her", you know, like, like I was on his side or whatever, and then like, and, like he disappeared-
- Q: Mmhuh.
- A: Like after, ah... after the girl ran towards the bathroom. I like turned around and he we, was gone.
- Q: Okay. Do you know where he went?
- A: No.
- Q: Okay. Uhm... after you came out of the bathroom and you had left the little black girl in there, tell me what you did then.
- A: Uh... I came out of the bathroom, I walked out of the door and then I walked to the, uh, far end of the room, that the door opens up and then there's video games in the middle-
- Q: Mmhuh.
- A: I walked to the far end to walk around on that side and I walked on that side, ah, right there was, uh, the, uh, black boy, ah, the girl's older brother and the, uh, Mexican girl. I walked right by 'em, just walked out of the Arcade.
- Q: Okay.
- COLLETTE: I think when we were talking before, Jeremy, you described what the little girl was wearing and what you did with her clothes.
- A: Oh the, uh, the little girl's clothes. She, the boots were- I, I remember those being like, uhm, like a,

like almost a calico pattern, like brown/black-

Q: Mmhuh.

A: -and a dark orange-ish red, kind'a mixed together. And then she had like a, uh, almost like stretch pants on, that had like over it, like attached to the top of the pants like, uh, material that just hung over freely.

Q: Mmhuh.

A: -like a colored line on the end, you know, they're not really a... I remember, uh, what color the, uh, underwear was, I don't remember that. But, uh, I had took her, uh, boots and her clothes and, uh, put 'em in the toilet. And, uh, when I left the body, I, uh, put the feet inside the toilet and, uh, so she was like sitting on the back edge of the toilet seat-

Q: Mmhuh.

A: -with her feet in the toilet and her hands on top of her legs.

Q: Tell me why you did that.

A: So that, uh...I was thinking that, you know, if somebody comes in the bathroom, they won't see like, you know, her legs hanging out from the bottom.

Q: Is that why you put her clothes into the toilet?

A: You know, I don't-- I don't really remember why I did the, put the clothes in the toilet. I, I think it was probably the same reason. I don't really remember.

Q: Mmhuh.

TURLEY: Jeremy, I think it, Phil should know, about the napkin too, when you were sittin' on her, when the girls came in.

A: Oh, uhm, also, uh... uh, from choking her, she had, uh, spit out a, a kind of a, a foam and with blood, mucus mixed with blood, you know, it was all bubbly and, uh, accidentally I had, uh, I guess, uhm, brushed my hand against it and like I'd gotten it all over my hand and so

I took some, uh, toilet paper and cleaned it off and I can't remember whether I put the toilet paper wad in the toilet or threw it on the ground.

Q: Okay. Do you remember, uhm, if you had wiped any portion of your body with that, except for wiping

her with that toilet paper that you just told me about?

A. ____ I, I got the mucus on my hand—

Q. Okay.

A. —mucus and blood on my hand, I used the toilet paper to clean my hand off.

Q. I see.

A. I didn't wipe it on her or myself, I just used it to clean my hand off.

Q. Okay, you told me earlier that, uhm, while this was going on, that you had, uhm, touched her with your penis. Is that, is that accurate?

A. That's accurate, yes.

Q. Okay. Do you remember if you got any blood on your penis?

A. Mm, no I don't ... there— there wasn't penetration

Q. Okay. Do you remember seeing her bleed at all, from her vaginal area?

A. Yes I do, I remember there was blood down there.

Q. Alright. Do you know—

A. —some on my finger.

Q. Okay, okay, that's what I was gonna ask you, did any transfer to your, to your body and you just said your finger?

A. Yes.

Q. Okay. Did you wipe that off?

A. I would think that I probably wiped it off at the same time that I wiped the mucus off of my hand.

Q. Okay. Uhm, I think you also told me that, uhm, there was a point in time there where you were sitting on top of her.

- A. Correct.
- Q. Okay. And you told me that you were stroking yourself.
- A. Yes.
- Q. Alright. And, uhm, was that in an effort to get an erection?
- A. Yes sir.
- Q. Okay. Were you able to achieve that?
- A. I was halfway achieving it and the Mexican girls came into the bathroom.
- Q. And that startled you?
- A. That stopped it.
- Q. Okay. Uhm, I need to ask you one thing. Uh... while this was occurring, do you recall if you had ejaculated at all?
- A. No I did not.
- Q. Okay. You are certain that you did not?
- A. I'm certain.
- Q. Okay. So then when you left the stall and went upstairs, tell me what you did then--
- A. I believe I exited the casino and went and waited, ah, by the car.
- Q. Were you
- A. --for David. 'Cause I, I think that was where we were supposed to meet.
- Q. At the car?
- A. Yeah, like four o'clock or something.

Q. Do you remember seeing David, uhm, at the top of the stairs, when you came out?

A. No I don't.

Q. Okay. Do you remember if when you came out of the Arcade and you went up the stairs, did you go right to the parking lot, or did you take your time going through the casino?

A. I don't really recall.

Q. Okay. Tell me what you guys did after, uh, you got to the car and you met up with David and his dad.

A: Well actually I, I met with David and his dad was still inside. So I waited at the car while he went and got his dad.

Q. Okay.

A. And then his, his dad and him came out and, uh, we left and we drove to Las Vegas.

Q. What'd you do when you got to Vegas.

A. Uhm, uh, we parked the car in a parking lot structure and, uh, and David and I were sleeping in the car, 'cause we were pretty tired and his dad went to play some poker at a casino. And, uh... then we, uh, woke up and we went and walked around and then met with his dad like 12 o'clock and we got a hotel room at, uh, the Holiday Inn.

Q. Okay, this beeping means we're runnin' outta tape on this side, so I'm gonna turn it off for a second and flip it over to the other side.

A: Alright.

Q: Okay, we're continuing on Side B. Alright so about 12 o'clock you met with David's father and went and got a room?

A: Right, and got a room, ah... on, uh, not the main strip, but the, uh, enclosed street? You know what I'm talkin' about?

COLLETTE: You told us the Holiday Inn.

A: Yeah, it was the Holiday Inn, but it's on a, it's by a strip of a bunch a casinos--

Q: Mmhuh.

A: Fremont, that's it.

Q: Oh, okay, on Fremont Street?

A: Right. We went and got a hotel, Holiday Inn, at Fremont and it's like a special named Holiday Inn, like it was taken over by another company.

Q: Okay.

A: But, uh, we got a room there and, uh, like slept a couple hours during the day, then got up, went out and, uh, checked out all the different casinos and went gambling in some of 'em. And, uh, stayed, stayed in Las Vegas til Monday. Uh, we drove down to the main strip at about 12 o'clock on Monday and the traffic was pretty bad, so we decided to stay on the strip 'til like 6 o'clock--

Q: Mmhuh.

A: So, uh, David and I went off and we, uh, checked out like the Luxor and, uh, uh, MGM and New York-New York, all the different hotels there and the casinos and, uh, and then we left at six and we were driving and then we got, we got to Stateline pretty fast, like I'd say about 40 minutes and then about ten miles past that and just

hit like deadlock traffic. So we got off at Barstow and took in a movie at like ten o'clock and left again at like 12:30 from Barstow and went about 7 miles, no traffic and then, uh, came over a ridge, there's traffic again. And, uh, finally got home to Long Beach at, uh, 3 am, Monday morning. That's when they dropped me off at home.

Q: Monday morning or Monday night/Tuesday morning?

A: Tuesday morning, sorry.

Q: Okay. That's all right. Uhm, tell me when you told David about what happened.

A: Uhm... I didn't really, uhm, discuss it with him. Uh... like on the, think it was Tuesday or Wednesday, like, I'd called him and I was talkin' to him just about like school and stuff, whatever, and, uh, he said he was gonna call back and then I called back a little later, 'cause he wasn't callin' back, and his

mom said he left and he came over my house and said, "Oh my God, you're on TV", like this girl was killed and all this stuff. So then, he, he figured it out pretty fast.

COLLETTE: Then he told you he was gonna have to go to the police.

A: Yeah.

COLLETTE: His dad insisted.

A: He said his dad was insisting that he would have to go to tell the police what he knew and he, he himself was gonna go and tell the police and then, you know, I said, "Well, that's uh, if that's what you have to do, that's what you have to do, that's fine." You know, I'm not gonna be upset with my friend for that.

Q: Mmhuh.

A: So, uh... he went to his, think his mom and dad talked to the police.

Q: And that was few hours ago. Is that right?

A: A little more than few hours ago--

Q: Yeah, a while ago.

A: --7, 8 hours ago.

Q: Okay. So--

? ____ (Both speaking at once)

Q: --ah, are you tellin' me that David didn't know anything about what happened that night?

A: Like, like I said, when he, uh, was at the bathroom door, he saw me grab the girl.

Q:

Right.

A:

And that's when he said like, "What are you doing?" and just left.

Q:

Okay. But afterwards, after, ah, you had come out of the stall and you ran into him in the parking lot, you didn't tell him what happened?

A:

I don't know, I might've, I don't know.

Q:

Okay.

A:

I don't think so, because I remember, or when he came over my house, he was like totally like surprised.

Q:

When was the first time you saw any kind of media coverage about what happened?

A:

When David came over. I think that was Tuesday night.

Q:

You don't read the papers?

A:

I read the papers, but, ah, not on a daily basis.

Q:

Well, do you watch the news on TV?

A:

Ah, yes, sometimes. I really, I really don't watch TV that much at all. I don't watch TV that much, I do read the paper sometimes. But, uh, after Dave came over and showed me that, I, I was watchin' the news to see, ah, what, uh, what would develop, uh, you know, what leads they were getting and everything. And I also had picked up the paper today, as a

matter of fact, read an article in there. Los Angeles Times.

Q:

Did you see, ah, the video, the surveillance on the TV?

A:

Yes I did, multiple times.

Q:

Did you recognize yourself on there?

A:

Yes I did.

Q:

Okay. Did any other of your friends call you and tell that they'd seen you on TV?

A: Ah...not then, one of my friends called me and said he saw me. And, uh, then some other people, some friends at school were like, "What were you doin' on TV last night or this morning?" So yeah, people noticed, they recognized me.

Q: Did you tell anybody about what happened?

A: Ah, yeah, I told a old girlfriend of mine.

Q: Do you wanna tell me her name?

A: Not really, no.

Q: Okay.

A: I think you already know it though, so —

COLLETTE: Well I think you already know that I talked to her and I know her name.

A: You talked, yeah.

COLLETTE: So you might as well tell him.

A: Agnes.

Q: Agnes?

A: You want the full name?

Q: Sure.

A: Agnes Lee.

Q: Okay. Tell me what Agne's reaction was when you told her.

A: She didn't believe me.

Q: Okay.

A: She didn't wanna believe me.

Q: Why did you tell her?

A: 'Cause I wanted to confide in somebody and I wanted to, I don't know. I was considering leaving, ah, trying to get out of the country and if I did that, I would'a wanted her to go with me.

Q: Mmhuh.

A: And, uh... I, she had, you know, we had been going out for a while and she had told me stories before, about how she used to know people in like, uh, certain like, uh, you know, gang extensions, gang affiliations and, uh, so I expected her to like have, I don't know, dealt with somethin' like that before, like, a, a murder or something and, uh,

she might, you know, help me out and, uh, you know, give me some advice on what I should do. And, uh, turned out that all the stuff she had told me was just bullshit, so it kind'a like rattled her pretty good.

Q: Mmhuh. Uhm... you have a computer at home?

A: Yes I do.

Q: Are you familiar with America on Line and the Internet and all that?

A: Yes.

Q: Okay. Did you talk to anybody on line about what happened?

A: No. I hadn't been, ah, hadn't been on line since before I left for Las Vegas from up here. My parents, uh, took my modem away, so I had not been on line.

Q: Okay.

A: But there are, uh, uh, people, I'd say a maximum of seven people I've met on line who know that I have my tongue and my nipples pierced.

Q: Okay.

A: So I mean some people could, you know, draw conclusions just based on that.

Q: Would you like to tell me what your on line address is?

A: Uh, sure, Fly Boy 1030.

Q: Fly Boy 1030?

A: That's correct.

Q: And is it just the way it sounds? The way it's spelled?

A: Yeah. Fly, uh, capital F, Boy, capital B, no spaces in between. And then, uh, 1030, no spaces.

Q: Okay. Uhm...did you see the coverage of the little girl's father on TV?

A: Uhm...no, I didn't see any of the coverage on TV. I saw the brother speaking on TV--

Q: Mmhuh

A: About how, uh, they didn't want the, he didn't want the media, ah, harassing his dad and putting him down. And, uh, I read an article today, well yesterday, in, uh, the Los Angeles Times about, uh, uh, like the father and they said they had a source in Las Vegas, that, uh, had heard like, had gotten the father saying that,

uh, to keep, uh... for there not to be any trouble, that the hotel would, uh, have to give him a six pack of beer, a hundred dollars and, uh, round trip tickets to Las Vegas and pay for his daughter's funeral.

Q: What'd you think about that?

A: I thought it was pretty sad.

Q: Why?

A: It's his daughter. It's, it's his daughter and she was murdered and he's thinking about a six pack of beer and some hundred dollars in playing chips.

TURLEY: David, you said if, uh, it was some good that came out of this, can you tell Phil?

A: Uh, yeah. Uh...uhm, I just, i, I was sayin' that I notice also in the article how a majority of it was talking about how, ah, parents need to keep more careful watch over their children, they can't just, uh, leave 'em in, ah, in Arcades, while they're up in the casino--

Q: Mmhuh.

- A: --like upstairs. And I think that this, based on how wide the media coverage has been, is gonna be a big eye opener for a lotta parents and they're not gonna be leaving their kids alone anymore.
- Q: Tell me what you thought about all those little kids down there at 3:30, 4 o'clock in the morning.
- A: I thought it was pretty ridiculous that kids would be up at that time. I mean I didn't, when I was a kid, I'd wanna, you know, stay up late or whatever, you know--
- Q: Mmhuh.
- A: --at the, I'm sure when I was a little kid, it'd be cool to be up at 3:30 in the morning, in the Arcade. But I mean just runnin' around rampant, there's like no supervision whatsoever. I mean it's like, it's, it's an area that's completely unsupervised and there's no adults around, it's just a bunch a little kids hangin' out.
- Q: Uhm, you know a lotta times in our investigations we come across situations and we give them names, like, uh, crimes of circumstance, crimes of passion, ah... spontaneous crimes, pre-planned incidents and stuff like that. Tell me what you would, ah, classify this particular incident as.
- A: I'd have to say it'd be spontaneous.
- Q: Spontaneous?
- A: Yeah.
- Q: Okay. You didn't plan on doin' this at all, when you got there?
- A: Definitely not, no.
- Q: Okay. And you hadn't planned on doing this when you first started playin' around with the little girl?
- A: No. Not even.
- Q: Do you have any idea what actually compelled you to do this?
- A: I don't know. I was sayin' earlier it's like it's, it's like, it just like something like went haywire or something, I don't know. It's like, like when she swung that thing at me, like I don't know, like I suddenly like reacted. And like it was just, it was just a completely strange experience. I mean it's, it's hard for me to

explain, I can't say. It, it wasn't like fun, it wasn't, uh, like a rush, it was just...it's strange, hard to explain. I don't know what triggered it. Like I think her sw, like swinging that thing at me, I guess that's what triggered it, when I grabbed her and was just like from there it went on.

Q: Tell me if you think that there would've been anything that could've stopped you from doin' this.

A: Yeah, lots of things.

Q: Give me an example.

A: Ah, for one, a parent bein' around their child when they're there. You know, not let, leaving your children alone. Uh, having signs posted saying you are under surveillance. That's, that's a pretty big deterrent.

COLLETTE: I think you told us you hadn't seen the cameras ____-

A: Yeah, I didn't, I didn't see the camera. Ah, I had, I had seen two cameras in big white boxes and that's it. I didn't see any camera up by the bathrooms.

Q: Okay. But now you know that, that you were caught on surveillance tape.

A: Yes, I know that.

Q: And you saw that from the TV coverage and people tellin' you?

A: That's correct

Q: Okay.

COLLETTE:

Why'n't you tell him about your blue Bruins baseball cap and your clothing, and what you did with all that stuff.

A:

Uhm, today I, I panicked today, because, uh, I didn't know what to do. I'm, I'm looking at spending a good amount of time, a good period of time of my life in jail now, so I was thinking about taking off and gettin' rid of any evidence I might have, or whatnot. So I, uh, I burned, uh, the cap that I was wearin' that night and, uh, the shorts that I was wearin' that night.

Q:

What kind'a cap was that?

A:

It was a, uh, a U.C.L.A. Bruins like baseball cap.

Q:

What color was it?

A:

It's a blue cap with the yellow B.

Q:

Okay. Uhm, so on the front of the cap there's the B?

A:

Correct.

Q:

And then on the surveillance tape, I saw some writing on the side of the cap.

A:

I believe it says, uhm, like go, go Bruins, or something, above the, uh, hole on the back of the cap.

Q:

Okay. And tell me about the shirt you were wearing that night.

A:

A blue shirt and it's like uh, just like tee shirt, it's, uhm, kind'a dark navy blue and it had like uh, I think some circle designs on it. It's just pretty much a tee shirt with some designs on it, on the front.

Q:

And what'd you do with that shirt?

A:

It's at home.

Q:

It's at home?

A:

Yeah, I don't, I don't remember whether I packed it or, ah, if it's in my room or if it's in the laundry room.

COLLETTE:

Could be in the laundry room, a green backpack he has, or a big black bag that he has.

A: The, uh, the shoes are in the backpack.

? The gray Vans tennis shoes.

A: Right. And the boxers are in the, uh, the black bag.

Q: Is that the kind'a shoes you were wearing, were gray Vans?

A: Yeah, those were the shoes I was wearing.

Q: Okay.

COLLETTE: But he says the maid was there today and they may have washed all those items.

A: All, I, I believe all the clothes had been washed.

Q: Okay. Uhm, well I gotta tell you, I can't think of any other questions I'd like to ask you. What I, what I'd wanna do now is ask, uh, Sergeant Turley or Detective Collette if they have any questions for you, if you don't mind.

A: No, I don't mind. That's fine.

TURLEY: Uh, Jeremy, the only thing that I have that, that I wanna, I think is important that Phil knows, because it's, I want our, ours to be pretty much the same. Do you belong to any gangs or anything right now?

A: No.

TURLEY: You're not a white supreme-ist?

A: No, definitely not.

TURLEY: You indicated to me that you didn't attack this girl because she was black.

A: That's correct. I did not attack her because she was black.

TURLEY: Okay. Also, you told, you told me that, uhm, you hadn't followed her around or anything else to see her locations and that, that you had been in the Arcade for a while, in fact, you even urinated in the Arcade itself, by the Helicop. Is that —

A: That's correct.

TURLEY: Tell me about that.

A: Urinated twice.

COLLETTE: The time if 0300, I just turned to Side B.

TURLEY: In the Arcade.

A: Twice in the Arcade, uhm, there was this spot, ah, there's a row of video games against the wall, going towards, uh, the, uh, ladies' bathroom and, uh, on the wall there's a, a like a socket, plug socket. Ah, urinated all over that. And, uh, and then there's a helicopter game like, uh, like right across from that, urinated inside that.

TURLEY: Okay. You also, uhm, told me earlier and I think it's important here to tell Phil too, that, uhm...after you had, uhm, choked her from, from the front and, uhm, you had sat on her and you heard her kind of, ah, still maybe possibly breathe, there was some life in her, uhm, that you had, uhm, you

wanted to basically, you didn't want her to be a vegetable for the rest of your life, so you, you looked there and you thought about how to do it and you, you remember recalling about some movies or something?

A: Yeah.

? Could you tell Phil about that?

A: Uhm, before I left, uh, and she was still breathing, not, not, not strong breathing, but, you know, a wheezy breathing, uh, very labored, and, uh, I, I, I thought about it and I, and I thought to myself that I couldn't leave her there like that, because I couldn't leave then and I figured that she would be a vegetable,

because of, uh, lack of oxygen to the brain, so, uh... I tried to, uh, break her neck. Uh, and doing it how I'd seen in movies before, uh, putting one hand on the back of the head and one hand under the chin and, uh, twisting, uh, the head to twist the neck, that uh, breaks it. And when I did that, uh, I heard a, a, a loud snap, but,

ah, she was still breathing so, uh, I did it one more time, as hard as I could and, and she stopped breathing.

TURLEY: Okay, Jeremy, at that time, you know, after you choked her, you know, and you didn't want her to be a vegetable, when you decided to break her neck, was it, was it then you say, hey, I'm gonna put her out of her misery and you were gonna kill her?

A: Yeah.

TURLEY: I mean, did you actually say that to yourself, or did you have that idea, or—?

A: Well, my thought was that that would be like the quickest, easiest thing. Uhm, least painful way.

? Mmhuh.

A: Just, you know, end it. So that's what I did.

Q: Okay. Uhm, can I ask you one question?

A: Sure.

Q: Did you, when she was, uh, having this labored breathing, did you consider trying to give her a little bit of CPR yourself, and then take off?

A: No, the thought never cross my mind.

Q: Okay.

TURLEY: Uhm, one other thing too. You, you, you told, uhm, us earlier, or at least clarify, when you had your penis out and you were, she was seated up against the toilet, that, uhm, she wasn't conscious at this time. What, I mean is that, is that the case? Is that, was she, was she screaming? Were you holding her into it, or, or what? Was she not—

A: She was not conscious.

? Okay.

A: She was breathing, but she was not conscious.

? Okay. Well how do you know she was breathing? Could you see ____

A: I could hear her breathing and I could see her chest moving up and down.

? Oh, you could?

A: Yes.

? Okay. And, uhm...were her eyes open or closed at that time?

A: I don't, I don't think I really looked at her eyes.

? Okay.

A: You know, I don't recall really looking at her face at all.

TURLEY: Do you remember anyone, when you were in the stall, in the handicapped stall, when this was all going on, do you remember anyone saying anything to you, or coming over the top of the stall, or under the stall, or opening the door of the stall itself, not just the bathroom?

A: No, I would've noticed that I think.

TURLEY: Well Phil, I don't have anything more.

Q: Okay.

COLLETTE: Thank you. Would you tell us what your grade point average was in school?

A: Uh, 3.5.

COLLETTE: 3.5? And do you recall I handed you, a uh, consent to search form, to search areas of, uh, the home you live in, from which you have control?

A: That's correct.

COLLETTE: And you read the whole thing out loud to us.

A: That's correct.

COLLETTE: and, uh, you signed it and agreed to let officers from our Department and Las Vegas, or our Department check for your clothing?

A: That's correct.

? Okay.

TURLEY: Jeremy, one, one quick thing. If, if I could relay something to the father from you, what would it be?

The McConnell court then concluded:

We therefore deem it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated.

McConnell, 102 P.3d at 624 (emphasis added).

The McConnell court clarified its ruling:

[I]n cases where the State bases a first-degree murder conviction in whole or part on felony murder, to seek a death sentence the State will have to prove an aggravator other than one based on the felony murder's predicate felony.

McConnell, 102 P.3d at 624.

Concerning this clarification, the McConnell court went one step further and cautioned the State:

We further prohibit the State from selecting among multiple felonies that occur during "an indivisible course of conduct having one principal criminal purpose" and using one to establish felony murder and another to support an aggravating circumstance.

McConnell, 102 P.3d at 624-25.

Thus, under the authority of McConnell, the first aggravator found in this case, that *the murder occurred in the commission of or an attempt to commit robbery*, is unconstitutional, and therefore invalid.

II. The McConnell Decision is Applied Retroactively.

In Bejarano v. State, 122 Nev. Adv. No. 92, 146 P.3d 265 (2006), the Court rejected all the State's arguments that the McConnell decision should not be applied retroactively, concluding:

Absent retroactive application of this rule, **there would be "a significant risk that a defendant . . . faces a punishment that the law cannot impose."** Thus, we conclude that McConnell announced a substantive rule of law that must be applied retroactively.

Bejarano, 146 P.3d at 274 (emphasis added), *see also* Rippo v. State, 122 Nev. ___, 146 P.3d 279, 282-283 (2006).

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1 **III. The Proper Remedy for a McConnell Error is a New Penalty Phase Hearing.**

2 It is not proper for any court in this State to engage in a reweighing analysis of aggravating
3 and mitigating circumstances in order to find an element of capital eligibility, pursuant to the U.S.
4 Supreme Court's decisions in Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey,
5 530 U.S. 466 (2000).

6 The fundamental principle of Ring and Apprendi is that the defendant has a "right to 'a jury
7 determination that [he] is guilty of every element of the crime with which he is charged, beyond a
8 reasonable doubt.' " Ring, 536 at 602, quoting United States v. Gaudin, 515 U.S. 506, 510 (1995).
9 In the context of the Nevada sentencing scheme, in which the outweighing of mitigation by statutory
10 aggravating factors is an element of capital eligibility, Johnson v. State, 118 Nev. 787, 802-803, 59
11 P.3d 450 (2002), the finding of that element cannot be made by a court, but must be made by a jury.
12 Ring, 536 U.S. at 606-607; Apprendi, 530 U.S. at 477.

13 However, it is anticipated that the State will argue the authority of Clemons v. Mississippi,
14 494 U.S. 738, 746-750 (1990), in which the Court then (17 years ago) found that an appellate court
15 could uphold a death sentence by reweighing aggravating and mitigating evidence and, in essence,
16 perform the sentencing calculus itself. It is argued by Vanisi that even though the Court has not yet
17 specifically overruled Clemons, the reasoning in Clemons cannot survive under the now-controlling
18 decisions of Ring and Apprendi.

19 This argument is supported by consideration of the decision of Walton v. Arizona, 497 U.S.
20 639 (1990), in which the Court upheld a system in which the trial court rather than a jury found
21 aggravating factors that were required for death eligibility, but in Ring it recognized "that Walton
22 and Apprendi are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both." 536
23 U.S. at 609. For exactly the same reasons, Clemons and Apprendi "are irreconcilable," and the
24 court's "Sixth Amendment jurisprudence cannot be home to both."

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1 Analysis of Clemons shows that it is based upon exactly the same theories that the Court
2 relied upon in Walton but disavowed in Ring and Apprendi. In Clemons, the Court reasoned:

3 Any argument that the Constitution requires that a jury impose the
4 sentence of death or make the findings prerequisite to imposition of
5 such a sentence has been soundly rejected by prior decisions of this
6 Court. Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d
7 704 (1986), held that an appellate court can make the findings
8 required by Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73
9 L.Ed.2d 1140 (1982), in the first instance and stated that "[t]he
10 decision whether a particular punishment - - even the death penalty -
11 - is appropriate in any given case is not one that we have ever
12 required to be made by a jury." 474 U.S. at 385, 106 S.Ct., at 696. .

13 Likewise, the Sixth Amendment does not require that a jury specify
14 the aggravating factors that permit the imposition of capital
15 punishment, Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104
16 L.Ed.2d 728 (1989), nor does it require jury sentencing, even where
17 the sentence turns on specific findings of fact. McMillan v.
18 Pennsylvania, 477 U.S. 79, 93, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

19 Clemons, 494 U.S. at 745-746 (emphasis supplied). This was the same analysis the Court relied on
20 in Walton to uphold the Arizona sentencing scheme which allowed the trial judge to find the
21 aggravating factors necessary to find eligibility for the death penalty. In Walton, the Court relied
22 substantially and explicitly on Clemons in upholding the Arizona scheme. Walton, 497 U.S. at 647-
23 649 (quoting Clemons). Indeed, the entire discussion of the Sixth Amendment issue in Walton
24 repeats the analysis in Clemons, including its rejection of the argument that the Sixth Amendment
25 requires jury findings of factors necessary for death eligibility; its approval of Hildwin v. Florida,
26 490 U.S. 638 (1989), and other Florida cases, upholding judge sentencing without jury findings of
27 aggravating factors; and its reliance on Cabana v. Bullock, 474 U.S. 376 (1986), holding that an
28 appellate court, rather than a jury, could make the findings necessary for death eligibility under
Enmund v. Florida, 458 U.S. 782 (1982). Walton, 497 U.S. at 647-649.

29 In Ring, the Court overruled Walton. The Ring Court concluded that Walton and its reliance
30 on the decisions in Hildwin, Cabana, and Enmund, could not be reconciled with Apprendi. Ring,
31 536 U.S. at 598-599. As explained in Ring, the fundamental defect with the Walton analysis was
32 its reliance on the distinction between elements of an offense and sentencing factors.

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1 Citing the Apprendi rule that the Sixth Amendment requires a jury determination of every
2 element of the offense, the Ring Court reasoned:

3 That right attached not only to Apprendi's weapons offense but also
4 to the "hate crime" aggravating circumstance. New Jersey, the Court
5 observed, "threatened Apprendi with certain pains if he unlawfully
6 possessed a weapon and with additional pains if he selected his
7 victims with a purpose to intimidate them because of their race."
8 Apprendi, 530 U.S., at 476, 120 S.Ct. 2348. "Merely using the label
9 'sentence enhancement' to describe the [second act] surely does not
10 provide a principled basis for treating [the two acts] differently." Ibid.

11 The dispositive question, we said, "is one not of form, but of effect."
12 Id., at 494, 120 S.Ct. 2348. If a State makes an increase in a
13 defendant's authorized punishment contingent on the finding of a
14 fact, that fact - no matter how the State labels it - must be found by
15 a jury beyond a reasonable doubt. See id., at 482-483, 120 S.Ct.
16 2348. A defendant may not be "expose[d] ... to a penalty exceeding
17 the maximum he would receive if punished according to the facts
18 reflected in the jury verdict alone." Id., at 483, 120 S.Ct. 2348; see
19 also id. at 499, 120 S.Ct. 2348 (SCALIA, J., concurring) ("[A]ll the
20 facts which must exist in order to subject the defendant to a legally
21 prescribed punishment *must* be found by the jury.").

22 Ring, 536 U.S. at 602.

23 The Court then reasoned that the distinction drawn between elements of an offense and
24 sentencing factors in the Arizona capital sentencing scheme, relied upon in Apprendi to distinguish
25 Walton, was "untenable," because "Apprendi repeatedly instructs in that context that the
26 characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative
27 of the question 'who decides,' judge or jury." 536 U.S. at 604-605. The Court concluded that
28 "Walton... cannot survive the reasoning of Apprendi." Id. at 603. "Because Arizona's enumerated
29 aggravating factors operate as 'the functional equivalent of an element of a greater offense,'
30 Apprendi, 530 U.S. at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found
31 by a jury." Id. at 609.

32 The Clemons decision was based on the same distinction between sentencing factors and
33 elements of the offense that the Court rejected in Apprendi, Ring, and subsequent cases. See
34 Cunningham v. California, ___ U.S. ___, 127 S.Ct. 856, 868-871 (2007); United States v. Booker,
35 543 U.S. 220, 231-233 (2005); Blakely v. Washington, 542 U.S. 296, 304-305 (2004); see Apprendi,
36 530 U.S. at 485-487 and n. 13 (limiting decision in McMillan v. Pennsylvania, 477 U.S. 79, 86-88,

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1 93 (1986), relied on in Hildwin, 490 U.S. at 640).

2 The Ring Court also rejected the state's argument that the Court's Eighth Amendment
3 jurisprudence permits judicial factfinding:

4 The notion "that the Eighth Amendment's restriction on a state
5 legislature's ability to define capital crimes should be compensated
6 for by permitting States more leeway under the Fifth and Sixth
7 Amendments in proving an aggravating fact necessary to a capital
8 sentence ... is without precedent in our constitutional jurisprudence."

9 Ring, 536 U.S. at 606, quoting Apprendi, 530 U.S. at 539 (O'Connor, J., dissenting). It similarly
10 rejected the argument that judicial factfinding might be a better way of guarding against arbitrary
11 imposition of death sentences: "The Sixth Amendment right to jury trial, however, does not turn on
12 the relative rationality, fairness, or efficiency of potential factfinders." Ring, 536 U.S. at 607. The
13 analysis in Clemons relied on Eighth Amendment jurisprudence as ensuring against arbitrary
14 imposition of the death penalty, even when the factual findings necessary for death eligibility were
15 made by trial or appellate courts. Clemons, 494 U.S. at 748-781. The Ring decision made it clear
16 that this analysis is simply irrelevant to the Sixth Amendment's requirement of jury factfinding of
17 all the elements of capital eligibility. See also Ring, 536 U.S. at 612 (Scalia, J., concurring).

18 In short, if we remove from the Clemons decision the parts of the Walton analysis which the
19 Court rejected in Ring, there is nothing left; and the conclusion that Walton cannot survive Apprendi
20 compels the same conclusion with respect to Clemons. Under Ring, a trial judge cannot find
21 aggravating factors necessary to capital eligibility, and appellate judges certainly cannot do so: in
22 either case, the constitutional violation is that "the wrong entity judged the defendant guilty." Rose
23 v. Clark, 478 U.S. 570, 578 (1986); Carella v. California, 491 U.S. 263, 267 (1989)(Scalia, J.
24 concurring in judgment); see Neder v. United States, 527 U.S. 1, 32, 34-39 (1999)(Scalia, J.
25 concurring and dissenting). The Nevada Supreme Court itself has recognized that Ring invalidated
26 Nevada's former three-judge panel sentencing scheme, which allowed judges to find aggravating
27 factors in cases where the defendant pleaded guilty or the penalty jury could not reach a verdict.
28 Johnson v. State, 118 Nev. 787, 799-804, 59 P.3d 450 (2002).

Allowing appellate judges to make death-eligibility findings is even worse. Unlike the trial
court, which has at least seen the trial and has a basis for evaluating the power of the testimony, an

1 appellate court sees only a cold record; and it sentences a defendant to death without ever looking
 2 him in the eye, without considering his demeanor, as a jury must, *see Allen v. Woodford*, 395 F.3d
 3 979, 1014 (9th Cir. 2005), and without hearing "the sound of his voice." *See McGautha v.*
 4 *California*, 402 U.S. 183, 220 (1971); *see also Bejarano v. State*, 146 P.3d at 276 (upholding death
 5 sentence by reweighing and finding, on cold record, that mitigating evidence "not particularly
 6 compelling"). In every sense, an appellate court that reweighs eligibility factors is replacing the
 7 jury's "highly subjective" and "moral judgment of the defendant's desert" by "decreeing death"
 8 itself. *See Caldwell v. Mississippi*, 472 U.S. 320, 340 n. 7 (1989).

9 It is particularly noteworthy that the Nevada Supreme Court has declared itself incapable in
 10 non-capital cases to act as an "appellate sentencing body." *State v. Sims*, 107 Nev. 438, 440, 814
 11 P.2d 63 (1991). Accordingly, under these circumstances where the ultimate punishment of death is
 12 at issue, such reweighing cannot produce a reliable sentence under the Eighth Amendment, much
 13 less one that is consistent with the right to jury trial on all elements of capital-eligibility under the
 14 Sixth Amendment. In any event, judgments as to the relative competence of judges or juries as
 15 factfinders are irrelevant, *see Ring*, 536 U.S. at 607: the only relevant consideration is that neither
 16 this Court nor the Nevada Supreme Court is a jury, and neither one therefore could constitutionally
 17 find any element of a criminal offense. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring)(noting that
 18 "decline [in belief in trial by jury] is bound to be confirmed, and indeed accelerated, by the repeated
 19 spectacle of a man's going to his death because a judge found that an aggravating factor existed."
 20 (Emphasis in original)).

21 There is no question that one element of death eligibility under Nevada law is that the
 22 aggravating factors are not outweighed by the mitigation. *Johnson v. State*, 118 Nev. at 802-803.
 23 The weighing of aggravating versus mitigating circumstances is not a numbers game and there is
 24 simply no accurate method to determine the jury's process, no possible way to know what the tipping
 25 point was for the jury as a whole or for any individual juror. Accordingly, if the felony-murder
 26 aggravating factor in Mr. Vanisi's case is vacated, any reweighing under *Clemons*, violates the Sixth
 27 Amendment under *Ring*, and *Appendi*.

IV. **Harmless Error Cannot Be Found Beyond a Reasonable Doubt.**

Under Nevada law, every aggravating factor adds its own weight to the sentencing calculus by encouraging the jury to find the offense "more aggravated and heinous" Homick v. State, 108 Nev. 127, 138, 825 P.2d 600 (1992). The weight to be accorded to the aggravating factors is not a mathematical counting of factors, see Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288 (1999); every juror is entitled to give whatever weight he or she wishes to any aggravating or mitigating circumstance; and any juror is free to refuse to find death eligibility, or to impose a death sentence, no matter how greatly the aggravation outweighs the mitigation. Bennett v. State, 111 Nev. 1099, 1109-1110, 901 P.2d 676 (1995). The upshot of this system is that – even before Ring – a court could only rarely (if at all) refuse to require a new penalty hearing to allow a jury to make a "reasoned, moral" choice to take the defendant's life. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). This is not such a case.

Further, this case resembles those in which the Supreme Court has reversed death sentences after invalidating an aggravating factor, despite the existence of other aggravating factors. For instance, in State v. Haberstroh, 199 Nev. 173, 184 69 P.3d 676 (2003), the Supreme Court reversed a death sentence after invalidating a depravity aggravating factor, even though the offense itself involved the kidnaping, robbery, rape and strangulation of a stranger; and one of the four valid aggravating factors was an escape from federal prison in which the defendant used a knife. Similarly, in State v. Bennett, 119 Nev. 589, 605, 81 P.3d 1 (2003), the Court reversed a death sentence based in part on an invalid "random or motiveless" aggravating factor, where three valid aggravating factors remained (including that the killing posed a great risk of death to more than one person, because the perpetrators attempted to kill another individual during the robbery but only wounded him).

Assessing the possible harmlessness of a constitutional error in the penalty phase of a capital case is significantly more difficult than making the determination with respect to a guilt phase issue. In the guilt phase, the jury must make a relatively simple yes-or-no determination: has every fact necessary to convict been proven beyond a reasonable doubt? When an error is injected into that calculation, it can be a reasonably objective task to determine whether the evidence supporting every

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1 element is so overwhelming, or the effect of some impropriety on the jury's deliberations is so slight,
2 that the court can say confidently that the same elements would have been found regardless of the
3 error.

4 The jurors' task in the penalty phase is quite different. While they make some factual
5 determinations as to the existence of aggravating factors, they must make an individual and personal
6 determination as to whether the aggravating factors are outweighed by the mitigation - - which
7 includes complete discretion to give whatever idiosyncratic weight to the aggravating factors and to
8 the mitigating evidence. Finally, the jurors must make a "reasoned moral response", California v.
9 Brown, 479 U.S. at 545. (O'Connor, J., concurring), to the question whether they want to take the
10 defendant's life. In making that decision, any single juror can prevent imposition of a death sentence
11 by deciding that the mitigation outweighs the aggravation, or by simply refusing to vote for death.
12 Under Nevada law, there is no set of circumstances which requires a juror to vote for death, no
13 matter how greatly the aggravation outweighs the mitigation (or even in the absence of any
14 mitigation), and every juror's right to refuse to impose a death sentence is unlimited. Bennett v.
15 State, 111 Nev. 1099, 1109-110, 902 P.2d 676 (1995).

16 Given the state of the law, it is virtually impossible for a court to guess what effect a
17 particular aggravating factor may have had on any juror's decision. The robbery aggravating factor
18 in this case was based on the supposed motive for the murder, and its potency in the penalty and
19 eligibility determination was increased by its character as a statutory aggravating factor as well as
20 a separately charged offense. The Nevada Supreme Court itself has held that every felony murder
21 aggravating factor adds its own weight to the eligibility and sentence calculus by making it "more
22 aggravated and heinous." Homick v. State, 108 Nev. at 138. The effect of the invalid aggravating
23 factor thus cannot be dismissed as de minimis.

24 The effect of the invalid factor on what "reasoned moral response" a juror could have had
25 to the sentencing choice is made even more difficult, because each juror's response is essentially
26 subjective. In attempting to assess what jurors might do in the absence of the error, this Court
27 should consider the "reasoned moral response" other juries or prosecutorial agencies have had to
28 equally or more egregious offenses. When prosecutors make the argument that a jury would

1 necessarily have imposed a death sentence, regardless of any error, because the crime and the
2 defendant are so bad, it is only appropriate to ask what juries and prosecutors actually do in response
3 to other egregious cases (although it must be recognized that, to a jury, every first degree murder case
4 will be an egregious one. *See Godfrey v. Georgia*, 446 U.S. 420, 428-429 (1980).)¹

5 Examining other cases that have resulted in verdicts of, or negotiations for, sentences less
6 than death shows that Mr. Vanisi's case cannot be considered one in which a death sentence was a
7 foregone conclusion. In this very Court, John Olausen, Fred Stites and David Lani were convicted
8 of killing police officer James Hoff. The State sought the death penalty. None of the men are under
9 a sentence of death. Last week in Department 6 of this judicial district in the case of *State v. Moore*,
10 CR06-2974, life sentences were imposed on Valerie Moore in a case in which there were 12 murder
11 victims and the potential aggravating circumstances included factors of multiple murder, a previous
12 conviction of murder and murder while under a sentence of imprisonment. It is hard to conceive of
13 more egregious circumstances, and yet, Ms. Moore was not sentenced to death. Another case from
14 this County that involved the murder of on-duty police officer was that of Larry Peck who ended
15 the life of officer John Bohach. *State v. Peck*, CR01-1975. The jury in Mr. Peck's case imposed a
16 sentence less than death. The State also sought the death penalty in the case of Roger Chambers and
17 proved up the aggravators of a prior violent felony and that the murder involved torture. The Nevada
18 Supreme Court found the death penalty excessive and removed Mr. Chambers from death row.
19 *Chambers v. State*, 113 Nev. 974, 944 P.2d 805 (1997).

20 In Clark County, there are even more examples of atrocious killings in which the sentence
21 imposed was less than death. In the Fernando Rodriguez case, for instance, the defendant was
22 convicted of two counts of first degree murder. His four aggravating circumstances were two prior
23 convictions for robbery, great risk of death to more than one person, and avoiding arrest. *State v.*
24 *Rodriguez*, No. C130763, **Ex. 1 (B)(12,13)**. By any objective criteria, Rodriguez' offenses were more
25

26 ¹ This is not an attempt to conduct a proportionality review of the sentence. Rather, it is
27 an attempt to identify some objective basis for assessing harmfulness, by looking to what results
28 occur in other egregious cases.

egregious than Mr. Vanisi's, but the jury in his case imposed sentences of life without the possibility of parole. The only mitigating factor cited by the jury was "mercy". Other defendants convicted of multiple murders have been given sentences less than death by juries, when the mitigating evidence was no more compelling than what was available in Mr. Vanisi's case (As the Nevada Supreme Court observed in its review of Vanisi's penalty phase "It is true that this case is not without mitigating evidence, including testimony of Vanisi's family and other evidence indicating he has mental health problems." 117 Nev. at 345). See State v. Budd, No. C193182 (three murder victims; mitigating factors included effect of execution on defendant's family and defendant's apology); State v. Powell, No. C148936 (four murder victims; aggravating factors of burglary, great risk of death to more than one person and avoiding arrest; no mitigating factors cited), **Ex. 1(B) (7,8)**; State v. Randle, No. C121817 (two murder victims; six aggravating factors, including three prior robbery or attempted robbery convictions), **Ex. 1(B) (9-11)**; State v. Daniels, No. C1126201 (two murder victims; four aggravating factors as to each murder), **Ex. 1(B) (14,15)**; Daniels v. State, 114 Nev. 261, 956 P.2d 111 (1998); State v. Ducksworth, No. C108501 (two murder victims; total of ten aggravating factors), **Ex. 1(B) (16)**; Ducksworth v. State, 114 Nev. 951, 966 P.2d 165 (1998); Ducksworth v. State, 113 Nev. 780, 942 P.2d 157 (1997); State v. Martin, No. C108201 (two murder victims; total of twelve aggravating factors), **Ex. 1 (B) (17,18)**. Most recently, a jury imposed a sentence less than death on a defendant who, in the course of trying to rob a cabdriver, killed the victim by setting him on fire. State v. Scholl, No. C204775, **Ex. 1 (B) (1-4)**. These cases show that there is no rational basis for believing that a jury would necessarily have imposed a death sentence on petitioner.

The behavior of prosecutors also precludes the State from arguing that a death sentence was a foregone conclusion in Mr. Vanisi's case. In the notorious Strohmeyer case, the state concluded that the needs of public justice in the kidnaping, sexual assault, and strangulation murder of a seven year-old girl would be satisfied by a life sentence. State v. Strohmeyer, No. C144577, **Ex. 1(A) (7,8)**. In multiple murder cases, the state has also engaged in negotiations resulting in sentences less than death. State v. Armstrong, No. C180047 (two murder victims and one attempted murder), **Ex. 1 (A) (1,2)**; State v. Rundle, No. C189563 (two murder victims, one killed by beating with baseball bat),

1 Ex. 1(A) (3,4); State v. Frenn, No. C178954 (two murder victims, killed by stabbing and beating,
 2 Ex. 1 (A) (6). In one case in which the state obtained a death sentence for four murders which was
 3 reversed on appeal, the state later agreed to life sentences on remand. State v. Evans, No. C116071,
 4 Ex. 1 (A) (9,10); Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001); Evans v. State, 112 Nev. 1172,
 5 926 P.2d 265 (1996).

6 In light of these circumstances, the State cannot argue that Mr. Vanisi's case was so
 7 egregious that imposition of a death sentence was a foregone conclusion. Accordingly, the
 8 McConnell error in this case cannot be found harmless beyond a reasonable doubt.
 9

10 V. **The Structure of the Nevada Death Sentencing System Precludes Any State Court from**
 11 **Making a Constitutionally Adequate Assessment of Harmlessness and from Reweighing**
 12 **to Uphold the Death Sentence.**

13 Finally, given the intense subjectivity of the weighing process and of the ultimate selection
 14 of the penalty to be imposed, no court can adequately review or replicate the situation of the original
 15 sentencer. Fundamentally, a court that upholds a death sentence, in spite of the presence of
 16 constitutional error, under the Nevada system is essentially imposing a new sentence itself, whether
 17 its analysis is called harmless error or reweighing. Because the Nevada system depends on a
 18 weighing system to establish death eligibility, and gives each juror unlimited discretion to weigh the
 19 factors and to refuse to impose death, any court reviewing the effect of error on that decision
 20 necessarily substitutes the Court's judgment for the jury's. Under those circumstances, it is the Court
 21 that replaces the jury's "highly subjective" and "moral judgment of the defendant's desert," by
 22 "decreeing death" itself. See Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7 (1989); Antonin Scalia,
 23 God's Justice and Ours, 2002 First Things 123 (May 2002), 2002 WLNR 10639587. Such a
 24 resentencing cannot result in a reliable sentence under the Eighth Amendment.

25 First and foremost, sentencing by a court cannot encompass the complete range of options
 26 available to a jury. Every member of a jury can prevent imposition of a death sentence by finding that
 27 the mitigation outweighs the aggravation or by concluding, on any or no ground, that he or she will
 28 not vote for death. No court can replicate that dynamic. Nor does any court have the ability, or
 perhaps the inclination, to refuse to impose a death sentence simply on basis of mercy, as the jury

1 did in the Rodriguez case. No court, reviewing a cold record, can consider a defendant's demeanor,
 2 which a jury can consider in a penalty hearing. *E.g.*, Allen v. Woodford, 395 F.3d 979, 1014 (9th Cir.
 3 2005); *see* Riggins v. Nevada, 504 U.S. 127, 137-138 (1992). No such reviewing court has to look
 4 a defendant in the eye while imposing a sentence, as a jury must; and such a court would necessarily
 5 send a defendant to his death without ever hearing "the sound of his voice." *See* McGautha v.
 6 California, 402 U.S. 183, 220 (1971). Unlike a new sentencing jury, such a court does not know
 7 about, and does not consider, a defendant's good behavior during post-conviction incarceration,
 8 which must be considered as mitigation. Skipper v. South Carolina, 476 U.S. 1, 6-8 (1986).

9 While the Supreme Court has in general tolerated the use of harmless error analysis or
 10 reweighing to uphold death sentences, Clemons v. Mississippi, 494 U.S. 738, 74 (1990), prior to the
 11 decision in Ring v. Arizona, 536 U.S. 584 (2002), the intensively subjective structure of the Nevada
 12 sentencing scheme is antithetical to judicial reweighing or to aggressive harmless error analysis.
 13 Finally, the members of the Nevada judiciary are popularly elected, and thus face the possibility of
 14 removal if they make a controversial and unpopular decision. This situation renders the Nevada
 15 judiciary insufficiently impartial under the federal due process clause to preside over a capital case.
 16 At the time of the adoption of the constitution, which is the benchmark for the protection afforded
 17 by the due process clause, *see, e.g.*, Medina v. California, 505 U.S. 437, 445-447 (1992), English
 18 judges qualified to preside in capital cases had tenure during good behavior.²

19
 20 ² The tenure of judges during good behavior was firmly established by the time of the adoption:
 21 almost a hundred years before the adoption, a provision required that "Judges' Commissions be made
 22 quamdiu se bene gesserint" was considered sufficiently important to be included in the Act of
 23 Settlement, 12, 13 Will. III c. 2 (1700); W. Stubbs, Select Charters 531 (5th ed. 1884); and in 1760, a
 24 statute ensured their tenure despite the death of the sovereign, which had formerly voided their
 25 commissions. 1 Geo. III c.23; 1 W. Holdsworth, History of English Law 195 (7th ed., A. Goodhart and
 26 H. Hanbury rev. 1956). Blackstone quoted the view of George III, in urging the adoption of this statute,
 27 that the independent tenure of the judges was "essential to the impartial administration of justice; as one
 28 of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the
 crown." 1 W. Blackstone, Commentaries on the Laws of England *258 (1765). The framers of the
 constitution, who included the protection of tenure during good behavior for federal judges under Article
 III of the Constitution, would not likely have taken a looser view of the importance of this requirement to
 due process than George III. In fact, the grievance that the king had made the colonial "judges dependent
 on his will alone, for the tenure of their offices" was one of the reasons assigned as justification for the
 revolution. Declaration of Independence § 11 (1776); *see* Smith, An Independent Judiciary: The
Colonial Background, 124 U.Pa.L. Rev. 1104, 1112-1152 (1976). At the time of the adoption, there were
 no provisions for judicial elections in any of the states. *Id.* at 1153-1155.

The absence of any such protection for Nevada judges results in a denial of federal due process in capital cases, because the possibility of removal, and at minimum of a financially draining campaign, for making an unpopular decision, are threats that "offer a possible temptation to the average [person] as a judge ... not to hold the balance nice, clear and true between the state and the [capitally] accused." Turney v. Ohio, 273 U.S. 510, 532 (1927); see Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing, Ass. Conc. Res. No. 3 (file No. 7, Statutes of Nevada 2001 Special Session), meeting of February 21, 2002, partial verbatim transcript (testimony of Rose, J., noting that lesson of election campaign, involving allegation that justice of Supreme Court "wanted to give relief to a murderer and rapist," was "not lost on the judges in the State of Nevada, and I have often heard it said by judges, 'a judge never lost his job by being tough on crime.'"); Beets v. State, 107 Nev. 957, 976, 821 P.2d 1044 (1991) (Young, J., dissenting) ("Nevada has a system of elected judges. If recent campaigns are an indication, any laxity toward a defendant in a homicide case would be a serious, if not fatal, campaign liability.")

Considering all of these factors, it is clear that any death sentence imposed in Mr. Vanisi's case cannot be constitutionally reliable under the Eighth and Fourteenth Amendments, unless it is imposed by a fully informed and properly instructed jury. Accordingly, the death sentence must be vacated and a new penalty phase ordered.

WHEREFORE, based on the foregoing points and authorities, Petitioner Vanisi respectfully requests that this Court grant him relief regarding the issue presented in Claim Two, based upon the presence of the invalid McConnell aggravator, and the retroactive application of the McConnell decision through the Bejarano decision;


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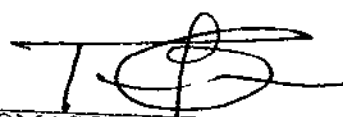
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1 FURTHER, that this Court find that the proper remedy for the error is a new penalty hearing;
2 and, regardless of and in addition to any other relief which is merited, this Court order a new penalty
3 phase hearing for Mr. Vanisi.
4

5 DATED this 26 day of MARCH, 2007.
6

7 
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10 Reno, Nevada 89512
(775) 786-4300

11 Attorney for Petitioner,
Siaosi Vanisi
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8 THOMAS L. QUALLS, ESQ
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11 Attorney for Petitioner,
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AFFIRMATION

The undersigned hereby Affirms that the preceding document does NOT contain the social security number(s) of any person(s).

DATED this 27 day of MARCH, 2007.



THOMAS L. QUALLS, ESQ
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(775) 333-6633
Attorney for Petitioner,
Siaosi Vanisi

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the law offices of Thomas L. Qualls, and that on this date, I served the foregoing *Memorandum of Law Regarding McConnell Error* on the party(ies) set forth below by:

✓ Placing an original or true copy thereof in a sealed envelope placed for collecting and mailing in the United States mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

✓ Personal delivery.

 Facsimile (FAX).

 Federal Express or other overnight delivery.

 Reno/Carson Messenger service.

addressed as follows:

Terry McCarthy
Appellate Deputy District Attorney
50 W. Liberty St., #300
P.O. Box 30083
Reno, Nevada 89520

Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

DATED this 28 day of March, 2007.

Kristyn Sched

EXHIBIT 1

A. Non-jury sentences

- A1. State v. Richard Armstrong, No. C180047, Judgment of Conviction (Plea of Guilty)(October 23, 2003).
- A2. State v. Richard Armstrong, No. C180047, Guilty Plea Agreement (August 29, 2003)
- A3. State v. William Rundle, No. C189563, Judgment of Conviction(September 16, 2003)
- A4. State v. William Rundle, No. C189563, Guilty Plea Agreement (May 21, 2003)
- A5. State v. Jose Vigoa, No. C168652, Guilty Plea Agreement (June 24, 2002)
- A6. State v. Matthew Frenn, No. C178954, Guilty Plea Agreement (November 6, 2002)
- A7. State v. Jeremy Strohmeyer, No. C144577, Judgment of Conviction (Plea)(November 5, 1998)
- A8. State v. Jeremy Strohmeyer, No. C144577, Guilty Plea Agreement (September 8, 1998)
- A9. State v. Vernell Evans, No. C116071, Judgment of Conviction (Jury Trial) (March 23, 2004).
- A10. State v. Vernell Evans, No. C116071, Sentencing Agreement (February 4, 2004)
- A11. State v. Moore, No. CR06-2974, Guilty Plea Memorandum (January 19, 2007)

B. Jury sentences

- B1. State v. James Scholl, No. C204775, Special Verdict (Mitigating & Aggravating) (February 17, 2006)
- B2. State v. James Scholl, No. C204775, Verdict (February 17, 2006)
- B3. State v. James Scholl, No. C204775, Judgment of Conviction (May 19, 2006)
- B4. State v. James Scholl, No. C204775, Verdict (February 15, 2006)
- B5. State v. Glenford Budd, No. C193182, Special Verdict (Mitigating & Aggravating) (December 16, 2005)
- B6. State v. Glenford Budd, No. C193182, Verdict (December 16, 2005)
(Count I-Dajon Jones)
(Count II-Derrick Jones)
(Count III-Jason Moore)
- B7. State v. Richard Powell, No. C148936, Special Verdict (Mitigating & Aggravating) (November 15, 2000)
(Count I-Samantha Scotti)
(Count II-Lisa Boyer)
(Count III-Steven Walker)
(Count IV-Jermaine Woods)

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- B8. State v. Richard Powell, No. C148936, Verdict (November 15, 2000)
(Count I-Samantha Scotti)
(Count II-Lisa Boyer)
(Count III-Steven Walker)
(Count IV-Jermaine Woods)
- B9. State v. Patrick Randle, No. C121817, Verdict (June 14, 1996)
- B10. State v. Patrick Randle, No. C121817, Special Verdict (June 14, 1996)
- B11. State v. Patrick Randle, No. C121817, Verdict (June 6, 1996)
- B12. State v. Fernando Rodriguez, No. C130763, Special Verdict (Mitigating & Aggravating)
(May 7, 1996)
(Count I-Brad Palcovic)
(Count II-Richley Miller)
- B13. State v. Fernando Rodriguez, No. C130763, Verdict (May 4, 1996)
(Count I-Brad Palcovic)
(Count II-Richley Miller)
- B14. State v. Jonathan Daniels, No. C126201, Special Verdict (Mitigating & Aggravating)
(November 1, 1995)
(Count I-June Frye)
(Count II-Nicasio Diaz)
- B15. State v. Jonathan Daniels, No. C126201, Verdict (October 26, 1995)
(Count I-June Frye)
(Count II-Nicasio Diaz)
- B16. State v. Ronald Ducksworth, No. C108501, Special Verdict (Mitigating & Aggravating)
(October 28, 1993)
(Count I-Joseph Smith III)
(Count II-Vikki Smith)
- B16. State v. Ronald Ducksworth, No. C108501, Verdict (October 28, 1993)
(Count I-Joseph Smith III)
(Count II-Vikki Smith)
- B17. State v. Carl Martin, No. C108501 Special Verdict (Mitigating & Aggravating) (October
28, 1993)
(Count I-Joseph Smith III)
(Count II-Vikki Smith)
- B18. State v. Carl Martin, No. C108501, Verdict (October 28, 1993)
(Count I-Joseph Smith III)
(Count II-Vikki Smith)

EXHIBIT 1

EXHIBIT A1

EXHIBIT A1

ORIGINAL

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JACP
DAVID ROGER
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Nevada Bar #002781
200 South Third Street
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(702) 455-4711
Attorney for Plaintiff

FILED

OCT 23 2 18 PM '03

L. E. R. R.
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RICHARD DEWAYNE ARMSTRONG,
#0658736

Defendant.

Case No: C180047

Dept No: V

JUDGMENT OF CONVICTION
(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crime(s) of COUNT 1 - BURGLARY (Felony); COUNTS 2 & 3 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony); COUNTS 4 & 6 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony); and COUNT 5 - BATTERY WITH USE OF A DEADLY WEAPON (Felony), in violation of NRS 205.060, 193.330, 200.010, 200.030, 193.165, 200.010, 200.030, 193.165, 200.481; thereafter, on the 16th day of October, 2003, the Defendant was present in court for sentencing with his counsel, CURTIS BROWN and KEDRIC BASSETT, Deputy Public Defenders, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the \$25.00 Administrative Assessment Fee, Submit to DNA testing under the direction of the Division and pay a \$150.00 Analysis fee to the Clark County Clerk, the Defendant is sentenced as follows:

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OCT 23 2003

COUNTY CLERK

1 COUNT I - a MAXIMUM term of (180) ONE HUNDRED EIGHT MONTHS with a
2 MINIMUM term of (72) SEVENTY-TWO MONTHS;

3 COUNT II - a MAXIMUM term of (240) TWO HUNDRED FORTY MONTHS with a
4 MINIMUM term of (96) NINETY-SIX MONTHS plus an equal and CONSECUTIVE
5 MAXIMUM of (240) MONTHS and a MINIMUM of (96) MONTHS for use of a deadly
6 weapon, running consecutive to Count I;

7 COUNT III - a MAXIMUM term of (240) TWO HUNDRED FORTY MONTHS with a
8 MINIMUM term of (96) NINETY-IX MONTHS plus an equal and CONSECUTIVE
9 MAXIMUM of (240) MONTHS and a MINIMUM of (96) MONTHS for use of a deadly
10 weapon, running consecutive to Count II;

11 COUNT IV - a term of LIFE WITHOUT THE POSSIBILITY OF PAROLE plus an equal
12 and CONSECUTIVE term of LIFE WITHOUT THE POSSIBILITY OF PAROLE for use of
13 a deadly weapon; \$6500 restitution, running consecutive to Count III;

14 COUNT V - a MAXIMUM term of (120) ONE HUNDRED TWENTY MONTHS with a
15 MINIMUM term of (48) FORTY-EIGHT MONTHS, running consecutive to Count IV;

16 COUNT VI - a term of LIFE WITHOUT THE POSSIBILITY OF PAROLE plus an equal
17 and CONSECUTIVE term of LIFE WITHOUT THE POSSIBILITY OF PAROLE
18 MONTHS; \$10,326 restitution; running consecutive to Count V;
19 with (725) days credit for time served.

20 DATED this 21st day of October, 2003.

21
22 
23 DISTRICT JUDGE
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28

kjk

ORIGINAL

1 GMEM

2 DAVID ROGER
3 DISTRICT ATTORNEY
4 Nevada Bar #002781
5 200 South Third Street
6 Las Vegas, NV 89155-2211
7 (702) 455-4711
8 Attorney for Plaintiff

FILED IN OPEN COURT
AUG 29 2003

SHIRLEY B. PARRAGUIRRE, CLERK
BY *[Signature]*

BILLIE JO CRAIG DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

Plaintiff,

-VS-

11 RICHARD DEWAYNE ARMSTRONG,
12 #0658736

Defendant.

CASE NO: C180047
DEPT NO: V

14 GUILTY PLEA AGREEMENT

15 I hereby agree to plead guilty to: COUNT 1 - BURGLARY (Felony - NRS
16 205.060); COUNTS 2 & 3 - ATTEMPT MURDER WITH USE OF A DEADLY
17 WEAPON (Felony - NRS 193.330, 200.010, 200.030, 193.165); COUNTS 4 & 6 - FIRST
18 DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010,
19 200.030, 193.165); and COUNT 5 - BATTERY WITH USE OF A DEADLY WEAPON
20 (Felony - NRS 200.481), as more fully alleged in the charging document attached hereto as
21 Exhibit "I".

22 My decision to plead guilty is based upon the plea agreement in this case which is as
23 follows:

24 The parties stipulate that Defendant will receive the maximum sentence on each
25 count. All counts will run consecutive with each other. This plea is conditioned upon the
26 court sentencing the Defendant consistent with the plea agreement. If the court declines to
27 accept the stipulation, Defendant's plea will be withdrawn at the discretion of the District
28 Attorney.

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COUNTY CLERK

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CONSEQUENCES OF THE PLEA

I understand that by pleading guilty I admit the facts which support all the elements of the offense(s) to which I now plead as set forth in Exhibit "1".

I understand that as a consequence of my plea of guilty the Court must sentence me to imprisonment in the Nevada Department of Corrections as follows:

COUNT 1 (Burglary) - for a minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$10,000;

COUNT 2 (Attempt Murder With Use of a Deadly Weapon) - for a minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than TWO HUNDRED FORTY (240) months plus an equal and consecutive minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than TWO HUNDRED FORTY (240) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment;

COUNT 3 (Attempt Murder With Use of a Deadly Weapon) - for a minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than TWO HUNDRED FORTY (240) months plus an equal and consecutive minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than TWO HUNDRED FORTY (240) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment;

COUNT 4 (First Degree Murder With Use of a Deadly Weapon) - life without the possibility of parole OR life with the possibility of parole with eligibility for parole beginning at twenty (20) years (480 months); OR a definite term of FIFTY (50) years (600 months) with eligibility for parole beginning at twenty (20) years (480 months) plus an equal and consecutive term of life without the possibility of parole OR life with the possibility of parole with eligibility for parole beginning at twenty (20) years (480 months); OR a definite term of FIFTY (50) years (600 months) with eligibility for parole beginning at twenty (20)

1 years (480 months);

2 COUNT 5 (Battery With Use of a Deadly Weapon) -- for a minimum term of not less than
3 TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED
4 TWENTY (120) months. The minimum term of imprisonment may not exceed forty percent
5 (40%) of the maximum term of imprisonment. I understand that I may also be fined up to
6 \$10,000;

7 COUNT 6 (First Degree Murder With Use of a Deadly Weapon) - life without the possibility
8 of parole OR life with the possibility of parole with eligibility for parole beginning at twenty
9 (20) years (480 months); OR a definite term of FIFTY (50) years (600 months) with
10 eligibility for parole beginning at twenty (20) years (480 months) plus an equal and
11 consecutive term of life without the possibility of parole OR life with the possibility of
12 parole with eligibility for parole beginning at twenty (20) years (480 months); OR a definite
13 term of FIFTY (50) years (600 months) with eligibility for parole beginning at twenty (20)
14 years (480 months);

15 I understand that the law requires me to pay an Administrative Assessment Fee.

16 I understand that, if appropriate, I will be ordered to make restitution to the victim of
17 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
18 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
19 reimburse the State of Nevada for any expenses related to my extradition, if any.

20 I understand that I am not eligible for probation for the offenses to which I am
21 pleading guilty.

22 I understand that more than one sentence of imprisonment will be imposed and that I
23 am not eligible to serve the sentences concurrently. The sentencing judge does not have the
24 discretion to order the sentences served concurrently.

25 I also understand that information regarding charges not filed, dismissed charges, or
26 charges to be dismissed pursuant to this agreement may be considered by the judge at
27 sentencing.

28 I have not been promised or guaranteed any particular sentence by anyone. I know

1 that my sentence is to be determined by the Court within the limits prescribed by statute.

2 I understand that if my attorney or the State of Nevada or both recommend any
3 specific punishment to the Court, the Court is obligated to accept the recommendation.

4 I understand that if the State of Nevada has agreed to recommend or stipulate a
5 particular sentence or has agreed not to present argument regarding the sentence, or agreed
6 not to oppose a particular sentence, such agreement is contingent upon my appearance in
7 court on the initial sentencing date (and any subsequent dates if the sentencing is continued).

8 I understand that if I fail to appear for the scheduled sentencing date or I commit a new
9 criminal offense prior to sentencing the State of Nevada would regain the full right to argue
10 for any lawful sentence.

11 I understand if the offense(s) to which I am pleading guilty to was committed while I
12 was incarcerated on another charge or while I was on probation or parole that I am not
13 eligible for credit for time served toward the instant offense(s).

14 I understand that as a consequence of my plea of guilty, if I am not a citizen of the
15 United States, I may, in addition to other consequences provided for by federal law, be
16 removed, deported, excluded from entry into the United States or denied naturalization.

17 I understand that the Division of Parole and Probation will prepare a report for the
18 sentencing judge prior to sentencing. This report will include matters relevant to the issue of
19 sentencing, including my criminal history. This report may contain hearsay information
20 regarding my background and criminal history. My attorney and I will each have the
21 opportunity to comment on the information contained in the report at the time of sentencing.
22 Unless the District Attorney has specifically agreed otherwise, then the District Attorney
23 may also comment on this report.

24 WAIVER OF RIGHTS

25 By entering my plea of guilty, I understand that I am waiving and forever giving up
26 the following rights and privileges:

27 1. The constitutional privilege against self-incrimination, including the right to refuse
28 to testify at trial, in which event the prosecution would not be allowed to comment to the

1 jury about my refusal to testify.

2 2. The constitutional right to a speedy and public trial by an impartial jury, free of
3 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the
4 assistance of an attorney, either appointed or retained. At trial the State would bear the
5 burden of proving beyond a reasonable doubt each element of the offense charged.

6 3. The constitutional right to confront and cross-examine any witnesses who would
7 testify against me.

8 4. The constitutional right to subpoena witnesses to testify on my behalf.

9 5. The constitutional right to testify in my own defense.

10 6. The right to appeal the conviction, with the assistance of an attorney, either
11 appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional
12 or other grounds that challenge the legality of the proceedings and except as otherwise
13 provided in subsection 3 of NRS 174.035.

14 VOLUNTARINESS OF PLEA

15 I have discussed the elements of all of the original charge(s) against me with my
16 attorney and I understand the nature of the charge(s) against me.

17 I understand that the State would have to prove each element of the charge(s) against
18 me at trial.

19 I have discussed with my attorney any possible defenses, defense strategies and
20 circumstances which might be in my favor.

21 All of the foregoing elements, consequences, rights, and waiver of rights have been
22 thoroughly explained to me by my attorney.

23 I believe that pleading guilty and accepting this plea bargain is in my best interest,
24 and that a trial would be contrary to my best interest.

25 I am signing this agreement voluntarily, after consultation with my attorney, and I am
26 not acting under duress or coercion or by virtue of any promises of leniency, except for those
27 set forth in this agreement.


28 ///

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1 I am not now under the influence of any intoxicating liquor, a controlled substance or
2 other drug which would in any manner impair my ability to comprehend or understand this
3 agreement or the proceedings surrounding my entry of this plea.

4 My attorney has answered all my questions regarding this guilty plea agreement and
5 its consequences to my satisfaction and I am satisfied with the services provided by my
6 attorney.

7 DATED this 28 day of August, 2003.

8 
9 RICHARD DEWAYNE ARMSTRONG
10 Defendant

11 AGREED TO BY:

12 
13 DAVID ROGER
14 District Attorney
15 Nevada Bar #002781
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1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of
3 the court hereby certify that:

4 1. I have fully explained to the Defendant the allegations contained in the charge(s)
5 to which guilty pleas are being entered.

6 2. I have advised the Defendant of the penalties for each charge and the restitution
7 that the Defendant may be ordered to pay.

8 3. All pleas of guilty offered by the Defendant pursuant to this agreement are
9 consistent with the facts known to me and are made with my advice to the Defendant.


10 4. To the best of my knowledge and belief, the Defendant:

11 a. Is competent and understands the charges and the consequences of pleading
12 guilty as provided in this agreement.

13 b. Executed this agreement and will enter all guilty pleas pursuant hereto
14 voluntarily.

15 c. Was not under the influence of intoxicating liquor, a controlled substance or
16 other drug at the time I consulted with the defendant as certified in paragraphs
17 1 and 2 above.

18 Dated: This 28 day of August, 2003.

19 
20 ATTORNEY FOR DEFENDANT
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2JDC05664

1 COUNT 1 - BURGLARY

2 did then and there wilfully, unlawfully, and feloniously enter, with intent to commit a
3 felony, to-wit: assault and/or battery and/or murder and/or a felony, that certain building
4 occupied by BONITA ARMSTRONG, located at 5150 East Sahara Avenue, Building 16,
5 Apartment 262, Las Vegas, Clark County, Nevada.

6 COUNT 2 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

7 did then and there, without authority of law, and with the intent to kill, malice
8 aforethought and express malice, wilfully and feloniously attempt to kill ARIEL
9 ARMSTRONG, a human being, with a deadly weapon, to-wit: a firearm, by the Defendant
10 shooting at and into the body of the said ARIEL ARMSTRONG with said firearm.

11 COUNT 3 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

12 did then and there, without authority of law, and with the intent to kill, malice
13 aforethought and express malice, wilfully and feloniously attempt to kill SIR LAWRENCE
14 ARMSTRONG, a human being, with a deadly weapon, to-wit: a firearm, by the Defendant
15 shooting at and into the body of the said SIR LAWRENCE ARMSTRONG with said
16 firearm.

17 COUNT 4 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON

18 did then and there wilfully, feloniously, without authority of law, and with
19 premeditation and deliberation, and with malice aforethought, and/or during the perpetration
20 or attempt perpetration of burglary, kill BONITA ARMSTRONG, a human being, with a
21 deadly weapon, to-wit: a firearm, by the Defendant shooting at and into the body of the said
22 BONITA ARMSTRONG with said firearm.

23 COUNT 5 - BATTERY WITH USE OF A DEADLY WEAPON

24 did then and there wilfully, unlawfully, and feloniously use force and violence upon
25 the person of another, to-wit: MALCOLM ARMSTRONG, with use of a deadly weapon, to-
26 wit: a firearm, by Defendant striking the said MALCOLM ARMSTRONG in the back of the
27 head with the said firearm.

28 ///

COUNT 6 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, and/or during the perpetration or attempt perpetration of burglary, kill ANDRE MARCUS, a human being, with a deadly weapon, to-wit: a firearm, by the Defendant shooting at and into the body of the said ANDRE MARCUS with said firearm.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY David Roger
DAVID ROGER
District Attorney
Nevada Bar #002781

DA#01F18276X/kjk
LVMPD EV#0110252447
BURG; ATT MWDW;
1 MWDW; BWDW - F
(TK4)

EXHIBIT A3

EXHIBIT A3

ORIGINAL

9

JOCP
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

FILED
SEP 16 8 55 AM '03

Shirley M. Hays
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM JAMES RUNDLE,
#147555

Defendant.

Case No: C189563

Dept No: XVII

JUDGMENT OF CONVICTION
(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crime(s) of COUNTS 1 & 4 - FIRST DEGREE MURDER (Felony), in violation of NRS 200.010, 200.030; thereafter, on the 11th day of September, 2003, the Defendant was present in court for sentencing with his counsel, NANCY LEMCKE, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the \$25.00 Administrative Assessment Fee and \$150.00 DNA Analysis Fee payable to the Clark County Clerk, the Defendant is sentenced as follows: Deft. SENTENCED as to COUNT I to LIFE in the Nevada Department of Corrections without the possibility of parole and as to Count II to LIFE in the Nevada Department of Corrections without the possibility of parole, COUNT II CONCURRENT with COUNT I. FURTHER

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CLERK

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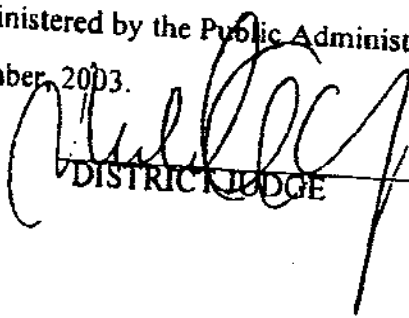
SEP 12 2003

CLERK

AW

1 ORDERED, Restitution in the amount of \$10,667.00 to be placed in a trust fund for the
 2 granddaughter, Gretchen Bellen, to be administered by the Public Administrator.
 3

4 DATED this 15 day of September, 2003.

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 7 DISTRICT JUDGE
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EXHIBIT A4

EXHIBIT A4

ORIGINAL

1 GMEM

2 DAVID ROGER
3 DISTRICT ATTORNEY
4 Nevada Bar #002781
5 CHRISTOPHER OWENS
6 Chief Deputy District Attorney
7 Nevada Bar #001190
8 200 South Third Street
9 Las Vegas, NV 89155-2211
10 (702) 455-4711
11 Attorneys for Plaintiff

FILED IN OPEN COURT
MAY 21 2003

SHIRLEY B. PARRAGUIRRE, CLERK

BY *April Watkins*

APRIL WATKINS DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 WILLIAM JAMES RUNDLE,
13 #0147555

14 Defendant.

CASE NO:

DEPT NO:

189563
~~CH8842~~
XVII

15 GUILTY PLEA AGREEMENT

16 I hereby agree to plead guilty to: COUNT 4 - FIRST DEGREE MURDER (Felony -
17 NRS 200.030) and COUNT 1 - FIRST DEGREE MURDER (Felony - NRS 200.030)
18 pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), as more fully alleged in the
19 charging document attached hereto as Exhibit "1" and Indictment which is reinstated in total
20 by agreement of the parties remaining charges will be dismissed after sentencing..

21 My decision to plead guilty is based upon the plea agreement in this case which is as
22 follows:

23 Both parties agree that I will receive a sentence of Life Without The Possibility Of
24 Parole for each Count and that the Counts will run concurrent.

25 CONSEQUENCES OF THE PLEA

26 I understand that by pleading guilty to Count 4, I admit the facts which support the
27 elements of the offense(s) to which I now plead as set forth in Exhibit "1". With regard to
28 my plea of guilty to Count 1, the State will make factual representations of proof which I

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CLARK COUNTY

1 will adopt as the state of the evidence.

2 I understand that as a consequence of my plea of guilty the Court must sentence me to
3 life without the possibility of parole. I understand that there will be no eligibility for parole
4 on either penalty. I understand that the law requires me to pay an Administrative Assessment
5 Fee.

6 I understand that, if appropriate, I will be ordered to make restitution to the victim of
7 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
8 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
9 reimburse the State of Nevada for any expenses related to my extradition, if any.

10 I understand that I am not eligible for probation or parole for the offenses to which I
11 am pleading guilty.

12 I also understand that information regarding charges not filed, dismissed charges, or
13 charges to be dismissed pursuant to this agreement may be considered by the judge at
14 sentencing.

15 I know that my sentence is to be determined by the Court within the limits prescribed
16 by statute and this agreement.

17 I understand that if my attorneys and the State of Nevada are both recommending a
18 specific punishment to the Court.

19 I understand that if the State of Nevada has agreed to recommend or stipulate a
20 particular sentence or has agreed not to present argument regarding the sentence, or agreed
21 not to oppose a particular sentence, such agreement is contingent upon my appearance in
22 court on the initial sentencing date (and any subsequent dates if the sentencing is continued).
23 I understand that if I fail to appear for the scheduled sentencing date or I commit a new
24 criminal offense prior to sentencing the State of Nevada would regain the full right to argue
25 for any lawful sentence.

26 I understand if the offense(s) to which I am pleading guilty to was committed while I
27 was incarcerated on another charge or while I was on probation or parole that I am not
28 eligible for credit for time served toward the instant offense(s).

1 I understand that as a consequence of my plea of guilty, if I am not a citizen of the
2 United States, I may, in addition to other consequences provided for by federal law, be
3 removed, deported, excluded from entry into the United States or denied naturalization.

4 I understand that the Division of Parole and Probation will prepare a report for the
5 sentencing judge prior to sentencing. This report will include matters relevant to the issue of
6 sentencing, including my criminal history. This report may contain hearsay information
7 regarding my background and criminal history. My attorneys and I will each have the
8 opportunity to comment on the information contained in the report at the time of sentencing.
9 Unless the District Attorney has specifically agreed otherwise, then the District Attorney
10 may also comment on this report.

11 WAIVER OF RIGHTS

12 By entering my plea of guilty, I understand that I am waiving and forever giving up
13 the following rights and privileges:

14 1. The constitutional privilege against self-incrimination, including the right to refuse
15 to testify at trial, in which event the prosecution would not be allowed to comment to the
16 jury about my refusal to testify.

17 2. The constitutional right to a speedy and public trial by an impartial jury, free of
18 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the
19 assistance of an attorney, either appointed or retained. At trial the State would bear the
20 burden of proving beyond a reasonable doubt each element of the offense charged.

21 3. The constitutional right to confront and cross-examine any witnesses who would
22 testify against me.

23 4. The constitutional right to subpoena witnesses to testify on my behalf.

24 5. The constitutional right to testify in my own defense.

25 6. The right to appeal the conviction, with the assistance of an attorney, either
26 appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional
27 or other grounds that challenge the legality of the proceedings and except as otherwise
28 provided in subsection 3 of NRS 174.035.

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the original charge(s) against me with my attorneys and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorneys any possible defenses, defense strategies and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorneys.

I believe that pleading guilty and accepting this plea bargain is in my best interest, and that continuation of the current trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorneys, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

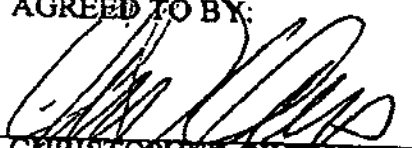
I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

My attorneys have answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorneys.

DATED this 21 day of May, 2003.


WILLIAM JAMES RUNDLE
Defendant

AGREED TO BY:


CHRISTOPHER OWENS
Chief Deputy District Attorney
Nevada Bar #001190

1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorneys for the Defendant named herein and as an officer
3 of the court hereby certify that:

4 1. I have fully explained to the Defendant the allegations contained in the charge(s)
5 to which guilty pleas are being entered.

6 2. I have advised the Defendant of the penalties for each charge and the restitution
7 that the Defendant may be ordered to pay.

8 3. All pleas of guilty offered by the Defendant pursuant to this agreement are
9 consistent with the facts known to me and are made with my advice to the Defendant.

10 4. To the best of my knowledge and belief, the Defendant:

11 a. Is competent and understands the charges and the consequences of pleading
12 guilty as provided in this agreement.

13 b. Executed this agreement and will enter all guilty pleas pursuant hereto
14 voluntarily.

15 c. Was not under the influence of intoxicating liquor, a controlled substance or
16 other drug at the time I consulted with the defendant as certified in paragraphs
17 1 and 2 above.

18 Dated: This 21 day of May, 2003.

19 
20 ATTORNEY FOR DEFENDANT

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28 dm

1 IND

2 STEWART L. BELL
Clark County District Attorney
Nevada Bar #000477

3 CHRIS J. OWENS
Chief Deputy District Attorney
Nevada Bar #001190
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
4 Attorney for Plaintiff

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6
7
8 DISTRICT COURT
9 CLARK COUNTY, NEVADA
10

11 THE STATE OF NEVADA,

12 Plaintiff,

13 -vs-

14 WILLIAM JAMES RUNDLE,
#0147555

15
16 Defendant(s).
17

Case No.
Dept. No.

C189563
IV

18
19
20 INDICTMENT

19 STATE OF NEVADA }
20 COUNTY OF CLARK } ss.

21 The Defendant(s) above named, WILLIAM JAMES RUNDLE, accused by the Clark
22 County Grand Jury of the crime(s) of MURDER WITH USE OF DEADLY WEAPON
23 (Open Murder) (Felony - NRS 200.010, 200.030, 193.165); ROBBERY WITH USE OF
24 DEADLY WEAPON (Felony - NRS 200.380, 193.165), and THEFT (Felony - NRS
25 205.0832, 205.0835); committed at and within the County of Clark, State of Nevada, on or
26 between May, 1997 and October, 2002, as follows:

27 //

28 //

EXHIBIT "1"

AA01370

2JDC05676

1 COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)

2 did, about or between April and July of 1997, then and there wilfully, feloniously,
3 without authority of law, and with premeditation and deliberation, and with malice
4 aforethought, kill WILLA RUNDLE, a human being, with use of a deadly weapon, to wit:
5 medications or drugs, by administering an overdose of prescription drugs to the said WILLA
6 RUNDLE, and/or by manner and means otherwise unknown, the defendant directly
7 committing said act or aiding and abetting persons unknown in the commission of said act
8 by providing counsel, encouragement, planning and access to said person or persons, and/or
9 each person acting pursuant to a conspiracy to commit murder.

10 COUNT 2 - THEFT

11 did, on or between May, 1997 and August , 2002 then and there knowingly,
12 feloniously, and without lawful authority, commit theft by converting, making an
13 unauthorized transfer of an interest in, or without authorization controlling property having a
14 value of \$2,500.00, or more, lawful money of the United States, belonging to WILLA
15 RUNDLE, Clark County, Nevada, in the following manner, to-wit: by defendant obtaining
16 in excess of \$2,500.00 in personal assets and monies of the said WILLA RUNDLE
17 following her untimely death by homicide, thereby converting, making an unauthorized
18 transfer of an interest in, or controlling without authorization, the money of WILLA
19 RUNDLE.

20 COUNT 3 - THEFT

21 did, on or between May, 1997 and August, 2002, then and there knowingly,
22 feloniously, and without lawful authority, commit theft by converting, making an
23 unauthorized transfer of an interest in, or without authorization controlling property having a
24 value of \$2,500.00, or more, lawful money of the United States, belonging to Willa Rundle,
25 the United States Government, the United States Treasury Department and/or the Social
26 Security Administration, or by obtaining said money by a material misrepresentation with
27 intent to deprive that person or entity of the property, or by coming into control of mislaid or
28 misdelivered property of Willa Rundle from United States Government, the United States

1 Treasury Department and/or the Social Security Administration on under circumstances
2 providing means of inquiry as to the true owner in the following manner, to-wit: by
3 defendant arranging for and/or obtaining in excess of \$2,500.00 in Social Security benefits
4 of the said WILLA RUNDLE, who was deceased and no longer entitled to said benefits,
5 materially misrepresenting by these actions that he was a person lawfully entitled to said
6 payments, thereby converting, making an unauthorized transfer of an interest in, or
7 controlling without authorization, the money of WILLA RUNDLE, the United States
8 Government, the United States Treasury Department and/or the Social Security
9 Administration with intent to deprive them of the property and/or by appropriating said
10 mislaid or misdelivered property to his own use or that of another person without reasonable
11 efforts to notify the true owner.

12 COUNT 4 - MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)

13 did, on or between August 16, 2002 and August 20th, 2002, then and there wilfully,
14 feloniously, without authority of law, and with premeditation and deliberation, and with
15 malice aforethought, kill SHIRLEY RUNDLE, a human being, by repeatedly striking the
16 head and body of the said SHIRLEY RUNDLE with a deadly weapon, to-wit: a baseball bat
17 and/or other blunt object, said murder being directly premeditated and/or said Murder being
18 committed during the commission of a robbery.

19 COUNT 5 - ROBBERY WITH USE OF A DEADLY WEAPON

20 did, on or between August 16, 2002 and August 20, 2002, then and there wilfully,
21 unlawfully, and feloniously take money and/or personal property, including a ring, watches
22 and other jewelry, from the person of SHIRLEY RUNDLE, or in her presence, by means of
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1 force or violence, or fear of injury to, and without the consent and against the will of the said
2 SHIRLEY RUNDLE, said Defendant using a deadly weapon, to-wit: a baseball bat and/or
3 other blunt object during the commission of said crime.

4 DATED this ____ day of May, 2003.

5
6 STEWART L. BELL
DISTRICT ATTORNEY
7 Nevada Bar #000477

8
9 BY

10 
11 CHRIS J. OWENS
12 Chief Deputy District Attorney
13 Nevada Bar #001190
14
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Names of witnesses appearing before the Grand Jury:

1 DR. ELLEN CLARK, WASHOE COUNTY CORONER
2 MAGDA BELEN, 10244 SINGING WIND, LV, NV
3 DET. THOMAS MARIN, LVMPD #2894
4 DET. DONALD TREMEL, LVMPD #2038
5 CSA YOLANDA McCLARY, FORENSIC LAB, LVMPD #2923
6 CSA DANIEL HOLSTEIN, FORENSIC LAB, LVMPD #3861
7 DET. SHEILA HUGGINS, LVMPD #3603
8 THEROM HAINES, SOCIAL SECURITY
9 NATHAN R. EATON, C/O WELLS FARGO BANK
10 THOMAS H. ROACH, C/O DISTRICT ATTORNEY'S OFFICE
11 ROBERT WILLIAM RUNDLE, C/O DISTRICT ATTORNEY'S OFFICE
12 BETH BORGAL, C/O DISTRICT ATTORNEY'S OFFICE
13 SGT. JOHN C. MIENAU, LASSIN COUNTY SHERRIF'S OFFICE, CA
14 SGT. THOMAS KELLER, LVMPD CYBER CRIMES UNIT
15 STEVEN SCARBOROUGH, LVMPD FORENSIC LAB, #2160
16 PATRICA DORAN, COR, BANK OF AMERICA
17 JOEL MOSKOWITZ, CFE, DISTRICT ATTORNEY'S OFFICE, 200 S. THIRD, LV, NV
18 DR. J. COREY BROWN, C/O AMY CHELINI, ESQ.
19 DR. JAMES BOURLAND, QUEST DIAGNOSTICS, LV, NV
20

Additional witnesses known to the District Attorney at the filing of the Indictment:

21 JAN KELLY, FORENSIC LAB, LVMPD #5666
22 TOM WALL, LVMPD FORENSIC LAB
23 DAVID WELCH, LVMPD FORENSIC LAB
24 TERRY COOK, LVMPD FORENSIC LAB
25 DR. LARRY SIMMS, CCME
26 JAMES ABRAHAM, DDS, C/O DISTRICT ATTORNEY'S OFFICE
27
28

1 C. GREEN, LVMPD FORENSIC LAB
2 K. GRAMMAS, LVMPD FORENSIC LAB
3 RODEL BELEN, 10244 SINGING WIND, LV, NV
4 OFFICER K. LeRUD, LVMPD
5 OFFICER W. WEBB, LVMPD
6 JANET BERTRAND, 7914 SELTZER ISLAND WAY, LV, NV
7 SGT. ROCKY ALBY, LVMPD HOMICIDE
8 PAUL LOONEY, OFFICE OF THE UNITED STATES POSTAL INSPECTOR
9 DOUGLAS WOODBURY, C/O WILD WEST CASINO, LV, NV
10 JOHN WINSTROM, NV SPORTS SCHEDULE, 3110 S. POLARIS, #24, LV, NV
11 CURTIS VIXIE, DDS, SUSANVILLE, CA
12 DONALD SIMPSON, DDS, SUSANVILLE, CA
13 ROBERT COOMBS, C/O DISTRICT ATTORNEYS OFFICE
14 JUDY RUNDLE, C/O DISTRICT ATTORNEY'S OFFICE
15 COLLEEN HAMILTON, 17116 BILTAR ST., VAN NUYS, CA
16 DEBRA RUNDLE, C/O DISTRICT ATTORNEY'S OFFICE
17 DEPUTY WALLACE, LASSEN COUNTY SHERRIF, CA
18 SGT. D. MARTIN, LASSEN COUNTY SHERRIF, CA
19 DET. BOLLINGER, LASSEN COUNTY SHERRIF, CA
20 DANA SPONER, LASSEN COUNTY SHERRIF, CA
21 RON WILSON, CALIFORNIA HIGHWAY PATROL
22 SGT. CEAGLIO, LASSEN COUNTY SHERRIF
23 COR, LAWRENCE WELK VILLAGE, CA
24 COR, KEY BANK, 434 QUEEN ANNE AVE. NORTH, SEATTLE, WA
25 COR, EXPRESS RENT A CAR, SEATTLE, WA
26 COR, SEATTLE SEAHAWKS, SEATTLE, WA
27 DET. HANF, SEATTLE PD, WA
28 ANJANJI MALA, KEY BANK, SEATTLE, WA

1 BURNEY CAMPBELL, SELF STORAGE, 12TH & MADISON, SEATTLE, WA
2 COR/KATHY, HOLIDAY INN, 211 DEXTER, SEATTLE, WA
3 COR, THE MAILBOX, 300 QUEEN ANNE AVE., SEATTLE, WA
4 GLENN STEADMAN, MEDITERRANEAN INN, 425 QUEEN ANNE, SEATTLE, WA
5 DOUG HILLSTROM, T.S. McHUGHS, 21 MERCER, SEATTLE, WA
6 GERALD OLSON, GOLDMARK, INC., 10325 AURORA NORTH, SEATTLE, WA
7 COR, DAYS INN MTEL, 5827 CARAVAN CT., ORLANDO, FL
8 ALLA VELBAUM, 5827 CARAVAN CT., ORLANDO, FL
9 SPECIAL AGENT S. SAVAGE, FBI, FL
10 TASK FORCE OFFICER HOCHULI, FBI, FL
11 OFFICER MARK CANTY, ORLANDO FLORIDA PD
12 OFFICER JERRY JERASINE, ORLANDO FLORIDA PD
13 EMMETT BROWNING, ORLANDO FLORIDA PD
14 DOUG THOMAS, CRIME SCENE UNIT, ORLANDO FLORIDA PD
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26 02AG071X/02F17461X:lg
27 LVMPD EV# 0208212083
28 MURD WDW; THEFT; RWDW - F

EXHIBIT A5

EXHIBIT A5

ORIGINAL

1 GMEM
2 STEWART L. BELL
3 DISTRICT ATTORNEY
4 Nevada Bar #000477
5 200 S. Third Street
6 Las Vegas, Nevada 89155
7 (702) 455-4711
8 Attorney for Plaintiff

FILED IN OPEN COURT

JUN 21 2007

SHIRLEY B. PARRAGUIRRE, CLERK

DISTRICT COURT BY Denise Husted
CLARK COUNTY, NEVADA

DENISE HUSTED DEPUTY

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 JOSE MANUEL VIGOA,
12 aka Jose Manuel Vigoa-Perez,
13 #0697364

14 Defendant.

C168652

Case No. C180724
Dept. No. IV

15 GUILTY PLEA AGREEMENT

16 I hereby agree to plead guilty to: COUNT 1 - CONSPIRACY TO COMMIT ROBBERY
17 AND/OR MURDER (Felony - NRS 198.480, 200.010, 200.030, 200.380), COUNTS 2, 14 and
18 29 - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 206.030,
19 193.165); COUNTS 3, 11, 12, 15, 23, 24 and 42 - POSSESSION OF FIREARM BY EX-
20 FELON (Felony - NRS 202.360); COUNTS 4, 5, 16, 17, 21, 22, 31, 32, 33, 34 and 35 -
21 ROBBERY WITH USE OF A DEADLY WEAPON (Felony - 200.380, 193.165); COUNTS
22 6, 7, 36 and 37 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS
23 193.330, 193.165, 200.080, 200.030), COUNTS 8, 9 and 10 - ATTEMPT ROBBERY WITH
24 USE OF A DEADLY WEAPON (Felony - NRS 193.330, 200.380, 193.165), COUNTS 13, 18,
25 25, 26, 27, 40 and 41 - POSSESSION OF STOLEN VEHICLE (Felony - NRS 205.273),
26 COUNTS 19 and 20 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON
27 (Felony - NRS 200.080, 200.030, 193.165), COUNT 28 - CONSPIRACY TO COMMIT
28 BURGLARY (Gross Misdemeanor - NRS 205.060, 199.480); COUNT 30 - CONSPIRACY TO

COUNTY CLERK

JUN 24 2007

RECEIVED

AA01378

1 COMMIT ROBBERY (Felony - NRS 200.380, 199.480); COUNT 38 - DISCHARGING
2 FIREARM OUT OF A MOTOR VEHICLE (Felony - NRS 202.287); COUNT 39 -
3 DISCHARGING FIREARM AT OR INTO VEHICLE (Felony - NRS 202.285); COUNT 43 -
4 STOP REQUIRED ON SIGNAL OF POLICE OFFICER (Felony - NRS 484.348); COUNT 44 -
5 CHILD ENDANGERMENT (Gross Misdemeanor - 200.508); COUNT 45 - CONSPIRACY TO
6 ESCAPE (Gross Misdemeanor - NRS 199.480, 212.090) and COUNT 46 - ATTEMPT ESCAPE
7 (Felony - NRS 193.330, 212.090), as more fully alleged in the charging document attached
8 hereto as Exhibit "1".

9 My decision to plead guilty is based upon the plea agreement in this case which is as
10 follows:

11 The Defendant agrees to enter a plea of guilty, under oath, to all counts. The parties
12 stipulate that the Defendant will receive the maximum sentence on all counts. The parties
13 stipulate that the Defendant will be sentenced to Life Without the Possibility of Parole on Counts
14 15 and 16, Murder With Use of a Deadly Weapon. Also, the parties stipulate that each count
15 will be served consecutive to each other count. This stipulation is intended to be binding on the
16 sentencing judge. If the sentencing judge decides not to accept this stipulation, either party may
17 withdraw from this stipulation and the parties will proceed to trial on all charges.

18 The State will urge the U.S. Attorney's Office to not file charges arising out of this case
19 against Defendant and his wife, Luisa Vigoa. The State will not file perjury charges against
20 Luisa Vigoa and her children. The State will not file further charges arising out of the instant
21 conspiracy unless other murders are uncovered by law enforcement. The State agrees that it will
22 not call Jose Vigoa as a witness in any proceedings concerning his accomplices.

23 Defendant does not intend to testify for any party concerning the events set forth in his
24 affidavit. The parties acknowledge that Defendant's affidavit is hearsay and inadmissible
25 evidence in any court proceeding in which Defendant is not a Defendant or a witness. The State
26 agrees that Defendant's affidavit will not be used against Pedro Duarte or Luis Suarez in any
27 proceeding in which Defendant is not a witness.

28 ///

CONSEQUENCES OF THE PLEA

I understand that by pleading guilty I admit the facts which support all the elements of the offense(s) to which I now plead as set forth in Exhibit "1".

I understand that as a consequence of my plea of guilty the Court must sentence me to imprisonment in the Nevada State Prison as follows:

COUNT 1 - CONSPIRACY TO COMMIT ROBBERY AND/OR MURDER: for a minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED TWENTY (120) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$5,000.

COUNT 2 - BURGLARY WHILE IN POSSESSION OF A FIREARM: for a minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$10,000.

COUNT 3 - POSSESSION OF FIREARM BY EX-FELON: for a minimum term of not less than TWELVE (12) months and a maximum term of not more than SEVENTY-TWO (72) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$5,000.

COUNT 4 - ROBBERY WITH USE OF A DEADLY WEAPON: for a minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED EIGHTY (180) months plus an equal and consecutive minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment.

COUNT 5 - ROBBERY WITH USE OF A DEADLY WEAPON: for a minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED EIGHTY (180) months plus an equal and consecutive minimum term of not less

1 than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED
2 EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent
3 (40%) of the maximum term of imprisonment.

4 **COUNT 6 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON:** for a minimum
5 term of not less than TWENTY-FOUR (24) months and a maximum term of not more than TWO
6 HUNDRED FORTY (240) months plus an equal and consecutive minimum term of not less than
7 TWENTY-FOUR (24) months and a maximum term of not more than TWO HUNDRED
8 FORTY (240) months. The minimum term of imprisonment may not exceed forty percent (40%)
9 of the maximum term of imprisonment.

10 **COUNT 7 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON:** for a minimum
11 term of not less than TWENTY-FOUR (24) months and a maximum term of not more than TWO
12 HUNDRED FORTY (240) months plus an equal and consecutive minimum term of not less than
13 TWENTY-FOUR (24) months and a maximum term of not more than TWO HUNDRED
14 FORTY (240) months. The minimum term of imprisonment may not exceed forty percent (40%)
15 of the maximum term of imprisonment.

16 **COUNT 8 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON:** for a
17 minimum term of not less than TWELVE (12) months and a maximum term of not more than
18 ONE HUNDRED TWENTY (120) months plus an equal and consecutive minimum term of not
19 less than TWELVE (12) months and a maximum term of not more than ONE HUNDRED
20 TWENTY (120) months. The minimum term of imprisonment may not exceed forty percent
21 (40%) of the maximum term of imprisonment.

22 **COUNT 9 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON:** for a
23 minimum term of not less than TWELVE (12) months and a maximum term of not more than
24 ONE HUNDRED TWENTY (120) months plus an equal and consecutive minimum term of not
25 less than TWELVE (12) months and a maximum term of not more than ONE HUNDRED
26 TWENTY (120) months. The minimum term of imprisonment may not exceed forty percent
27 (40%) of the maximum term of imprisonment.

28 ///

1 **COUNT 10 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON:** for a
 2 minimum term of not less than TWELVE (12) months and a maximum term of not more than
 3 ONE HUNDRED TWENTY (120) months plus an equal and consecutive minimum term of not
 4 less than TWELVE (12) months and a maximum term of not more than ONE HUNDRED
 5 TWENTY (120) months. The minimum term of imprisonment may not exceed forty percent
 6 (40%) of the maximum term of imprisonment.

7 **COUNT 11 - POSSESSION OF FIREARM BY EX-FELON:** for a minimum term of not less
 8 than TWELVE (12) months and a maximum term of not more than SEVENTY-TWO (72)
 9 months. The minimum term of imprisonment may not exceed forty percent (40%) of the
 10 maximum term of imprisonment. I understand that I may also be fined up to \$5,000.

11 **COUNT 12 - POSSESSION OF FIREARM BY EX-FELON:** for a minimum term of not less
 12 than TWELVE (12) months and a maximum term of not more than SEVENTY-TWO (72)
 13 months. The minimum term of imprisonment may not exceed forty percent (40%) of the
 14 maximum term of imprisonment. I understand that I may also be fined up to \$5,000.

15 **COUNT 13 - POSSESSION OF STOLEN VEHICLE:** for a minimum term of not less than
 16 TWELVE (12) months and a maximum term of not more than ONE HUNDRED TWENTY
 17 (120) months. The minimum term of imprisonment may not exceed forty percent (40%) of the
 18 maximum term of imprisonment. I understand that I may also be fined up to \$10,000.

19 **COUNT 14 - BURGLARY WHILE IN POSSESSION OF A FIREARM:** for a minimum
 20 term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE
 21 HUNDRED EIGHTY (180) months. The minimum term of imprisonment may not exceed forty
 22 percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up
 23 to \$10,000.

24 **COUNT 15 - POSSESSION OF FIREARM BY EX-FELON:** for a minimum term of not less
 25 than TWELVE (12) months and a maximum term of not more than SEVENTY-TWO (72)
 26 months. The minimum term of imprisonment may not exceed forty percent (40%) of the
 27 maximum term of imprisonment. I understand that I may also be fined up to \$5,000.

28 ///

1 **COUNT 16 - ROBBERY WITH USE OF A DEADLY WEAPON:** for a minimum term of
2 not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE
3 HUNDRED EIGHTY (180) months plus an equal and consecutive minimum term of not less
4 than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED
5 EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent
6 (40%) of the maximum term of imprisonment.

7 **COUNT 17 - ROBBERY WITH USE OF A DEADLY WEAPON:** for a minimum term of
8 not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE
9 HUNDRED EIGHTY (180) months plus an equal and consecutive minimum term of not less
10 than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED
11 EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent
12 (40%) of the maximum term of imprisonment.

13 **COUNT 18 - POSSESSION OF STOLEN VEHICLE:** for a minimum term of not less than
14 TWELVE (12) months and a maximum term of not more than ONE HUNDRED TWENTY
15 (120) months. The minimum term of imprisonment may not exceed forty percent (40%) of the
16 maximum term of imprisonment. I understand that I may also be fined up to \$10,000.

17 **COUNT 19 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON:** for life
18 without the possibility of parole OR life with the possibility of parole with eligibility for parole
19 beginning at 20 yrs (240 months); OR a definite term of 50 yrs (600 months) with eligibility for
20 parole beginning at 20 yrs (240 months) plus an equal and consecutive term of life without the
21 possibility of parole OR life with the possibility of parole with eligibility for parole beginning
22 at 20 yrs (240 months); OR a definite term of 50 yrs (600 months) with eligibility for parole
23 beginning at 20 yrs (240 months).

24 **COUNT 20 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON:** for life
25 without the possibility of parole OR life with the possibility of parole with eligibility for parole
26 beginning at 20 yrs (240 months); OR a definite term of 50 yrs (600 months) with eligibility for
27 parole beginning at 20 yrs (240 months) plus an equal and consecutive term of life without the
28 possibility of parole OR life with the possibility of parole with eligibility for parole beginning

1 at 20 yrs (240 months); OR a definite term of 50 yrs (600 months) with eligibility for parole
2 beginning at 20 yrs (240 months).

3 **COUNT 21 - ROBBERY WITH USE OF A DEADLY WEAPON:** for a minimum term of
4 not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE
5 HUNDRED EIGHTY (180) months plus an equal and consecutive minimum term of not less
6 than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED
7 EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent
8 (40%) of the maximum term of imprisonment.

9 **COUNT 22 - ROBBERY WITH USE OF A DEADLY WEAPON:** for a minimum term of
10 not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE
11 HUNDRED EIGHTY (180) months plus an equal and consecutive minimum term of not less
12 than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED
13 EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent
14 (40%) of the maximum term of imprisonment.

15 **COUNT 23 - POSSESSION OF FIREARM BY EX-FELON:** for a minimum term of not less
16 than TWELVE (12) months and a maximum term of not more than SEVENTY-TWO (72)
17 months. The minimum term of imprisonment may not exceed forty percent (40%) of the
18 maximum term of imprisonment. I understand that I may also be fined up to \$5,000.

19 **COUNT 24 - POSSESSION OF FIREARM BY EX-FELON:** for a minimum term of not less
20 than TWELVE (12) months and a maximum term of not more than SEVENTY-TWO (72)
21 months. The minimum term of imprisonment may not exceed forty percent (40%) of the
22 maximum term of imprisonment. I understand that I may also be fined up to \$5,000.

23 **COUNT 25 - POSSESSION OF STOLEN VEHICLE:** for a minimum term of not less than
24 TWELVE (12) months and a maximum term of not more than ONE HUNDRED TWENTY
25 (120) months. The minimum term of imprisonment may not exceed forty percent (40%) of the
26 maximum term of imprisonment. I understand that I may also be fined up to \$10,000.

27 **COUNT 26 - POSSESSION OF STOLEN VEHICLE:** for a minimum term of not less than
28 TWELVE (12) months and a maximum term of not more than ONE HUNDRED TWENTY

(120) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$10,000.

COUNT 27 - POSSESSION OF STOLEN VEHICLE: for a minimum term of not less than TWELVE (12) months and a maximum term of not more than ONE HUNDRED TWENTY (120) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$10,000.

COUNT 28 - CONSPIRACY TO COMMIT BURGLARY: to the Clark County Detention Center for a period of not more than one (1) year and/or a fine up to \$2,000.00.

COUNT 29 - BURGLARY WHILE IN POSSESSION OF A FIREARM: for a minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$10,000.

COUNT 30- CONSPIRACY TO COMMIT ROBBERY: for a minimum term of not less than TWELVE (12) months and a maximum term of not more than SEVENTY-TWO (72) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment.

COUNT 31 - ROBBERY WITH USE OF A DEADLY WEAPON: for a minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED EIGHTY (180) months plus an equal and consecutive minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment.

COUNT 32 - ROBBERY WITH USE OF A DEADLY WEAPON: for a minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED EIGHTY (180) months plus an equal and consecutive minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent

1 (40%) of the maximum term of imprisonment.

2 **COUNT 33 - ROBBERY WITH USE OF A DEADLY WEAPON:** for a minimum term of
3 not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE
4 HUNDRED EIGHTY (180) months plus an equal and consecutive minimum term of not less
5 than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED
6 EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent
7 (40%) of the maximum term of imprisonment.

8 **COUNT 34 - ROBBERY WITH USE OF A DEADLY WEAPON:** for a minimum term of
9 not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE
10 HUNDRED EIGHTY (180) months plus an equal and consecutive minimum term of not less
11 than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED
12 EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent
13 (40%) of the maximum term of imprisonment.

14 **COUNT 35 - ROBBERY WITH USE OF A DEADLY WEAPON:** for a minimum term of
15 not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE
16 HUNDRED EIGHTY (180) months plus an equal and consecutive minimum term of not less
17 than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED
18 EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent
19 (40%) of the maximum term of imprisonment.

20 **COUNT 36 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON:** for a
21 minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more
22 than TWO HUNDRED FORTY (240) months plus an equal and consecutive minimum term of
23 not less than TWENTY-FOUR (24) months and a maximum term of not more than TWO
24 HUNDRED FORTY (240) months. The minimum term of imprisonment may not exceed forty
25 percent (40%) of the maximum term of imprisonment.

26 **COUNT 37 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON:** for a
27 minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more
28 than TWO HUNDRED FORTY (240) months plus an equal and consecutive minimum term of

not less than TWENTY-FOUR (24) months and a maximum term of not more than TWO HUNDRED FORTY (240) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment.

COUNT 38 - DISCHARGING FIREARM OUT OF MOTOR VEHICLE: for a minimum term of not less than TWENTY-FOUR (24) months and a maximum term of not more than ONE HUNDRED EIGHTY (180) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$5,000.

COUNT 39 - DISCHARGING FIREARM AT OR INTO VEHICLE: for a minimum term of not less than TWELVE (12) months and a maximum term of not more than SEVENTY-TWO (72) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$5,000.

COUNT 40 - POSSESSION OF STOLEN VEHICLE: for a minimum term of not less than TWELVE (12) months and a maximum term of not more than ONE HUNDRED TWENTY (120) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$10,000.

COUNT 41 - POSSESSION OF STOLEN VEHICLE: for a minimum term of not less than TWELVE (12) months and a maximum term of not more than ONE HUNDRED TWENTY (120) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$10,000.

COUNT 42 - POSSESSION OF FIREARM BY EX-FELON: for a minimum term of not less than TWELVE (12) months and a maximum term of not more than SEVENTY-TWO (72) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$5,000.

COUNT 43 - STOP REQUIRED ON SIGNAL OF POLICE OFFICER: for a minimum term of not less than TWELVE (12) months and a maximum term of not more than SEVENTY-TWO (72) months. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$5,000.

1 **COUNT 44- CHILD ENDANGERMENT:** to the Clark County Detention Center for a period
2 of not more than one (1) year and/or a fine up to \$2,000.00.

3 **COUNT 45 - CONSPIRACY TO ESCAPE:** to the Clark County Detention Center for a
4 period of not more than one (1) year and/or a fine up to \$2,000.00.

5 **COUNT 46 - ATTEMPT ESCAPE:** for a minimum term of not less than TWELVE (12)
6 months and a maximum term of not more than ONE HUNDRED TWENTY (120) months. The
7 minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of
8 imprisonment. I understand that I may also be fined up to \$10,000.

9 I understand that the law requires me to pay an Administrative Assessment Fee.

10 I understand that, if appropriate, I will be ordered to make restitution to the victim of the
11 offense(s) to which I am pleading guilty and to the victim of any related offense which is being
12 dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the
13 State of Nevada for any expenses related to my extradition, if any.

14 I understand that I am not eligible for probation for the offenses to which I am pleading
15 guilty.

16 I understand that if more than one sentence of imprisonment is imposed and I am eligible
17 to serve the sentences concurrently, the sentencing judge does not have the discretion to order
18 the sentences served concurrently or consecutively.

19 I also understand that information regarding charges not filed, dismissed charges, or
20 charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

21 I have not been promised or guaranteed any particular sentence by anyone. I know that
22 my sentence is to be determined by the Court within the limits prescribed by statute. I
23 understand that if my attorney or the State of Nevada or both recommend any specific
24 punishment to the Court, the Court is not obligated to accept the recommendation.

25 I understand that the Division of Parole and Probation will prepare a report for the
26 sentencing judge prior to sentencing. This report will include matters relevant to the issue of
27 sentencing, including my criminal history. This report may contain hearsay information
28 regarding my background and criminal history. My attorney and I will each have the opportunity

1 to comment on the information contained in the report at the time of sentencing. Unless the
2 District Attorney has specifically agreed otherwise, then the District Attorney may also comment
3 on this report.

4 WAIVER OF RIGHTS

5 By entering my plea of guilty, I understand that I am waiving and forever giving up the
6 following rights and privileges:

7 1. The constitutional privilege against self-incrimination, including the right to refuse to
8 testify at trial, in which event the prosecution would not be allowed to comment to the jury about
9 my refusal to testify.

10 2. The constitutional right to a speedy and public trial by an impartial jury, free of
11 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the
12 assistance of an attorney, either appointed or retained. At trial the State would bear the burden
13 of proving beyond a reasonable doubt each element of the offense charged.

14 3. The constitutional right to confront and cross-examine any witnesses who would
15 testify against me.

16 4. The constitutional right to subpoena witnesses to testify on my behalf.

17 5. The constitutional right to testify in my own defense.

18 6. The right to appeal the conviction, with the assistance of an attorney, either appointed
19 or retained, unless the appeal is based upon reasonable constitutional jurisdictional or other
20 grounds that challenge the legality of the proceedings and except as otherwise provided in
21 subsection 3 of NRS 174.035.

22 VOLUNTARINESS OF PLEA

23 I have discussed the elements of all of the original charge(s) against me with my attorney
24 and I understand the nature of the charge(s) against me.

25 I understand that the State would have to prove each element of the charge(s) against me
26 at trial.

27 I have discussed with my attorney any possible defenses, defense strategies and
28 circumstances which might be in my favor.

SV&ns12JDC05696

1 All of the foregoing elements, consequences, rights, and waiver of rights have been
2 thoroughly explained to me by my attorney.

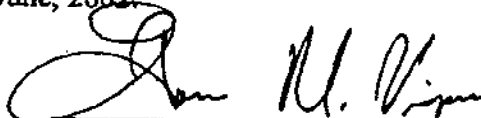
3 I believe that pleading guilty and accepting this plea bargain is in my best interest, and
4 that a trial would be contrary to my best interest.

5 I am signing this agreement voluntarily, after consultation with my attorney, and I am not
6 acting under duress or coercion or by virtue of any promises of leniency, except for those set
7 forth in this agreement.

8 I am not now under the influence of any intoxicating liquor, a controlled substance or
9 other drug which would in any manner impair my ability to comprehend or understand this
10 agreement or the proceedings surrounding my entry of this plea.

11 My attorney has answered all my questions regarding this guilty plea agreement and its
12 consequences to my satisfaction and I am satisfied with the services provided by my attorney.

13 DATED this 20 day of June, 2002.

14 

15
16 JOSE MANUEL VIGOA
17 aka Jose Manuel Vigoa-Perez
18 Defendant

19 AGREED TO BY:

20 
21 Deputy District Attorney

1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of
3 the court hereby certify that:

4 1. I have fully explained to the Defendant the allegations contained in the charge(s) to
5 which guilty pleas are being entered.

6 2. I have advised the Defendant of the penalties for each charge and the restitution that
7 the Defendant may be ordered to pay.

8 3. All pleas of guilty offered by the Defendant pursuant to this agreement are consistent
9 with the facts known to me and are made with my advice to the Defendant.

10 4. To the best of my knowledge and belief, the Defendant:

11 a. Is competent and understands the charges and the consequences of pleading
12 guilty as provided in this agreement.

13 b. Executed this agreement and will enter all guilty pleas pursuant hereto
14 voluntarily.

15 c. Was not under the influence of intoxicating liquor, a controlled substance or
16 other drug at the time I consulted with the defendant as certified in paragraphs 1
17 and 2 above.

18 Dated: This 20 day of June, 2002.

19 
20 
21

22 ATTORNEY FOR DEFENDANT
23
24
25
26
27
28

1 INFO
2 STEWART L. BELL
3 DISTRICT ATTORNEY
4 Nevada Bar #000477
5 200 S. Third Street
6 Las Vegas, Nevada 89155
7 (702) 455-4711
8 Attorney for Plaintiff

6 DISTRICT COURT
7 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 JOSE MANUEL VIGOA,
13 aka Jose Manuel Vigoa-Perez,
14 #0697364

15 Defendant.

Case No. C180124
Dept. No. IV

AMENDED
INFORMATION

16 STATE OF NEVADA }
17 COUNTY OF CLARK } ss:

18 STEWART L. BELL, District Attorney within and for the County of Clark, State of
19 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

20 That JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez, the Defendant above
21 named, having committed the crimes of CONSPIRACY TO COMMIT ROBBERY AND/OR
22 MURDER (Felony - NRS 198.480, 200.010, 200.030, 200.380), BURGLARY WHILE IN
23 POSSESSION OF A FIREARM (Felony - NRS 206.030, 193.165); POSSESSION OF
24 FIREARM BY EX-FELON (Felony - NRS 202.360); ROBBERY WITH USE OF A
25 DEADLY WEAPON (Felony - 200.380, 193.165); ATTEMPT MURDER WITH USE OF
26 A DEADLY WEAPON (Felony - NRS 193.330, 193.165, 200.080, 200.030), ATTEMPT
27 ROBBERY WITH USE OF A DEADLY WEAPON (Felony -NRS 193.330, 200.380,
28 193.165), POSSESSION OF STOLEN VEHICLE (Felony - NRS 205.273), FIRST

1 DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.080,
2 200.030, 193.165), CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor - NRS
3 205.060, 199.480); CONSPIRACY TO COMMIT ROBBERY (Felony - NRS 200.380,
4 199.480); DISCHARGING FIREARM OUT OF A MOTOR VEHICLE (Felony - NRS
5 202.287); DISCHARGING FIREARM AT OR INTO VEHICLE (Felony - NRS 202.285);
6 STOP REQUIRED ON SIGNAL OF POLICE OFFICER (Felony - NRS 484.348); CHILD
7 ENDANGERMENT (Gross Misdemeanor - 200.508); and POSSESSION OF A FIREARM
8 BY EX-FELON (Felony - NRS 202.360); CONSPIRACY TO ESCAPE (Gross
9 Misdemeanor - NRS 199.480, 212.090) and ATTEMPT ESCAPE (Felony - NRS 193.330,
10 212.090) on or between September 19, 1998, and June 3, 2002, within the County of Clark, State
11 of Nevada, contrary to the form, force and effect of statutes in such cases made and provided,
12 and against the peace and dignity of the State of Nevada,

13 COUNT 1 - CONSPIRACY TO COMMIT ROBBERY AND/OR MURDER

14 did, on or between September 19, 1998, and June 10, 2000, then and there meet with
15 PEDRO RAFAEL DUARTE, OSCAR SANCHEZ CISNEROS, LUIS SUAREZ, and
16 UNIDENTIFIED INDIVIDUALS, and between themselves and each of them with the other,
17 wilfully, unlawfully and feloniously conspire and agree to commit the crime of Robbery and/or
18 Murder, and in furtherance of said conspiracy, Defendant JOSE MANUEL VIGOA did commit
19 the acts as set forth in Counts 2 through 21, said acts being incorporated by this reference as
20 though fully set forth herein.

21 COUNT 2 - BURGLARY WHILE IN POSSESSION OF A FIREARM

22 did, on or about the 20th day of September, 1998, then and there wilfully, unlawfully,
23 and feloniously enter, with intent to commit robbery and/or murder, while in possession of a
24 firearm, that certain building occupied by MGM GRAND HOTEL, located at 3799 Las Vegas
25 Boulevard South, Las Vegas, Clark County, Nevada.

26 COUNT 3 - POSSESSION OF FIREARM BY EX-FELON

27 Defendant JOSE MANUEL VIGOA, aka Jose Manuel Vigoa-Perez, did, on or about the
28 20th day of September, 1998, then and there wilfully, unlawfully, and feloniously own or have

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

SIAOSI VANISI,

Appellant,

vs.

RENEE BAKER, WARDEN, and
CATHERINE CORTEZ MASTO,
ATTORNEY GENERAL FOR
THE STATE OF NEVADA,

Respondents.

No. 65774

Volume 6 of 26

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Clerk of Supreme Court

APPELLANT'S APPENDIX

Appeal from Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)

Second Judicial District Court, Washoe County

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of January, 2015. Electronic Service of the foregoing Appellant's Appendix shall be made in accordance with the Master Service List as follows:


Terrence P. McCarthy
Washoe County District Attorney
tmccarth@da.washoecounty.us

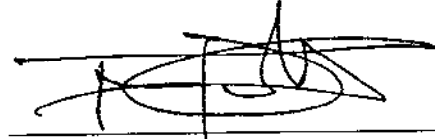
Felicia Darensbourg
An employee of the Federal Public Defender's Office

1
2
3 **CERTIFICATION OF COUNSEL**

4 Undersigned Counsel for the Petitioner, SIAOSI VANISI, hereby certify that despite the
5 court's February 18, 2005, ruling that Mr. Vanisi is competent to continue in this collateral
6 proceeding, his degree of communication and assistance in this proceeding falls below the standard
7 necessary to render effective assistance of counsel. Counsel are of the belief that Mr. Vanisi remains
8 legally incompetent to continue in these proceedings. Pursuant to NRS 34.820(4) this Court has never
9 admonished either Petitioner or counsel that all claims must be joined in a single petition. Under these
10 circumstances, Petitioner reserves the right to amend and/or supplement this petition with further
11 claims, factual allegations and legal authority.
12

13
14 DATED this 22nd day of February, 2005.

15
16 
17 SCOTT EDWARDS, ESQ
18 State Bar No. 3400
19 729 Evans Ave.
20 Reno, Nevada 89512
(775) 786-4300

16 
17 THOMAS L. QUALLS, ESQ
18 State Bar No. 8623
19 216 East Liberty St.
20 Reno, Nevada 89501
(775) 333-6633

CERTIFICATE OF SERVICE:

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the law offices of Scott W. Edwards, and that on this date, I served the foregoing *Supplemental Points & Authorities to Petition for Writ of Habeas Corpus (Post-conviction) – Death Penalty Case* on the party(ies) set forth below by:

_____ Placing an original or true copy thereof in a sealed envelope placed for collecting and mailing in the United States mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

_____ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

X _____ Reno/Carson Messenger service.

addressed as follows:

Terry McCarthy
Appellate Deputy District Attorney
50 W. Liberty St., #300
P.O. Box 30083
Reno, Nevada 89520

Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

SIAOSI VANISI

DATED this 22nd day of February, 2005.

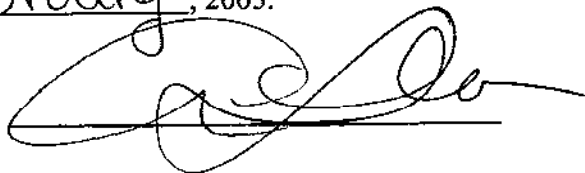


EXHIBIT A

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 13 2004
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

OSBALDO TORRES,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. PCD-04-442

ORDER GRANTING STAY OF EXECUTION AND REMANDING CASE FOR EVIDENTIARY HEARING

Osbaldo Torres was tried by jury, convicted of first degree murder and other charges, and received the death penalty in the Oklahoma County District Court, Case No. CF-1993-4302. This Court affirmed Torres's conviction for murder, and the United States Supreme Court denied Torres's petition for certiorari.¹ This Court denied Torres's first Application for Post-Conviction Relief on August 4, 1998.² Torres's application for federal habeas relief was denied.³ This Court subsequently denied Torres's second Application for Post-Conviction Relief.⁴ Torres's execution date is set for Tuesday, May 18, 2004. On April 29, 2004, Torres filed a Subsequent Application for Post-Conviction Relief. The State filed a Response on May 11, 2004. Briefs were also filed on behalf of *amici curiae* the Government of the Republic of Mexico and international law experts and former diplomats.

¹ *Torres v. State*, 1998 OK CR 40, 962 P.2d 3, cert. denied, 525 U.S. 1082, 119 S.Ct. 826, 142 L.Ed.2d 683 (1999).

² *Torres v. State*, Case No. PCD-1998-213 (Okla. Cr. August 4, 1998) (Order not for publication).

³ *Torres v. Mullen*, 317 F.3d 1145 (10th Cir. 2003), cert. denied, 540 U.S. ___, 124 S.Ct. 562, 919, 157 L.Ed.2d 454 (2003).

After consideration of the pleadings filed with this Court, we order that Torres's execution date be **STAYED** indefinitely, pending further order of this Court.

We further order that Torres's request for an evidentiary hearing is **GRANTED**.⁵ This case is **REMANDED** to the District Court of Oklahoma County for an evidentiary hearing on the issues of: (a) whether Torres was prejudiced by the State's violation of his Vienna Convention rights in failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate; and (b) ineffective assistance of counsel.

The evidentiary hearing shall be held within sixty (60) days from the date of this Order. The trial court shall file findings of fact and conclusions of law with this Court within forty-five (45) days of the conclusion of the evidentiary hearing, together with the transcripts and record of the proceedings. Torres shall file a supplemental brief addressing the trial court's findings of fact and conclusions of law within twenty (20) days after the District Court's findings and conclusions are filed with this Court. The State shall file a response brief within fifteen (15) days after Torres's supplemental brief is filed.

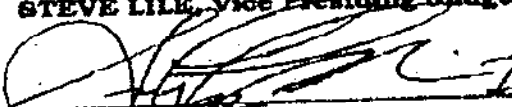
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 13 day
of May, 2004.

⁵ *Torres v. State*, 2002 OK CR 35, 58 P.3d 214, cert. denied, 538 U.S. 928, 123 S.Ct. 1580, 155 L.Ed.2d 323 (2003).


CHARLES A. JOHNSON, Presiding Judge


STEVE LILE, Vice Presiding Judge


GARY L. LUMPKIN, Judge


CHARLES B. CHAPEL, Judge


RETA M. STRUBHAR, Judge

ATTEST:


Clerk

§ 22 O.S.2001, §1089(D)(5); Rule 9.7(D)(4)-(7), Rules of the Oklahoma Court of Criminal Appeals,
Title 22, Ch.18, App. (2004).

CHAFEL, J., SPECIALLY CONCURRING:

I specially concur in this decision staying Torres's execution and remanding the case for an evidentiary hearing. I write to comment on the dissent's conclusion that the International Court of Justice decision here is not binding, and on dissent's statement that, under that case's terms, all this Court need do is to review Torres's case to see whether his trial and conviction afforded him minimal due process.

This case presents an issue of first impression for this Court, and for any other court within the United States. Torres bases his subsequent application for relief on the International Court of Justice decision, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* [*Avena*].¹ That case was brought by the Government of Mexico against the United States of America to resolve a diplomatic dispute over alleged violations of the Vienna Convention on Consular Relations [Vienna Convention]² in the United States criminal cases of fifty-two Mexican nationals, including Torres. In *Avena*, the International Court of Justice found that Torres's rights under the Vienna Convention were violated, and ordered the United States to review and reconsider Torres's conviction and sentence in light of the treaty breach. This Court must determine how to apply that ruling.

¹ 2004 I.C.J. 128 (Judgment of March 31, 2004). The existence of this specific judgment in Torres's case distinguishes this situation from the one this Court faced in *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703. In *Valdez*, the petitioner attempted to rely on an International Court of Justice case to which neither he nor his complaining government were party, and which did not specifically discuss his Vienna Convention claims.

The Vienna Convention is a multinational treaty respecting consular relations, which provides that law enforcement authorities shall inform detained foreign nationals of their right to contact consular officials for assistance.³ Both the United States and Mexico are signatories to the Convention.⁴ The Convention itself does not specify an enforcement mechanism. That mechanism is contained in the Optional Protocol, ratified along with the Convention itself, which provides that states may bring disputes under the Vienna Convention to the International Court of Justice for binding resolution. Under the treaty's terms, while states ratifying the Vienna Convention are free to accept or reject the Optional Protocol, acceptance creates a binding obligation. The United States proposed this provision on dispute settlement and was instrumental in drafting the Optional Protocol,⁵ was the first state to bring a case under its provisions,⁶ and has consistently looked to the International Court of Justice for binding decisions in international treaty disputes, including those brought under the Vienna Convention.⁷ The United States was the first to bring a case in the

² Multilateral Vienna Convention on Consular Relations and Optional Protocol on Disputes, 21 U.S.T. 77 (1969), T.I.A.S. No. 6820.

³ Vienna Convention, 21 U.S.T. 77, art. 36, ¶ 1.

⁴ The United States Senate ratified the treaty and optional protocol on October 12, 1969, and President Richard Nixon ratified it on November 12, 1969. It was entered into force with respect to the United States on December 24, 1969, and President Nixon proclaimed the treaty's entry into force on January 29, 1970. 115 Cong. Rec. 30997 (Oct. 22, 1969); 21 U.S.T. 77, 373.

⁵ Report of the United States Delegation to the Vienna Conference on Consular Relations, reprinted in Sen. Exec. E. 91st Cong., 1st Sess., May 8, 1969, at 41-59-61.

⁶ United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1979 I.C.J. 7; 1980 I.C.J. 3, 5, 24-26.

⁷ "Under the fundamental principle of *pacta sunt servanda*, which states that treaties must be observed," the United States has consistently invoked the Vienna Convention to protest other

International Court of Justice specifically under the Optional Protocol.⁸ The United States has also defended against eleven cases brought in the International Court of Justice, including *Avena*.⁹

There is no question that this Court is bound by the Vienna Convention and Optional Protocol. The Supremacy Clause provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."¹⁰ The federal government's power to make treaties is independent of and superior to the power of the states.¹¹ Every state

nations' failures to provide Americans with access to consular officials." *U.S. v. Superville*, 40 F.Supp.2d 672, 676 (D.Virgin Islands, 1999).

⁸ *Tehran Hostages*, *supra* Note 13; *Treatment in Hungary of Aircraft and Crew of the United States of America* (United States v. Hungary), 1954 I.C.J. 99, 103 (Vienna convention claim dismissed because Hungary had not consented to International Court of Justice jurisdiction). See also *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy) 1989 I.C.J. 15 (1948 Treaty of Friendship, Commerce and Navigation between Italy and United States, the Protocol and 1951 Supplementary Agreement); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), 1984 I.C.J. 246 (1958 Convention on the Continental Shelf); *Aerial Incident of 7 November 1954* (United States v. USSR) (1959); *Aerial Incident of 4 September 1954* (United States v. USSR) (1958); *Aerial Incident of 27 July 1955* (United States v. Bulgaria) (1957-1960); *Aerial Incident of 7 October 1952* (United States v. USSR) (1955-1956); *Aerial Incident of 10 March 1953* (United States v. Czechoslovakia) (1955-1956); *Treatment in Hungary of Aircraft and Crew of the United States of America* (United States v. Hungary) (1954); *Treatment in Hungary of Aircraft and Crew of the United States of America* (United States v. USSR) (1954).

⁹ See *Case Concerning the Vienna Convention on Consular Relations* (Paraguay v. United States) 1998 I.C.J. 426, and the *LaGrand Case* (F.R.G. v. United States) 2001 I.C.J. 104, all brought under the Vienna Convention. The Paraguay case was dismissed at Paraguay's request after Virginia executed its subject, defendant Angel Francisco Breard. *LaGrand* found that Germany's and Walter LaGrand's rights under the Vienna Convention were violated when Arizona failed to inform LaGrand of his right to contact the German consulate; LaGrand was also executed during the pendency of International Court of Justice proceedings.

¹⁰ U.S. Const. art. VI cl. 2. See, e.g., *Antoine v. Washington*, 420 U.S. 194, 201, 95 S.Ct. 944, 949, 43 L.Ed.2d 129 (1975) (treaties are binding upon affected states under the Supremacy Clause); *Mezquita v. State*, 125 S.W.3d 161, 169 (Ark., 2003); *State v. Prasertphong*, 75 P.3d 675, 688 (Ariz., 2003); *Garcia v. State*, 17 P.3d 994 (Nev., 2001); *State v. Issa*, 752 N.E.2d 904, 915 n.2 (Ohio, 2001); *State v. Miranda*, 622 N.W.2d 353, 355 (Minn.App., 2001); *U.S. v. Carrillo*, 70 F.Supp.2d 854, 859 (N.D.Ill., 1999); *U.S. v. Emueghunam*, 268 F.3d 377, 389 (C.A.6, 2001); *U.S. v. Jimenez-Nava*, 243 F.3d 192, 195 (C.A.5 2001); *U.S. v. Li*, 206 F.3d 56, 60 (C.A.1, 2000). See also *Busby v. State*, 40 P.3d 807, 809 n.2 (Alaska App., 2002) (Convention on Road Traffic).

¹¹ See, e.g., *Nielsen v. Johnson*, 279 U.S. 47, 52, 49 S.Ct. 223, 224, 73 L.Ed. 607 (1929); *U.S. v. Emueghunam*, 268 F.3d 377 (C.A.6 2001); *U.S. v. Jimenez-Nava*, 243 F.3d 192, 195 (C.A.5

or federal court considering the Vienna Convention, for any reason, has agreed that it is binding on all jurisdictions within the United States, individual states, districts and territories. Several courts have expressed concern that any failure of United States courts to abide by the Vienna Convention may have significant adverse consequences for United States citizens abroad. "Treaty violations not only undermine the "Law of the Land," but also international law, where reciprocity is key. If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens."¹² I share those concerns.

2001); *Murphy v. Netherland*, 116 F.3d 97, 100 (C.A.4, 1997); *Busby v. State*, 40 P.3d 807, 809 (Alaska App., 2002).

¹² *U.S. v. Carrillo*, 70 F.Supp.2d 854, 860 (N.D.Ill., 1999). "Accordingly, the State Department has intervened and attempted to persuade state authorities to honor the Vienna Convention when state law enforcement officers have neglected or refused to inform detained foreign nationals of their right to contact consular officials. For example, the Secretary of State recently asked the Governor of Virginia to stay the execution of Paraguayan death-row prisoner Angel Francisco Breard until the International Court of Justice could consider whether Virginia's violation of the Vienna Convention warranted a new trial. The Secretary expressed concern that "[t]he execution ... could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention." [FN4] As the Secretary recognized, continued violation of the treaty imperils the rule of law, the stability of consular relations, and the safety of Americans detained abroad." *U.S. v. Superville*, 40 F.Supp.2d 672, 676 (D.Virgin Islands, 1999); "The United States, through this treaty [the Vienna Convention], has clearly granted certain specified rights to foreign nationals. The purpose behind those rights is two-fold: i) to afford minimal protections to foreign nationals detained by authorities in this country and ii) to assure minimal protections to United States (U.S.) citizens detained by authorities in foreign countries who are also signatories to the Treaty. In my judgment, the decision of this Court in this case, and the decision of the United States Supreme Court puts U.S. citizens traveling abroad at risk of being detained without notice to U.S. consular officials. Why should Mexico, or any other signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a 60 Minutes piece on a U.S. citizen locked up in a Mexican jail without notice to any U.S. governmental official we ought to remember these cases." *Flores v. State*, 1999 OK CR 52, 994 P.2d 782, 788 (Chapel, J., concurring in result).

At its simplest, this is a matter of contract. A treaty is a contract between sovereigns.¹³ The notion that contracts must be enforceable against those who enter into them is fundamental to the Rule of Law. This case is resolved by that very basic idea. The United States voluntarily and legally entered into a treaty, a contract with over 100 other countries. The United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to the treaty.

As this Court is bound by the treaty itself, we are bound to give full faith and credit to the *Avena* decision. I am not suggesting that the International Court of Justice has jurisdiction over this Court - far from it. However, in these unusual circumstances the issue of whether this Court must abide by that court's opinion in *Torres's* case is not ours to determine. The United States Senate and the President have made that decision for us. The Optional Protocol, an integral part of the treaty, provides that the International Court of Justice is the forum for resolution of disputes under the Vienna Convention.¹⁴ The negotiation and administration of treaties is reserved to the Executive

¹³ *United States v. Stuart*, 489 U.S. 353, 365-66, 109 S.Ct. 1183, 1190-91, 103 L.Ed.2d 388 (1989); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 238 (C.A.D.C., 2003); *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1301 (C.A.11 2003); *U.S. v. Emuegbunam*, 268 F.3d 377, 389 (C.A.6 2001); *U.S. v. Jimenez-Nava*, 243 F.3d 192, 195 (C.A.5 2001); *U.S. v. Li*, 206 F.3d 56, 60 (C.A.1, 2000); *Talbot v. Mufti*, 73 F.3d 535, 537 (C.A.4 1996).

¹⁴ "The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as 'the Convention', adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963, Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period, Have agreed as follows: Article I. Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." 21 U.S.T. 77, 325-29.

Branch, with Senate ratification.¹⁵ Therefore, when interpreting a treaty, we give great weight to the opinion and practice of the government department primarily responsible for it.¹⁶ The State Department has consistently taken the position that the only remedies under the Vienna Convention are diplomatic, political, or exist between states under international law.¹⁷ As noted above, the State Department has also consistently turned to the International Court of Justice to provide a binding resolution of disputes under the Vienna Convention, and has relied on the binding nature of International Court of Justice decisions to enforce United States rights under the Convention. The *Avena* decision mandates a remedy for a particular violation of Torres's, and Mexico's rights under the Vienna Convention.¹⁸ *Avena* is the product of the

¹⁵ U.S. Const., art. II §2 cl. 2.

¹⁶ *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168, 119 S.Ct. 662, 671, 142 L.Ed.2d 576 (1999); *Sunintoma Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982); *U.S. v. Duarte-Acero*, 296 F.3d 1277, 1282 (C.A.11 2002); *Emuegbunam*, 268 F.3d at 392; *United States v. De La Pava*, 268 F.3d 157, 165 (2nd Cir.2001); *Li*, 206 F.3d at 63.

¹⁷ In a First Circuit case, the State Department submitted answers to questions posed by the Court regarding its interpretation of the Vienna Convention. The Court subsequently cited that response: "[t]he Department of State Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li* ('Answers') at A-2, the State Department has concluded that [t]he [Vienna Convention] and the US-China bilateral consular convention are treaties that establish state-to-state rights and obligations.... They are not treaties establishing rights of individuals. The right of an individual to communicate with his consular official is derivative of the ongoing state's right to extend consular protection to its nationals when consular relations exist between the states concerned. *Id.* at A-3; see also *id.* at A-1. 'The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law.' See *id.* at A-3." *Li*, 206 F.3d at 63. These Answers have been subsequently cited in a number of state and federal cases. See, e.g., *State v. Navarro*, 659 N.W.2d 487, 491, (Wis.App., 2003) *Review Denied by State v. Navarro*, 661 N.W.2d 101, (Wis. 2003) (TABLE, NO. 02-0850-CR); *U.S. v. Duarte-Acero*, 296 F.3d 1277, 1282 (C.A.11 2002); *State v. Martinez-Rodriguez*, 33 P.3d 267, 272 n. 5 (N.M., 2001); *U.S. v. Carrillo*, 70 F.Supp.2d 854, 860 (N.D.M., 1999); *U.S. v. Superville*, 40 F.Supp.2d 672, 676 (D.Virgin Islands, 1999);

¹⁸ This essential aspect of the case distinguishes it from *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-938 (D.C.Cir. 1988). The plaintiffs in *Nicaragua* attempted to invoke an International Court of Justice decision made under international law and a treaty with Nicaragua. However, the plaintiffs were not parties to the International Court of Justice decision, and the treaties relied on were not self-executing. By contrast, *Avena*

process set forth in the Optional Protocol, under which Mexico brought a suit against the United States for alleged treaty violations. This process is promulgated by the treaty itself and exists between states as a result of international law - well within the State Department's definition of an appropriate remedy for violations of the Vienna Convention.

Having determined that this Court is bound by the treaty and the *Avena* decision, I turn to the decision itself. The International Court of Justice found that Torres's, and Mexico's, rights under the Vienna Convention were violated when he was not informed of his right to contact his consulate for aid after his Oklahoma arrest for murder. I note that neither the State of Oklahoma nor the United States has ever disputed (a) that Torres is a Mexican national, or (b) that he was not informed of his rights under the Vienna Convention. At the time of his arrest, Torres was registered as a resident alien with the Immigration and Naturalization Service.¹⁹ As a remedy for this violation, *Avena* directs the United States to review and reconsider Torres's conviction and sentence in light of the consequences of the treaty violation.²⁰ That review and reconsideration falls to this Court. This is the first state pleading in which Torres has raised his Vienna Convention claim, and normally this Court would consider it procedurally barred. However, while leaving the particular method of review and reconsideration up to the United States, *Avena* states that a

applies directly to Torres's case, and the Vienna Convention is self-executing through the Optional Protocol.

¹⁹ Exhibits Q, S, Appendix, Subsequent Application for Post-Conviction Relief. As the dissent notes, the State claims that there is conflicting information regarding when Mexico was first told of Torres's detention. However, any such conflict does not change the fact that Torres was never personally informed of his right to contact the consulate, as required under the treaty.

complete application of procedural bar will not fulfill the mandate to review and reconsider the conviction, if procedural bar prevents the Vienna Convention claim from being heard.²¹ In order to give full effect to *Avena*, we are bound by its holding to review Torres's conviction and sentence in light of the Vienna Convention violation, without recourse to procedural bar. Common sense and fairness also suggest this result. Torres, like many foreign nationals, was unaware he had the right to contact his consulate after his arrest for murder.²² Torres's Vienna Convention claim was generated by the State of Oklahoma's initial failure to comply with a treaty. I believe we cannot fulfill the goal of a fair and just review of Torres's case if we refuse to look at his Vienna Convention claims on the merits.

Torres argues that the violation of his Vienna Convention rights deprived him of the substantial investigative, legal, and financial assistance which would have been, and eventually was, afforded him by the Mexican government. He claims that the information developed with this assistance would, if presented to a jury, have resulted in a different outcome. He also claims that trial counsel was ineffective for failing to inform him of his right to

²⁰ *Avena*, slip op. at 52.

²¹ *Avena*, slip op. at 51-52. This holding distinguishes this case from cases in which Vienna Convention claims were brought to United States state and federal courts in the first instance. Courts, including this court, have routinely applied procedural bar to such claims. See, e.g., *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703, 709; *Breard v. Greene*, 523 U.S. 371, 375, 118 S.Ct. 1352, 1354, 140 L.Ed.2d 529 (1998); *Murphy v. Netherland*, 116 F.3d 97, 100 (C.A.4, 1997); *Mezquita v. State*, 125 S.W.3d 161 (Ark., 2003); *Adenodi v. State*, 616 N.W.2d 716, 717 n. 2 (Minn., 2000); *State v. Reyes-Camarena*, 7 P.3d 522 (2000); *State v. Ameen*, 183-84, 1 P.3d 330 (Kan. App. 2000).

²² In an earlier opinion in Torres's case, Justice Stevens noted it was "manifestly unfair" to apply procedural bar to "a foreign national who is presumptively ignorant of his right to notification." *Torres v. Mullin*, — U.S. —, 124 S.Ct. 919, 919, 157 L.Ed.2d 454 (2003) (Stevens, J., dissenting to denial of petition for writ of certiorari).

consular assistance under the Vienna Convention and was rendered ineffective by counsel's lack of experience and funds, which could have been remedied had the Mexican government been notified of his detention and the charges against him.

In determining the merits of these claims, I first look to see whether Torres has shown prejudice. In dicta, the United States Supreme Court has noted that any claim of error under the Vienna Convention is subject to a requirement of prejudice.²³ Other courts, considering Vienna Convention claims brought initially in state and federal courts, have used a three-prong test to determine prejudice: (1) the defendant did not know he had a right to contact his consulate for assistance; (2) he would have availed himself of the right had he known of it; and (3) it was likely that the consulate would have assisted the defendant.²⁴ I would adopt this test. The first of these prongs is uncontested. Regarding the second prong, Torres has provided this Court with an affidavit stating that he would have asked the Mexican consulate for help.²⁵ This assertion is bolstered by the fact that Torres did request help from the

²³ *Breard v. Greene*, 523 U.S. 371, 377, 118 S.Ct. 1352, 1356, 140 L.Ed.2d 529 (1998) (refusing to stay Breard's execution during pendency of International Court of Justice case, case was decided on procedural bar grounds).

²⁴ *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo.App., 2002); *Zavala v. State*, 739 N.E.2d 135, 142 (Ind.App., 2000); *State v. Cevallos-Bermeo*, 754 A.2d 1224, 1227 (N.J.Super.A.D., 2000); *U.S. v. Chaparro-Alcantara*, 37 F.Supp.2d 1122, 1126 (N.D.Ill. 1999); *United States v. Esparrza-Ponce*, 7 F.Supp.2d 1084 (S.D.Cal.1998); *United States v. Villa-Fabeia*, 882 F.2d 434, 440 (9th Cir.1989), overruled on other grounds, *United States v. Proa-Tovar*, 975 F.2d 592 (9th Cir.1992).

²⁵ Affidavit of Osvaldo Torres Aguilera, Exhibit W, Appendix, Subsequent Application for Post-Conviction Relief [Appendix].

Mexican government when he became aware of his right to do so, after his direct appeal had been filed.²⁶

Torres offers this Court a great deal of material regarding the third prong. The Mexican government has actively assisted Mexican nationals since well before Torres's 1993 arrest. This tradition of active assistance extends back to the 1920s.²⁷ In 1993, the Mexican government monitored and participated in capital cases throughout the United States involving Mexican nationals through consulates, Mexican government departments, and retained counsel in the United States.²⁸ Mexico has a systematic procedure to offer very specific consular assistance in defending these cases.²⁹ Consular officials monitor defense counsel's efforts, speak regularly with defense counsel, the defendant and his family, and attend court proceedings; officials often assist in gathering evidence in preparation for both stages of capital trials.³⁰ Mexico provides funds for experts and investigators, particularly regarding discovery and presentation of mitigating evidence, but for DNA testing, jury consultants, and

²⁶ Torres's family contacted the Mexican Consulate in 1997. Affidavit of Arturo A. Dager Gomez, ¶¶ 29-31, Exhibit A, Appendix.

²⁷ Affidavit of Everard Kidder Meade IV, Exhibit G, Appendix.

²⁸ Affidavit of Arturo A. Dager Gomez, Exhibit A, Appendix; Affidavit of Ramon Xiloli Ramirez, Exhibit B, Appendix; Affidavit of Scott J. Atlas, Exhibit C, Appendix; Affidavit of Barbara K. Strickland, Exhibit D, Appendix; Affidavit of Jaime Paz Y Fuente Gutierrez, Exhibit E, Appendix; Affidavit of Bonnie Lee Goldstein, Exhibit F, Appendix; Declaration of Michael Iaria, Exhibit H, Appendix.

²⁹ Affidavit of Ramon Xiloli Ramirez, ¶¶ 13, 14, Exhibit B, Appendix; Affidavit of Jaime Paz Y Fuente Gutierrez, ¶ 4, Exhibit E, Appendix; Affidavit of Scott J. Atlas, ¶¶ 4, 5, 7, Exhibit C, Appendix; Affidavit of Barbara K. Strickland, *passim*, Exhibit D, Appendix. In one example, after a thorough criminal investigation by the Mexican consulate, capital charges against a Mexican national in Texas were dismissed. Affidavit of Arturo A. Dager Gomez, ¶ 10, Exhibit A, Appendix.

³⁰ Affidavit of Arturo A. Dager Gomez, ¶ 7, Exhibit A, Appendix.

other specialized testimony where appropriate.³¹ Mexico obtains and provides official documents from institutions in Mexico such as schools and hospitals, searches for criminal records, and assists attorneys traveling in Mexico with logistical support, translators, and witness identification and preparation.³² In addition to aiding retained or appointed counsel, the consulate also helps capital defendants obtain qualified capital counsel.³³ Taken as a whole, this material overwhelmingly indicates the ability of the Mexican government to assist Torres at the time of his arrest and trials,³⁴ and the intention of the Mexican government to assist Mexican nationals charged with capital crimes in the United States at the time of Torres's arrest and trials.³⁵

These services were all available to Torres. This assistance would have been offered at the time of his arrest, had the Mexican consulate been informed of Torres's detention under the Vienna Convention.³⁶ After the Mexican government was told of Torres's case, consular staff interviewed appellate counsel, Torres, and his family, and determined Torres had no criminal record in Mexico.³⁷ Mexico retained counsel to review Torres's case and assist his court-appointed attorney, and retained two investigators, a social worker, a mitigation specialist, two gang experts, and a bilingual neuropsychologist to

³¹ *Id.* at ¶¶ 8, 9.

³² *Id.* at ¶ 12; Declaration of Michael Iaria, ¶¶ 6-8, Exhibit H, Appendix.

³³ Affidavit of Arturo A. Dager Gomez, ¶¶ 17, 18, Exhibit A, Appendix; Declaration of Michael Iaria, ¶¶ 4-5, Exhibit H, Appendix.

³⁴ Torres's first trial ended in a mistrial on the issue of guilt or innocence.

³⁵ As this Court found in *Valdez*, the Mexican government was prepared to assist a Mexican national facing a capital Oklahoma charge in 1989. *Valdez*, 46 P.3d at 710.

³⁶ *Id.* at ¶¶ 32-41; Affidavit of Ramon Xiloti Ramirez, ¶¶ 6-8 Exhibit B, Appendix.

³⁷ Affidavit of Arturo A. Dager Gomez, ¶ 30, Exhibit A, Appendix.

develop evidence in Torres's case.³⁸ Torres provides this Court with information generated by these investigations. Torres has raised enough significant questions to warrant an evidentiary hearing on these issues.

In accordance with the *Avena* decision, I have thoroughly reviewed and reconsidered Torres's conviction and sentence in light of the consequences of the violation of his rights under the Vienna Convention. I have concluded that there is a possibility a significant miscarriage of justice occurred, as shown by Torres's claims, specifically: that the violation of his Vienna Convention rights contributed to trial counsel's ineffectiveness, that the jury did not hear significant evidence, and that the result of the trial is unreliable. This Court has decided to remand the case for an evidentiary hearing on the Vienna Convention and ineffective assistance of counsel issues. This decision comports with the *Avena* requirement of review and reconsideration.

³⁸ *Id.* at ¶ 32.

LUMPKIN, J.: DISSENTS

I must respectfully dissent to the Court's decision to stay the execution and remand the case for evidentiary hearing.

A review of the history of this case reveals the issue of ineffective assistance of counsel was raised and adjudicated in Appellant's direct appeal and that issue is now barred by *res judicata*. See *Torres v. State*, 1998 OK CR 40, 962 P. 2d 3. Appellant's original application for post-conviction relief, PC-1998-213, also sought to raise the issue of ineffective assistance of trial counsel. That application was denied in an unpublished opinion and not appealed. His second application for post-conviction relief was filed in case number PCD-2002-1047, but the two propositions of error did not raise any errors relating to ineffective assistance of counsel. See *Torres v. State*, 2002 OK Cr 35, 58 P.3d 214. The United States Supreme Court denied certiorari in that case on March 24, 2003. See *Torres v. State*, 538 U.S. 928, 123 S.Ct. 1580, 155 L.Ed.2d 323 (2003). The Appellant did not raise the issue of failure to notify him of his right to notify the Mexican consular office of his arrest in any of these appeals.

I find the legal issues barred by *res judicata* and waiver. I have reviewed the briefs and materials presented and do not find any of the proffered evidence brings into question the guilt of the Appellant. The Appellant's guilt was proven beyond a reasonable doubt by sufficient evidence as an aider and abetter. See *Conover v. State*, 933 P.2d 904, 914-16 (Okla.Cr.1997). Trial

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counsel was determined to have rendered effective assistance of counsel in the direct appeal pursuant to the standard established by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed. 674 (1984) and that decision has not been found to be in error through the reviews completed by the federal courts during the years this case has proceeded through the review process.

As with any case that has been pending in some stage since 1993, someone will be able to look back and say something else could or should have been done. However, that is exactly what the U.S. Supreme Court in *Strickland* told us not to do. As was pointed out in the original opinion, the original trial ended in a mistrial in 1995. There were no surprises during the second trial. My reading of the materials submitted with this subsequent application for post-conviction relief reflect those items dealt with mitigation evidence. And, while mitigation evidence was presented during the trial leading to the verdict in this case the proffered items reveal more of the same type could have been presented, all be it in more depth and by different witnesses with better credentials. In reality, that could be said of every case of this type we review. Therefore, I find no basis in law or fact to require a further evidentiary hearing.

I also do not find *Avena and other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. ____ (March 31, 2004) binding on this Court. And, I must note the State raised a very interesting point of fact in Footnote 4 of their Response Brief filed in this case. In that footnote the State points out that

Mexico has made conflicting admissions of when they learned of Appellant, i.e. December 1997 and March 1996. But more pointedly, the State says,

In addition, trial counsel for Mr. Torres has advised undersigned that she contacted Mexico and informed them of Mr. Torres' case prior to his trial. The undersigned has been unable to obtain an affidavit from trial counsel and has filed a motion asking this Court to compel counsel to prepare an affidavit. This motion has not been ruled upon by this Court.

If this Court were to take any action, it should be to afford the State the opportunity to file an affidavit of trial counsel. If the affidavit comports with the proffer of the footnote then the entire issue is moot. Consular rights were afforded. Mexico was given notice.

Regardless, the legal basis for this claim has been available since Appellant's arrest in 1993. The *Avena* decision cannot revive a stale claim. At most *Avena* asked us to review the case to ensure Appellant received the benefit of the process that was due him, and which would have been assured him if he had been advised of his consular rights.

In *Avena*, the International Court of Justice stated in pertinent part:

152. . . . The Court has rejected Mexico's submission that, by way of *restitutio in integrum*, the United States is obliged to annul the convictions and sentences of all of the Mexican nationals the subject of its claims The review and reconsideration of conviction and sentence required by Article 36, paragraph 2, which is the appropriate remedy for breaches of Article 36, paragraph 1, has not been carried out. The Court considers that in these three cases it is for the United States to find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in paragraphs 138 *et. seq.* of the present Judgment.

153. For these reasons, The Court,

(7) By fourteen votes to one,

Finds that, in relation to the 34 Mexican nationals referred to in paragraph 106 (4) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to arrange for legal representation of the nationals, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1(c) of the Convention . . .

...

(9) By fourteen votes to one,

Finds that the appropriate reparation in this cases consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentence of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment . . .

(11) Unanimously,

Finds that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(b) of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment.

Without a doubt Appellant has been afforded his rights under Avena. He has been represented by competent lawyers at each stage of these proceedings and afforded all the rights guaranteed to citizens of the United States. That is reflected in the volumes of trial and appellate records amassed over the last eleven years. The argument that has been made in the voluminous filings on behalf of Appellant in this subsequent post-conviction application is that if we

had known then what we know now we would have hired more expensive, experienced lawyers and provided more experts. That is very commendable and each citizen hopes his or her sovereign country would take that same individualized interest in them should the occasion arise. However, that is not the legal standard. If it were, we would be affording the same benefit to American citizens on a daily basis. Since it is not, we must judge by the Rule of Law that applies to all persons convicted of crimes.

Appellant's submissions constitute possible additional mitigation evidence. He has now had the opportunity to present that evidence to the Pardon and Parole Board, and ultimately to the Governor, for consideration. As I reviewed the proffered documents I could not find any matters that brought into question the validity of the judgment and sentence in this case. His ability to present these additional matters through the executive clemency process is another example of the due process that has been afforded to him. As a matter of law I do not find the subsequent application meets the requirements of 22 U.S.C. 2001, 51089.1(3)(9) and should be denied.

I am authorized to state that Judge Lile joins in this dissent.

EXHIBIT B

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QUESTIONS PRESENTED CAPITAL CASE

The United States and Mexico are party to the Vienna Convention on Consular Relations and its Optional Protocol Concerning the Compulsory Settlement of Disputes. Acting on the consent set forth in the Optional Protocol, Mexico initiated proceedings in the International Court of Justice seeking relief for the violation of Petitioner's Vienna Convention rights. On March 31, 2004, the Court rendered a judgment that adjudicated Petitioner's rights. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31). The *Avena* Judgment built on the Court's rulings in *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (June 27), an earlier case also brought under the Optional Protocol.

On Petitioner's application for a certificate of appealability of the denial of his petition for habeas corpus, the United States Court of Appeals for the Fifth Circuit held that precedents of this Court and its own barred it from complying with the *LaGrand* and *Avena* Judgments.

3. In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?
4. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

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The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), and reproduced herein at 119A. Earlier opinions in this proceeding are reproduced herein at 1A-135A, 174A-275A.

JURISDICTION

The Court of Appeals entered judgment on May 20, 2004. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254.

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

Clause 2 of Section 2 of Article II, Clause 1 of Section 2 of Article III, and Clause 2 of Article VI of the United States Constitution.

1. Article 36 of the Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.
2. Article I of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.
3. Articles 92, 93(1), and 94(1) of the Charter of the United Nations, *opened for signature* June 26, 1945, 59 Stat. 1031.
4. Articles 1, 3(1), 9, 36(1), and 59 of the Statute of the International Court of Justice, 59 Stat. 1055.

STATEMENT OF THE CASE

A. The Vienna Convention and Its Optional Protocol.

The Vienna Convention on Consular Relations ("Vienna Convention"), *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, "is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." DEP'T OF STATE TELEGRAM 40298 TO THE U.S. EMBASSY IN DAMASCUS (February 21, 1975), *reprinted in* LUKE T. LEE, *CONSULAR LAW AND PRACTICE* 145 (2d ed. 1991).

Article 36 of the Convention enables consular officers to protect nationals who are detained in foreign countries. Article 36(1)(b) requires the competent authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay." Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance, including arranging for legal representation. Finally, Article 36(2) requires that a country's "laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended." The United States has described the rights and obligations set forth in Article 36 as "of the highest order," in large part because of the reciprocal nature of the obligations and hence the importance of these rights to United States consular officers seeking to protect United States citizens abroad.¹

¹ ARTHUR W. ROVINE, U.S. DEP'T OF STATE, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1973, at 161 (1973). As Judge Stephen Schwebel, the former United States Judge on the International Court of Justice, has observed, "the citizens of no State have a higher interest in the observance of [Vienna Convention] obligations than the peripatetic citizens

The Optional Protocol Concerning the Compulsory Settlement of Disputes ("Optional Protocol"), *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261, provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, art. I.

The United States played a leading role at the 1963 diplomatic conference that produced the Vienna Convention and its Optional Protocol. *See* Report of the United States Delegation to the United Nations Conference on Consular Relations in Vienna, Austria, March 4 to April 22, 1963, *reprinted in* S. Exec. E, 91st Cong. at 59-61 (1st Sess. 1969). Among other things, the United States proposed the binding dispute settlement provision that became the Optional Protocol and successfully led the resistance to efforts by other states to weaken or eliminate altogether the dispute settlement provisions. *See id.* at 72-73.

The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and President Nixon sent it to the Senate for approval on May 8, 1969. The Senate held hearings on October 7, 1969, and unanimously ratified the instruments on October 22, 1969. *See* 115 CONG. REC. 30,997 (Oct. 22, 1969). To date, 166 States have ratified the Vienna Convention and 45 States the Optional Protocol.² The Vienna Convention is among the most

of the United States." Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 248, 259 (Provisional Measures Order of Apr. 9) (declaration of President Schwebel).

² *See Status of Multilateral Treaties Deposited with the Secretary-General, Vienna Convention on Consular Relations, at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterII/treaty31.asp>.

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widely ratified multilateral treaties in force today. LEE, at 23-25.

B. The International Court of Justice.

Often referred to as the "World Court," the International Court of Justice is "the principal judicial organ of the United Nations." U.N. CHARTER art. 92; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 1, 59 Stat. 1055 ("ICJ STATUTE"). The Court's Statute is annexed to the U.N. Charter, so that States that become Members of the United Nations also become parties to the Statute. U.N. CHARTER art. 93, para. 1.

Here, too, the United States proposed the draft ICJ Statute and led the effort to create the Court. RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 865 (1958). The United States saw the Court as a means to pursue its longstanding objective to promote the rule of law on the international level:

Throughout its history the United States has been a leading advocate of the judicial settlement of international disputes. Great landmarks on the road to the establishment of a really permanent international court of justice were set by the United States. . . . As the United States becomes a party to [the U.N.] Charter which places justice and international law among its foundation stones, it would naturally accept and use an international court to apply international law and to administer justice.

EDWARD R. STETTINIUS, JR., SECRETARY OF STATE AND CHAIRMAN OF THE UNITED STATES DELEGATION, CHARTER OF THE UNITED NATIONS: REPORT TO THE PRESIDENT ON THE

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RESULTS OF THE SAN FRANCISCO CONFERENCE 137-38
(1945).³

The United States has brought ten cases to the Court either as an applicant or by special agreement with another State. In another eleven cases, including *Avena*, the United States has been a respondent in an action brought by another State or States.⁴

C. The *Avena* Judgment.

On January 9, 2003, the Government of Mexico initiated proceedings in the International Court of Justice against the United States, alleging violations of the Vienna Convention in the cases of Mr. Medellin and 53 other Mexican nationals who had been sentenced to death in state criminal proceedings in the United States. See Mexico's Application Instituting Proceedings (Mex. v. U.S.), No. 128 (*Avena* and Other Mexican Nationals) (I.C.J. Jan. 9, 2003).⁵

On June 20, 2003, Mexico filed a 177-page Memorial and 1300-page Annex of written testimony and documentary evidence in support of its claims. On November 3, 2003, the United States filed a 219-page Counter-Memorial and 2500-

³ The Court is composed of fifteen judges, none of whom may have the same nationality. ICJ STATUTE, art. 3(1); see also *id.*, arts. 4, 9. "Judges are picked in their individual capacity, and are not political appointees of their respective governments." David J. Bederman et al., *International Law: A Handbook for Judges*, 35 STUD. IN TRANSNAT'L LEGAL POL'Y 76 (2003). As a result, "the judges of the ICJ are rarely politicized." DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 240 (2001).

⁴ See International Court of Justice: List of Contentious Cases by Country, at <http://www.icj-cij.org/icjwww/idecisions/icasbycountry.htm#UnitedStatesofAmerica>.

⁵ The parties' written and oral pleadings as well as the orders and press releases of the Court in the *Avena* case are available at <http://www.icj-cij.org/icjwww/idecisions.htm>.

page Annex, also containing written testimony and documentary evidence in rebuttal. Both parties' submissions exhaustively addressed the factual predicate for each of the Vienna Convention violations alleged, including those in the case of Mr. Medellin, and argued all relevant points of law.

During the week of December 15, 2003, the International Court held a hearing. *Avena* Judgment, para. 11 (188A). The 18-person United States team was led by the Honorable William Howard Taft IV, Legal Advisor to the State Department, and included lawyers from the Departments of State and Justice and distinguished professors of international law and comparative criminal procedure from France and Germany.

On March 31, 2004, the International Court issued its Judgment. The *Avena* Judgment built on the Court's earlier holdings in *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27) ("*LaGrand* Judgment"), which Germany also brought on the basis of the Optional Protocol, and in which the United States also fully participated.⁶ However, in *Avena*, unlike *LaGrand*, the applicant State was able to seek relief on the merits for nationals who had not yet been executed.

As a result, in *Avena*, the International Court expressly adjudicated Mr. Medellin's own rights. *First*, the International Court held that the United States had breached Article 36(1)(b) in the cases of 51 of the Mexican nationals,

⁶ In *LaGrand*, the International Court held that, *first*, Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; *second*, by applying procedural default rules in the circumstances of those cases, the United States had applied its own law in a manner that failed to give full effect to the rights accorded under Article 36(1) and hence violated Article 36(2); and *finally*, if the United States failed to comply with Article 36 in future cases involving German nationals who were subjected to severe penalties, it must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *LaGrand* Judgment, paras. 77, 90-91, 125.

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including Mr. Medellin, by failing “to inform detained Mexican nationals of their rights under that paragraph” and “to notify the Mexican consular post of the[ir] detention.” *Avena* Judgment, paras. 106(1)-(2), 153(4) (244A-245A, 272A).

Second, the International Court held that in 49 cases, including that of Mr. Medellin, the United States had violated its obligations under Article 36(1)(a) “to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1 (c) of that Article regarding the right of consular officers to visit their detained nationals.” *Id.*, paras. 106(3), 153(5)-(6)(245A, 273A). The International Court also held that in 34 cases, including that of Mr. Medellin, the breaches of Article 36(1)(b) also violated the United States’s obligation under paragraph 1(c) “to enable Mexican consular officers to arrange for legal representation of their nationals.” *Id.*, paras. 106(4), 153(4), 153(7) (245A-246A, 272A, 273A).

Finally, as to remedies, the International Court first denied Mexico’s request for annulment of the convictions and sentences. *Id.*, para. 123 (255A). The Court held, however, that United States courts must provide review and reconsideration of the convictions and sentences tainted by the violations it had found. *Id.*, paras. 121-22, 153(9) (254A, 274A). The International Court explained, *first*, that the required review and reconsideration must take place as part of the “judicial process;” *second*, that procedural default doctrines could not bar the required review and reconsideration; *third*, that the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, that the forum in which the review and reconsideration occurred must be capable of “examin[ing] the facts, and in particular

the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.” *Id.*, paras. 113-14, 122, 134, 138-39, 140 (249A-250A, 254A, 259A-260A, 262A-263A).

The International Court reached each of these holdings by a vote of fourteen to one. Both the United States and Mexican judges voted with the majority.

D. Mr. Medellin’s Proceedings.

On June 29, 1993, law enforcement authorities arrested Jose Ernesto Medellin Rojas, 18 years old at the time, in connection with the murders of two young women in Houston, Texas. Mr. Medellin, a Mexican national, told the arresting officers he was born in Laredo, Mexico,⁷ and informed Harris County Pretrial Services that he was not a United States citizen.⁸ Nevertheless, as the Court of Appeals found, Mr. Medellin was not advised of his Article 36 right to contact the Mexican consul. 23A.

The United States recognizes that the consular assistance Mexico provides its nationals in capital cases is “extraordinary.” 1 Counter-Memorial of the United States of America at 186 (Nov. 3, 2003) (*Avena* Case). At the time Mr. Medellin was arrested and tried, Mexican consular officers routinely assisted capital defendants by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and most importantly, ensuring that Mexican nationals were represented by competent and experienced

⁷ State’s Ex. 113 at 000076 (Statement of Jose Ernesto Medellin Rojas).

⁸ 165A.

defense counsel.⁹ As a result of the Article 36 violation in his case, however, Mr. Medellin had no opportunity to receive the assistance of Mexican consular officers either before or during his trial.

The Texas trial court appointed counsel to represent Mr. Medellin, who was indigent. Unbeknownst to the court, lead counsel was suspended from the practice of law for ethics violations during the investigation and prosecution of Mr. Medellin's case. Memorial of Mexico, App. A ¶ 232 (June 20, 2003) (*Avena Case*). Counsel failed to strike jurors who indicated they would automatically impose the death penalty,¹⁰ and called no witnesses at the guilt phase of trial. On September 16, 1994, Mr. Medellin was convicted of capital murder. *State v. Medellin*, No. 675430, Judgment (339th D. Ct., Tex. Oct. 11, 1994).

At the penalty phase, the only expert witness the defense presented was a psychologist who had never met Mr. Medellin. S.F. Vol. 35 at 294-349. Mr. Medellin's parents testified only briefly. *Id.* at 279-92. The entire penalty phase defense lasted less than two hours. Tr. at 343-441 (Docket).

The jury recommended a death sentence, and on October 11, 1994, the trial court sentenced Mr. Medellin to death. On March 19, 1997, the Texas Court of Criminal Appeals affirmed Mr. Medellin's conviction and sentence in an unpublished opinion. 61A.

⁹ See Memorial of Mexico at 11-38 (*Avena Case*); see also *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding that Mexico would have provided critical resources in 1989 capital murder trial of Mexican national); Michael Fleischman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals In United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. L. 359, 365-74 (2003) (describing Mexico's consular assistance in capital cases in Texas and elsewhere over the last several decades).

¹⁰ See, e.g., S.F. Vol. 15 at 113; Vol. 16 at 205; Vol. 16 at 286.

On April 29, 1997, Mexican consular authorities learned of Mr. Medellin's detention when he wrote to them from death row and promptly began rendering assistance to him. Memorial of Mexico, App. A ¶ 235 (*Avena* Case).

On March 26, 1998, Mr. Medellin filed a state application for a writ of *habeas corpus* arguing, among other things, that his conviction and sentence should be vacated as a remedy for the violation of his Article 36 rights. In support of this claim, Mr. Medellin submitted an affidavit from Manuel Perez Cardenas, the Consul General of Mexico in Houston, explaining that Mexico would have provided immediate assistance if consular officers had been informed of his detention. 172A-173A.

After refusing to grant an evidentiary hearing, the trial court denied relief. Without changing so much as a comma, the court adopted the State's proposed findings of fact and conclusions of law, including the State's argument that the claim had been procedurally defaulted or, in the alternative, that Mr. Medellin "failed to show [his] foreign nationality," "lacked standing" to raise the Vienna Convention claim, and could not show that the violation affected the constitutional validity of his conviction or sentence. 46A-48A. On September 7, 2001, the Texas Court of Criminal Appeals affirmed in an unpublished order. 33A.

On November 28, 2001, Mr. Medellin filed a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of Texas, and on July 18, 2002, an amended petition. Mr. Medellin again raised an Article 36 claim.

On June 26, 2003, the District Court denied relief and a certificate of appealability ("COA"), finding the Vienna Convention claim procedurally defaulted under "an adequate and independent state procedural rule." 82A. In the

alternative, the District Court concluded that it was compelled to deny relief by Fifth Circuit precedent to the effect that the Vienna Convention does not create individually enforceable rights, that no judicial remedy is available for its violation, and that Mr. Medellin could not show prejudice unless the Vienna Convention violation also qualified as a violation of a constitutional right. 84A-85A & n.17.

On May 20, 2004, the Court of Appeals also denied Mr. Medellin's request for a COA. 135A. The Court recognized that *Avena*, which had issued since the District Court's ruling, had been brought on behalf of Mr. Medellin, among others. It also recognized that the International Court had held in *LaGrand* and reiterated in *Avena* that, *first*, the application of procedural default rules to bar review of the Vienna Convention claim on the merits violated Article 36 of the Convention, and *second*, that Article 36 conferred individually enforceable rights. It held, however, that the first holding "contradict[ed]" this Court's brief *per curiam* order in *Breard v. Greene*, 523 U.S. 371 (1998), and that the second contravened its own ruling in *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001). It held, therefore, that it was bound to disregard *LaGrand* and *Avena* unless and until this Court or, in terms of the second holding, the *en banc* Court of Appeals, decided otherwise. 131A-133A.

ARGUMENT

Because the United States is party to the Vienna Convention and its Optional Protocol, the *Avena* Judgment constitutes a binding adjudication of the Vienna Convention rights of Mr. Medellin and fifty other Mexican nationals. Although the Court of Appeals recognized the impact of that Judgment on Mr. Medellin's case, it held that it was barred by prior precedent from giving effect to the Judgment. Hence, this Court should grant the petition in order to prevent the United States from breaching its freely undertaken commitment to the international community to abide by the *Avena* Judgment. This Court should also grant the petition in order to resolve the conflicts among this Court, the International Court of Justice, and other United States courts on the proper interpretation and application of the Vienna Convention.

I. The Court Should Grant the Petition In Order To Bring The United States Into Compliance With Its Obligation To Abide By The *Avena* Judgment.

A. The Court of Appeals Was Bound to Give Effect to the *Avena* Judgment As the Rule of Decision in Mr. Medellin's Case.

1. The Vienna Convention, the Optional Protocol, and the *Avena* Judgment Are Binding International Law.

The *Avena* Judgment is binding on the United States as a matter of international law for the simple reason that the United States agreed that it would be binding.

The jurisdiction of the International Court of Justice is based entirely on consent.¹¹ Under Article 36(1) of the Statute of the Court, the Court has jurisdiction over "all matters specially provided for . . . in treaties and conventions in force." ICJ STATUTE, art. 36(1). The Optional Protocol to the Vienna Convention constitutes a compromissory clause covering just such a "class of matters specially provided for." DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 242 (2001). The Optional Protocol provides:

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. I.

Hence, by ratifying the Optional Protocol, the United States both gained the right to sue and agreed to be subject to suit in the International Court of Justice in order to resolve disputes with other parties to the Optional Protocol regarding the "interpretation and application" of the Vienna Convention.¹² Though neither the United Nations Charter nor the ICJ Statute, both treaties to which the United States is party, provide the requisite consent, the binding character of

¹¹ David J. Bederman et al., *International Law: A Handbook for Judges*, 35 *STUD. IN TRANSNAT'L LEGAL POL'Y* 76, 76-77 (2003). ("Every matter that comes before the ICJ does so because of the consent of the litigants. The only question is how that consent is manifested. The Court does not – and cannot – exercise a mandatory form of jurisdiction over states.").

¹² Indeed, the United States was the first State to take advantage of that instrument, when in 1979 it sued Iran in the International Court to enforce rights, among others, under the Vienna Convention, and founded the Court's jurisdiction in part on the Optional Protocol. See *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24), reprinted in 19 *I.L.M.* 553 (1980).

the Court's adjudication in cases in which a State has given consent is reinforced by both those instruments. Article 59 of the ICJ Statute provides that decisions of the Court are binding on the parties to the case. And by Article 94(1) of the Charter, the United States unequivocally agreed "to comply with the decision of the International Court of Justice in any case to which it is a party." RESTATEMENT (THIRD) FOREIGN RELATIONS § 903 cmt. g (1987).

The rule of *pacta sunt servanda* – that parties should perform their treaty obligations in good faith – "lies at the core of the law of international agreements and is perhaps the most important principle of international law." RESTATEMENT (THIRD) FOREIGN RELATIONS § 321 cmt. a (1987).¹³ Here, the application of the rule could not be more straightforward: having agreed to submit disputes involving the Vienna Convention to the International Court, the United States must now abide by its adjudication of those disputes.¹⁴

¹³ See THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961) ("[A] treaty is only another name for a bargain[;] it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.") (emphasis in original). See also *Am. Dredging Co. v. Miller*, 510 U.S. 443, 466 (1995) (Kennedy, J., dissenting) ("Comity with other nations and among the States was a primary aim of the Constitution. At the time of the framing, it was essential that our prospective foreign trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce.").

¹⁴ See ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 67 (Terry D. Gill, ed., 6th ed. 2003) ("Neither the Charter of the United Nations, nor any general rule of present-day international law, imposes on States the obligation to refer their legal disputes to the Court—but once consent has been given, the decision of the Court is final and binding and without appeal, and the States parties to the litigation are obliged to comply with that decision."); see also *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899) ("[A]n award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith unless there be ground to impeach the

2. The Vienna Convention, the Optional Protocol, and the *Avena* Judgment Are Binding Federal Law.

The United States Constitution places the power to make treaties in the hands of the democratically elected branches of the federal government. Article II, section 2, clause 2, provides that the President “shall have Power . . . to make Treaties.” U.S. CONST. art. II, § 2, cl. 2. The President may do so, however, only “with the Advice and Consent of the Senate.” *Id.* For the Senate to grant consent, “two thirds of the Senators present [must] concur.” *Id.* This structure ensures that the United States takes on international treaty obligations only with the clear support of the elected representatives of the American people. *See generally* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 36-37 (2d ed. 1996).

Under the Supremacy Clause, a ratified treaty has the status of preemptive federal law.¹⁵ Hence, as this Court has long held, a ratified treaty

is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.* And when such rights are of a nature to be enforced

integrity of the tribunal itself.”).

¹⁵ Emphasis added, Article VI, clause 2, provides: “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and *all Treaties made, or which shall be made,* under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” *See* Sandra Day O’Connor, *Federalism of Free Nations*, in *INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS* 13, 18 (1996) (“The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.”).

in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598-99 (1884) (emphasis added).

The treaty obligations reflected in the Vienna Convention and its Optional Protocol are entirely self-executing; they required no implementing legislation to come into force. See *Hearing Before the Senate Comm. on Foreign Rel.*, S. EXEC. REP. NO. 91-9, 91st Cong. at 5 (1st Sess. 1969) (statement of J. Edward Lysterly, Deputy Legal Adviser for Administration, U.S. Department of State). As President Richard M. Nixon stated when he announced their entry into force

the [Vienna] Convention and Protocol . . . and every article and clause thereof shall be observed and fulfilled with good faith, on and after December 24, 1969, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

21 U.S.T. 77, 185.

B. The Court Should Ensure the United States's Compliance with its International Obligations.

Because the Vienna Convention and its Optional Protocol are fully effective as federal law, the Court of Appeals should have applied *Avena* as the rule of decision in determining whether to grant a certificate of appealability.¹⁶ Given the United States's commitment to abide by that judgment, the district court's resolution of Mr. Medellin's Vienna Convention claim was not just "debatable," but plainly wrong. See *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).¹⁷ For the same reason, there also can be no debate that "the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). By failing to issue the certificate, the Court of Appeals both erred as a matter of

¹⁶ For example, in *Wildenhus's Case*, 120 U.S. 1 (1887), New Jersey sought to try a Belgian crewmember who was subject to a treaty allocating criminal jurisdiction over sailors on ships in American ports between the local courts and the Belgian consulate. Asserting a right under the treaty to try the crewmember, the Belgian consul sought a writ of habeas corpus. After noting that "[t]he treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere," this Court held that "[i]f it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States." 120 U.S. at 17. Cf. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004) (denying relief under Alien Tort Statute, 28 U.S.C. § 1350, in part because treaties at issue were not self-executing and thus could not "establish the relevant and applicable rule of international law").

¹⁷ Should there be any doubt on this point, one need only look to the decision in *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002) (*LaGrand* forecloses strict reliance on procedural default doctrine for Convention violations and thus "undermin[es] a major premise of [Breard]").

federal law and placed the United States in breach of its international obligations.¹⁸

This Court should grant the petition in order to prevent the breach of treaty that would otherwise result from the Court of Appeals' error. To be sure, this Court does not sit to correct routine error. But the Framers gave treaties the status of supreme federal law and included cases arising under treaties within the federal judicial power precisely in order to enable this Court to prevent the lower courts of the United States from breaching an international obligation by refusing to enforce a treaty or other international obligation. U.S. CONST. art. III, § 2, cl. 1; art VI, cl. 2.

As James Madison emphasized at the Constitutional Convention:

The tendency of the States to th[e] violations [of the law of nations and of treaties] has been manifested in sundry instances. . . . A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole.

¹⁸ See, e.g., IAN BROWNLIE, *STATE RESPONSIBILITY*, PART 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); see also *Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.)*, paras. 75-76, 2002 ICJ 121 (Feb. 14) (issuance of arrest warrant by Belgian investigative judge violated rule of customary international law recognizing head-of-state immunity); *LaGrand Judgment*, paras. 111-15 (failure of U.S. State Department, U.S. Solicitor General, Governor of Arizona, and this Court to "take all measures at [their] disposal" to prevent execution violated United States's treaty obligation to abide by order of provisional measures); *Iran v. United States*, Case No. 27, Award No. 586-A27-FT, 1998 WL 1157733, para. 71 (Iran-U.S. Cl. Trib. June 5, 1998) (refusal of U.S. courts to enforce Iran-U.S. Claims Tribunal award violated United States's obligation under Algiers Accords to treat Tribunal awards as final and binding).

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., rev. ed. 1966). Alexander Hamilton made the same point when he said that “the peace of the whole ought not to be left at the disposal of a part,” so that “the responsibility for an injury ought ever to be accompanied with the faculty of preventing it.” THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

To achieve that end, the Framers gave this Court the final authority to ensure enforcement of our treaty obligations.

The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal.

THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).¹⁹

This case presents precisely the circumstances in which the Framers expected this Court to intervene. Acting on behalf of the United States, the President, with the consent of the Senate, has agreed to abide by the *Avena* Judgment. But the Court of Appeals has concluded – in large part on the basis of this Court’s own precedent – that the United States cannot comply. Left undisturbed, that decision would be the kind of “national calamit[y]” against which Madison warned

¹⁹ See also 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot ed., 2d ed. 1881) (“[T]he provision for judicial power over cases arising under treaties], sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect.”) (statement of James Wilson).

– because it would send a message to the world that we preach, but do not practice, adherence to the rule of law.

While the death penalty itself is not at issue in this case, the death penalty context makes the petition all the more compelling. The next step in this case will be Mr. Medellin's execution. If there were any case in which this Court should not send a message to friends and allies that the United States is indifferent to its international commitments, it is this one, in which the Court would send at the same time a message that the United States is indifferent to human life.

II. The Court Should Grant The Petition In Order To Resolve The Conflicts Among This Court, The International Court of Justice, And Other United States Courts About The Vienna Convention And The *LaGrand* And *Avena* Judgments.

In *Breard v. Greene*, 523 U.S. 371 (1998), by a brief *per curiam* order, this Court refused to stay the imminent execution of a foreign national who had been convicted and sentenced to death in proceedings that Virginia conceded had violated the Vienna Convention, but who had been held to have procedurally defaulted the Vienna Convention claim.²⁰ The Court observed that the Convention “arguably” conferred an individual right that the foreign national, as well as the State party to the Convention, could enforce. *Id.* at 376. It stated, however, that as a matter of international law, absent a clear and express statement to the contrary, implementation of the Vienna Convention was subject to the procedural rules of the forum state. *Id.* at 375. Hence, the Court concluded, the Convention did not preclude the United States from procedurally barring *Breard*’s claim. *Id.*²¹

²⁰ By the *Breard* order, the Court denied four discretionary applications (two petitions for certiorari, an application for a bill of original complaint, and an application for an original writ of *habeas corpus*), on the eve of an execution, without full briefing and oral argument, in carefully couched language. The opinion thus has limited precedential value. See, e.g., *Teague v. Lane*, 489 U.S. 288, 296 (1989) (“[O]pinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits.”); *United States Bancorp Mortg. Co. v. Bonner Mall Pshp.*, 513 U.S. 18, 24 (1994) (noting the Court’s “customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion” even when issued on the merits).

²¹ In the *Breard* order, this Court also suggested that the section of the Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214 (1996) (“AEDPA”), now codified at 28 U.S.C. §2254(e)(2) (2002), would have barred review of *Breard*’s conviction and sentence as later-in-time federal law. *Breard*, 523 U.S. at 326. That issue does not affect this petition, however. Unlike *Breard*, Petitioner Medellín raised his

Since the *Breard* order, however, the legal universe has fundamentally changed. In its 2001 *LaGrand* Judgment, the International Court expressly held, *first*, that, as this Court had suggested, the Vienna Convention conferred rights on the individual national as well as the sending State, and *second*, that the application of the procedural default doctrine to bar a Vienna Convention claim when the receiving State had failed in its obligation to advise the foreign national of his or her Vienna Convention rights, constituted a violation of Article 36(2) of the Convention. *LaGrand* Judgment, paras. 77, 90-91. Needless to say, this Court did not have the benefit of those specific holdings on the interpretation and application of the Vienna Convention when it made its more general observations in the *Breard* order.

In the *Avena* Judgment, the International Court of Justice reiterated both of those holdings. Moreover, it did so in a

Vienna Convention claim in state post-conviction proceedings, filed an affidavit in support of the claim, and requested an evidentiary hearing, which the state court denied. Under these circumstances, section §2254(e)(2) does not bar a federal evidentiary hearing on Mr. Medellin's claim. See, e.g., *Mason v. Mitchell*, 320 F.3d 604, 621 n.6 (6th Cir. 2003) (§2254(e)(2) does not apply where petitioner sought but was denied state court evidentiary hearing); *Morris v. Woodford*, 229 F.3d 775, 781 (9th Cir. 2000), *cert. denied*, 532 U.S. 1075 (2001) (same). Presumably for that reason, respondent state officials did not raise, and the Fifth Circuit had no occasion to decide, any issues concerning section 2254(e)(2). Even if that provision might somehow prove relevant in the future, moreover, it would remain the case that the issues that the Fifth Circuit *did* decide will be faced again and again by both state courts (which would be bound by the Supremacy Clause to apply *Avena* and would remain unaffected by any restriction on federal courts imposed by AEDPA) and federal courts (which would have to decide the questions presented here before reaching any alleged AEDPA bar). Finally, Petitioner respectfully submits that if provided full briefing and argument, the Court would hold, in accord with *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that the Congress that enacted section 2254(e)(2) did not intend the United States to breach its treaty obligation to abide by the Vienna Convention, the Optional Protocol, and the *Avena* Judgment.

case that *adjudicated* Petitioner Medellin's own rights. Specifically, the Court held that the United States had violated Article 36(1) of the Convention by failing to afford Mr. Medellin the opportunity to secure the assistance of the Mexican consul, and that under Article 36(2), the United States courts could not apply the procedural default doctrine to avoid assessing on the merits the impact of the violation on the proceedings that led to his conviction and sentence. *See Avena* Judgment, paras. 128-134, 140 (257A-260A, 263A).

The Court of Appeals expressly acknowledged the holdings of *LaGrand* and *Avena*, and it fully appreciated their import. It concluded, however, that existing precedent, including the *Breard* order, prevented it from complying with *LaGrand* and *Avena*. 131A-134A. This Court should grant the petition in order to resolve no less than three conflicts reflected in the decision of the Court of Appeals.

First, the Court should grant the petition in order to resolve the conflict between, on the one hand, the common holdings of *Breard*, *LaGrand*, and *Avena* that the Vienna Convention creates individually enforceable rights and, on the other, numerous United States courts' holdings to the contrary. On this issue, the Fifth Circuit held itself precluded from applying the holdings of *LaGrand* and *Avena* by prior precedent, this time its own. 133a (5th Cir. 2004) (applying *United States v. Jimenez-Nava*, 243 F.3d 192,195-98 (5th Cir. 2001)).

The Fifth Circuit is not alone. While at least one District Court has recognized an individually enforceable right,²² at least four other Courts of Appeals and numerous other

²² *See Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) (finding that the Vienna Convention affords a private right of action to individuals).

federal and state courts have concluded that Article 36 does not create such a right.²³ That conclusion is contradicted not only by the express holdings of *LaGrand* and *Avena*, but by this Court's own suggestion in *Breard*.

Second, the Court should resolve the conflict between this Court's order in *Breard* and the holdings of the International Court of Justice in *LaGrand* and *Avena* on the issue of whether Article 36(2) precludes the application of procedural default doctrines when the United States has itself failed in its obligation of notification. On this issue, the Fifth Circuit stated flatly that *LaGrand* and *Avena* "contradict" the *Breard* order. 132A. It held, however, that it did not have the authority to "disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims." *Id.* It believed itself bound to follow that decision "until taught otherwise by the Supreme Court." *Id.*

²³ See *United States v. Pineda*, 57 Fed. Appx. 4, 6-7 (1st Cir. 2003) (unpublished); *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002); *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001); *United States v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001); *Gordon v. State* 863 So. 2d 1215, 1221 (Fla. 2003); *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001); *Cauthern v. State*, No. M2002-00929-CCA-R3-PD, 2004 Tenn. Crim. App. LEXIS 149, *144-48 (Tenn. Crim. App. 2004); *State v. Flores*, No. 01-3322, 2004 Wisc. App. LEXIS 446, *4-5 (Wis. Ct. App. May 26, 2004); see also *Mendez v. Roe*, 88 Fed. Appx. 165, 167 (9th Cir. 2004) (unpublished) (Vienna Convention claim not cognizable on federal habeas petition "because no clearly established federal law directs that Article 36's consular access provision institutes a judicially enforceable right"); *United States v. Nambo-Barajas*, No. 02-195(2), 2004 U.S. Dist. Lexis 6422, at *7-8 (D. Minn. Apr. 13, 2004) ("Eighth Circuit has not recognized an individually-enforceable right under article 36(b) of the Vienna Convention.").

Again, the Fifth Circuit is not alone. While at least one District Court has applied *LaGrand*,²⁴ at least five other Courts of Appeals and numerous other federal and state courts have concluded that the *Breard* order precludes them from following *LaGrand* or have simply ignored *LaGrand*.²⁵

Finally, the Court should grant the petition in order to resolve the conflict between the Fifth Circuit and the Oklahoma Court of Criminal Appeals on the issue of whether the adjudication in *Avena* of a Mexican national's own rights must be given effect in the United States courts notwithstanding any inconsistent United States precedent. The Fifth Circuit failed to perceive a difference between *LaGrand*, in which the International Court of Justice addressed the Vienna Convention in a case that was binding only between Germany and the United States, and *Avena*, in which, after adjudicating Mr. Medellin's own rights, the Court gave a judgment that required the United States to take specific steps in his case. 131A-133A. By contrast, in

²⁴ See *United States ex rel. Madej v. Schomig*, 223 F.Supp.2d 968 (N.D. Ill. 2002) (*LaGrand* forecloses strict reliance on procedural default doctrine for Convention violations).

²⁵ See, e.g., *Villagomez v. Sternes*, 88 Fed. Appx. 100, 101 (7th Cir. 2004) (unpublished) (without referring to *LaGrand*, holding Vienna Convention claim procedurally defaulted); *United States v. Nishnianidze*, 342 F.3d 6, 18 (1st Cir. 2003) (same); *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 426 (6th Cir. 2003) (same); *Drakes v. INS*, 330 F.3d 600, 606 (3d Cir. 2003) (same); *United States v. Sanchez*, 39 Fed. Appx. 10, 11 (4th Cir. 2002) (unpublished) (same); *Mckenzie v. Dep't of Homeland Security*, No. 3:04cv0067, 2004 U.S. Dist. LEXIS 7041, at *6-8 (D. Conn. Apr. 23, 2004) (same); *Nambo-Barajas*, 2004 U.S. Dist. Lexis 6422, at *9 (same); *Gordon v. State*, 863 So. 2d 1215, 1221 (Fla. 2003) (same); *State v. Escoto*, 590 S.E.2d 898, 906 (N.C. Ct. App. 2004) (same); *Valdez v. State*, 46 P.3d 703, 709 (Okla. Crim. App. 2002) (acknowledging *LaGrand*, but holding, in light of *Breard*, Vienna Convention claim procedurally defaulted). See also *Plata v. Dretke*, No. 02-21168, slip op. (5th Cir. Aug. 16, 2004) (denying certificate of appealability in post-*Avena* case).

Torres v. Oklahoma, 142A-163A, the Oklahoma Court of Criminal Appeals recently recognized that prior precedent cannot control in the case of a Mexican national subject to the *Avena* Judgment.

In *Torres*, the Court stayed the execution of a Mexican national subject to the *Avena* Judgment and, in accord with that Judgment, remanded the matter for an evidentiary hearing to determine the prejudice resulting from the Vienna Convention violation. Though the *Torres* order did not set forth the Court's reasoning, the concurring and dissenting opinions make it clear that, but for the *Avena* Judgment, the Court would have held the Vienna Convention claim procedurally defaulted.²⁶ 142A-163A. However, as Judge Chapel stated in a concurring opinion, and the majority presumably recognized, "this Court is bound by the Vienna Convention and Optional Protocol" and hence required to give full effect to the *Avena* decision. 147A, 150A. Thus, although the Oklahoma Court's own precedent would have required that it disregard *LaGrand* in favor of *Breard*'s treatment of procedural default, the Oklahoma Court was now bound to follow, as a matter of federal law, the holding in the *Avena* Judgment that *Torres*'s Vienna Convention claim could not be procedurally barred. 153A & n.21.

By the *Avena* Judgment, the International Court of Justice determined the rights of 49 Mexican nationals in addition to Messrs. *Torres* and *Medellin*. Thus, in 49 more cases, United States courts will face the question on which the Court of Appeals here and the Oklahoma Court of

²⁶ Hours after the Court of Criminal Appeals ruled, Governor Brad Henry commuted Mr. *Torres*'s sentence to a term of life without parole, stating "[u]nder agreements entered into by the United States, the ruling of the ICJ [in *Avena*] is binding on U.S. courts." Press Release, Office of Governor Brad Henry, *Gov. Henry Grants Clemency to Death Row Inmate Torres* (May 13, 2004), http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1.

Criminal Appeals split – whether *Avena*’s adjudication of the Article 36 rights of individual Mexican nationals must be given effect in United States courts notwithstanding the *Breard* order or any other inconsistent United States authority.

Each of these issues will be faced again and again by both state and federal courts addressing applications by other Mexican nationals whose rights have been adjudicated in *Avena* and other foreign nationals seeking to invoke the authority of *Avena* and *LaGrand*. This Court should grant the petition in order to resolve the disabling conflicts over the proper legal rule and thereby free United States courts from the straightjacket that, they erroneously believe, requires them to breach the solemn promises made by this country’s elected representatives in the Vienna Convention and its Optional Protocol. See *Tennard v. Dretke*, 124 S.Ct. 2562, 2569 (2004) (correcting the legal standard on certiorari review of denial of a COA); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (same).

III. The Court Should Grant the Petition To Ensure International Judicial Comity and Uniform Treaty Interpretation.

Even if the *Avena* Judgment did not constitute an adjudication of Mr. Medellin’s own rights to which United States courts are obligated to give effect as a matter of both international and United States law, the International Court’s rulings in *LaGrand* and *Avena* should be given effect in the interest of international comity and uniform treaty interpretation.

A. The Court Should Grant the Petition in the Interest of International Judicial Comity.

This Court has long promoted the goal of comity between the courts of different nations. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 164 (1895). In a world of enormous economic interdependence and regular international travel and migration, the courts of more than one nation will frequently have jurisdiction to address disputes arising from any given course of events. RESTATEMENT (THIRD) FOREIGN RELATIONS § 421 (1987). As a result, our courts will frequently have occasion to accord respect to proceedings in another State's courts. That respect can take a variety of forms, including the recognition of a foreign judgment, *see Hilton*, 159 U.S. at 164; forbearance from adjudicating a given case in favor of more efficient proceedings before the courts of a foreign country, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 257-61 (1981); forbearance from exercising jurisdiction in recognition of the greater interest of a foreign country, *see Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 818-19 (1993) (Scalia J., dissenting); and forbearance from interference by antisuit injunction with proceedings in the courts of another country, *see Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354-55 (6th Cir. 1992). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (enforcing agreement to arbitrate before foreign arbitral tribunal); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972) (enforcing agreement to litigate before foreign court).

This "comity of courts" cannot be confined to the judgments and proceedings of national courts. As many have remarked, the subject matter and frequency of international adjudication continue to expand. *See, e.g., Dietmar Prager, The Proliferation of International Judicial Organs, in PROLIFERATION OF INTERNATIONAL ORGANIZATIONS 279* (Niels M. Blokker et al., eds., 2001). As individual States

continue to entrust the resolution of specific categories of disputes to international tribunals, national courts will need to extend the same respect to those tribunals.

This case presents the most compelling opportunity possible for according judicial comity to the ruling of an international tribunal. Not only has the United States agreed to the jurisdiction exercised by the International Court of Justice, the most important court in the international legal system, but that Court, in rendering its judgment, has itself sought to engage the United States courts in a collaborative judicial enterprise. Specifically, though that Court had jurisdiction to grant Mexico's request for annulment of the convictions and sentences, *see Avena Judgment*, para. 119 (252A-253A), it chose not to do so. Instead, the Court ordered that the United States courts themselves conduct review and reconsideration of the convictions and sentences tainted by the violations, in accord with the criteria laid down in the judgment, and then fashion relief for any prejudice. *Id.*, para. 153(9) (274A).

"If an international tribunal recognizes the importance of the national courts of the countries within its jurisdiction as enforcers of its decision, it is inviting a kind of judicial cooperation that melds the once distinct planes of national and international law." Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 194 (2003); *see also* Anne Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998). This Court should accept that invitation by granting the petition to ensure compliance by United States courts with the "authoritative interpretation of Article 36" pronounced in the *LaGrand* and *Avena* Judgments. *Torres v. Mullin*, 124 S. Ct. 919, 919 (2003) (Stevens, J.).

B. This Court Should Grant the Petition to Ensure Uniform Interpretation of a Multilateral Treaty.

The parties to a treaty should be presumed to intend a uniform interpretation in all jurisdictions in which the treaty may apply. *Olympic Airways v. Husain*, 124 S. Ct. 1221, 1232 (2004) (Scalia, J., dissenting). Here the United States and some 44 other signatories to the Convention also agreed to submit disputes concerning the interpretation and application of the treaty for binding adjudication by the International Court of Justice. Surely those parties' agreement to that single forum strengthens the presumption that the parties were looking for a consistent interpretation of the treaty provisions. It follows that a State party to the Vienna Convention should defer to the interpretation of the Convention by that Court – especially, needless to say, when that State is not only party to the Convention, but party to the very case in which the Court issued the interpretation.

Again, the *Avena* Judgment confirms that the International Court recognized its own responsibility to ensure uniform interpretation of the treaty. The Court stated that it had approached the case “from the viewpoint of the general application of the Vienna Convention” and advised that its interpretation and application of the Convention would apply in any future cases between parties to the Convention. *See Avena* Judgment, para. 151 (269A-270A). Again, therefore, this Court should reciprocate by granting the petition in order to ensure that United States courts abide by the Court's authoritative interpretation of the Convention.

CONCLUSION

The Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Dated: New York, New York
August 18, 2004

Respectfully submitted,

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Exhibit 37

Exhibit 37

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RONALD A. LONGTHORPE, JR.

BY

DEPUTY

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

SIAOSI VANISI,

Petitioner,

Case No. CR98P0516

vs.

Dept. No. 4

WARDEN, Ely State Prison;
and the STATE OF NEVADA,


DEATH PENALTY CASE

Respondents.


REPLY TO STATE'S RESPONSE TO MOTION FOR PROTECTIVE ORDER

Petitioner Siasoi Vanisi, through his counsel, SCOTT W. EDWARDS and THOMAS L. QUALLS, hereby replies to the State's response to his Motion for a protective order covering all confidential materials falling under the attorney-client privilege and those materials covered by the work product doctrine. This reply is made and based upon the attached memorandum of points and authorities, all documents and papers on file herein, and any oral argument deemed appropriate.

DATED this 16th day of MARCH, 2005.


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MEMORANDUM OF POINTS AND AUTHORITIES

The State's response to the motion for protective order is largely misdirected. The State argues that there is no constitutional right to a post-conviction proceeding. (State's Response at 3). This is not an issue raised by Vanisi in this matter. Therefore, it is not necessary to argue this point, as Vanisi is not asserting a constitutional right to a post-conviction proceeding, but violations of his constitutional rights at the trial and appellate level. Specifically, as relevant to the instant Motion, Vanisi's rights under the Sixth Amendment are at issue. See Bittaker, *infra*. (Incidentally, Vanisi's Fifth and Fourteenth Amendment rights also overlap in these matters.)

The State has argued that the case of Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003), relied upon by Vanisi in his Motion, was "wrongly decided." (State's Response at 3). Respectfully, whether a decision by the Ninth Circuit Court of Appeals is "wrongly decided" is not a matter within this Court's discretion or jurisdiction. Bittaker involved a requested protective order covering attorney-client privileged communications in the context of a Sixth Amendment claim raised in a federal habeas petition. This Court has previously acknowledged in this case that, on matters of federal constitutional law, decisions of the Ninth Circuit are controlling over this court, as well as all state courts within the jurisdiction of the Ninth Circuit. (Oral Findings and Conclusions, Competency Hearing, February 18, 2004.)

The State also argues that the decision in Bittaker was "clearly limited...to actions arising in federal court." (State's Response at 3, *citing* to 331 F.3d at 726). This is simply not a true statement. Indeed, the Bittaker decision, at 331 F.3d at 726 explains just the opposite:

[W]e hold that the scope of the implied waiver must be determined by the court imposing it as a condition for the fair adjudication of the issue before it.

Id. The Bittaker Court further explains that both state and federal courts have the power to limit the scope of the waiver involved in litigating any discrete issue:

The power of courts, state as well as federal, to delimit how parties may use information obtained through the court's power of compulsion is of long standing and well-accepted.

Id. (citations omitted.)

Finally on this point, the Bittaker Court explained the importance of a court's (be it state or federal) power to limit the use of sensitive information:

Courts could not function effectively in cases involving sensitive information--trade secrets, medical files and minors, among many others--if they lacked the power to limit the use parties could make of sensitive information obtained from the opposing party by invoking the court's authority.

Id.

Also, the State quotes Wardleigh v. Second Jud. Dist. Ct., 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995), "where a party seeks an advantage in litigation by revealing part of a privileged communication, the party shall be deemed to have waived the entire attorney-client privilege as it relates to the subject matter of that which was partially disclosed." (State's Response at 4). It seems that the State is misguided here as well as to the request at issue by Mr. Vanisi. Wardleigh stands for the position that a waiver of part of a privileged communication under the attorney-client privilege is a waiver of the whole communication regarding the subject matter. Id. This is a somewhat unremarkable legal conclusion. Indeed, it is hardly applicable to the issue at hand. As the Wardleigh Court explains in the next paragraph after the language quoted by the State:

In other words, "where a party injects part of a communication as evidence, fairness demands that the opposing party be allowed to examine the whole picture."

Wardleigh, 111 Nev. at 355, 891 P.2d at 1186 (citation omitted).

Unlike Bittaker, Wardleigh does not address the use of sensitive information in other proceedings or the court's inherent authority to order a restriction regarding the same. Mr. Vanisi is not attempting to limit the State's use of the sensitive information in the post-conviction habeas proceedings at issue. Further, Vanisi is not attempting to use only part of the information in question and hide the rest from the State. Accordingly, Wardleigh is inapposite to this matter.

On the merits, the State offers no legal basis for denying the Motion. The theory of the necessity for a protective order is simple. Mr. Vanisi had a constitutional right to effective assistance of counsel at trial and on appeal. In order to prove that he was deprived of those rights, Mr. Vanisi will have to disclose information that would otherwise be protected from disclosure by the attorney-

client privilege, the work-product doctrine, the privilege against self-incrimination, or other privileges. But since these disclosures are effectively compelled as a result of the deprivation of his constitutional rights in the previous proceedings, it is unfair to allow the State to exploit those disclosures in any proceeding other than the habeas proceeding itself, such as in a re-trial or in a separate prosecution. This rather obvious analysis is the basis of Bittker v. Woodford, 331 F.3d 715, 722 (9th Cir. 2003) (en banc), upon which petitioner relies. *Accord*, Osband v. Woodford, 290 F.3d 1036, 1042-1043 (9th Cir. 2002).

The State argues that petitioner is attempting to use his privileges as both a sword and a shield by raising claims of ineffective assistance but barring the State from using the evidence upon which the claims are based. (State's Response at 5). This is not the case. Petitioner's motion makes it clear that the relief sought is only an order that prevents the State from using any otherwise privileged information against Mr. Vanisi in the event of a re-trial of his case and from disseminating that information to other agencies that would use it against him. *See Osband*, 290 F.3d at 1042. The relief sought does not attempt to prevent disclosure, as so limited, to the district attorney for the purpose of litigating this habeas proceeding. The State's arguments on this point do not address the actual position taken by the petitioner and they therefore do not form a basis for denial of the motion.

As for the State's position on the limitation of dissemination to the press, there is not much need for discussion. The petition has been filed under seal. Accordingly, it is not currently available as a public document. Therefore the press -- like the rest of the public -- does not have access to the same. The Motion for Protective Order filed by Vanisi simply seeks to prevent the State from future dissemination of the sensitive information to the press.

For these reasons, the motion for a protective order should be granted.


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WHEREFORE, based on the foregoing points and authorities, petitioner Vanisi respectfully requests that this Court grant a protective order regarding the privileged information at issue, as set forth herein.

DATED this 16TH day of MARCH, 2005.


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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an agent of the law offices of Thomas L. Qualls, and that on this date, I served the foregoing *Reply to State's Response to Motion for Protective Order* on the party(ies) set forth below by:

_____ Placing an original or true copy thereof in a sealed envelope placed for collecting and mailing in the United States mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

_____ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

XX _____ Reno/Carson Messenger service.

addressed as follows:

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DATED this 16TH day of MARCH, 2005.

Exhibit 38

Exhibit 38

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

14 SIAOSI VANISI,

15 Petitioner,

Case No. CR98P0516

16 vs.

Dept. No. 4

17 WARDEN, Ely State Prison;
18 and the STATE OF NEVADA,


DEATH PENALTY CASE

19 Respondents.
20 _____


21 **MEMORANDUM OF LAW REGARDING MCCONNELL ERROR**

22 Petitioner Siasos Vanisi, through his counsel, hereby presents this Memorandum of Law
23 regarding the issue of how the instant case is affected by the decision of McConnell v. State and its
24 progeny. This Memorandum is made and based upon the attached memorandum of points and
25 authorities, exhibits, all documents and papers on file herein, and any oral argument deemed
26 appropriate.

27 DATED this 26 day of MARCH, 2007.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction: The McConnell Decision Applies to Vanisi's Case.

In Claim Two in his Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), Vanisi alleged that: "One of the Three Aggravating Circumstances Found in this Case: That *the Murder Occurred in the Commission of or an Attempt to Commit Robbery*, Was Improperly Based upon the Predicate Felony-murder Rule, upon Which the State Sought and Obtained a First Degree Murder Conviction, in Violation of the Eighth and Fourteenth Amendments to the United States Constitution."

It was also set forth in the Supplement that the record shows Mr. Vanisi was charged in Count I with murder in the first degree, a violation of NRS 200.010 and NRS 200.030 and NRS 193.165, a felony, in that:

the said defendant during the course of and in furtherance of an armed robbery did willfully and unlawfully murder Sergeant George Sullivan in that the said defendant on or about January 13, 1998, did kill and murder Sergeant George Sullivan, a human being, in the perpetration and/or furtherance of an armed robbery...

(TT, Vol. VI, 1009).

Further, the record shows that when the jury imposed a death sentence for the murder, it found three aggravating circumstances: (1) *the murder occurred in the commission of or an attempt to commit robbery*; (2) the victim was a peace officer engaged in the performance of his official duties, and the defendant knew or reasonably should have known the victim was a peace officer; and (3) the murder involved mutilation.

The inclusion of this first aggravator: that the murder occurred in the commission of or an attempt to commit robbery, which is based upon the predicate felony used to find felony murder, brings rise to the claim at issue.

In McConnell v. State, 120 Nev. 1043, 103 P.3d 606 (2004), *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005), the Nevada Supreme Court found that "**it is clear that Nevada's definition of felony murder does not afford constitutional narrowing.**" McConnell, 102 P.3d at 622 (emphasis added).